



REPUBLIC OF KENYA



**Guaranty Trust Bank of Kenya Limited v Boniface Ndirangu Njuguna
t/a Goods Import & Exorts Agencies (Civil Appeal E060 of 2021)
[2024] KEHC 11650 (KLR) (Civ) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11650 (KLR)

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

CIVIL

CIVIL APPEAL E060 OF 2021

AN ONGERI, J

SEPTEMBER 19, 2024

BETWEEN

GUARANTY TRUST BANK OF KENYA LIMITED APPLICANT

AND

**BONIFACE NDIRANGU NJUGUNA T/A GOODS IMPORT & EXORTS
AGENCIES RESPONDENT**

RULING

1. The application coming for consideration is the one dated 5/4/2024 brought under Sections IA, IB and 3A of the [Civil Procedure Act](#); and Order 51 Rule I of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeking the following orders;
 - i. Spent.
 - ii. That pending the hearing and determination of this Application, this Honorable Court be pleased to grant interim orders to stay the execution of the Judgment dated 9th February, 2024 and the resultant Decree and all consequential orders and proceedings thereto.
 - iii. That this Honorable Court be pleased to grant an order that the Judgment Sum be applied towards setting off the outstanding loan balance owed by the Appellant of Kshs.1,723,810.01/ = as at 4th April, 2024 and the balance be settled within 60 days of the date of the order.
 - iv. That this Honorable Court be pleased to make an order as to costs.
 - v. That this Honorable Court be pleased to make any such or further order as it may deem necessary in the interest of justice.



2. The application is based on the following grounds;
 - i. That on 9th February, 2024, this Honorable Court delivered its Judgment against the Respondent for the sum of Kshs.2,031,800 together with Costs and Interest at court's rate from the date of the trial court's judgment.
 - ii. The court granted stay of execution of the Judgment for 30 days which period has now lapsed. During this period, the Respondent Bank filed and served a Notice of Appeal and letter seeking typed proceedings and a copy of the decree pending appeal.
 - iii. However, in the spirit of concluding litigation, the Respondent through its advocates wrote to the Appellants advocates informing them that the Appellant took loan facilities with the Bank which he is now in default to the sum of Ksh.1,723,810.01/= as at 4th April, 2024 which amount continues to accrue interest and thus proposed to set off the same from the judgment sum.
 - iv. The letter further requested for a tabulation of interest as the Respondent had already settled part of the decretal sum and the Appellant's costs in the lower court.
 - v. The Appellant has yet to respond to the Respondent's letter and we have since noted that he has since applied for issuance of warrants of attachment and sale and are apprehensive that there is a real danger that he will proceed with execution against the Respondent if the execution is not stayed.
 - vi. Unless the accompanying Application is certified urgent and the prayers sought therein granted, the Respondent stands to be prejudiced as Judgment has been entered against them, and there is an imminent risk of execution against them.
 - vii. It is in the interest of justice that execution of the Judgment is stayed pending the hearing and determination of this application.
3. It is supported by the affidavit of Pascaline Mburu sworn on 5/4/2024 in which it is deposed that on 9/2/2024, the Court delivered its judgement against the Respondent for the sum of Kshs.2,031,800 together with costs and interests at Court rates from date of judgement and proceeded to grant a 30 day stay.
4. During the period of stay, the Respondent filed and served a notice of appeal and wrote to court requesting typed proceedings and a copy of the decree pending appeal.
5. The Respondent then wrote to the Appellant's advocate informing them of the Appellant's outstanding debt of Kshs.1,708,739.54 as at 26th February 2024, requesting to off-set the same from the judgement.
6. The letter also sought for a tabulation of interest as the Respondent had already settled Kshs.65,365 to the Appellant's advocate as costs for Lower court proceedings and Kshs.31,500 being the decretal sum.
7. That the Appellant neglected to respond but applied for warrants of attachment and there is real danger that he will proceed with the execution. The debt for which the Appellant is in default continues to accrue interest.
8. The Respondent is willing to settle the decretal sum less the outstanding debt owed by the Appellant to the tune of Kshs.1,723,810.10 as at 4th April, 2024 within 60 days should the Court allow them time to obtain the necessary approvals.



9. The respondent filed a replying affidavit sworn by Boniface Ndirangu Njuguna on 29/4/2024 in which he stated as follows;
10. That the court is functus officio and the present application is only meant to deny the Appellant the fruits of his judgement. A letter from the Applicant's advocates, written within the stay period, had sought a 60 day grace period to seek approvals and settle the decretal sum. The letter raised extraneous matters that were not raised during trial.
11. Further, that the prayer for stay pending appeal and to be allowed to off-set the loan are contradictory prayers meant to delay payment of the decretal sum and buy time. He added that the application lacks merit, is an abuse to the Court process considering the Applicant has liberty to commence recovery proceedings.
12. The parties filed written submissions as follows:
13. Counsel for the Applicant submitted that the Court is not functus officio and that it is within its powers to consider the application as it only concerns the execution of the decree and not the merits of the case. He submitted that the Appellant did not deny receipt of an apology or the award and costs awarded in the lower court.
14. He further submitted that the Judgement debtor has placed before court letters of offer and account statements which indicate that the Appellant is in default. Refusal to respond to the off-set request and proceeding to take warrants implies bad faith. He urged the Court to allow the application and have the decretal sum set off from the outstanding loan balance owed by the decree holder.
15. Counsel for the Respondent/Decree holder submitted that the instant application is trying to re-open this case after a final decision has been pronounced.
16. He further submitted that the Court is functus officio as there are no errors, clerical or otherwise brought for the Court to make correction. He contended that only the Court of Appeal has jurisdiction to hear and determine such an application.
17. He further contended that this court had already granted a stay of execution to the Applicant which is squandered under the guise of negotiations. The response to the applicant's letter on costs cannot be a basis for the present application. The Respondent has relied solely on the decree as issued by Court to extract warrants.
18. He urged the court to dismiss the application and award the Decree Holder punitive costs.
19. The sole issue for determination is whether the decretal sum should be used to settle a loan advanced to the respondent.
20. I find that the loan was not granted on condition that the decretal sum would be used to off-set it.
21. I find that there is no nexus between the loan contract and the awarding of the decretal sum and the application is seeking to introduce new issues that require evidence to prove which amounts to re-opening the case.
22. In the case of *Philip N. Onchwari v Gusii Mwalimu Sacco Limited* [2015] eKLR the court held that;

“the Respondent did not file any Counter-Claim and in the judgement the court made a specific finding in respect thereof . . . The foregoing being the case, the Respondent had no authority to make deductions from the decretal sum.



23. The Applicant had an opportunity to bring forward the issue of a loan advanced to the Respondent in the form of a Counter-claim which it never made.

24. I dismiss the application dated 5/4/2024 with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Respondent/Decree holder

..... for the Applicant/Judgment Debtor

