



REPUBLIC OF KENYA



**KENYA LAW**  
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**Marula Estate Limited v Natures Choice Fresh Produce & 2 others (Civil Case E009 of 2021) [2023] KEHC 17835 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17835 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL CASE E009 OF 2021  
GL NZIOKA, J  
APRIL 24, 2023**

**BETWEEN**

**MARULA ESTATE LIMITED ..... PLAINTIFF**

**AND**

**NATURES CHOICE FRESH PRODUCE ..... 1<sup>ST</sup> DEFENDANT**

**EXPORTERS LTD & ANOTHER ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion application dated 29<sup>th</sup> September 2022, brought under the provisions of; Order 10 Rule 11, Order 22 Rule 22(1) Order 45 Rule 1 of the Civil Procedure Rules, 2010, Section 1A,1B and 3A of the *Civil Procedure Act*, (Cap 21) Laws of Kenya, and any other enabling provisions of the law, the applicant is seeking for the following orders
  - a. Spent
  - b. Spent
  - c. That the Honourable Court be pleased to review and/or vary decree issued on the 16<sup>th</sup> September 2022
  - d. Spent
  - e. The Honourable court be pleased to issue any other orders that, it may deem fit, just and expedient in the interest of justice
2. The application is supported by the grounds on the face of it and the affidavit of even date sworn by Daniel Kamau Mburu, a director of the applicant. He avers that, on 27<sup>th</sup> September 2022, Ms Beafect Auctioneers acting on the respondent's instructions proclaimed the applicant's property pursuant to the warrants of attachment and sale issued by the court on 25<sup>th</sup> September 2022.



3. That the proclamation relates to recovery of disputed astronomical sum of Kshs 95,295,792, purportedly owed by defendant and guaranteed by the applicant. That, the entire execution process is pre-mature and irregular as the applicant on 16<sup>th</sup> September 2022, paid a sum of; Kshs 2,000,000 towards the actual debt amount of Kshs 67,770,041 as at 30<sup>th</sup> August 2022. Further sum of; Kshs 1,200,000 ordered to be paid as party/party, costs has already been paid.
4. That, the delay in remitting the 1<sup>st</sup> instalment was occasioned by events beyond the applicant's control as respondent took long to give its bank account details yet the bank required certain documents to process the remittance. Therefore, the delay was not deliberate.
5. Further at the time the decree was issued, the applicant had already paid the 1<sup>st</sup> instalment yet, the plaintiff did not disclose that fact to the court and neither did the plaintiff issue the mandatory notice of its intention to execute.
6. The applicant argues that, due to the non-disclosure of material facts, the respondent has soiled hands and should not be granted the orders sought. Furthermore, the respondent is claiming the entire principal sum lumped with unjustifiable compound interest.
7. That, the applicant still has time to settle the decretal sum and therefore the extraction of the decree is premature, illegal, unconscionable, unacceptable and amounts to unjust enrichment.
8. Further, the applicant is not able to raise the entire decretal sum at once and that is why from the onset, the parties negotiated payment by instalments. Furthermore, if the proclaimed goods are carted away, it will occasion disruption and inconvenience to the applicant's business and greatly embarrass it.
9. That, it will also compromise the applicant's ability to meet its loan obligations, with ripple effect that, the applicant will not be able to honour the instalments repayment herein and that, the applicant intends to continue honouring the payments.
10. That in the given circumstances the Honourable Court ought to grant stay of execution noting the balance of convenience overall tilts in favour of the Applicant, and if the respondent suffers any prejudice it can be compensated by way of costs.
11. However, the application was opposed vide a replying affidavit dated 6<sup>th</sup> October 2022 sworn by Benjamin G. Wainaina, an Advocate of the High Court of Kenya who has conduct of this matter on behalf of the plaintiff cum respondent.
12. He avers that, on 30<sup>th</sup> March 2022, the parties herein executed a consent settling this matter. That the consent terms were adopted as an order of the court on 16<sup>th</sup> May 2022. That upon the adoption thereof the court become functus officio. Further the consent is a binding contract between the parties and can only be set aside or varied if the threshold of varying a contract is satisfied.
13. That, on 15<sup>th</sup> September 2022, the Hon. Deputy Registrar issued a decree in conformity with the terms of the consent settlement. Therefore, there are no compelling reasons to review the decree. The respondent further argues that the law requiring a draft decree be approved by the other party is not mandatory, as the Civil Procedure Rules, 2010 uses the word "may" and failure to do so cannot be a ground to invalidate the decree.
14. Furthermore, the applicant has not stated in what manner the decree is defective, null and void. That, in terms of the consent, the applicant was to pay a sum of; Kshs 62,770,041 by monthly instalments of; Kshs 2,000,000 with effect from 30<sup>th</sup> August 2022 having been given a period of five (5) months before the commencement date. Therefore, the applicant had ample time to obtain the respondent's



bank account details. Even so, due to the business relationship between the parties, the applicant knew the respondent's bank account details.

15. That, the applicant having defaulted the entire outstanding amount became due in accordance with the consent terms and therefore execution followed. Thus as a result of default in payment of the 2<sup>nd</sup> instalment, execution followed. Further, prior to execution the applicant's lawyer was sent an email of the intended execution, but there was no response thereto. Therefore, the execution was not premature, irregular or is done in bad faith as alleged.
16. The respondent avers that, the interest reflected in the decretal sum is as per the consent entered into by the parties. That, the waiver of interest was conditional on payments made and agreed dates, therefore, the entire amount became payable.
17. That the issuance of the decree and warrants of attachment is a task undertaken by the Deputy Registrar and does not require the jurisdiction of the High Court. Further, the figure of, Kshs 1,200,000 not considered by the Deputy Registrar is an error which cannot vitiate the decree, as the applicant will be given a credit thereof.

Furthermore, the 2<sup>nd</sup> instalment was paid on 4<sup>th</sup> October 2022, instead of 30<sup>th</sup> September 2022. That, a sum of Kshs 5,200,000 has been paid leaving a balance of Kshs 90,095,791 as per the warrants of attachment and sale issued by the court.

18. Finally, the respondent argued that as the decree and warrants of attachment and sale were issued by the Hon. Deputy Registrar the matter should have been directed towards the Hon. Deputy Registrar and there is no need to reopen the closed file. That the jurisdiction of the court is not properly invoked.
19. The application was disposed of vide filing of submissions. The applicant in its submissions conceded that the consent dated 30<sup>th</sup> March 2022 as read in its definite terms was subject to execution and enforceability. However, in this case, execution was unnecessary and irregular as the applicant failed to make material disclosure the payments received. Further, that the applicant had complied with the terms of the consent by the time the plaintiff was commencing execution proceedings.
20. That it will be inequitable to enforce the impugned decree issued to the plaintiff/respondent as its validity has been put into question. Further, the amount of Kshs 95,295,792 is almost double the principal amount owed by the 1<sup>st</sup> defendant which stems from an unjustified compound interest.
21. Furthermore, the balance of convenience to set aside the impugned decree tilts in favour of the applicant as the plaintiff came to court with soiled hand in failing to make material disclosure of the payments received, and it had failed to notify the applicant of the intention to execute the consent judgment.
22. That a party that comes to equity with soiled hands should not be allowed to benefit and derive an advantage from such inequitable conduct and/or proceed further with execution of the irregular decree extracted. Reliance was placed on the case of Contractors Limited vs Margaret Oparanya (2004) eKLR, where it was that the court has conditional discretion to interfere with consent judgments and may refuse to enforce it where it would be inequitable to do so.
23. That the respondent is not barred from enjoying the fruits of the consent judgment but is only seeking to set aside as unjustifiable oppressive decree to allow the applicant to continue making payments as initially agreed by the parties' consent.
24. Further under Order 21 rule 12 courts can allow settlement of decretal sums if a judgment debtor is unable to pay a lump-sum amount and the application is brought in good faith, without delay and the



instalments were reasonable. Reliance was placed on Gas Link Limited vs Haven D. Mandarin T/A Everest Enterprises (2014) eKLR; Freight Flowers Limited vs Elsek & Elsek Limited (2012) eKLR and Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited (2014) eKLR.

25. That the applicant has approached the court with clean hands and has a genuine ground to have the court exercise its inherent discretion under section 3A of the *Civil Procedure Act* to vary the decree. That in *Patel vs E.A Cargo Handling Services limited* (1974) E.A. 75 it was held that the main concern of courts is to do justice and that a court will not impose on itself conditions to fetter the wide discretion it was given by the rules.
26. Further, the discretion is to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake and that the court should take whichever course appears to carry a low risk of injustice. The applicant relied on the case of; *Wachira Karani vs Bildad Wachira* (2016) eKLR and *Esther Wamaitha Njihia & 2 Others vs Safaricom Limited* (2014) eKLR where the courts stated that in exercising its discretion, a court's the fundamental duty is to do justice to the parties.
27. However, the plaintiff/respondent submitted that Order 45 rule 1 of the Rules, set circumstances under which a court can review its decree. That, in the instant application the applicant has failed to satisfy the conditions set out in the said provision and is only seeking review as it was unable to raise the decretal sum. Therefore, the application is an abuse of the court process and ought to be dismissed.
28. That the decree is a reflection of the judgment on record as agreed by the parties and therefore it is binding a contract between the parties. That, in order to vary the decree, the party applying ought to satisfy the threshold for setting aside a contract. Reliance was placed on the case of *Flora Wasike vs Destimo Wamboko* (1982 – 1988) 1 KAR 625
29. Further, for consent or judgment to be set aside, it must be proved that it was obtained by fraud or collusion; or by an agreement contrary to the policy of court; or if the consent was given without sufficient material facts; or misapprehension; or in ignorance of material facts; or for a reason which would enable a court to set aside an agreement and cited the decision of the Court of Appeal in *Brooke Bond Liebig v Mallya* 1975 E.A 266.
30. That the consent judgment was made in the presence of counsels and is thus binding on all parties and relied on the case of *Hirani v Kassim* (1952) 19 EACA 131. Further, while the court has power to set aside or review a consent decree, it can only do so on proof of grounds stated above which were never advanced by the applicant and therefore the application lacks merit.
31. At the conclusion of the hearing of the matter, I find that, there is no dispute that the parties herein entered into a consent settlement of the matter and adopted the same as the order of the court. However, I note and observe from the outset that, none of the prayers herein call upon this court to set aside that consent settlement and/or the resultant judgment. It seeks for setting aside or variation of the decree herein. In that regard I shall not delve into the argument advanced on the circumstances under which the court will set aside a consent judgment.
32. Be that as it were, the application herein has been brought under inter alia; Order 10, rule 11 of the Civil Procedure Rules (herein "the Rules), which relates to setting aside of judgment and states that;  

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just” (emphasis added)
33. However, it is noteworthy that, the subject judgment referred to in the afore provisions relate to; judgment entered into in default of appearance or filing of a defence, which is not the case herein.



34. The applicant has also cited Order 22 rule 22(1) of the rules which states that:

“ 22.

- (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto”.

35. Pursuant to the aforesaid the court herein has jurisdiction but the rule cited relates to a decree sent to another court for execution. That is not the case herein.

36. The respondent has argued that, the matter herein falls under Order 45 Rule 1 of the Rules which states as follows:

“ 1.

- (1) Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.



37. In the given matter the court is not invited to review the judgment. Be that as it may, the issue herein is the process the plaintiff/respondent employed in execution of the consent judgment. In that regard Order 21 rule 8 (2), (3) of the Rules states that:

- “(1) A decree shall bear the date of the day on which the judgment was delivered.
- (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.
- (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.
- (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
- (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 111cc 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”.

38. The afore provisions gives this court the jurisdiction to hear and determine any disagreement over a draft decree. In the instant matter the plaintiff/respondent did not accord the respondent an opportunity to approve or reject it and that is why the provisions of sub rule 4 were not invoked.

39. Further, although the plaintiff/respondent argues that the requirement to submit the draft decree for approval is discretionary I find that the use of the word “may” refers to the preparation of the draft decree and not submission to the other party. Even then it is conceded that the subject decree herein did not take into account all the sums paid by the applicant and therefore the execution cannot proceed.

40. In that regard I make the following orders:

- a. The plaintiff/respondent shall within seven (7) days of the date of this order serve the applicant with a draft decree for approval or otherwise;
- b. The respondent shall approve or reject it within seven (7) days of the service thereof.
- c. The status quo shall be maintained within the fourteen (14) days.

41. Those then are the orders of the court



**DATED, DELIVERED AND SIGNED ON THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of;

Mr. Gikaria for the applicant

Mr Wainaina for the respondent

Ms Ogutu: Court Assistant

