



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 121 OF 2016**

**ECOBANK KENYA LIMITED..... PLAINTIFF**

**VERSUS**

**AFRIKON LIMITED.....DEFENDANT**

**RULING**

1. These are Garnishee proceedings and the Court is asked to determine the Motion dated 24<sup>th</sup> May 2017 seeking the following orders:-

2. *Spent*

3. *Spent*

4. *Spent*

5. The 1<sup>st</sup> – 3<sup>rd</sup> Garnishees, National Irrigation Board, IVRCL Limited, and Isolux Ingeneria S.A, be directed, to within 7 days of an order of this Honourable Court furnish a full account of all monies owed and/or held in favour of the Judgement Debtor.

6. A Garnishee Order absolute be issued directed to the 1<sup>st</sup> – 3<sup>rd</sup> Garnishee, National Irrigation Board, IVRCL Limited, and Isolux Ingeneria S.A to release and/or remit to the Decree Holder such sums as are held in all bank accounts by the said Garnishees in favour of Judgment Debtor Afrikon Limited in order to satisfy the Decree given on 15<sup>th</sup> May, 2017.

7. Costs of this Garnishees proceedings to be given to the Decree- holder and the Garnishees, and be borne by the Judgement Debtor.

2. Pivotal to the success or failure of the Motion is whether or not there is a proper money Decree upon which Garnishee proceedings can be mounted.

3. In a Plaint presented on 14<sup>th</sup> April, 2013, Ecobank Kenya Ltd ( The Bank) sued Afrikon Limited (Afrikon), for inter alia, a money claim of Kshs.168,125,570/= and USD 13,355,937.12.

4. On 4<sup>th</sup> October 2016, Counsel for the parties herein asked the Court to record and adopt an order in the following terms:-

“We, the undersigned Advocates for the respective parties to the above-noted case, should be grateful if the following Consent Order would be recorded and adopted as an order of this Honorable Court:-

“Recognizing that the Plaintiff and the Defendant have agreed that the outstanding amount owed by the Defendant to the Plaintiff is Kshs.331,370,748.73 and USD 11,402,847.28 as at 30<sup>th</sup> September 2016; and further recognizing that the Plaintiff and the Defendant have agreed that the aforesaid outstanding amount be restructured in terms of the facility letter dated 30<sup>th</sup> September 2016 (“Restructure Facility Letter”)

**By CONSENT**

The above-noted suit be and is hereby marked as fully and finally settled on the following terms:-

1. Costs of the suit are awarded to the Plaintiff, which costs are to be agreed upon between the parties. In the event that parties do not agree, the Plaintiff’s costs are to be taxed by the taxing master.
2. That Afrikon Limited agrees at all times to provide access, tracking and joint registration of all the assets referred to in Schedule 1 attached herewith (“the Assets”) which assets are financed by Ecobank Kenya Limited.
3. Except with the prior express written approval of Ecobank Kenya Limited, the Assets are to be held by a Collateral Management Agent to be appointed by Ecobank Kenya Limited.
4. That Afrikon Limited guarantees that the Assets referred to in Schedule 1 may only be released for the Defendant’s use upon written instructions from Ecobank Kenya Limited, which instructions are to be on the Bank’s official letterhead, once the tracking, joint registration and assignment of income is complete.
5. That Afrikon Limited guarantees to assign all the current and future rentals from the Assets referred to in Schedule 1 towards repayment of Afrikon Limited’s outstanding obligations with Ecobank Kenya Limited.
6. In the event of default with compliance of any of the aforementioned terms or any conditions of the aforementioned Restructure Facility Letter, Ecobank Kenya Limited will be at liberty to attach, sell or in any way deal with the assets referred to in Schedule 1 without further reference to Afrikon Limited”.

The Consent was duly adopted as an order of the Court on the same day.

5. On 31<sup>st</sup> May 2017, the firm of Wamae and Allen, acting for the Bank wrote to the Deputy Registrar as follows:-

31<sup>st</sup> May 2017

The Deputy Registrar

High Court of Kenya at Nairobi

Commercial and Tax Division

MILIMANI

Dear Sir,

ECOBANK KENYA LIMITED VS. AFRIKON LIMITED

Pursuant to the consent letter dated 4<sup>th</sup> October 2016 and the consent order issued on 15<sup>th</sup> May, 2017, judgement was entered against the Defendant for the sum of KES 331,370,748.73 and USD 11,402,847.28 [using an exchange rate of KES 103.38 to 1 USD as at 31<sup>st</sup> May 2017 come to KES 1,178,826,351.81]. The total sum in the judgment on which costs should be certified comes to KES 1,510,197,100.54.

We should be grateful for the issuance of a Certificate of Costs under Rule 68A of the Advocates Remuneration Order. The Costs are as follows base on the 2014 Advocates Remuneration Order Schedule 6(1)(c) are KES 19,428,619.71 as calculated below.

Instruction Fees

On the first 1,000,000	KES 75,000.00
On the amount between KES 1,000,000 and 20,000,000 –	KES 332,500.00
On the balance of KES 1,490,197,200.54	KES 22,352,956.51
Total	KES 22,940,456.51
A. 85% of instruction fees	KES 19,499,388.03
B. Court filing fees	KES 71,500.00
C. Certificate of costs	KES 175.00
Total (A+B+C)	KES 19,571,063.03

We undertake to pay your charges.

Yours faithfully,

Wamae & Allen Advocates

6. Afrikon has serious reservations about the manner in which the order was extracted and argues that these Garnishee proceedings are premature because the order that compromised this suit is not a money decree and that the Decree which is sought to be executed was not extracted in conformity to the provisions of Order 21 Rule 8 of The Civil Procedure Rules. Let me start with the latter.

7. Order 21 Rule 8 is on preparation and dating of Decrees and Orders. It provides:-

“(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 subrules 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 111cc manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order”.*(My emphasis)*

8. The rationale for above provisions cannot be difficult to surmise. A Decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A Decree must accurately and faithfully reflect the Orders or Judgement of the Court. The provisions of order 21 Rule 8 offers an opportunity for parties to settle the terms of the Decree so that they are satisfied that it is a true and faithful reflection of the Judgment. But Parties may sometimes disagree as to whether a draft decree prepared by one of them is in accordance with the judgement and in that event it is submitted to a Judge for resolution(order 21 Rule 8 (4)). The provisions of order 21 Rule 8 are important and no party can be permitted to circumvent them.

9. Afrikon complains that the Bank extracted the order/decree without first submitting it to their Lawyers for approval. The Bank does not deny this. Afrikon takes the view that the order/decree is not in accordance with the Consent of 4<sup>th</sup> October 2016. Clearly, as the order/decree was extracted contrary to the provisions of order 21 Rule 8 then it is an improper order/decree.

10. Garnishee proceedings are execution proceedings and once an order/decree upon which the proceedings rests are tainted then the entire Garnishee proceedings are vitiated. The Bank seeks to enforce an improperly extracted order/decree and will not be allowed to do so. For that reason, the Motion 24<sup>th</sup> May 2017 must fail.

11. In addition, the Court cannot allow the order/decree to stand. It is hereby set aside.

12. This Court does further observe that the Bank’s attempt to obtain the Certificate of Costs before an agreement or taxation is a direct infraction of clause 1 of the Consent. By the terms of clause 1 the parties bound themselves that in the event of a disagreement on costs, the Plaintiff’s costs were to be taxed by the Taxing Master. There is no agreement on costs and the Plaintiff was obliged to place a Bill of Costs before the Taxing Master for taxation. The Plaintiff’s letter of 31<sup>st</sup> May, 2017 requesting for issuance of a Certificate of Costs on untaxed costs was a bold infraction of the express terms of the Consent.

13. I know that Counsel have addressed me on the purport of the Consent and what the Contents of the decree/order therefrom should be. This Court prefers to deal with that disagreement should it be properly placed before it under the auspices of Order 21 Rule 8(4).

14. For now the Motion of 24<sup>th</sup> May 2017 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> day of September,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Wawire h/b Gichuhi for Plaintiff

Kangethe for Defendant

ALEX - Court Clerk