



REPUBLIC OF KENYA



**Jack & Jill Supermarket Limited v Ngunjiri (Civil Case 317 of 2014)  
[2023] KEHC 1983 (KLR) (Civ) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1983 (KLR)

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

**CIVIL  
CIVIL CASE 317 OF 2014**

**JN MULWA, J**

**MARCH 10, 2023**

**BETWEEN**

**JACK & JILL SUPERMARKET LIMITED ..... PLAINTIFF**

**AND**

**VIKTAR MAINA NGUNJIRI ..... DEFENDANT**

**RULING**

1. On October 25, 2018, Njuguna, J entered judgment in favour of the Plaintiff against the Defendant herein as follows:
  - a. Special damages – Kshs 1,508,000/-,
  - b. Exemplary and punitive damages – Kshs 20,000,000/-,
  - c. Costs of the suit to the plaintiff Special damages to earn interest from the date of filing of the suit and general damages from the date of judgment.
2. Subsequently, on October 9, 2020, following an application by the defendant, Serگون, J allowed the defendant to liquidate the decretal sum by way of monthly installments of Kshs 1,250,000/- from November 10, 2020 and thereafter on the 10<sup>th</sup> day of each succeeding month until payment in full.
3. By a Notice of Motion dated December 20, 2021, the Defendant approached the court seeking the following orders: -
  1. That this honorable court be pleased to order satisfaction of the decree in the sum of Kshs 1,006,381/- issued against the plaintiff in the defendant's favour in the following matters:
    - i. Jack & Jill Supermarket Ltd v Viktar Maina Ngunjiri - HCCC 379 of 2013 for the sum of Kshs 278,806/-;



- ii. Jack & Jill Supermarket Ltd v Viktar Maina Ngunjiri - HCCC 183 of 2009 for the sum of Kshs 440,221/-; and
  - iii. Jack & Jill Supermarket Ltd v Viktar Maina Ngunjiri - HCCC 422 of 2012 for the sum of Kshs 287,360/- to be set off from the decretal sum of Kshs 21,508,000/- due to the Plaintiff.
2. That this honorable court be pleased to order execution of the plaintiff's decree to the tune of Kshs 20,501,613/- after deducting the sum of Kshs 1,006,387/- due to the defendant.
  3. That the costs of this application be provided for.
4. The Application was brought pursuant to provisions of section 1A, 1B and 3A of the [Civil Procedure Act](#) and order 22 rule 14 of the [Civil Procedure Rules, 2010](#). It is premised on the grounds on the face of the motion and supported by an Affidavit sworn by the Defendant and a Further Affidavit sworn on July 21, 2022 by his advocate Odera Obar Kennedy.
  5. The Defendant averred that the sum of Kshs 1,006,387/- which he sought to be set off or deducted from the decretal sum of 21,508,000/- due to the Plaintiff, arose from costs certified as due to him from the Plaintiff in respect of the three matters listed above. According to his advocate, the instant application has since been fully compromised following the full payment of the decretal sum due to the Plaintiff, less the Defendant's taxed costs of Kshs 1,006,387/-.
  6. The Plaintiff opposed the application through a Replying Affidavit sworn on May 24, 2022 by its Managing Director Schon Noorani. He avers that the Decree has not been fully satisfied as alleged as the sum of Kshs 21,508,000/- only consisted of the judgment sum without taking into account the interest accrued and costs of the suit awarded to the Plaintiff. He contends that the instant application is a disguised appeal against the Orders of October 9, 2020 yet the said decision has never been challenged hence this Court lacks jurisdiction to hear and determine this Application.
  7. It is averred that the Certificates of Costs annexed to the Supporting Affidavit are unknown to the Plaintiff as the same have never been served on the Plaintiff and neither has the Plaintiff been party to the proceedings that resulted in their issuance. Further, that no execution proceedings have been commenced against the Plaintiff in recovery of any costs and in any event, the authenticity of the Certificates of Costs is not ascertainable as no original or certified copies thereof and the Decrees in those matters have been availed to this Court. Lastly, the Plaintiff states that the Certificates of Costs relate to decisions made over 6 years ago and therefore are unenforceable against it.
  8. The application was canvassed by way of oral arguments tendered by Mr Odera for the Defendant/ Applicant and Mr Munywoki for the Plaintiff. In their respective submissions, Counsel replicated the averments in the parties respective affidavits filed in support of and against the application, leaving only one issue that falls for determination in my view; whether the Defendant's application is merited?

### **Determination**

9. Order 22 Rule 14 of the [Civil Procedure Rules](#) on which the Defendant's application was anchored provides for execution of cross decrees as follows;
  - " 14 Where applications are made to a court for the execution of cross-decrees in
    - (1) separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then—



- a. if the two sums are equal, satisfaction shall be entered upon both decrees; and
  - b. if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.
- (2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.
- (3) This rule shall not be deemed to apply, unless—
- a. the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and
  - b. the sums under the decree are definite.
- (4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.”

10. To begin with, it is evident from the provisions of Sub rule (1) (b) that an application under this provision ought to be made by a decree holder of a larger sum of money for the satisfaction of a smaller sum of money; See Warsame, J (as he then was) in *Kenya Commercial Bank v Commissioner of Police & 2 others* [2012] eKLR. For that reason alone, the court finds that the Defendant’s application is unmerited. However, even assuming that the application is properly before the court, it would not be allowed on the basis of the Certificates of Costs annexed to the Defendant’s supporting affidavit. Indeed and as submitted by the Plaintiff’s advocate, the authenticity of the said Certificates cannot be vouched for as there is nothing to ascertain that they emanated from this court or that they indeed relate to the three suits which this court is a stranger to.

11. In addition, the Defendant cannot purport to claim that the Plaintiff’s Decree in the instant suit has been fully satisfied. From the judgment of October 25, 2018, there is no doubt that the sum of Kshs 21,508,000/- does not include the interest and the costs of the suit that were awarded to the Plaintiff. The Defendant has not provided any proof that there were discussions and/or negotiations between the parties that led to the Plaintiff agreeing to let go of the interest and costs awarded and accepting a lesser amount in full and final settlement of the decree of this court. Indeed, even the orders of October 9, 2020 did not relate to the sum Kshs 21,508,000/- only as the Defendant purports. This is so because at paragraph 8 of the Ruling, the learned judge expressly acknowledged that if interest and costs are added to the principal sum, the decretal sum is likely to rise to more than Kshs 25,000,000/-.

12. For the foregoing, the court finds that the defendant’s application dated December 20, 2021 lacks merit. The same is hereby dismissed with costs to the plaintiff.

Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2023.**

**J.N. MULWA**



**JUDGE.**

