



**Jondus Enterprise Limited v Spectre International Limited (Civil Case 52 of 2018)
[2023] KEHC 1982 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 52 OF 2018
A MABEYA, J
MARCH 10, 2023**

BETWEEN

JONDUS ENTERPRISE LIMITED PLAINTIFF

AND

SPECTRE INTERNATIONAL LIMITED DEFENDANT

RULING

1. Before Court is an application dated 6/10/2022. It was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application sought that the Deputy Registrar does authorize the execution filed on 26/9/2022 for the recovery of the partial judgment as decreed by court on 26/1/2021.
3. The grounds for the application were set out on its face and in the supporting affidavit sworn by Gikandi Ngibuni on 6/10/2022. It was contended that, this Court entered a partial judgment in favor of the plaintiff for Kshs 24,476,479.86/= on 26/1/2021 and left the remainder of the claim to proceed to hearing.
4. That vide a ruling dated 22/9/2022, the defendant's application for stay of execution of the said partial decree was dismissed by Court. That it was therefore just that the application for leave to proceed with execution was allowed to give effect to the ruling.
5. The application was opposed vide the replying affidavit of Jacob Agoch sworn on 7/11/2022. It was averred that the subject judgment was contested and was subject of an appeal filed by the defendant in Civil Appeal No E142 of 2021 Spectre International vs M/S Jondus Enterprise. That the suit was still pending and the plaintiff had been indolent in prosecuting it since the partial judgment was entered.



6. That execution ought to be put on hold until the suit and the appeal were determined. That if the application was allowed, it would render the appeal nugatory and militate against the hearing and determination of the main suit. That the defendant would suffer most prejudice if execution was allowed as it ought to have been granted an opportunity to exhaust its appeal before execution.
7. The application was canvassed by way of written submissions. The plaintiff's submissions were dated November 10, 2022 while those of the defendant were dated November 29, 2022. This Court has considered those submissions as well as the rival pleadings.
8. Section 94 of the *Civil Procedure Act* provides: -

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.
9. In *Commercial Bank of Africa V Lalji Karsan Rabadia & 2 Others* [2013]eKLR, analyzed the above provision and held: -

“The language of the statute is clear and unequivocal. A decree holder is at liberty, with leave of the court, to execute a decree before costs are ascertained. I do not agree with the defendants that the present decree is preliminary. In a sense, it is not a decree upon final judgment in the suit: but to the extent of the order of Court of February 6, 2012, it is a final decree on the sum of Kshs 481,489,273.78 and US \$ 654,119.01 and costs thereof. The determination of the remainder of the suit of Kshs 240,000,000/- will not alter that fact in the decree of the High Court. I however agree with the defendants that the Court of Appeal may in Nairobi Civil Appeal No 63 of 2012 Lalji Karsan Rabadia and others Vs Commercial Bank of Africa overturn the decree. I say so because the appellate court has stated the appeal is arguable. But that court, in its wisdom, declined to grant the defendants a stay of execution of the present decree.”
10. In the case before me, it is undisputed that partial judgment was entered in favor of the plaintiff on 26/1/2021 for the sum of Kshs 24,476,479.86/=. The remainder of the claim was left to proceed for hearing. The decree thereof was final as far as it relates to that amount. The defendant's application to set aside that judgment was dismissed vide ruling dated 22/9/2022. Though the defendant appealed against the judgment, it did not plead that orders staying execution of the decree thereof were issued, or that it even made any application for stay before the Court of Appeal in that matter.
11. The plaintiff also submitted that the defendant had filed Civil Appeal Application No E039 of 2021 for a stay of execution of the partial decree, but the defendant failed to comply with the conditions that were set by the Court of Appeal with regard to the stay application. The defendant did not mention anywhere in its pleadings that it had been previously granted stay and failed to comply with the conditions for stay.
12. The existence of an appeal is not in itself enough ground to deny a decree holder an opportunity to enjoy its judgment.
13. The submission that execution can only issue when the entire suit is heard and determined is also rejected. It has already been found that the decree final as far as the sum specified is concerned.



14. For the above reasons, this Court is persuaded to exercise its discretion in favour of the plaintiff. There is no sufficient reason put forth to prevent the plaintiff from executing its partial decree.
15. Consequently, I grant leave to the plaintiff to execute the partial decree of the judgment delivered on 26/1/2021 in favour of the plaintiff for Kshs 24,476,479.86/= and grant the orders sought accordingly.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

