



**Ecobank Kenya Limited v Nyabwari & 2 others (Commercial Case 86 of 2015)  
[2025] KEHC 12516 (KLR) (Commercial and Tax) (1 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12516 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 86 OF 2015  
JWW MONG'ARE, J  
SEPTEMBER 1, 2025**

**BETWEEN**

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

**AND**

**MARROSY KING NYABWARI ..... 1<sup>ST</sup> DEFENDANT**

**ATTAIN ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**FELIX OGAMBA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before this Honourable Court is a Notice of Motion Application dated 3<sup>rd</sup> April 2025 and filed under a certificate of urgency and brought under Order 51 Rule; Order 36 Rule 10 of the Civil Procedure Rules, Section 1A,1B & 3A of the [Civil Procedure Act](#) and it seeks the following reliefs:
  1. Spent
  2. Spent
  3. That the Warrants of arrest issued on 3<sup>rd</sup> December 2024 against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be stayed pending the hearing of this application.
  4. That upon hearing of the Application, the Honourable Court do order that the Consent entered into between the Counsel for the Plaintiff and Counsel for the Defendants together with the decree dated 9<sup>th</sup> March 2016 and any all other consequential orders thereof against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be set aside.
  5. That the Honourable Court be pleased to reopen the matter to allow the Defendants to file their statements of Defence together with evidentiary material.



6. That in the alternative and without prejudice to prayers 4 and 5 hereinabove, the Honourable Court do find that the decretal sum of Kshs.14,441,973.63/= together with interest, costs of execution and collection fee totaling to Kshs.60,177,211.15/= offends section 44A of the Banking Act, Cap 488 of the Laws of Kenya, hence its null and void.
  7. That costs off this Application be provided for.
2. The Application is supported by the grounds set out on its face and the supporting affidavit of Marrosy King Nyabwari sworn on 3<sup>rd</sup> March 2025. The Application is opposed and the Plaintiffs have filed a replying affidavit sworn by Duncan Mutembei on 7<sup>th</sup> May 2025. Both parties have filed their written submissions which I have carefully considered.
  3. In an earlier application filed on 28<sup>th</sup> November 2024 and later marked as withdrawn subsequently, the Applicant had intimated that the consent judgment was entered without their knowledge as they alleged not to have been served. The present application appears to have abandoned that trajectory and line of defence and the Defendant/Applicants having been confronted with evidence of their participation in the suit before this court, which from the record the court notes was settled by consent of the parties, now claim that the decretal amount now offends section 44A of the Cap 488 laws of Kenya and urge this court to set aside the consent order and reopen the suit for them to defend the same.
  4. I have looked at the pleadings herein and the rival submissions filed by both parties. I note that the suit herein was filed sometimes in 2015 and parties once they filed defence engaged in negotiations that resulted in a consent judgment. This consent was recorded before the court and it is the resultant failure by the Defendants to comply with the terms thereto that has resulted in the current state of affairs with warrants of arrest being issued by the court.
  5. The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus:
 

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
  6. Similarly, in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7<sup>th</sup> edition) Vol 1 page 124, and reiterated that:
 

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
  7. A perusal of the record herein does not reveal any evidence of collusion, fraud or misrepresentation. What can be gleaned from the record noting that the consent judgment was entered way back in 2016 which is over 9 years ago, the present application has been brought with the sole intention of the



Defendants' attempt to delay the investable, which is the execution of the decree herein, through legal means, which include issuance of warrants of arrest by the court against the judgment debtors.

8. On the aspect of the decretal amount violating the in duplum rule as set out under section 44A of the *Banking Act*, Cap 488 Laws of Kenya, I agree with the arguments put forth by the Plaintiff that this being a decree emanating from a judgment of the court, interest on the unpaid sums cannot be capped and the in duplum rule applies to banking contracts that are subject to the *Banking Act*. Indeed section 44A(4) of the said Act provides as such where it states " This section shall not apply to limit any interest under a court order accruing after the order is made."
9. In sum I find the present application without merit. The same is not only frivolous, but vexatious and an abuse of the court process. I dismiss the same forthwith and award the costs of this application to the Plaintiff. The said costs are assessed at Kshs.50,000/=. The Plaintiff is at liberty to proceed with the execution process in accordance with the law. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2025**

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**J.W.W. MONGARE**

**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Musau for the Plaintiff/Decree-Holder
2. N/A for the Defendant
3. Amos- Court Assistant

