



**Hirji v Corporation Limited & another (Civil Case 659 of 2007)
[2024] KEHC 1478 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 659 OF 2007
JWW MONG'ARE, J
FEBRUARY 19, 2024**

BETWEEN

FIROZE NURALI HIRJI DECREE HOLDER

AND

SOUTHERN CREDIT BANKING CORPORATION LIMITED 1ST DEFENDANT

DEVETRONIC COMPANY LIMITED 2ND DEFENDANT

RULING

1. This ruling determines the Notice to Show Cause dated 23rd December, 2021 by Firoze Nurali Hirji, the Decree-holder, against one of the Defendants' herein, Southern Credit Banking Corporation/ Spire Bank as the Judgment Debtor. By the Notice to Show Cause, the Decree-holder seeks to have its movable property attached in the execution of Kshs.972,920/- as per the decree issued herein.
2. The background of the matter is that the Plaintiffs filed a suit against the Defendants seeking orders that a declaration for the sale and transfer of LR No. 7785/259 by the 1st to the 2nd Defendant was illegal, null and void and an order seeking cancellation of the transfer by the 1st Defendant to the 2nd Defendant. The court vide the judgment delivered by Hon. Lady Justice Ngetich on 19th December 2018 declared the transfer a nullity and directed that the transfer to the 2nd Defendant to be cancelled. Costs were awarded to the 3rd Plaintiff to be paid by the Defendants. Consequently, the 3rd Plaintiff/ Judgment holder filed his Bill of Costs which was taxed by Hon. S. A. Opande on 29th November 2019 for the sum of Kshs.969,920/=. The taxed amount is the subject of the Notice to Show Cause herein.
3. In opposing the Notice to show cause, Caroline Kori, the legal officer of Spire Bank/ 1st Defendant/ Judgment Debtor, filed a Replying Affidavit sworn on 25th June 2023, in which she avers the Defendants/Judgment debtors are different entities and therefore not liable for each other's financial



obligations or debts. She avers the 1st Defendant is not to shoulder the entire costs awarded to the 3rd Plaintiff/Judgment Holder. The execution against the 1st Defendant is unlawful, discriminatory, and unfair, the same ought to be executed against both Defendants.

4. By the court's directions on 19th September 2023, the parties canvassed the Notice to Show Cause by way of written submissions. Only the 1st Defendant/Judgment Debtor filed submissions dated 30th October, 2023. At the hearing of the Notice to Show Cause, Mr. Ogegu for the 2nd Defendant argued the Notice to Show Cause was against the 1st Defendant and not the 2nd Defendant.

Analysis and Determination

5. I have considered the Notice to Show Cause, the Affidavit filed in response and the 1st Defendant's submissions. To my mind, the issue that arises for determination is "whether the execution of the immovable property of the 1st Defendant should proceed."
6. Order 22 rule 6 of the Civil Procedure Rules 2010 under the heading "Application for execution", provides:-

"Where the decree holder desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court..... and applications under this rule shall be in accordance with Form No. 14 of Appendix A.

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or evidence shall issue unless not less than 10 days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, a copy of that notice shall be filed with the first application for execution.

7. Further Section 38 of the [Civil Procedure Act](#) provides as follows:-

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- a. by delivery of any property specifically decreed;
 - b. by attachment and sale, or by sale without attachment, of any property;
 - c. by attachment of debts;
 - d. by arrest and detention in prison of any person;
 - e. by appointing a receiver; or
 - f. in such other manner as the nature of the relief granted may require:
8. Ms Gathoni counsel for the Decree-holder argued that no offers have been advanced by the Judgment Debtor in settlement of the decree, and urged the court to allow the Notice to Show Cause.
 9. Mr. Mutigi opposed the Notice to Show Cause on the basis that execution should not proceed as the decretal amount should be apportioned between the two (2) Defendants, as the Judgment Debtors jointly and severally. The Decree holder does not have the liberty to execute the entire decree against the 1st Defendant contrary to the court's judgment.



10. By the Court's judgement delivered by Honourable Ngetich on 19th December, 2018 the costs were awarded to the 3rd Plaintiff to be paid by the Defendants. The court notes that the apportionment of liability on the Defendants would have been done at the time of delivery of the judgment. In the absence of such apportionment, the Decree Holder is at liberty to choose any one or both Defendants to execute against in satisfaction of the decree.
11. It is noteworthy that the 2nd Defendant may not escape liability of the decretal amount until the amount is paid in full. Both Judgment Debtors carry full liability for the payment of the decretal sum. In the instances that the amount is not paid the Decree-holder has a right to execute against the decree from any one of the Judgment Debtors without giving the parties an explanation for his choices.
12. I am persuaded and I associate myself with the words of Ochieng J in *Kenyariri & Associates Advocates v Hans Juergen Langer* [2017] eKLR where the learned Judge held that:- "The choice of one or more judgment-debtors as the person against who execution would be levied, is not discriminatory. It is an entitlement flowing from the court's verdict, that liability would be Joint and Several."
13. In the circumstances, therefore, this court is not persuaded that the Notice to show cause is unfair and discriminatory. The upshot of the courts finding is that it is trite law that a successful party is entitled to the fruits of his judgment it therefore follows that the Notice to Show cause is properly filed and the same is allowed as prayed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Gathoni holding brief for Twaib SC for the Plaintiff.

Ms. Kwamboka holding brief for Mr. Onuti for the 1st Defendant.

Mr. Kalu holding brief for SC Mutua.

Amos - Court Assistant

