



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 496 OF 2000**

JOSEPH MUCHINA ..... APPELLANT

VERSUS

CO-OPERATIVE BANK KENYA LTD .....RESPONDENT

**JUDGMENT**

In a suit filed in the court of the Principal Magistrate on 11th August 1997 (Civil Case No. E.J. 506 of 1997, the plaintiff (now respondent) sought from the defendant (now appellant) a sum of Kshs.486,477/11 being the outstanding balance on account of card No. 4407 4040 000 67 under an agreement entered into by and/or between the parties on 8th November, 1995.

The appellant neither entered appearance nor defence and the respondent applied for default judgment to be entered on 5th September, 1997 and this was done on 21st November, 1997.

After entry of the default judgment, a decree was drawn but before execution, this appellant was notified of this in a letter by counsel for the respondent to the appellant dated 28th November, 1997 wherein the appellant was requested to pay the claimed amount.

It was then that counsel for the respondent and the appellant sent a consent letter to court dated 27th February 1998 and filed in court on 31st July 1998 to the following effect:-

BY CONSENT

- (i) The judgment – debtor to liquidate the decretal sum herein by monthly installments of Kshs.100,000/= commencing 31st August 1998 and thereafter on the last day of each succeeding month until payment in full;
- (ii) In default of any one installment, warrants of arrest of the judgment-debtor to issue forthwith.
- (iii) The Judgement debtor to pay the outstanding further legal of Kshs.15,731.00 forthwith.

The appellant does not seem to have made no payment in compliance with this consent and on 9th April, 1999 counsel for the respondent wrote to the court to ask it to process warrants of arrest of the appellant for execution.

This is when another consent order was recorded on 17th December, 1999 in the following terms; namely:

BY CONSENT

(i) J.B to liquidate the decretal sum as Kshs.500,000 (Five Hundred Thousand) on or before 6.1.2000.

(ii) Judgement debtor to liquidate the balance by monthly instalments of between 200,000/= on or before 6th day of each succeeding month until payment in full.

(iii) Judgement debtor to pay advocates charges to be agreed between the parties or assessed by the court.

(iv) In default execution to issue.

I note that by this time, the appellant had acquired services of a lawyer by name L. Wahome & Company Advocates, represented by one Miss Ouma on the entry of the above consent order.

Following this agreement, the appellant paid a total of Kshs.924,000/= but when the respondent sought recovery of further sums on account of an amended warrant of attachment, showing a total of Kshs.1,066,000/=, the appellant came up with an application dated 28th April, 2000 to seek several prayers: namely;

1. Dispensation of summons pending the hearing of the application,
2. Stay of execution pending determination of the application.
3. Judgement entered herein in default of appearance be set aside or varied and all the consequential orders be set aside.
4. That in the alternative the court do record a compromise and decree that the suit is fully settled, and that
5. Costs of the application be provided for.

The Application was based on the grounds set out thereon and supported by the affidavit deposed to by the appellant and filed in court together with the application.

The grounds referred to above were that the default judgement entered herein was irregular as it offends provisions of Order IXA Rule 3(2) of the Civil Procedure Rules; that the warrants herein are also irregularly issued as there was no compliance with the mandatory provisions of Order XXI Rule 7(2) of the Civil Procedure Rules, that the award of interest at 8% per month was not "reasonable" in conformity with the provisions of Section 26(1) of the Civil Procedure Act and that the suit should be marked as settled should be marked as settled the same having been compromised in accordance with the provisions of Order XXIV Rule 6(1) of the Civil Procedure Rules.

The supporting affidavit gave reason why the appellant did not enter appearance and defence to the suit, because he agreed to pay the debt by installments.

That the appellant was told the debt amounted to Kshs.900,000/= and that if he paid this sum the suit would be cleared completely.

That counsel for the respondent confirmed to the appellant that he only owed the respondent Kshs.924,325/= and if he paid this sum, the whole debt would be cleared.

The appellant stated that he paid this sum by instalments of Kshs.500,000/= in case (see JKM 1) on 14.3.2000 but that a few days later auctioneers were sent to his house to attach his motor vehicle Registration number KAB 600 P.

Then, he talked to a Mr. Muchiri of the auctioneers firm (Fore Front Auctioneers) who informed him

that the balance outstanding was Kshs.424,325/= which he paid vide a bankers cheque on 7th April, 2000. (JKM 3).

Then later the same auctioneers went to his house 16 days later with a warrant claiming the sum of Kshs.1,066,000/= and this is why he instructed his advocate to file the application subject to the present appeal.

The application was placed before a Principal Magistrate (C.O. Kanyangi Esq) on 19th May, 2000 and 12th June, 2000 for hearing when counsel for both parties submitted thereon. The Magistrate ruled on the application dismissing it on 26th June, 2000, hence this appeal.

The appeal listed 7 grounds of appeal was heard by this court on 21st May, 2002 wherein counsel for both parties submitted either for or against the appeal.

Counsel for the appellant contested the interest imposed on the claimed amount at 8% per month and said this should have been proved or that the executive officer should not have entered judgement in respect of this interest as it did not constitute courts' interest rate.

The counsel also contested the fresh amended warrants of attachment for a sum of Kshs.1,066,000/= and said they were amended contrary to the Rules.

Counsel for the respondent opposed the appeal and said the appellant had consented to paying the decretal amount without opposing the rate of interest.

And that the warrants were properly amended when an error was detected as to decretal amount on 27.11.97.

In the lower court the appellant had applied for setting aside of judgement entered in default of appearance. As shown, the default judgement was entered when the appellant failed to file appearance and when he was informed of this he went to the counsel for the respondent and agreed to make payment in installments. On this agreement being reached, he abandoned defending the suit. He must have known what the claim against him was as he had been served with the plaint which included interest at the rate of 8% per month.

He raised no complaint over this and even when he went to court to accept payment of the decretal amounts by installment on 31.7.98 and on 17th December, 1999 he was aware these installments included the element of interest at 8% per month.

The appellant also agreed to have paid up to Kshs.924,000/= to the respondent which amount included interest at the rate of 8% per month.

And to crown it all, this is the interest rate the appellant agreed to pay when he signed an agreement with the respondent to be issued with card No.4407 – 4040 – 000 – 6708.

In the circumstances, it seems an uphill task for the appellant to go back and question the interest rate and make it the basis of setting aside the default judgement and or for this court to set aside the order of the Magistrate dismissing the application to set aside the default judgement. I would dismiss this part of appeal.

As to whether parts had or not compromised the suit, I note that after the forefront auctioneers visited the appellant on 17th March 2000 with attachment warrants showing Kshs.924,335/= even after he had paid Kshs.500,000/= directly to the respondent on 14.3.2000 – not reflected, the appellant prepared a cheque for Kshs.424,335/= plus a further Kshs.55,675/= being advocates fees which he paid to the auctioneers straight away.

This was after he had already spoken to a Mr. Muchiri of the auctioneers firm and been assured the

decretal sum was Kshs.924,335/=.

Muchiri did not swear an affidavit to deny that he had given to the appellant the information that the decretal sum was Kshs.924,335/=.

Similarly paragraph 9 of the supporting affidavit quoted counsel for the respondent, a Mr. Kyalo, as having confirmed the decretal amount at Kshs.924,335/= but the said Kyalo did not swear a replying affidavit to deny this.

In these circumstances, I am inclined to hold that, contrary to the learned Magistrates views, the parties had compromised this suit at Kshs.924,335/= and that the respondent's application to court to award the warrants of attachment to add interest and further court fees since 21.11.97 was an afterthought calculated to place on unnecessary extra burdens on the appellant – which this court cannot accept. To this extent only I would allow this appeal.

As regards costs, since either side has succeeded in part in this appeal, each should bear his/its own costs then hence and in the court below. This are the orders of this court.

Delivered this 3rd day of June, 2002.

**D.K.S AGANYANYA**

**JUDGE**