Oriental Commercial Bank Limited v Shreeji Contractors Ltd & 2 others (Civil Appeal 81 of 2017 & 126 of 2020 (Consolidated)) [2024] KEHC 8602 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 81 OF 2017 & 126 OF 2020 (CONSOLIDATED)

HM NYAGA, J

JULY 15, 2024

BETWEEN

ORIENTAL COMMERCIAL BANK LIMITED ..... APPELLANT

AND

SHREEJI CONTRACTORS LTD ..... 1ST RESPONDENT

PRAVINKUMAR SANKALDAS PATEL ..... 2ND RESPONDENT

MINAXIBEN PRAVINKUMAR PATEL ..... 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon G. Oduor, Chief Magistrate delivered on 31st May, 2017 in CMCC No. 201 of 2013)

JUDGMENT

1. This judgment relates to two consolidated cases;

   - HCCA 81 of 2017 and

   - HCCA 126 of 2020.

2. The first appeal, in HCCA No. 81 of 2017 arose from the judgment and decree of Hon. G.H. Oduor (CM) delivered on 31st May, 2017 in Nakuru CMCC No. 201 of 2013.

3. The second appeal, HCCA 126 of 2020, arose from the ruling of the lower court delivered on 28th May,2020 in the same suit.

4. There were directions that both appeals be consolidated since they arose out of the same suit. I will address the two appeals herein.

Brief facts

5. The respondent instituted a suit in the trial court vide a plaint dated 13th March, 2013 praying for judgment against the defendant/Appellant for: -

    a. A mandatory Injunction compelling the defendant to return and/or release the original logbooks of Motor Vehicle Registration Number KAH 778 S Caterpillar tractor and Motor Vehicle Registration Number KAD 046 R Mitsubishi saloon to the Plaintiff.

    b. In the alternative a Permanent Injunction restraining the Defendant from either transferring, selling, dealing, disposing or in any way interfering with the logbooks of Motor Vehicles KAH 778 S Caterpillar tractor and KAD 046 R Mitsubishi Saloon.

    c. Costs of the suit with interests thereon.

    d. Any other relief this Honourable Court deems fit to grant.

6. The claim arose from a loan facility of Kshs. 2,000,000/= which the plaintiff/Respondent had applied for and received from the Appellant through account no. 0040040401.

7. The 1st respondent averred that it offered two original logbooks for Motor Vehicle Registration Number KAH 778 S Caterpillar tractor and Motor Vehicle Registration Number KAD 046 R Mitsubishi saloon as security for the advancement of the said loan and the said logbooks were to be held by the Defendant/Appellant as security until it liquidated its loan.

8. The Plaintiff/Respondent further claimed that on 2nd August 2012 it fully repaid the loan and upon requesting the Defendant/Appellant to release the aforementioned logbooks it declined to do so, despite the fact that it had neither applied for nor taken any other loan from it.

9. The Defendant/Appellant filed its statement of defence and counterclaim on 12th April, 2013 wherein it denied the Plaintiff/ Respondent's Claim. It was its case that the Respondent still owed it a sum of Ksh. 5,575,584/= as at 28th February,2013 which amount continued to attract interest at 36% per annum until payment in full.

10. The Defendant/Appellant further averred that it had a lien over the logbooks in its possession so long as the said amount remained unpaid. The Defendant/Appellant therefore prayed that the Plaintiff's/ Respondent's suit be dismissed with costs.

11. In its Counterclaim, the Defendant/Appellant averred that the 1st Respondent was its customer having opened two bank accounts with it being account number 0040040401 and 0040040360.

12. The Appellant pleaded that on or about 15th November,2010, the 1st Respondent applied for and was granted a loan facility for Ksh. 2,000,000/= which was disbursed through account no.0040040401 as the loan account and on or about 18th November,2010, the 2nd and 3rd Respondents jointly and severally guaranteed the payment of the Ksh.2 Million together with interest at the rate being charged to the 1st Respondent at the date of demand.

13. The Appellant averred that as security the 1st Respondent offered the aforesaid logbooks as security for the loan to be held so long as the 1st respondent was indebted to it.

14. The Appellant averred that the 1st Respondent defaulted in making payments to clear its indebtedness with it and as at 28th February,2013 a sum of Ksh. 5,575,584/= was due and outstanding and continued to attract interest at 36% per annum until payment in full. The Appellant thus prayed for orders against the Respondents jointly and severally for: -

a. The Payment of the sum of Ksh. 5,575,584/= together with interest at 36% per annum or at such rates as the Defendant may in its sole and absolute discretion from time to time determine from 28th February,2013 until payment in full.

b. Costs of the suit together with interest.

c. Any other relief this Honourable Court may deem fit to grant.

15. The trial Magistrate considered the evidence and testimonies and found there was no overdraft facility advanced to the Plaintiff/1st Respondent. Consequently, he allowed the Plaintiff/1st Respondent suit as prayed and dismissed the Defendant/Appellant's Counterclaim.

First Appeal

16. The appellant, being aggrieved with the said judgment, instituted the 1st appeal herein vide a Memorandum of Appeal dated 29th June,2017 premised on the following grounds: -

I. That the Learned Magistrate erred in Law and in fact in allowing the 1st Respondent's case as prayed in the plaint and dismissing the Appellant's Counterclaim.

II. That the Learned Magistrate erred in Law and in fact in not finding that the Respondents were jointly and severally liable for the payment of the sum of Ksh. 5,575,584/= together with interest at 36% per annum or at such rate or rates as the Appellant may, in its sole and absolute discretion, from time to time determine from 28th February,2013 until payment in full.

III. That the Learned Magistrate erred in Law and in fact in dismissing the Appellant's Counterclaim when there was overwhelming evidence that the Respondent owed the Appellant a sum of Ksh. 5,575,584/= outstanding as at 28th February,2013 together with interests at 36% per annum until payment in full.

IV. That the Learned Magistrate erred in Law and in fact in finding that there was no overdraft facility when there were statements showing the amount which allegedly cleared the loan account was transferred from account number 0040040360 which was overdrawn to loan account number 0040040401.

V. That the Learned Magistrate erred in Law and in fact in failing to consider that there was no contest that the loan of Ksh. 2,000,000/= which the 1st Respondent took from the Appellant through account number 0040040401 had been fully paid as of 2nd August 2012 when there was evidence to the contrary.

VI. That the Learned Magistrate erred in Law and in fact in failing to consider that the Appellant had a right of consolidation and set off with regard to account number 0040040360 and 0040040401.

VII. That the Learned Magistrate erred in Law and in fact in failing to evaluate the evidence on record and consider the exhibits tendered by the Appellant.

VIII. That the Learned Magistrate erred in Law and in fact in ordering that the Log Books held as security for loan be returned to the 1st Respondent despite there being an outstanding amount due and owing to the Appellant.

Second Appeal

17. After the filing of the 1st appeal, the respondent moved to execute the decree in the matter, which necessitated the appellant's application dated 26th November,2019. In the said application, the appellant sought to recall and set aside the decree dated 19th November, 2019 and the Certificate of Costs dated 22nd November, 2019; that the 1st Respondent be ordered to comply with the provisions of Order 21 Rules 7 and 8 of the Civil Procedure Rules and to list its Bill of Costs dated 5th July,2017 for taxation; that the 1st Respondent pay the auctioneers charges incurred so far and the costs of the Application.

18. The said Application was premised on grounds inter alia that the 1st Respondent was executing a decree without the knowledge of the Appellant's counsel in contravention of mandatory requirements of Order 21 Rule 8 of the Civil Procedure Rules; that the 1st respondent was executing a decree which was more that one year old without first serving a Notice to show cause why execution should not issue contrary to the mandatory requirements of Order 22 Rules 18 and 19 of the Civil Procedure Rules; that the 1st respondent was executing for costs which had not been agreed by the parties, fixed by the magistrates prior the drawing of the decree, certified by the Registrar under Section 68 A of the Advocates (Remuneration) order or taxed by the court; that the 1st Respondent had caused Jogedah Auctioneering services to proclaim the Appellant's goods with an intention of recovering Ksh.538,5975/= which had denied the Appellant an opportunity of participating in the taxation or assessment process; that the 1st Respondent is unjustly enriching itself by bloating the costs and charging interest which was not awarded by the court.

19. In response to the Application, the 1st Respondent counsel swore a replying affidavit on 5th December 2019 wherein he inter alia averred that Order 21 Rule 8 of the Civil Procedure Rules is inapplicable to matters before the lower court and that the same is not couched in mandatory terms.

20. He asserted that the decree was not more than one-year-old and that execution was in respect of costs and not decree and therefore there was no need for a notice to show cause. He also stated that their said bill of costs was duly assessed by the magistrate and a certificate of costs issued pursuant to Order 21 Rule 9 of the Civil Procedure Rules and Section 68A of the Advocates Remuneration Rules. The counsel asserted that the Appellant had not pinpointed the exaggerated items and that Section 27 of the *Civil Procedure Act* and precedents allow subordinate court to assess party and party costs either ex-parte or inter-partes.

21. The trial court dismissed the Appellant's Application. In its ruling, it largely agreed with the 1st Respondent's counsel. The court held that Order 22 Rule 18 was inapplicable as the decree was not more than one-year-old and that the magistrate had the discretion to assess costs ex-parte or inter-partes.

22. Aggrieved by the ruling, the appellant preferred this appeal, which faulted the lower court on four grounds as follows:

    I. That the Learned Trial Magistrate erred in Law and fact in not holding that the decree extracted on 22nd November,2019 was drawn in violation of the provisions of Order 21 Rule 8 Sub Rules 1,2,3,4 and 5 having found that the said provisions are applicable before the Subordinate Courts.

    II. That the Learned Trial Magistrate erred in Law and fact in holding that the procedure adopted by the plaintiff and the magistrate in assessing the bill of costs is allowed in law when the procedure offends the principles of a fair hearing.

III. That the Learned Trial Magistrate erred in Law and fact in finding that the decree being executed was dated 22nd November,2019 hence less than one-year-old when the date of the decree is dated 31st May,2017 when the judgment was delivered.

IV. That the Learned Trial Magistrate erred in Law and fact in not finding that the execution process offended the Mandatory Provisions of Order 22 Rule 18 of the Civil Procedure Rules.

23. Both appeals were canvassed through written submissions. For an orderly disposal of the appeals, I will first deal with the 2nd appeal which was on the application for stay of execution of the decree of the lower court.

Appellant's Submissions on the 2nd Appeal

24. Citing the Provisions of Order 21 Rule 8 of the Civil Procedure Rules, the Appellant submitted that the 1st Respondent caused a decree to be extracted behind its back in contravention of this order.

25. The Appellant thus urged this court to find the 1st Respondent did not comply with the above order. In buttressing its submissions, the Appellant relied on the cases of David Makau vs Maua Mutie Ndunda [2017] eKLR; Landmark Holdings Ltd vs Robert Macharia Kinyua [2018] eKLR & Al Taj Alaudin Alibhai vs Jiwani Impex Limited [2012] eKLR.

26. The Appellant further argued that it was neither served with the 1st Respondent's party and party costs nor granted a chance to participate in taxation.

27. The Appellant posited that it is a good procedure to have costs assessed in the presence of both parties. It argued that the costs as assessed by the trial court offends the right to fair hearing and provisions of Schedule VII of the Advocates Remuneration Order. In support of this position, the Appellant placed reliance on the case of Peter Njuguna Njoroge vs Julius Narankaik Ologollimot [2010] eKLR

28. The Appellant further submitted that the decree in issue is dated 31st May, 2017. That the same was executed in 2019 which was after a lapse of one year and as such the 1st Respondent contravened Order 22 Rule 18 of the Civil Procedure Rules as it was not served with a notice to show cause why execution should not issue prior to proceeding with execution. To support this proposition, reliance was placed on the cases of Reuben Nyanginja Ndolo vs Dickson Waithika Mwangi & 3 Others [2012] eKLR & Alfred Muyeyeli & another vs Jamin Onyiri & another [2020] eKLR.

29. The Appellant thus urged this court to set aside the orders of the lower court dated 28th May,2020 and to allow its application dated 26th November,2019 with costs.

1st Respondent's Submissions on the second appeal

30. The 1st Respondent cited the provisions of Order 21 Rule 8 of the Civil Procedure Rules and the case of Lochab Transporters Ltd vs Fanuel Kambona Mutesa [2017] eKLR and submitted that the said provisions are not couched in mandatory terms.

31. The 1st Respondent further argued that the Order 21 Rule 8 is inapplicable to matters before the subordinate court. To buttress this position, reliance was placed on the cases of Charles Njagi Ireri vs Njeru Simon Gathuri & Another [2016] eKLR & Wilfred Mbogo & 5 others vs Nelson Mwaniki [2016] eKLR.

32. The 1st Respondent further argued that the trial magistrate had the discretion to either assess the costs before her ex parte or notify the parties. To this effect, reliance was placed on the case of Bernard Gichobi Njira vs Kanini Njira Kathendu & another [2015] eKLR.

33. With respect to whether the respondents failed to comply with Order 22 Rule 18 of the Civil Procedure Rules, the Respondent submitted in the negative for reason that the execution was based solely on party and party costs which is less than a year old.

34. On costs of the Appeal, the Respondent submitted that pursuant to Section 27 of the *Civil Procedure Act*, Costs follow the event unless the court or for good reason otherwise orders. To bolster this position, the respondent relied on the cases of Republic vs Rosemary Wairimu Munene (exparte applicant) Ihururu Dairy Farmers Cooperative Society Ltd (2014) eKLR & DGM vs EWG [2021] eKLR.

35. In light of the above, the Respondent urged this court to grant them costs of the second Appeal.

Analysis and determination on the second appeal

36. The Appellant challenges the legality of the Decree. It submitted that the same was extracted without its knowledge or involvement in violation of the provisions of Order 21, Rule 8 of the Civil Procedure Rules 2010.

37. The Respondent on its part is of the view that Order 21 Rule 8(2) is not couched in mandatory terms.

38. Order 21 Rule 8(2) which provides as follows on the preparation of decrees;

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> (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit who, shall approve it with or without amendment or reject it without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
>
> (3) if no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
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> (4) On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
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> (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the sub rules shall refer to magistrate.
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> (6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order."

39. It is clear that the above provisions of rule 8(2) apply to a decree in the High Court, but Rule 8(5) also imposes the same procedure on decrees in the subordinate court. However, the common practice in the subordinate courts has been for the court to invoke sub rule (7) and draw up its own decree.

40. Although the word used is "may" and it may be argued that this do not make it mandatory for the draft decree to be served to the other party for approval, it is always proper to do so. This is to avoid a situation where the contents of the decree as extracted are disputed and may be found to be at variance with the orders of the court.

41. The issue has been dealt with by the superior courts. What is clear is that there is no consensus on whether the failure to abide by order 21 rule 8(2) would render a decree invalid. In the authorities cited by the respondent including Lochab Transporters Ltd vs Fanuel Kambona Mutesa (supra) the court was of the view that failure to adhere to the said rule is not fatal to an extracted decree. On the other side there are decisions that hold the view to the contrary. These were cited by the appellant. I will cite these examples.

42. In Florence Cherugut vs Cheptum Murei Annah [2022] eKLR the court observed that: -

> " The main idea behind the enactment was to on preparation of decrees and orders following that process was to avoid situations where parties extracted decrees that would be at variance with the final adjudication of the Court or so to say, that would suit their interests. It was not to act as a hurdle for the successful party to in a cause when realizing the fruits of his judgment. Otherwise, if no execution could occur without the approval of the decree by the other party, mischievous ones would lie in wait for such step to be started and then erect a range of "bulwarks" of objections to delay the execution, after all they have all to lose if it came to pass.
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> My understanding of the provision is that where a party drafts a decree containing errors of omission or inclusion of non-existent orders in a judgment, that is to say, where the decree does not tally with a judgment, then the Deputy Registrar would reject it and order the parties to make the necessary rectification or submissions as to the correct version. The import of the above mentioned provision is to cure any defect in the decree. However, where the decree is free from any defect, then it is executed as it is; provided it does not contravene the orders contained in the judgment. Where such defect arises as it may at times, the provision comes to the aid of the affected party."

43. In Eco Bank Ltd vs Elsek (Kenya) Limited & 3 Others [2015] eKLR the court stated as follows:

> " The Plaintiff has not denied it did not forward the draft Decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the Decree was shown not to conform the judgment...."

44. In Ecobank Kenya Ltd vs Afrikon Ltd (2017) eKLR the court held that;

> " The rationale for above provisions cannot be difficult to surmise. A Decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A Decree must accurately and faithfully reflect the Orders or Judgment of the Court. The provisions of order 21 Rule 8 offers an opportunity for parties to settle the terms of the Decree so that they are satisfied that it is a true and faithful reflection of the Judgment. But Parties may sometimes disagree as to whether a draft decree prepared by one of them is in accordance with the judgment and in that event it is submitted to a Judge for resolution(order 21 Rule 8 (4)). The provisions of order 21 Rule 8 are important and no party can be permitted to circumvent them.
>
> Afrikon complains that the Bank extracted the order/decree without first submitting it to their Lawyers for approval. The Bank does not deny this. Afrikon takes the view that the order/decree is not in accordance with the Consent of 4th October 2016. Clearly, as the order/decree was extracted contrary to the provisions of order 21 Rule 8 then it is an improper order/decree."

45. In *Wanyororo Farmers Company vs Evans Ezekiel Wafula Simiyu T/A E. Wafula & Associates Advocates I High Court (Nakuru) Civil Case Number 2 Of 2017* (O.S), I addressed the issue of failure to comply with the rules in extracting a decree in the High Court. I stated as follows;

> " As I stated, a decree was extracted and was signed by the Deputy Registrar. What is not clear is whether the decree was extracted in the manner provided for under Order 21 rule 8. I agree with the Applicant that the said Rule is couched in mandatory terms. If parties are allowed to evade it, then it has no reason for being there in the first place.
>
> Ordinarily a party wishing to extract a decree in compliance with order 21 rule 8 would also inform the court that a draft decree has been sent to the other side for approval. There is nothing to show that this procedure was adhered to prior to the signing of the decree herein. I agree with the decisions cited by the Applicant herein.
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> I would therefore find, subject to confirmation that the appropriate notice of change was duly filed, that the decree was irregularly extracted and I set it aside."

46. Going by the said authorities, I am inclined to favour the decisions that hold the view that failure to serve the other party with the proposed decree is a fundamental step towards execution and failure to comply with Order 21 Rule 8 would render such a decree invalid. The view to the contrary would, in my view then render the entire rule unnecessary in the first place. If parties can be allowed to circumvent the requirements, then the rule ought to be removed entirely. The rule does provide safeguards for situations where the other party does not approve the draft decree so this cannot hold up any execution process.

47. Would the same view hold in respect to a decree of the subordinate court? The respondent suggests that the said rule only applies to decrees of the High Court but the reading of the entire rule suggests that the same applies to the subordinate courts as well. There is really no distinction between a decree of either court. All are formal expressions of the court.

48. The importance of the said rule cannot be emphasized more than in this suit. In its conclusion the trial court held that;

> " The counterclaim thus fails. It follows therefore that the plaintiff's suit succeeds and I grant the orders as prayed in the plaint."

49. The decree as extracted is correct in so far as the prayers in the plaint are concerned but the same contains an order that 'the defendant's counterclaim is dismissed with costs to the plaintiff.' That prayer was not issued by the court. Costs must be expressly stated and as such the decree in question was at variance with the judgment delivered.

50. As I stated, the common practice had been for the subordinate courts to draw up the decree itself rather than ask the parties to draft it. I am of the view that the practice is not irregular per se, but parties in the lower court ought to be encouraged to adhere to the civil procedure rules. This would avoid a situation such as the one that arises herein.

51. The Appellant also contended that costs were assessed without his participation and as a result the 1st Respondent unjustly enriched itself by bloating the costs and charging interest which was not awarded.

52. In Bernard Gichobi Njira vs. Kanini Njira Kathendu & another (supra) the court observed that: -

> " The subordinate court has a discretion either to assess costs ex parte and notify the parties or invite the parties and tax the same inter partes that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or the other."

53. In view of the foregoing, I find that the trial court rightly exercised its discretion in assessing the costs, although on an award it never made, and if the Appellant was dissatisfied with the taxation, it ought to have filed an objection by way of a reference to the High court, under the Advocates Remuneration Order.

54. It is important to point out that the rules were amended in 2020 to add Order 22 rule 9A that now requires a party to file a request for assessment of costs, with notice to the other parties. This matter proceeded before the said amendment.

55. Therefore, looking at the decree as drawn, I find that the same was not in agreement with the judgment. The execution for costs was on the basis that costs on the plaintiff's suit and dismissed counterclaim were awarded but that was not the case.

56. I therefore find and hold that the decree issued by the lower court was inconsistent with the judgment therein.

57. The Appellant also submitted that the 1st Plaintiff/Respondent failed to comply with Order 22 Rule 18 of the Civil Procedure Rules which provides:

> "
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> " 18.
>
> (1) Where an application for execution is made:

(a) More than one year after the date of the decree;

(b) Against the legal representative of a party to the decree; or

(c) For attachment of salary or allowance of any person under rule 43;

The Court excluding the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him ……".

58. The Appellant submitted that the 1st Respondent should have served it with a notice to show cause why execution should not issue considering the decree it sought to execute was more than one-year-old. The 1st Respondent on its part submitted that it is executing for party and party costs and not the decree and hence there was no need for a Notice to show cause.

59. There is no dispute that judgment in this matter was delivered on the 31st May, 2017 and the decree was issued on 19th November 2019.

" The *Civil Procedure Act* defines a decree as;

"The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."

60. A distinction ought to be drawn between the date of the delivery of the Judgment and the date of the issuance of the decree. After a judgment, many other issues may arise such as ascertainment of costs, application to set aside the judgment or review it, and so on. It is until all issues are exhausted that the decree is issued. As such the basis of the said rule is the date of the issuance of the decree which is the formal order of the final decision of the court.

61. The process of execution of the decree was commenced on or about the 22nd November,2019. No doubt, a year had not elapsed from the date of the decree.

62. In Rose Chepkorir vs Mwinyi Mohammed Riva & another [2015] eKLR the court dealt with this issue and it held that;

" From these provisions its clear that the period of one (1) year starts running from the date of the decree and not the date of judgment. In this case the date of decree is 26th March, 2014.

The request for execution is dated 26th January, 2015 and was received by the court on 29th January, 2015. It was within the one (1) year period."

63. It is thus my finding that the decree was issued on 19th November 2019 and the execution was within a year of such decree. Therefore, there was no need for a notice to show cause as alleged by the appellant/ applicant.

64. In conclusion, as regards the second appeal, I allow the same and hold that the decree as extracted for execution was inconsistent with the judgment and it is set aside. All the subsequent proceedings are also set aside.

65. The fault being on the part of the court, I order that each party bear its own costs.

66. I will now deal with the first appeal which was against the judgment of the lower court.

67. Being a first appeal, this court is under a duty to reconsider the evidence adduced and analyse it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. This point was reiterated in Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR where the Court held that:

> " this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

68. With the above in mind, I will now proceed to determine the said Appeal.

69. Having reviewed the Memorandum of Appeal, the Record of Appeal and submissions filed, the questions for determination are: -

    1. Whether the trial court erred in law and fact by allowing the 1st Respondent's suit.

    2. Whether the trial court erred in law and fact by dismissing the Appellant's Counterclaim.

70. The parties prosecuted the 1st appeal by way of written submissions which I summarise as hereunder.

Appellant's Submissions

71. On whether the Appeal is merited, the Appellant submitted in the affirmative.

72. The Appellant argued that the 1st Respondent opened an account number 0040040360 on 5th October,2010 and on 16th November,2010 applied for a loan facility of Kshs. 2,000,000/= which was approved and disbursed via a loan account number 0040040401registered in its name.

73. The Appellant submitted that the 1st Respondent offered the aforementioned logbooks as security for the loan and the 2nd and 3rd Respondents guaranteed the loan by giving personal guarantees.

74. The Appellant submitted that the statement for account number 0040040360 for the period from 5th October,2010 to 15th March 2013 shows when the loan was disbursed it was debited from account number 0040040401 and credited on account number 0040040360 on 23rd November 2010 while the statement of account number 0040040401 for the period 23rd November 2010 to 15th March 2023 shows that the money which was used to service the loan was taken from the 1st Respondent's

current account number 0040040360, which was then overdrawn giving rise to the amount due. The Appellant contended that the 1st Respondent indeed admitted to have overdrawn its current account through its letter dated 25th January 2013.

75. The appellant posited that the statement for account number 0040040360 shows that the account started being overdrawn from 9th December,2010 and the 1st respondent continued issuing cheques when it was aware that the account had a debit balance. The Appellant argued that no money is given for free by Banks. To buttress this proposition, the Appellant relied on the cases of CFC Stanbic Bank Limited vs Kenya Youth Hostels Association Registered Trustees [2017] eKLR & HYUNDAI Motors Kenya Limited vs East African Development Bank Ltd [2007] eKLR.

76. The Appellant further argued that pursuant to clause 3 of the general terms and conditions referred to in the account opening dated 5th October, 2010 and signed by the 2nd and 3rd Respondents as directors of the 1st Respondent and in Clause 7 of the offer Letter, it had a right at any time without notice or demand to them notwithstanding any settlement account or other matter whatsoever to combine or consolidate all or any existing accounts of the 1st Respondent.

77. In light of the foregoing, the Appellant urged this court to allow the Appeal, set aside the orders of the lower court dated 31st May,2017, dismiss the 1st Respondent's case with costs and allow its counterclaim with costs.

Respondent's Submissions

78. The Respondent submitted that it was uncontested that the loan facility of Ksh. 2,000,000/= taken on 23rd November,2010 vide account number 0040040401 was paid. However, despite the full payment the Appellant declined to release the original logbooks of the aforesaid Motor Vehicles which had been offered as security for the above loan.

79. The Respondent submitted that it proved that account no. 0040040360 was never withdrawn and it was used to deposit money from M/s Bliss Flora which it conducted business with as evidenced by the cheque deposit slips and a statement of account that were produced as P. Exhibit 6 & 7 respectively.

80. The respondent argued that the Appellant on their part did not proffer any statement or documentation before the trial court to show the purported overdraft or existing arrears that would cumulatively add to Ksh. 5,575,584/= allegedly owed.

81. To buttress its submissions, the 1st Respondent relied on the case of National Bank of Kenya Ltd vs Isaac A. Ogetta (1999) eKLR where the court held inter alia that there has to be a documentation of any loan or overdraft facility arrangement between the bank and the client and that the banks must abide by the basic principles and canons of lending, failing which the court will lend no assistance to a manager's irresponsibility or recklessness and will not pass a judgment which will promote evil on society.

82. The respondents also cited the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others (2013) eKLR for the proposition that courts cannot aid in bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side ,it unfairly harms the innocent party.

83. In light of the above, the 1st respondent prayed that the Appeal be dismissed with costs to it.

84. Before addressing the issues in this appeal, I will briefly give a summary of the evidence of the parties before the lower court.

85. The respondents/plaintiffs called two witnesses in the trial.

86. PW1 was Ann Njeri Mungai the 1st Respondent's office Administrator. She testified that the respondent was engaged in construction work. That the respondent applied for a loan from the Appellant of Ksh. 2,000,000/= and the same was disbursed through account no. 004004041 on 23rd November,2010. She stated that the 1st Respondent offered the aforementioned logbooks as security for loan. It was also her testimony that the 1st Respondent also had another account number 0040040360 with the Appellant. She added that on 2nd August,2012 the 1st Respondent fully repaid the loan but the appellant declined to return the said logbooks on ground that there were unpaid amounts from account No. 0040040360.

87. It was her further testimony that Bliss Flora Flower contracted the 1st Respondent to work in the farm and they agreed that payments would be deposited in account No. 0040040360. That the said flower company used to pay the 1st respondent through cheques. She disputed that the 1st Respondent took an overdraft of 5 million as demanded by the Defendant/Applicant. In support of the 1st Respondent's case, she produced copies of the aforesaid Motor vehicles as P. Exhibit 1& 2 respectively, Statement of Account No. 004004041 as P. Exhibit 3 and Cheque of the last payment of Kshs. 905,997/= as P. Exhibit 4, A cheque deposit slip dated 2.8.2012 duly stamped by the Appellant as P. Exhibit 5, 21 Cheque deposits evidencing deposits made by Bliss Flora Flower farm as PEX.6, statement of account no. 0040040360 as P. Exhibit 7, Demand letters dated 10.12.2011 & 11.11.2011 demanding clearance of loan in account No. as P. Exhibit 8 & 9 respectively, 1st Respondent Advocate's letters addressed to the Appellant demanding for log books as P. Exhibit 10 & 11 respectively.

88. In cross examination, she confirmed she was not a signatory of either the aforesaid accounts but stated that she was informed how the accounts were being operated. She admitted that was not aware of the cheques that were drawn in account no. 0040040360 and how the Appellant and the 1st Respondent were operating or details of the agreement they entered into. She confirmed that account no. 004004041 had no cheque deposits save for the last one.

89. Regarding the statement of account 0040040360 of 4th February,2011, she confirmed that there was a corresponding loan repayment with P. Exhibit 3 and that money was being taken from account 004004041 to account 0040040360. She also confirmed that P. Exhibit 7 showed that on 16th August,2011 a loan repayment of Ksh. 181,000/- had a corresponding entry in account no. 004004041. She further stated that the account balance for account no. 0040040360 as at 16th August, 2011 was Ksh. 5,174,941/= but couldn't tell whether that was a debit balance which had an overdraft.

90. In re-examination, she stated that as at 8th December loan in account 004004041 was cleared and that account no. 0040040360 showed a balance of 5 million and interest.

91. PW2, Pravin Kumar Sankardas, the 1st Respondent's Director recalled that on 23rd November, 2010, he took a loan from the Appellant of Ksh. 2,000,000/=and he repaid it. He said on 2nd August 2012 he received a statement confirming clearance of the loan repayment. He said the Appellant declined to release his logbook after he had cleared repaying the loan.

92. It was his further testimony that he did not withdraw money from account 0040040360 when it had no money. He disputed owing the Appellant the claimed amount and stated that he never received any notice of the overdraft interest.

93. The defendant called one witness. DW1 was Alfonso Victor Gambo, the Chief Manager of the Appellant. He testified that his duties were to oversee lending, operations and internal audit. He adopted his witness statement as his evidence in chief. He stated that the 1st Respondent opened an account with them on 5.10.2010. subsequently, it requested for asset financing which was approved

in November 2010. He added that the 1st Respondent's account went into arrears and the balance due as at 13.3.2013 was Kshs. 5,575,584/=.

94. It was his further testimony that the bank dealt with the loan and overdrafts accounts as they were held by the plaintiffs and therefore the bank could debit the overdraft account and then credit the loan account. He said that the directors are liable for the liabilities of their company as the guarantors duly signed. He stated that the amount was still accruing.

95. In his written statement filed in court, he stated that the 1st respondent drew cheques on its current account number 0040040360 which were honoured by the Defendant and as at 28th February,2013, the amount due and owing from the plaintiff to the defendant was Ksh. 5,575,584/= and continues to attract interest at 36% per annum until payment in full.

96. He further stated that on or about the 25th January,2013, the plaintiff wrote a letter to the Governor Central Bank, admitting that it indeed overdrew its current account and that it was only liable to pay the principal amount and not interest, but it had not even paid the admitted amount.

97. In cross examination, he said the bank is still holding the logbooks that were used as security for a loan of Ksh.2 million. He said the loan account registered a nil account on 2nd August,2012. He confirmed the 1st respondent did not make an application for an overdraft and that they gave a notice on increase of interest rates to the plaintiff. He further stated that the guarantors did not indicate they were guaranteeing the overdrafts and that according to the guarantee notice of demand should be made to the guarantor.

98. From the pleadings and evidence it is undisputable that;

    a. The 1st respondent opened an account number 00440360 with the appellant on 5th October 2010 (current account).

    a. The 1st Respondent applied for a loan of Ksh.2 million and the same was disbursed to it through account no. 004004041 (Loan Account).

    b. The 1st Respondent gave out its aforesaid log books to be used as a security for the loan.

    c. That the 2nd and 3rd Respondents guaranteed the said loan transaction.

99. The 1st Respondent stated that it fully liquidated the said loan on 2nd August,2012 and received a statement confirming clearance of the loan.

100. The defendant/appellant's witness confirmed to this court the said position by stating that "the loan account registered a nil account on 2nd August, 2012".

101. Does the reflection of a "nil balance" in the loan account mean that the 1st respondent actually paid the amount?

102. To answer the question above one needs to look at how the parties operated their relationship.

103. From the documents produced in court, it is evident that the appellant opened the two stated accounts in the name of the 1st respondent. When the loan was approved, the loan account was debited with the Ksh. 2,000,000/- on 23rd November 2010 and a corresponding credit was made to the current account on the same day.

104. It is also evident that the loan repayments were done by a debit on the current account and a corresponding credit to the loan account. For instance, the loan repayment of 18th January 2011, Kshs. 180,000/- was debited in the 1st respondent's current account and a corresponding credit of the same

amount was made in the loan account. Similarly, the loan repayments of 28th February 2011, 28th March 2011, 10th May 2011 and so on, followed the same pattern.

105. It is also evident that the current account, from which the loan amount was to be debited from, also fell into a debit itself. However, the appellant continued to debit the current account with the loan repayments. A case in point are the entries for loan repayments of 18th January 2011, 4th and 28th February 2011, 28th March 2011,10th May 2011, 22nd July 2011, and 16th August 2011,

106. The respondents argues that there was no evidence led by the Appellant to specifically show that the 1st respondent applied for an overdraft facility or that the said logbooks were to be used as security for the purported overdraft facility. The respondents also argue that the Appellant did not have any justifiable ground for withholding the 1st Respondent's security after it had fully repaid the loan of Ksh. 2,000,000/=.

107. The 1st Respondent also submitted that the second account was never overdrawn and that M/s Bliss Flora which it conducted business with, used to deposit money into the second account. It produced Cheque deposits evidencing deposits made by the said company.

108. From the bank statements adduced at the trial, it is quite evident that the 1st respondent never paid the loan as alleged. The "nil balance" was created after the appellant closed the loan account, which by 31st July 2012 had a debit balance of ksh. 905,897/-. By then the current account had already been debited with the loan repayments, that created the overdraft that the respondents are complaining about.

109. Now clause 7 of the bank's terms and conditions gave it the right to set off any account belonging to the 1st respondent against any other account. This is what appears to have happened when it debited the loan account balance to the current account, which was already in debit itself.

110. It was the Appellant's case that it honoured the cheques drawn by the 1st Respondent on its current account number 0040040360 and as at 28th February,2013, the amount due and owing was Ksh. 5,575,584/= and it continued to attract interest at 36% per annum until payment in full.

111. The statement of accounts produced demonstrates this position. Other than the loan repayments, there were outgoing payments from the current account made by the 1st respondent and which were honoured by the bank.

112. In further buttressing its case that the second account was overdrawn, the Appellant produced a complaint letter against it dated 25th January,2013 that was written by the 1st Respondent to the Governor Central Bank of Kenya, wherein it confirmed the Appellant allowed it to use an overdraft that it had not applied for. The said letter categorically states as follows: -

> " Please note that they also allowed us to use an overdraft facility which we did not apply for. One of our clients, M/S Bliss Flora Ltd was late in making their payments to us and due to good relations with the bank they requested the bank to allow all our cheques be paid. This was done with an understanding that we shall not be liable for interest and that they would make payments to clear the overdraft"

113. The 1st Respondent's assertion that it used the overdraft facility but the same was to be paid by M/S Bliss Flora Ltd cannot hold. The account was not in the name of Bliss Flora. Therefore, the said entity not privy to the contract between the appellant and the 1st respondent. The sole mandate to operate the account rested with the 1st respondent and knowing that its account was in debit, it continued to issue cheques that were honoured by the appellant. The 1st respondent cannot therefore escape liability.

114. As regards the interest, in the case of Mwaniki Wa Ndegwa vs. National Bank of Kenya Ltd & another [2016] the court while discussing the issue of interest observed:

> " From these provisions it is evident that although the security documents did not provide a specific rate of interest, the documents clearly provided the manner in which such interest was to be determined.
>
> Having voluntarily signed the security documents the appellant must be taken to have been fully aware of the conditions upon which the security was given, and in particular that the documents did not contain a specific rate of interest, but provided for the interest rate to be determined at the ruling rate for Bank advances in Kenya.
>
> We restate the position taken by this Court in Ajay Indravadan Shah vs. Guilders International Bank Ltd [2003] eKLR, that:
>
> > "If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."
>
> By signing the Charge and the Guarantee, the appellant and the respondents agreed on a rate of interest to be determined by the Bank, and once the rate of interest was determined as agreed, the appellant was bound by that rate of interest. This is the same position that was taken by this Court in Fina Bank Ltd vs. Ronak Ltd (2001) 1 EA 54 where it was held that:
>
> > "As the Charge documents which were in evidence before the High Court expressly reserved, in favour of the appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified ..."

115. A question that arises then, is why the appellant continued to debit the current account with the loan repayment knowing that the current account itself had no funds and was also in debit.

116. Whereas the bank had the discretion to set off the loan account against the current account, I think that this would have been in order if the current account had funds. The problem arose as the current account had no funds itself to repay the loan.

117. In my opinion, the appellant ought to have taken steps to realise the security it had in respect to the loan account the minute it found that the current account had no funds to meet the obligations under the loan account.

118. Debiting the current account as it did resulted in the appellant imposing a higher interest rate, applicable to overdrafts, on the loan account than the parties had agreed to. Those debit entries ought to be reversed and the outstanding loan charged interest at the agreed or applicable rates.

119. Guided by the principles enunciated in the above case, I opine that the Appellant is not entitled to any additional interest that accrued from the debiting of the current account with the loan account repayments. Any such interest would be as agreed in the loan account and not the rates applicable on the overdraft.

120. As for the other payments made by the appellant towards cheques issued by the 1st respondent, I think that the bank is well entitled to charge the prevailing interest rates in respect to the overdraft at the

time. The 1st respondent is estopped from denying the overdraft facility as it knew that it had no funds in its current account when it issued several cheques for payment, which were honoured by the bank. Its own letter to the Central Bank of Kenya is an admission that it obtained the said facility.

121. The 2nd and 3rd Respondents argue that they did not guarantee the overdraft. While I agree with them in that respect, the fact remains that the loan amount that they guaranteed the 1st respondent was never paid and therefore they are still responsible for it. There is ample evidence that the 2nd and 3rd respondents were issued with notices of the default by the 1st respondent and so they cannot claim otherwise.

122. Having looked at the evidence I am of the view that the trial court erred when it found that the 1st respondent had repaid its loan. The truth is that it never did so, for reasons that I have adduced herein. The appellant was thus entitled to retain the security it held to secure the loan to the 1st respondent.

123. I am also of the opinion that the trial court erred when it held that the 1st respondent did not secure an overdraft facility. The 1st respondent knowingly drew cheques on the said account. The account opening/operating documents gave the appellant the right to allow or refuse to make payments when the account had no funds. Having exercised the latter, then the appellant is thus entitled to recover the amount so overdrawn.

124. For the foregoing reasons, I allow the 1st appeal and hereby set aside the orders of the trial court allowing the 1st respondent' s suit against the appellant and substitute it with an order dismissing the said suit with costs.

125. As regards the counterclaim, I also allow the appeal and set aside the order dismissing the same. I substitute it with an order that the same is allowed on the following terms;

    i. The counterclaim as against the 1st respondent is allowed as prayed. The interest on both the loan account number 004004041and the overdraft in the current account number 00440360 to be calculated at their respective rates, guided by the findings I have made hereinabove.

    ii. The counterclaim is allowed as against the 2nd and 3rd respondents but only to the extent of the unpaid amount on the loan account number 004004041 and at the interest applicable on the said loan account rather than the overdraft in the current account, guided by the findings hereinabove.

    iii. The appellant shall have the costs of the 1st appeal.

126. To ensure compliance with the above orders, the appellant shall recalculate the interest payable by the 1st respondent on the two accounts and by the 2nd and 3rd respondent on the loan account guided by the findings that I have made hereinabove. The same shall be subject to any statutory or regulatory caps on accrual of interest as may be applicable.

127. The court shall give the time frame for such compliance.

128. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

No appearance for appellant

Mr. Guyo for respondent