



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1208 OF 2003

AFRICAN COMMUTER SERVICES LIMITED.....DECREE HOLDER

VERSUS

KENYA CIVIL AVIATION AUTHORITY.....JUDGMENT DEBTOR

AND

CFC STANBIC BANK LIMITED.....1ST GARNISHEE

COMMERCIAL BANK OF AFRICA LIMITED.....2ND GARNISHEE

KENYA COMMERCIAL BANK LIMITED.....3RD GARNISHEE

RULING

This protracted litigation has moved from the High Court, the Court of Appeal to the Supreme Court and now back to the High Court. In the process, the decree holder secured a decree against the judgment debtor which is now the subject of this ruling.

By an application dated 11th and filed on 14th December, 2018 the decree holder moved the court by way of Notice of Motion under Order 23 Rules 1, 9 and 10, Order 40 Rules 1 and 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the decree be executed by way of attachment of the Judgment debtor's funds held by the garnishees cited in the application, to satisfy the outstanding decretal sum said to be Kshs. 2,438,360,489/=. The particulars of account numbers have been cited in the application.

The application is supported by an affidavit sworn on 11th December, 2018 by Esmail Jibril, the Managing Director of the decree holder, alongside the grounds set out on the face of the application. There is a further affidavit sworn by the same deponent on 28th February, and filed on 1st March, 2019.

The application is opposed by the judgment debtor and there is a replying affidavit sworn on 19th and filed on 20th December, 2018 by Cyril Wayongo the Ag. Corporation Secretary of the judgment debtor. There is also a further affidavit sworn by Gilbert Kibe, the Director General of the Judgment Debtor on 22nd March, 2019 and filed on the same day.

On 14th December, 2018 the said application was placed before me under certificate of urgency and upon perusal I was satisfied that, a Decree Nisi should issue against all the cited garnishees who were then to be served with a view to making an answer to the said application.

Subsequently, when the parties appeared before the court on 20th December, 2018 for directions, the learned counsel for the judgment debtor informed the court that the judgment debtor owed the judgment creditor some money and was willing to pay; however, the amount owing and as calculated by the judgment creditor was highly disputed.

To allow the judgment debtor to continue operations, it was agreed that a sum of Kshs. 1 billion (Kshs.1,000,000,000) be paid to the judgment creditor. On the other hand, it was agreed that a sum of Kshs. 2.9 billion held in the judgment debtor's account with the 2nd garnishee, Commercial Bank of Africa Limited be frozen and the order remain in place until the determination of the application. It was further agreed that the order directed to the 1st and 3rd garnishees be lifted and vacated.

Another application was subsequently filed by the judgment creditor to cite the judgment debtor for contempt after there was delay in the payment of Kshs. 1 billion as agreed earlier. However, that application was withdrawn after it was confirmed the said sum had been paid, albeit on the eve of court appearance to prosecute that application.

Counsel for the judgment creditor and the judgment debtor then appeared before me to argue the application. The counsel for the 2nd garnishee was excused from the said proceedings for obvious reasons.

The application was for payment of outstanding decretal sum as at 31st December, 2018 together with interest that had accrued. It is the decree holder's case that it has a decree dated 24th March, 2014 for the sum of Kshs. 1,421,671,718 as against the judgment debtor. It is submitted that over the years up to the time of filing this application, the said sum has attracted interest of Kshs. 1,016,688,771 such that the sum due and owing is Kshs. 2,438,360,489.

There is no dispute that the decree sought to be executed or enforced was drawn pursuant to the Court of Appeal Judgment in Civil Appeal No. 34 of 2009. It is submitted that this matter had already been litigated before Mabeya J who gave ruling in that regard and therefore, this court has no jurisdiction to interfere with the same. The record shows that after the ruling of Mabeya J, the judgment debtor applied to review the same which however was declined by the court. The judgment debtor then moved to the Court of Appeal in civil appeal No. 197 of 2016 but that appeal was compromised vide a consent recorded on 29th November, 2017.

Following that compromise, it is the judgment creditor's position that since the judgment debtor did not comply therewith, that is the consent being enforced. The computation of interest is *res judicata* as the consent filed in the Court of Appeal settled the matter completely.

In opposing the application, the judgment debtor submitted that the amount of interest payable was contested and it has never been determined. Even where it has been agreed, the parties have abandoned such an agreement, and therefore the doctrines of estoppel and waiver are applicable.

It is submitted that this application is not for enforcement of the consent recorded in the Court of Appeal, since the parties abandoned that consent and went into negotiations which led to agreement of another sum. Having entered into fresh negotiations, the judgment creditor waived the right to pursue the enforcement of the said consent, and therefore should not be allowed to do so. The computation of interest is not *res judicata* because Mabeya J did not address the issue in his judgment.

It is submitted further that, there are parameters in the calculation of rates of interest, and in any case interest at court rates is 12 %. Further, unless a judgment states otherwise, the interest is calculated on simple and not compound interest. A report has been filed by the judgment debtor prepared by Interest Rates Advisory Centre (IRAC) which, it is submitted, should be the guide in calculation of the rate of interest.

On 26th November, 2014 Mabeya J gave an order for the attachment of the judgment debtor's account with National Bank of Kenya Limited in part satisfaction of the decretal sum which was then said to be Kshs. 1,421,671,718/=. Again, on 25th September, 2015 the same court delivered a ruling relating to a review application which targeted the same decree and also asked for a fresh decree, and or the amount owing under the judgment be computed by the court. The main reasons advanced for the said move were that the decree extracted by the judgment creditor was grossly exaggerated, and that the judgment debtor had caused the decretal amount to be professionally computed by a leading interest advisory firm in Kenya known as Interest Rates Advisory Centre (IRAC).

At the end of it all, the learned Judge concluded that he had no jurisdiction to entertain that application and proceeded to dismiss the same with costs to the decree holder. It would appear the consent at the centre of these proceedings dated 29th November, 2017 followed the two rulings made by Mabeya J. It is important to set out in full the said consent. The decree holder and the judgment debtor are the parties. It reads as follows,

“CONSENT

By consent of all parties herein, the Appellant and Respondent in Civil Appeal No. 197 of 2016, hereby enter into consent in the following terms;

1 THAT the total decretal amount plus interest now standing at Kenya Shillings Two Billion (Ksh. 2,000,000,000) be paid by the appellant to the Respondent in full and final settlement of all claims arising from and incidental to the suit herein;

2 THAT there shall be no further claim of damages, interest and costs in the matter;

3 THAT the above cited sum of Kshs. 2,000,000,000 is to be paid in three instalments in the following manner;

a. A first instalment of Kshs. Nine Hundred Million (Kshs. 900,000,000) to be paid immediately upon execution of this Consent;

b. A second instalment of Kshs. Nine Hundred Million (Kshs. 900,000,000) to be paid before 31 January, 2018; and

c. The final instalment of Kenya Shillings of Kshs. 200,000,000 (Two Hundred Million) to be paid before 1st March, 2018;

4 THAT upon payment of the agreed amount or part payment thereof, all pending proceedings in any court in Kenya regarding damages and costs payable and the rising in matters herein shall forthwith be withdrawn.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2017.

Signed	Signed
APPELLANT	RESPONDENT
MR. E.M. JIBRIL	DIRECTOR GENERAL
MANAGING DIRECTOR	CIVIL AVIATION AUTHORITY
Signed	signed

ADVOCATES FOR THE APPELLANT ADVOCATES FOR THE RESPONDENTS”

The consent arrived at by the parties as set out above was not complied with, and on 21st December, 2017 the Director General of the judgment debtor herein wrote to the advocates for the judgment creditor in reply to a letter of even date, apologising for the delay in remittance of the 1st instalment as agreed and undertaking to honour the settlement.

On 8th of January, 2018 the advocates for the judgment creditor wrote to the Judgment debtor drawing its attention to the said consent and breach thereof. It is important to set out the last paragraph of the said letter which has been annexed to further affidavit of Esmail Jibril filed on 1st of March as annexure JEO7. It reads as follows,

“We put you on notice therefore that we shall now proceed to charge 12% compound interest at court rates from the date of the consent and in due course we shall proceed to execute for the said decretal amount owing and due to our client as per the consent.”

Apparently, this prompted a meeting held on 1st February, 2018 at Crown Plaza Hotel, Nairobi, between the representatives of the judgment debtor and judgment creditor and in the presence of the advocate for the judgment creditor. In relation to computation of interest, it was observed that the Attorney General and the Principal Secretary in the Ministry under which the judgment debtor operated, had given some guidance on the calculation of the amount due and the following statement is captured in the minutes (marked as JEO8) as follows,

“.....the calculation of the amount due should be based on the Court Award i.e. the principal sum of Kshs. 362,625,656 which is the decretal sum awarded by the Court of Appeal and the computation of compound interest from the date of filing. The parties after deliberation on this concurred on this computation to resolve the matter.”

It is instructive that under the heading “Way forward” captured in the same minutes, the parties agreed that the payment should factor in computation of compound interest from the date of filing plus costs and interest, taking into account what had already been paid under the garnishee proceedings earlier mentioned herein.

It is further instructive that in a letter dated 15th February, 2018 in the further affidavit of Esmail Jibril (marked JEO9) the advocates for the judgment debtor said in part as follows,

“We are informed that our respective clients met and agreed to vary the terms of the consent dated 29th November, 2017 to accord with the directions of the Attorney General on computations of interest.”

The said advocates then forwarded draft consent for approval which, however, was not executed by the advocates for the judgment creditor, because it did not reflect the agreement between the respective clients.

In a letter dated 15th February, 2018 (JEO9) the advocates for the judgment creditor wrote to set out the correct position and asked that the advocates for the judgment creditor revert soonest. There is no evidence that this was done.

Whereas it is true that after the consent of 29th November, 2017 the parties herein engaged in further negotiations, there is no evidence on record that there was any change of the sum claimed by the judgment creditor from the judgment debtor. It is clear that all along, the understanding of the parties was anchored on the said consent order. The judgment debtor however, has submitted that in entering into further negotiations, the judgment creditor waived its rights to execute the decree based on the consent and therefore estopped from relying thereon.

Waiver has been addressed in several decided cases including **Banning Vs. Wright (1972) 2 ALL, ER 987 at Pg 998** where the court stated as follows,

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to stipulation in a contract or over statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes, a person’s actions can be interpreted as a waiver – waiver by conduct”.

In the case of **Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Limited (2007) e KLR** the court stated as follows,

“A waiver may arise where a person pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right”.

Going by the record before me, I am unable to see any indication, express or otherwise in the conduct of the judgment creditor to suggest that it intended to waive its right under the consent. I say so because, in the further affidavit of Esmail Jibril, there is consistency in reference to the consent of 29th November, 2017, the plea for compliance and the desire to have this matter closed. In any case, a party in default cannot ride on the principle of waiver attributed to the other.

The current execution proceedings by way of garnishee orders sought, finds reference to the said consent which has been breached by the judgment debtor. Had there been compliance, these proceedings would not have proved necessary. Was there notice of intention to levy the interest charged? The answer is in the positive. The letter annexure JEO7 speaks for itself.

The goodwill extended by the judgment creditor to the judgment debtor had been stretched to the limit by the time this application was filed, which is in exercise of the legal rights reserved in a legal action.

I must now address the issue of whether or not computation of interest is *res judicata*. When the judgment debtor moved the court for review of the decree, the court declined to review the decree or approve the issuance of a new decree. I have read the holdings of the court in **Civil Appeal No. 240 of 2011 Hon. Daniel Torotoich Arap Moi CGH vs Mwangi Stephen Mureithi (2014) e KLR** and **Barclays Bank Kenya Ltd vs Lilian Mwangi Nguruki (2014) e KLR**.

Even if the direction of those cases is that, generally interest should be ordered at court rates, in the instant case, there is consistency backed by the parties’ own commitment that this would be based on compound interest. In any case annexure EJO8 to the supporting affidavit of Esmail Jibril has factored in interest at 12% in line with the decree. The court cannot rewrite the express provisions where parties have voluntarily committed themselves thereto.

I have already observed that Mabeya J did not address the subject of interest in his ruling of 25th September, 2015. The prayer to address the decree afresh was part of the application. The fact that no finding was made does not mean that the court made no decision. Section 7 of the Civil Procedure Act states as follows,

Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation 5 thereof reads as follows,

“Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.”

I need not say more on that subject.

The proceedings herein expose the judgment debtor as a litigious party ready to stretch proceedings to unimaginable proportions, yet it would appear clear that it must meet its legal obligations. The judgment debtor is a public body; that notwithstanding, it is incumbent that it meets its legal obligations. To continue resisting the judgment creditor’s quest to recover the fruits of its judgment amounts to postponing an obvious eventuality.

Taking into consideration all the matters placed before me, I am persuaded that the judgment creditor’s application is irresistible.

Accordingly, the Decree Nisi order issued on 14th December, 2018 is hereby made absolute. It shall now be executed in full against the judgment debtor’s account held with the 2nd Garnishee, Commercial Bank of Africa Ltd, Account No. 6514690019 taking into account the sum of Kenya Shillings 1 billion (Kshs.1,000,000,000) already paid.

The judgment creditor shall also have the costs of this application.

Dated, signed and delivered at Nairobi this 27th Day of June, 2019.

A.MBOGHOLI MSAGHA

JUDGE