



REPUBLIC OF KENYA



**Tanzania National Roads Agency v Kundan Singh Construction Ltd (In Receivership)
& another (Civil Suit 8 of 2010) [2025] KEHC 10555 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 8 OF 2010
G MUTAI, J
JULY 11, 2025**

BETWEEN

TANZANIA NATIONAL ROADS AGENCY PLAINTIFF

AND

**KUNDAN SINGH CONSTRUCTION LTD (IN RECEIVERSHIP) 1ST
DEFENDANT**

KENYA COMMERCIAL BANK LTD 2ND DEFENDANT

RULING

1. In a judgment delivered on 20th September 2024, this court (per Olga Sewe, J) entered judgment for the plaintiff against the 1st defendant and ordered inter alia that:-

“Interest on the sum of TShs.2,746,387,500/- at the prevailing commercial rates from 8th February 2010 until payments in full.”

The plaintiff was also awarded the costs of the suit.

2. The plaintiff desires to file a party and party bill of costs and, for that reason, wants to have the commercial rates of interest ascertained. Consequently, they filed the notice of motion application dated 8th November 2024, seeking to have the court determine the said rate and to refer the matter to the Deputy Registrar for determination of the rate of interest payable. The applicant also sought leave for execution to recover the principal sum of TShs.2,746,387,500/-, together with interest assessed by the Deputy Registrar before taxation, on the basis that Section 94 of the *Civil Procedure Act* allows execution before assessment of costs in certain circumstances.
3. The application is supported by the affidavit of Justinian Byabato and Mr Joseph M. Munyithya, sworn on 7th and 8th November 2024. The affidavit of Mr Munyithya annexed a letter written by Ondong



& Associates Certified Public Accountants (K), in which the latter identified what would amount to commercial interest rates for the period in question.

4. Ondong & Associates Certified Public Accountants (K) assessed the interest payable as being: -
 - a. 2010 13.82%
 - b. 2011 20.04%
 - c. 2012 20.29%
 - d. 2013 17.56%
 - e. 2014 15.93%
 - f. 2015 17.45%
 - g. 2016 16.59%
 - h. 2017 13.67%
 - i. 2018 13.06%
 - j. 2019 12.44%
 - k. 2020 12.00%
 - l. 2021 12.10%
 - m. 2022 12.34%
 - n. 2023 13.59%
 - o. 2024 16.30%
5. The said accountants based their report on the Central Bank of Kenya's Annual Supervision Reports, which are guided by CBR rates.
6. The application was opposed. The 1st defendant filed a replying affidavit sworn by Mr Kereto Marima, the Receiver Manager of the 1st defendant /respondent, in which he deposed that it would be wrong to allow the execution before taxation as it would not only be grossly unfair to the defendants but also an unreasonable use of the court's time. Regarding the assessment of the commercial rate of interest, Mr Marima deposed that the court was functus officio. He stated that the evidence of the rate of interest should have been provided during the hearing of the matter. He therefore prayed that the application be dismissed with costs.
7. The 2nd defendant filed grounds of opposition in which it averred that the court was functus officio, having delivered its judgment. It was argued that the Court lacked jurisdiction to determine the rate of interest, as this matter fell within the jurisdiction of the Deputy Registrar of the court. Furthermore, the court was functus officio, and there was no reason to elect to allow the execution before assessing the costs, as no justification had been provided.
8. The contents of the grounds of opposition were expounded with more detail in the replying affidavit sworn by Ms Lilian Sogo, the Legal Manager of the 2nd defendant/respondent, sworn on 25th February 2025.



9. The application was canvassed through written submissions. The plaintiff/applicant and the 1st defendant/respondent filed written submissions. The 2nd defendant/respondent did not. I shall set out the precis of the said submissions below.
10. The submissions of the plaintiff/applicant are dated 10th February 2025. The plaintiff/applicant submitted that the defendants/respondents did not file their responses on time. For that reason, the application should be considered undefended and allowed. Regarding the merits of the case, counsel for the plaintiff/applicant submitted that this court had jurisdiction under Section 34 of the [Civil Procedure Act](#) to intervene after the entry of judgment to answer all questions arising between the parties. In support of this contention, counsel relied on the case of [Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda](#) [2021] KEHC 8899 (KLR) and also [Bank of Africa Limited v Zablon Mogambi Mogaka & another](#) [2021] KEHC 4678 (KLR).
11. Mr Munyiya submitted that the calculation of the quantum of interest would be done by the Deputy Registrar once this court had fixed the commercial rate of interest. He relied on the decision of Mabeya, J in [Karuri Stores Pharmaceuticals Limited v Acacia Medical Centre Limited](#) [2015] KEHC 8266 (KLR).
12. On the jurisdiction of the court under Section 94 of the [Civil Procedure Act](#), counsel urged that the court could allow execution even where taxation had not been done, pursuant to the said provision, where such an act is considered just. In support of his contention, counsel relied on the case of [Bruce Joseph Bockle v Coquero Limited](#) [2017] eKLR and [Mombasa Bricks & Tiles Limited & 5 others v Arvind Shab & 6 others](#) [2018] KEHC 5987 (KLR).
13. Mr Munyiya urged that since the foundation for the suit was a commercial transition secured by bank guarantees, which are payable on demand, the payment was expected immediately upon demand. He urged the court to allow execution to recover the decretal amount pending taxation.
14. The 1st defendant's submissions are dated 21st February 2025. Counsel for the 1st respondent urged that the application should be dismissed.
15. Mr Kongere urged that a party seeking an interest other than the court rate had to provide an evidentiary basis for it and should have led evidence as to what the said rate is/was. Counsel relied on the case of [Alba Petroleum Limited v Total Marketing Kenya Limited](#) [2019] eKLR and [Total \(Kenya\) Limited Formally Caltex Oil \(Kenya\) Limited v Janevams Limited](#) [2015] eKLR. According to the counsel for the 1st defendant/respondent, what the plaintiff was seeking, during the post-trial period, was to produce evidence and to have the court accept such evidence as correct. This, counsel urged, could not be done as the court was functus officio.
16. Mr Kongere relied on the decision of the Court of Appeal in [Telkom Kenya Limited v John Ochanda \(Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited\)](#) [2014] KECA 600 (KLR). He stated categorically that no new evidence could be received post-judgment. He further submitted that nothing in section 34 of the [Civil Procedure Act](#) permits the taking of such evidence to improve an otherwise deficient judgment.
17. Mr Kongere distinguished the decision in [Karuri Stores Pharmaceuticals Limited v Acacia Medical Centre Limited](#) [2015] KEHC 8266 (KLR), on the ground that the judgment in the said matter already fixed interest at the rate of 1.5% per month and all the Deputy Registrar was required to do was to ensure that it was reflected in the warrants. He contended that it wasn't a case of calling for evidence to determine what rate of interest applied at any given time.



18. On leave to execute before taxation, Mr Kongere conceded that the discretion existed permitting this court to allow execution in such circumstances. The discretion, however, had to be exercised judiciously. He submitted that the mere fact that the taxation was likely to be long and the plaintiffs needed their money wasn't a relevant consideration. Counsel urged that if the application were allowed, the court would, in essence, be opening up the floodgates, as all successful litigants have an urgent need for money and the taxation process is lengthy. Counsel relied on the case *Commercial Bank of Africa v Lalji Karsan Rabadia & 2 others* [2012] KEHC 409 (KLR).
19. It was urged that in any case, if the court refuses to allow the production of new evidence, then it would not be possible to allow execution, as execution cannot be based on an uncertain amount. reliance was placed on the decision of the court in *Jiwa v Idrata Developers Limited* [2022] KEHC 283 (KLR).
20. Counsel thus urged that the application be dismissed with costs.
21. I have perused the judgment of the court, the application, the responses thereto, and the submissions of the parties. Does the application have merit? What orders should be issued by this honourable court?
22. To consider the above issues I must restate the finding of this Court that gave rise to the application. I note that in the further amended plaint, the plaintiff prayed at prayer (c) for:-

“interest at commercial rate from 1st October 2007 to 8th February 2010 until payment in full.”

In the judgment, the learned judge found at paragraph 115 (c) thereof that the plaintiff was entitled to interest on the sum of TShs.2,746,387,500/- at the prevailing commercial rates from 8th February 2010 until payment in full.

23. What amounts to a commercial rate was not stated in the judgment. The question before me is whether this court can take evidence at this point to establish the relevant rates. The court is also called upon to determine if it is indeed *functus officio*, and for that reason, barred from considering the matter further.
24. The plaintiff contends that under section 34 (1) of the *Civil Procedure Act*, such a question can be determined by the court executing the decree and for that reason, this court is not *functus officio*.
25. Section 34 of the *Civil Procedure Act* provides that:-
 - “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
 - (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
26. In my view, the court isn't *functus officio*. The issue that remains to be determined, namely the commercial rate of interest, pertains to the execution, discharge, and satisfaction of the decree and is therefore within the proper province of this court. I say so as the judgment of Olga Sewe, J hasn't been set aside, vacated or reviewed. The determination of what commercial rate of interest is would determine the execution, the discharge or satisfaction of the decree.



27. I am guided by the decision of the court in *Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda* [2021] KEHC 8899 (KLR).

28. In *Bank of Africa Limited v Zablon Mogambi Mogaka & another* [2021] KEHC 4678 (KLR), it was held that:-

“The provisions of section 34 (1) are very clear and the wording of the said section is that any questions arising from between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, to the suit shall be determined by the court executing.”

29. I disagree with the submissions of the counsel for the 1st defendant/respondent that merely ascertaining what commercial rate of interest amounts to amending the judgment or correcting imperfections in it. For that reason, it is my view that the decision in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] KECA 600 (KLR) is inapplicable here. The court is not *functus officio*.

30. In the *Telkom Kenya case*, the court defined *functus officio* as being:-

“The Supreme Court in *Raila Odinga v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *functus officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd v Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court.”

31. What the *functus officio* doctrine does is to prevent merit-based reengagement with a concluded matter. As seen above, the doctrine is subject to certain exceptions. In my view, the determination of the rate of interest falls within the exceptions.

32. Having found as above, I note that the assessment of what the commercial rate of interest is was made by the certified public accountants and that the findings have not been challenged. It is based, in part, on the CBR, which the Central Bank of Kenya publishes. In my view, the same is objective. I thus allow the interest as follows: -

- a. 2010 18.82%
- b. 2011 20.04%
- c. 2012 20.29%
- d. 2013 17.56%



- e. 2014 15.93%
 - f. 2015 17.45%
 - g. 2016 16.59%
 - h. 2017 13.67%
 - i. 2018 13.06%
 - j. 2019 12.44%
 - k. 2020 12.00%
 - l. 2021 12.10%
 - m. 2022 12.34%
 - n. 2023 13.59%
 - o. 2024 16.30%
33. Having done so, I refer the matter to the Deputy Register of this Court so that she may determine the amount of interest payable.
34. Should the plaintiff be allowed to execute before taxation? Section 94 of the [Civil Procedure Act](#) provides as follows: -
- “Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”
35. My view is that execution may only be done once the costs are ascertained. This, to me, is based on prudential grounds, as it ensures that there is good use of the court’s time and avoids a situation where parties execute for the decree and thereafter seek costs. If this were allowed as a matter of course, the courts would be clogged. It is for that reason, I think, that Section 94 allows execution before assessment of costs only where the court is satisfied that there is a good basis to do so.
36. From how section 94 is couched, it is up to the party seeking to execute for a decretal amount before the taxation of costs to demonstrate what special circumstances exist to warrant allowing such a course of action. Have such circumstances been shown in this case? I agree with the counsel for the 1st defendant/respondent that the mere fact that a party requires the money urgently or that taxation would take a long time isn’t sufficient warrant.
37. The observations made by Odunga, J, as he then was in [Commercial Bank of Africa v Lalji Karsan Rabadia & 2 others](#) [2012] KEHC 409 (KLR) are apt:-
- “In my view the rationale for taxing the costs at the end of the trial is to avoid multiplicity of proceedings in form of taxation which may lend themselves to references. The Court ought to avoid the possibility of entertaining multiplicity of similar legal proceedings since such multiplicity has the effect of allotting a case more judicial time and resources at the expense of other cases. Again in cases where the case is yet to be finally determined the taxation of



costs arising from interlocutory proceedings has the effect of interfering with the orderly conduct of litigation as the file has to be shuttled from the Taxing Master to the Judge.”

38. Considering the matter before me, I am unable to discern any special circumstance that would make this court allow execution before taxation of costs. To do so won't result in the best use of the scarce judicial time. In the circumstances, I decline to allow the limb of the application.

39. The upshot of the foregoing is that the application is allowed in part in the following terms: -

1. I fix the rate of commercial interest as follows: -

- a. 2010 18.82%
- b. 2011 20.04%
- c. 2012 20.29%
- d. 2013 17.56%
- e. 2014 15.93%
- f. 2015 17.45%
- g. 2016 16.59%
- h. 2017 13.67%
- i. 2018 13.06%
- j. 2019 12.44%
- k. 2020 12.00%
- l. 2021 12.10%
- m. 2022 12.34%
- n. 2023 13.59%
- o. 2024 16.30%

2. I refer the matter to the Deputy Register of this Court so that she may determine the amount of interest payable;

3. I decline to allow execution before taxation; and

4. I award the plaintiff/applicant the costs for the application.

40. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 11TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Munyithya, for the Plaintiff/Applicant;

Ms Cheruiyot, holding brief for Mr Kongere, for the 1st Defendant/Respondent;



Mr Nyachoti, for the 2nd Defendant/Respondent; and
Arthur - Court Assistant.

