



Kwihokana Women Self-Help Group (Sued through its officials, namely Tabitha Wanjiru Gitonga – Chairlady Irene Muthoni Kinyanjui – Secretary Anne Nyaguthii Mana – Treasurer & another v Muchemi & 2 others (Civil Appeal 45 of 2017) [2022] KEHC 16472 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU**

CIVIL APPEAL 45 OF 2017

CM KARIUKI, J

DECEMBER 20, 2022

BETWEEN

**KWIHOKANA WOMEN SELF-HELP GROUP (SUED THROUGH ITS OFFICIALS, NAMELY TABITHA WANJIRU GITONGA – CHAIRLADY IRENE MUTHONI KINYANJUI – SECRETARY ANNE NYAGUTHII MANA – TREASURER 1ST APPELLANT
KENYA WOMEN FINANCE TRUST LIMITED 2ND APPELLANT**

AND

**MUTITU RURAYA MUCHEMI 1ST RESPONDENT
DAVID GICHUKA KAMANGU 2ND RESPONDENT
RUOL AUCTIONEERS 3RD RESPONDENT**

(Being an appeal against the Judgment of Honourable J. Wanjala, Chief Magistrate, Nyahururu delivered on 18th January 2017 in Nyahururu CMCC 21 of 2012)

RULING

1. By application dated July 26, 2022, the applicant seeks the orders that; the execution of judgment dated October 7, 2020 be stayed on the grounds that the applicant is able to pay the decretal amount in judgment and has been in negotiations with the respondent. However, the respondent has gone ahead to attach the 2nd respondent's properties for an amount that is grossly exaggerated, unlawful, and unjustified.
2. The application is anchored on provisions of order 22 of the [CPR 2010](#). An affidavit from Marion Wasike, head of legal services of the 2nd applicant, also supports it. The 2nd applicant's case is that



- The judgment in this matter was delivered on October 7, 2020. By a letter dated March 2, 2022, the advocates representing the respondent wrote to 2nd applicant's advocates, advising on the decretal amount due and owing from them to the respondents.
3. The said advocates inadvertently failed to forward to them the said letter or advise on the contents of the same. On July 22, 2022, they were shocked to receive a proclamation notice from Ruol Auctioneers, allegedly attaching the 2nd applicant's movable properties.
 4. They consulted their advocates on record, who admitted having received the aforementioned letter dated March 2, 2022 but inadvertently failed to appraise them for their further instructions and actions.
 5. They were perturbed by the amount stated in the warrants of attachment which is Kshs 6,962,426.67. The amount is obviously grossly exaggerated and untenable in the circumstances. There is no plausible explanation for the said amount to have increased from Kshs 2,476,336.67 as stated in the aforementioned letter of March 2, 2022 to Kshs. 6,962,426.67 in a span of four months unless, of course, the respondents are on a mission to unjustly enrich themselves.
 6. That the 2nd applicant is ready and willing to defray the decretal amount as was stated in the letter of March 2, 2022 in the sum of Kshs 2,476,334.67, otherwise, it seeks an explanation to show the exaggerated figure aforesaid was arrived at.
 7. The respondents oppose the same via the affidavit of Wanjiru Mwaniki sworn on August 20, 2022. The respondent case is that the applicants herein have inexcusable indolence where they have failed, for almost two years to settle the judgment and decree of October 7, 2020, and such responsibility cannot be relinquished as it was the sole responsibility of the appellants to follow up their case with their advocates on record for and on their behalf to ensure that necessary steps were being taken towards the settlement of the said monies and hence the respondents cannot be faulted for commencing for execution process.
 8. The court is urged not be inclined to exercise its discretion in favour of the applicants as they did not take up any action after judgment was delivered and decree obtained and neither have, they given this honourable court a satisfactory reason for failure to remit the total amount owing from them being Kshs 6,962,426.67/= as enumerated in warrants of execution issued by this honourable court on July 15, 2022.
 9. That the appellants allegation that the figures of Kshs 6,962,426.67/= is exaggerated is ridiculous, an after-thought and merely aimed to mislead this honourable court as the Judgment of October 7, 2020 is very clear on the amount awarded by the court.
 10. That from the said judgment, the respondents were awarded the following. Special damages at Kshs 410,000/= Loss of income of Kshs 14,000/= Per month with interest at 14% per annum from November 22, 2011. Costs of the suit together with interests at court's rate.
 11. That loss of income itself calculated using compounded interest, every month amounted to Kshs 6,438,600/= as at the time of obtaining the Warrants of Attachment. When added to the special damages of Kshs 410,000= . Costs of the suit at Kshs 98,326.67/= as per the certificate of costs together with other additional costs, the sums amount to Kshs 6,962,426.67/= which is the amount properly due and owing from the Appellants herein.
 12. That it should be noted that the letter of March 2, 2022, contained erroneous figures based on a decree that was erroneously issued by the court but the said decree has been re-submitted to the court for purposes of its being corrected.



13. That further, the said latter did not take into consideration the interest that has accrued on the judgment amount since judgment was delivered by the court on October 7, 2020 which was in error.
14. That the appellants herein have never appealed against the judgment of the court of October 7, 2020 and/or the decree ensuing therefrom and thus they cannot therefore start crying foul at this late state when the respondents decided to execute against the same.
15. That upon filing, the court from the outset of instant application, duly issued warrants of attachment against the applicants, the judgment debtors, for an amount of Kshs 6,962,426.67/= which cannot now be gain said as it was irregularly calculated by the court's officials themselves.
16. The parties were directed to canvass application via submission which they filed and exchanged.
17. Applicant submissions

Issues

18

- a. Whether the applicants' advocates actions should be excusable.
- b. Whether the decretal sum of Kshs 6,962,426.67 is justifiable.

Application

19. On the first issue the applicants were aware that judgment was issued on October 7, 2020 and were unable to settle the decretal sum since their advocates; This is because the applicants' advocate was still following up with the previous deposited amount of Kenya shillings one million and thirty-two thousand, one hundred and fifty-two (Kshs 1,032,152) in court as a condition for stay pending the hearing and determination of Nyahururu High Court Appeal No 45 of 2017.
20. The applicants' advocates had to follow up with the judiciary so as to enable them ascertain how much is required from the applicants, as a top up thereafter in the fulfillment of the decretal sum in the entire case.
21. The 1st and 2nd respondents' advocate was aware of the challenges the applicants' advocates have been experiencing with the follow up since they were in constant communication. This led to the advertent mistake and failure on the applicants' advocates to inform the applicants' of the letter from Ndegwa Wahome & Co Advocates.
22. The applicants' advocates did not simply sit back and do nothing on the said but were still following up with the judiciary on the receipts of the security deposit. The applicants' should not be held liable for the unforeseeable omission by their advocates.
23. The applicants' were and still willing to settle the decretal sum as indicated in the letter dated March 3, 2022 and their delay was not intentional. In Civil Suit No 51 of 2017 (*Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co Ltd & 2 others*) where the judge concluded that since the defendant's advocate failed to file defence on time but as soon as the suit was filed several applications were filed in quick succession, the intention to vigorously oppose the suit was clear.
24. The present application was therefore not brought to court to obstruct justice. The advocates' mistake was excusable and therefore the same should be applied in the applicants' case herein.
25. Secondly, the decretal sum of Kenya shillings six million nine hundred and sixty-two thousand four hundred and twenty-four and sixty-seven (Kshs 6,962,426.67) is said to be grossly exaggerated,



unlawful and unjustifiable and that the court should nullify the proclamation notice issued by Ruol auctioneers; because the same contains unjustifiable decretal sum. If the respondent are allowed to proceed with the execution the same will amount to irreparable damage to the applicants' and that the same cannot be compensated.

26. The applicants' are relying on Civil Suit No 2384 of 1999 (*Titus Tiego v Elizabeth Kadenge Mleshe*) whereby the judge stated that he is persuaded that the attempts by the decree holder/ respondent to execute or the sum shown therein is greatly prejudicial to the applicant.

Respondent Submission

27. It is the 1st and 2nd respondents' submission that the Warrants of attachment against the applicants for a sum owing from them being Kshs 6,692,426.67/= was regularly calculated by the court officials. What is not in doubt is that the judgment in this matter was delivered by Hon Lady Justice v Wendo on the October 7, 2020 in favour of the 1st and 2nd respondents as against the appellants in the following terms: -

- a. Special damages at Kshs 410,000/=.
- b. Loss of income of Kshs 14,000/= per month with interest at 14% per annum from November 22, 2011.
- c. Costs of the suit together with interests at courts rate.

28. From the said judgment, it is undisputed that the respondents were awarded a sum of Kshs 410,000/= in special damages. The court also awarded a sum of Kshs 14,000/= per month for loss of earnings calculated from November 22, 2011 up to the date of Judgment on October 7, 2020. This works out as follows:

$$14,000 \times 12 \text{ months} \times 9 \text{ years} = \text{Kshs } 1,512,000/=$$

29. The court went further to indicate that the Kshs 14,000/= will attract interest at the rate of 14% per annum. This means that the interest would be loaded to the said monies every month for 9 years at a compounded rate. This calculation on interest only when compounded, amounts to Kshs 3,264,000/= The total judgment amount should therefore, work out as follows: -

- i. Special damages Kshs. 410,000
 - ii. Add loss of earnings from November 22, 2011 - October 7, 2020 Kshs 1,512,000
Kshs 1,922,000/ +
 - iii. Add interests on loss of earnings Kshs 3,264,000
Kshs 5,186,000/=
 - iv. Add costs as per certificate of costs Kshs 98,326/=
Kshs 5,284,326/=
 - v. Add interest on the decretal sum from the date of judgment to date of payment on August 5, 2022 (22 months) Kshs 1,356,310
Kshs 6,640,636/=
- _ Less amount paid by the appellants on August 5, 2022 Kshs 2, 476 334.67



Kshs 4,164,302/=

_ Less amount recovered from the court Kshs.1,032,152.00

Kshs 3,132,150.00

30. The amount of Kshs 6,692,426.67/= as calculated by the court on the warrants of execution was therefore proper and correct taking into consideration additional costs appertaining to the execution process and is not exaggerated in any manner.
31. Further to that, after much consultation with the court officials at the registry, the 1st & 2nd respondents submit to this honourable court that the decree obtained from the judgment of October 7, 2020 was wrongly extracted by the court officials who were novices at the time and therefore erroneously calculated the figures in the decree and we seek that the same be nullified and the Deputy Registrar be directed to issue a fresh decree with the accurate figures.
32. That in any case, even if respondent were to go by the sums contained in the erroneous decree, the total sums owing from the appellants would amount to the following:
- i. Special damages of Kshs 410,000/=
 - ii. Add Loss of earnings at: Kshs 1, 512,000/=
 - iii. Add interests of Loss of earnings at Kshs 1, 898,160/=
 - iv. Add costs as per the certificate of costs Kshs 98, 326.67/=
- Kshs 4,923,734.17/=
- v.) Add interests from October 7, 2020 up until the date of payment on August 5, 2022 ($14/100 \times 668/365 \times 3,919,486.69$) at Kshs 1,004,247.48
- Total Kshs 4, 923, 734.17
33. The appellant herein have never disputed the judgment amount as awarded, neither have they preferred an appeal as against the same. From the foregoing, it is therefore clear that there are still amounts due and owing from the applicants herein and the process of execution ought to be allowed to proceed as it is.
34. Taking into consideration the actions of the applicants, it is evident that they have been less than candid with the court and their only true intentions are the derailment of this suit. The applicants are basically holding the 1st and 2nd respondents herein at ransom by their laxity to have this matter laid to rest.
35. The central issue raised by the applicants is that their advocates on record inadvertently failed to appraise their clients on the contents of the 1st and 2nd respondents alleged letter of March 2, 2022 and therefore no instructions were given on further action to be taken towards the settlement of the decretal amount.
36. It is the 1st and 2nd respondents' submission that it is impossible to relinquish the responsibility of the applicants in following up on their case since it is not contentious that they unaware of the judgment and decree obtained dated October 7, 2020.
37. The applicants citing inefficient assistance by their counsels on record does not in any way excuse their indolence that is apparent in their submissions by failing to settle the decretal sum for almost two years. The 1st and 2nd respondents submit to this honourable court that it would be absurd for the applicants to claim that the sole reason that they did not take up any action after judgment which was delivered



on October 7, 2022 was premised on grounds that their advocates did not forward the said contentious letter of March 2, 2022.

38. Reliance is made on the case of *Habo Agencies Limited v Wilfred Odhiambo* [2015] eKLR the court had this to state when the applicants blamed a 3rd party for laxity: -

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented.”

39. The applicants have never appealed the decision of October 7, 2022 and it is clear that the 1st and 2nd respondents have meticulously demonstrated to this honourable court that the only reaction that ensued from the applicants was when the respondents commenced the execution process which is proof enough that they are crying foul at this late stage when the respondents decided to execute against the same.
40. The applicants' delay towards settling the decretal sum owing from them is unexplained and neither have they given this honourable court sufficient reasons proving that they have been willingly pursuing this matter and we urge this court not to delve into the same.
41. Lastly, the 1st and 2nd respondents submit that the alleged mistakes of the advocates on record for the applicants should not be excused as the cited claims are misplaced, misguided and full of falsehood. Thus court is urged to dismiss the present application, as if granted, would greatly prejudice the respondents and they would not be able to enjoy the fruits of their judgment.

Issues, Analysis And Determination

42. The issues here in is that whether the decree subject is grossly exaggerated unlawful and unjustified in its form and content and what is order as to costs?
43. The applicant complaint is that the amount stated in the warrants of attachment which is Kshs 6,962,426.67. The amount is obviously grossly exaggerated and untenable in the circumstances. There is no plausible explanation for the said amount to have increased from Kshs 2,476,336.67 as stated in the aforementioned letter of March 2, 2022 to Kshs 6,962,426.67 in a span of four months, unless of course the respondents are on a mission to unjustly enrich self.
44. That 2nd applicant is ready and willing to defray the decretal amount as was stated in the letter of March 2, 2022 in the sum of Kshs 2,476,334.67, otherwise it seeks an explanation as to show the exaggerated figure aforesaid was arrived at. On the other hand, the respondent contends that they were awarded the following. Special damages at Kshs 410,000/= Loss of income of Kshs 14,000/= per month with interest at 14% per annum from November 22, 2011. Costs of the suit together with interests at court's rate.
45. That loss of income itself calculated using compounded interest, every month amounted to Kshs 6,438,600/= as at the time of obtaining the warrants of attachment. When added to the special damages of Kshs 410,000= . Costs of the suit at Kshs 98,326.67/= as per the certificate of costs together with other additional costs, the sums amount to Kshs 6,962,426.67/= which is the amount properly due and owing from the appellants herein.
46. That it should be noted that the letter of March 2, 2022, contained erroneous figures base on a decree that was erroneously issued by the court but the said decree has been re-submitted to the court for purposes of its being corrected.



47. That further, the said latter did not take into consideration the interest that has accrued on the judgment amount since judgment was delivered by the court on October 7, 2020 which was in error.
48. What I find as the genesis of the instant matter is the content of the decree subject of the matter. This can be solved by strictly following the procedure set out in the provisions of CPR 2010 on preparation of the decree to wit; preparation and dating of decrees and orders [order 21, rule 8.]
- (1) A decree shall bear the date of the day on which the judgment was delivered.
 - (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
 - (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
 - (4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
 - (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the sub-rules shall refer to magistrate.
 - (6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.
49. Thus, the mandate to supervision drawing and execution of decree being the province of the deputy registrar, I find it apt to remit the instant dispute on content of the decree and warrants to the Deputy Registrar to;
- i. Entertain the submissions of the parties on the content of the decree and calculation of the interest and amount recoverable by the decree holder to date and same exercise be completed within 30 days from the date the DR hears the arguments or in event want to settle, from the time they seek time to settle.
 - ii. In event of any event finds that there is issue for the judge to give direction, the matter be referred to the judge accordingly.
 - iii. There be liberty to apply.
 - iv. Meanwhile the stay of execution will remain in force until the settlement or until this court directs otherwise.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER 2022.

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CHARLES KARIUKI



JUDGE

