



**Kimanthi v Kenindia Assurance Co. Ltd & another (Civil Suit E119 of 2021)
[2025] KEHC 12874 (KLR) (Civ) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E119 OF 2021**

JN MULWA, J

SEPTEMBER 18, 2025

BETWEEN

MARY NDUKU KIMANTHI PLAINTIFF

AND

KENINDIA ASSURANCE CO. LTD 1ST DEFENDANT

TRIDENT INSURANCE CO. LTD 2ND DEFENDANT

RULING

1. Before the Court for determination is the motion dated 03/02/2025 filed by Kenindia Assurance Co. Ltd (hereafter the 1st Defendant) against Mary Nduku Kimanthi (hereafter the Plaintiff) and Trident Insurance & Co. Ltd, (hereafter 2nd Defendant) and premised on Section 1B & 3A of the [Civil Procedure Act](#) (CPA), Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules (CPR) seeking inter alia:
 - i. Spent.
 - ii. Spent.
 - iii. That the Honorable Court be pleased to set aside the warrants of attachment issued to Expeditious Auctioneers dated 28/01/2025 and proclamation notice dated 29/01/2025.
 - iv. That the Honorable Court be pleased to set aside the decree emanating from the judgment delivered on 17/10/2024 to reflect the correct interest.
 - v. That the Honorable Court does order that the 1st Defendant has settled their apportioned amount as per the judgment in this matter delivered on 17/10/2024 and that the only sums



owed to the Plaintiff is interest which has to be as per the said judgment of this Court and costs which are yet to be agreed upon or taxed.

- vi. That the costs of the Auctioneer be borne by the Plaintiff.
 - vii. That the 1st Defendant be awarded costs of the motion.
2. The motion is premised on grounds at the supporting affidavit sworn by Kathike Mary Musengya on an even date. The kernel of her deposition is that judgment in the matter was rendered on 17/10/2024 wherein both Defendants were found jointly and severally liable for the sum of Kshs. 4,005,639.95/ on 24/12/2024, from which the 1st Defendant paid the Plaintiff Kshs. 2,002,818/-. She goes on to depose that prior to proclamation and attachment by the Plaintiff no decree was served upon the 1st Defendant to enable them pay the interest due pursuant to the judgment of this Court.
 3. The deponent states further that the interest as calculated in the warrants of attachment is erroneous and the 1st Defendant will suffer unless the same are set aside and interest reviewed and calculated from 17/07/2018 instead of 16/02/2018 maintaining that the judgment of this Court was issued jointly and severally as against the Defendants however the Plaintiff has caused warrants of attachment to be issued against both Defendants despite the 1st Defendants having paid 50% of judgment sum.
 4. That the decree in the primary suit was issued on 19/07/2018 and interest should be calculated from then and not from 16/02/2018 as stated in the warrants of attachment. She asserts that execution as against the 1st Defendant is an attempt by the Plaintiff to unjustly enrich herself and that as it stands, the Plaintiff's claims as against the 1st Defendants should be for interest and costs only.
 5. The 1st Defendant deposes that it is ready, willing and able to pay 50% of the interest once the correct tabulation has been done therefore the instant motion will not prejudice the Plaintiff; meanwhile it is in the interest of justice that it is allowed having been filed expeditiously.
 6. Mary Nduku Kimathi opposes the motion by way of replying affidavit dated 21/02/2025 and a further replying affidavit dated 11/04/2025. She confirms that the judgment was issued jointly and severally in her favour as against the Defendants in the matter; that the Defendants were to pay interest at Court's rates from the date of the decree in the primary suit from 16/02/2018 until payment in full; that according to the warrants of attachment in execution of the decree, interest from 16/02/2018 to 28/01/2025 is Kshs. 3,899,408 plus court fees of Kshs. 1,500/- making the total sum payable as Kshs. 7,906,548.13/-.

The Applicant further deposes as judgment was joint and several as against the Defendants, the 1st Defendant ought to settle the decretal sum plus costs and auctioneer charges at 50 %.

7. Directions were taken on disposal of the 1st Defendant's motion by way of written submissions. That said, having duly considered the rival material and submissions on record, this Court postulates that the salient issues for determination concern:-
 - a. Whether the error on calculation of applicable interest warrants the setting aside of the decree and resultant warrants of the attachment issued to Expeditious Auctioneers?
 - b. Whether the Court ought to order that the 1st Defendant has settled their portion of the judgment sum?
 - c. Who ought to bear the Auctioneer Costs?
 - d. Who ought to bear the costs of the motion?



Whether the error on interest warrants the setting aside of the decree and resultant warrants of the attachment issued to Expeditious Auctioneers?

8. In presenting the instant motion the 1st Defendant cited Section 3A which was judiciously addressed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR and requires no restatement. Alongside the above provision, the 1st Defendant equally relied on Order 22 Rule 22 of the CPR, which this Court reasonably believes has no direct application in the instant matter. Nevertheless, should the 1st Defendant have preferred to set aside the decree of this Court, the application avenues would be Order 10 Rule 11 on (setting aside judgment), Order 42 on (Appeals) and Order 45 on (review).
9. However, a cursory review of the Applicant's motion neither of the grounds advanced in the affidavit in support thereof warrants this Court's intervention by way setting aside, appeal and or review of this Court's judgment and decree rendered on 17/10/2024. Accordingly, the Court will decline to entertain any notion towards the same whereas neither has this Court jurisdiction been properly invoked by way of either setting aside, appeal or review.
10. That said, as to whether this Court can proceed to set aside the resultant warrants of the attachment issued to Expeditious Auctioneers, the application provision would be Section 3A of the CPA which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court" The 1st Defendant has made heavy whether of the fact that the warrants of attachment ought to be set aside on accord of the Plaintiff's failure to serve a draft decree of this Court upon it prior to taking out a decree and resultant warrants of attachment. Here, Order 21 Rule 8 of the CPR employs the word "may" in its wording to translate that it is not mandatory for a decree holder to prepare a draft decree and submit it for the approval of the other parties to a suit. Therefore, failure to serve the same cannot invalidate a decree and or resultant warrants of attachment and proclamation.
11. However, Order 21 Rule 7(1) of the CPR employs the words "shall" to mandate that a decree must conform with a judgment. Contextualizing the aforesaid to the instant matter it would require that the decree and warrants of attachment particularly on the question of interest must agree and or conform with the judgment. Thus, where a decree does not conform with a judgment the same would warrant intervention by this Court either by way of setting aside the decree or warrants of attachment for purposes of alteration of any errors or defects thereof.
12. The 1st Defendant argues that the interest calculated in the warrants of attachment is erroneous and likely to cause prejudice should it be condemned to settle the same. Applying, my mind to the provisions of Order 21 Rule 7(1) of the CPR, the judgment of this Court rendered on 17/10/2024, stated in part that-;

"15. That the primary case HCCC No.393/2004 then proceeded for full trial against the 3rd defendant and formal proof against the 1st and 2nd Defendants. And on 16th February 2018, she obtained judgment in her favour against the three (3) defendants jointly and severally for Kshs.4,005,639/95 together with costs and interest accruing thereon until payment in full."

13. The Court proceeded to conclude in its judgement as follows-;

"27. Judgment be and is hereby entered in favour of the plaintiff against the defendants jointly and severally in the sum of Ksh.4,005,639.95 together with



costs and interest at court rates from the date of the decree in the primary suit until payment in full.”

14. Order 21 Rule 8(1) of the CPR, specifically provides that “A decree shall bear the date of the day on which the judgment was delivered.”. The Applicant has argued that the interest in the warrants of attachment ought to have been calculated from 17/07/2018 and not 16/02/2018. No basis was laid why the interest ought to have been calculated from 17/07/2018 and not 16/02/2018. It is evident from the above excerpts of the judgment of this Court that the judgment in the primary suit was rendered on 16/02/2018, to wit, it was ordered that interest would accrue from the said date until payment in full. Thus, the interest on the principal sum adjudged would accrue from the date of judgment and not the date in which the decree was issued.
15. There is a distinction between the date of the decree, which is the judgment date, and the date in which the decree is issued. Invariably, upon the pronouncement of a judgment, the applicable provision on interest was Section 26 of the CPA. The Court garners from the 1st Defendant’s contestation that the interest would accrue from the date in which the decree was issued and not the date of the decree. Consequently, the warrants of attachment (Annexure KMM3) having duly captured that interest to accrue from 16/02/2018, it cannot be stated that the same was erroneous to thus necessitate the setting aside resultant warrants of attachment. The Court declines the 1st Defendant’s invitation to set aside the warrants of attachment on the said ground as the interest duly conforms with the judgment.

Whether the Court ought to order that the 1st Defendant has settled their portion of the judgment sum?

16. Here, the gist of the 3rd Defendant’s argument is that it has since paid the Plaintiff Kshs. 2,002,818/- being half of the judgment sum meanwhile it is willing to pay 50% of the correct tabulation on interest and eventual taxed costs. The Plaintiff does not dispute payment of the aforestated amount. However, the surmised retort on the issue is that judgment was jointly and severally as against the Defendants, therefore the 1st Defendant ought to settle the decretal sum plus costs and auctioneer charges.
17. This Court is of the reasoned view that nothing in the law precludes a decree holder from pursuing satisfaction of a decree against one or some of the judgment debtors and hence the decision to pursue one party cannot be deemed prejudicial. This is seen under the doctrine of “joint and several” liability which presupposes that a decree holder is at liberty to seek payment of the entire decretal amount from all, any or one of the debtors.
18. As held in the case of *Jacob Oluochi Ondeko & 2 others v Praxedes P Mandu Okutoyi & 2 others; Madison General Insurance Kenya (Interested Party)* [2021] eKLR:

“Ringera, J (as he then was) in *Kenya Airways Limited v Mwaniki Gichohi & another Nairobi (Milimani)* HCCC no 423 of 2002 dealt with the doctrine of joint and several liability and held that:

“The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).” What I understand by that decision is that in a joint and several liability, the successful party is at liberty to either execute the decree against the judgment debtors together or only execute against one of them for the whole or part thereof save that the creditor cannot execute for the full amount against all the debtors as that would amount



to double compensation. In other words, whatever is realized against one debtor must be taken into account in seeking recovery from the other debtor. In this case, the Plaintiffs are at liberty to execute against both the 1st and the 3rd Defendants at once for the whole amount or choose only one of them or execute against them for different amounts.”

19. A perfunctory review of (Annexure KMM2 and KMM3) it would appear that as at 24/12/2024, the 3rd Defendant had since paid out to the Plaintiff Kshs. 2,002,818/- of which was palpably not factored the warrants of attachment issued by this Court on 28/01/2025. Expeditious auctioneers seem to have proceeded to take out warrants for the entire amount of Kshs. 7,609,548/- as against the Defendants without factoring in the amount paid out by the 1st Defendant to the Plaintiff.
20. Applying my mind to the rendition of Ringera, J. in Kenya Airways Limited (supra) while the Plaintiff is at liberty to either execute the decree against the judgment debtors together or only against one of them for the whole or part, by failing to factor in the amount already received, the 1st Defendant’s contestation on unjust enrichment would appear merited.
21. Consequently, on the issue, this Court will fall short of declaring that the 1st Defendant has settled their portion of the judgment sum but assertively make a finding that the warrants of attachment as extracted would in all probability lead to a situation of unjust enrichment on the part of the decree holder. The court further finds that once the correct interest is tabulated from 16/2/2018 being date of judgment in the trial court, it will be ready to pay its ½ share of both interest and certified/taxed costs.

Who ought to bear the Auctioneer Costs?

22. Given this Court’s earlier finding on the warrants of attachment, it was incumbent upon the decree-holder to inform the auctioneer and or upon application for the said warrants of attachment, to inform and or factor in the Kshs. 2,002,818/- that had since been settled by the 1st Defendant. They failed to do so, and as a consequence extracted defective warrants of attachment that blatantly omitted to capture funds already received in part settlement of the decree of the Court by the 1st Defendant, as rendered on 17/10/2024.
23. Obviously, such an omission must be visited on the Plaintiff and not the 1st Defendant, who ought to be absolved from settling any auctioneers’ costs.
24. This Court believes it has reasonably addressed itself on the questions it localized for determination. Consequently, the 1st Defendant’s application succeeds in part in the following extent-;
 - a. The warrants of attachment issued to Expeditious Auctioneers dated 28/01/2025 and proclamation notice dated 29/01/2025 as against the 1st Defendant are hereby set aside forthwith.
 - b. The Plaintiff shall bear the Auctioneer’s costs on accord of this Court’s finding that the warrants of attachment were defective on extraction.
 - c. Costs of the motion are awarded to the 1st Defendant in any event.Orders Accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

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JANET MULWA.
JUDGE

