



**Simon Ngomonge t/a Dollar Auctions v Rafiki Microfinance Bank
Limited (Miscellaneous Commercial Application E294 of 2022)
[2023] KEHC 17519 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS COMMERCIAL APPLICATION E294 OF 2022**

DAS MAJANJA, J

MAY 19, 2023

BETWEEN

SIMON NGOMONGE T/A DOLLAR AUCTIONS APPLICANT

AND

RAFIKI MICROFINANCE BANK LIMITED RESPONDENT

RULING

1. By the application dated March 6, 2023, the applicant seeks to review and or set aside the ruling delivered on February 17, 2023 and all consequential orders and in place allow his application dated July 27, 2023. The application is supported by his own affidavit sworn on March 6, 2013 and opposed by the Respondent through the replying affidavit of its officer, Stella Mbuli, sworn on April 12, 2023. The parties' advocates made brief submissions in support of their respective positions.
2. The ruling dated February 17, 2023 dismissed the application dated July 27, 2022 in which the applicant sought judgment for Kshs. 3,206,999.19 being fees certified by the Deputy Registrar following taxation of his Bill of Costs dated April 14, 2022. The reasons the court dismissed the application is that by the time execution took place, there was an order for stay in force. The court therefore concluded that the execution which gave rise to the Bill of Costs was irregular in the face on order of stay with the result that the applicant was not entitled to fees for the process.
3. The Applicant now submits that order was given in error and that there is an error apparent on the face of the record warranting review of the dismissal order in terms of section 80 of the *Civil Procedure Act* and Order 45 rule 1 and 2 of the *Civil Procedure Rules*. Both parties agree that on March 23, 2021 in



the subject suit, HC COMM No. 384 of 2016, Youth Enterprise Development Fund Board v Rafiki Microfinance Bank, Tuiyott J., made the following order:

Prayer 2 of the respondent's application is granted in the interim on condition that the defendant (respondent herein) shall deposit a bank guarantee for the entire decretal sum with a credible bank other than itself within Twenty One (21) days from the date hereof, failure to which execution shall issue.

4. It is clear from the aforesaid order that it automatically lapsed on April 13, 2021 whereupon the plaintiff in the primary suit was entitled to proceed with execution. At paragraph 7 of the replying affidavit, the Respondent admits that it did not comply with the timelines imposed by the court and in that regard states that, "there were delays in the process of obtaining the said Guarantee due to change of leadership at the institution during that period"
5. However, the application and process of execution did not take place within that time, it took place on August 31, 2021 by which time the respondent had filed an application for extension of time to file the Guarantee as ordered and the Guarantee had been furnished on April 15, 2021. Since the Guarantee had been provided and was accepted, the plaintiff in that case is deemed to have accepted compliance with the orders of stay and the condition issued by the court.
6. While I accept that there is an error in the ruling stating that the orders staying execution issued on March 31, 2021 were still in force at the time of the proclamation of the respondent's moveable properties, I decline to review the decision for the reason that once the Guarantee had been granted and accepted there was no reason to proceed with execution.
7. I therefore dismiss the application dated March 6, 2023 but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Muriuki instructed by Morara Apiemi and Nyangito Advocates for the Applicant.

Ms Msando instructed by Prof. Tom Ojienda and Associates Advocates for the Respondent.

