



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Old Mutual Life Assurance Co., Limited (Commercial Suit 389 of 2004)
[2021] KEHC 248 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 389 OF 2004
DAS MAJANJA, J
NOVEMBER 19, 2021**

BETWEEN

JOSEPH KANGUCHU MWANGI PLAINTIFF

AND

OLD MUTUAL LIFE ASSURANCE CO., LIMITED DEFENDANT

RULING

1. The Defendant has filed the Notice of Motion dated 29th October 2021 seeking an order that, “the decree dated 3rd March 2015 be substituted decree approved by the court.” When the matter came up for hearing the parties agreed that I should give the appropriate directions in the matter. The issue for resolution is whether the court should issue another decree and if so, on what terms as there are two judgments in this suit.
2. The first one by Gikonyo J., is dated 3rd March 2015. After hearing the matter, the learned Judge concluded as follows:

Accordingly, I restrain the sale of the suit property on the notices issues herein. They may, however, issue fresh notices and sell the charged property unless the debt is paid in full. Determination of who pays the costs of the suit shall await the outcome on assessment of damages. It is so ordered.
3. The assessment of damages was conducted by Tuiyott J., who delivered a Judgment of Assessment of Damages dated 28th April 2020 holding that:

Ultimately, the court enters Judgment for Plaintiff for damages of Kshs. 2,415,880.79 with interest thereon at court rates from the date of filing this suit and costs of the suit.



4. Flowing from the Judgment dated 3rd March 2015, the Plaintiff extracted a decree which was issued on 15th July 2021 which states as follows:

1. THAT the sale of the suit properties be and is hereby restrained on the notices issued herein.
2. THAT they may however, issue fresh notices and sell the charged property unless the debt is repaid in full.
3. THAT determination as to who pays costs of the suit shall await outcome on the assessment of damages.

5. The parties are unable to agree on the decree capturing the determination by Tuiyott J. I think the first decree was issued in error is so far as it stated that is a decree. Under section 2 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) defines a decree as a formal expression of the court's adjudication which conclusively determines the rights of the parties with regard to all matters in the controversy and may be either preliminary or final. In this case, since the issue assessment of damages remained to be determined, the decree in relation to the judgment dated 3rd March 2015 could only be termed as a "Preliminary Decree" as the issue of assessment remained to be determined.

6. Once the judgment on damages was delivered by Tuiyott J., the final expression of the adjudication including that earlier determination, ought to be expressed in a decree which sets out the entire determination. In this case therefore and in exercise of the court's power to amend decrees under section 99 of the *Civil Procedure Act*, I direct that the decree issued on 15th July 2021, be amended to read "PRELIMINARY DECREE". Consequently, I direct the Deputy Registrar to issue a decree on the following terms:

1. THAT the sale of the suit properties be and is hereby restrained on the notices issued herein.
2. THAT they may however, issue fresh notices and sell the charged property unless the debt is repaid in full.
3. THAT the Defendant shall pay the Plaintiff Kshs. 2,415,880.79 with interest thereon at court rates from the date of filing this suit.
4. THAT the Defendant shall pay the costs of the suit.

7. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 19th day of NOVEMBER 2021

D. S. MAJANJA

JUDGE

Mr Chege instructed by Amolo and Gacoka Advocates for the Plaintiff.

Ms Koech instructed by Nyiha Mukoma and Company Advocates for the Defendant.

