



REPUBLIC OF KENYA



**Techno-Economic Co-operation Ltd v Kigwe Complex Limited (Civil Case 464 of 2012)
[2023] KEHC 17285 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 464 OF 2012**

A MABEYA, J

MAY 12, 2023

BETWEEN

TECHNO-ECONOMIC CO-OPERATION LTD PLAINTIFF

AND

KIGWE COMPLEX LIMITED DEFENDANT

RULING

1. This is a ruling on a Motion on Notice dated March 28, 2023 by the defendant. The same was brought under Article 40, 50 and 159 of the Constitution, Section 1A, 1B, 3A, 44 and 64 of the Civil Procedure Act and Order 22 Rule 6 and Order 51 Rule of the Civil Procedure Rules and Rule 6 and 11 of the Auctioneers Rules 1997.
2. Prayer numbers 2 and 4 thereof were to the effect that pending the hearing and determination of the Motion, there be a stay of further execution on condition that the defendant deposits in Court a sum of Kshs 35 million. Those two are spent as the Court chose to hear the main prayer and deliver this ruling before the auction date.
3. The background to the application was that the defendant's property had been proclaimed and advertised for sale on May 15, 2023. The only prayer left is for the setting aside and lifting of the notification of sale dated March 10, 2023 by M/S Upstate Kenya Auctioneers.
4. The grounds for the application include that the plaintiff commenced the execution process by way of notification of sale of property known as LR No 152972/2 (Certificate of Title No IR 209943 Area size 0.8049 ha-Thika Road) ('the property'). That the notification of sale sought to satisfy a decretal amount of Kshs 62,697,352.31 which was a huge sum due to interest. That the decree was obtained more than a year ago in violation of Order 22 Rule 18 of the Civil Procedure Rules.



5. It was averred that the proclamation for sale on May 5, 2023 was unlawful, null and void as the auctioneer did not explain how he had arrived at Kshs 62,697,352.31. That the interest computation on the figure Kshs 62,697,352.31 consists of time barred interest making the entire proclamation unlawful.
6. That the summation of interest by the plaintiff was legally wrong as it purported to calculate interest from over 6 years contrary to the *Limitation of Actions Act*. That therefore the interest would only be recoverable up to the year 2019. That unless the execution is stayed as prayed, the defendant is likely to suffer irreparable loss as the plaintiff may successfully sell the suit property worth Kshs 280,000,000/= on the basis of an unlawful decretal amount of Kshs 62,697,352.31.
7. In opposition to the application the plaintiff filed a replying affidavit sworn on April 14, 2023 by Mr Fan Bo, its Managing Director.
8. He averred that the rate of interest on the judgment debt and when it should start running was determined by this Court in its judgment dated May 30, 2019. That the challenge to the procedure followed by the auctioneer in execution and allegations of illegality and irregularity of the decree were determined by this court in its ruling of May 26, 2022.
9. Further, that judgment in this matter was delivered on May 30, 2019 which is 3 years and 11 months ago and not 6 or 12 years as alleged by the defendant. That contrary to the allegation by the defendant, the property would not be sold at a throw away price but at the price reserved by the Court appointed valuer. That it is the Court and not the auctioneer or the plaintiff who determined the judgment debt and accrued interest.
10. It was contended that judgment was delivered on May 30, 2019 and the current application was being brought four years after judgment, two years after the first notification sale and after the Court had made four orders giving the execution process the green light. That therefore, the application cannot be said to have been made expeditiously.
11. That the defendant is bound by the consent order of *28/22/2022* and cannot raise any new issues challenging the same process and the amounts consented thereto. That the judgment debt and interest became due and payable on May 30, 2019 when the Court delivered its judgment which was 3 years, 11 months at the time of filling the replying affidavit.
12. That the application for execution was made on September 3, 2020 for the decree of July 16, 2019. That the delay in applying for execution was caused by the defendant's applications for adjournments which were granted five times.
13. I have considered the rival contestations and the submissions on record. The issue for determination is whether the Court should set aside and lift the Notification of Sale dated March 10, 2023 by M/S Upstate Kenya Auctioneers.
14. The graven of the defendant's complaint is that, the amount being executed for is excessive as judgment was for slightly over Kshs 25 million, that the interest levied is illegal for exceeding 6 years and finally that the decree is more than 1 year and there was no Notice to Show Cause.
15. Judgment, in this matter, was entered on May 30, 2019 as follows: -
 - ' a) Kshs 8,560,150.90 with interest at court rate from 4th January 2012 until payment in full.



- b) Kshs 17,339,150.70 with interest at court rate from May 23, 2012 until payment in full.
 - c) Costs of the suit and costs of the Defendant's counter claim.'
16. The amount sought to be executed for as per the Notification of Sale dated March 10, 2023 was Kshs 62,697,352.31. That constitute the principal sum, interest thereon and the costs of the suit and counterclaim.
 17. The defendant argued that the interest levied was exorbitant and violated section 4(4) of Limitations of Actions Act which stipulates that interest recoverable from a debt should not exceed 6 years. Based on this, the defendant contended that the proclamation was unlawful and void.
 18. On its part, the plaintiff contended that the rate and duration of interest was determined by the Court in the judgment itself. That the issues raised in the present application had already been dealt with in previous rulings of this Court and the Consent Order of November 28, 2022.
 19. Section 4(4) of the *Limitation of Actions Act* provides: -

'An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.'
 20. In this case the judgment debt and interest upon it became due on May 30, 2019 when the court issued its judgment. That is the on which the right to charge interest on the decretal amount arose. It does not matter that the Court specified that the commencement date was prior to the date of judgment. From the record, it is clear that the deputy registrar of this Court calculated the interest due in accordance with the decree, at court rate.
 21. As at the time the present application was made, the same was a few months shy of 4 years which is well under the 6 years limitation provided under the Limitations of Actions Act.
 22. In this regard, the allegation that the interest charged was unlawful or illegal does not lie. The plaintiff is well within the law to seek recovery of the amount notified in the Notification and Proclamation.
 23. Further, the record will show that on November 28, 2022, the parties entered into a Consent whereby they agreed, inter-alia, to have the suit property sold, to have a court-appointed valuer carry out the valuation of the property and that the executable amount would be Kshs 54,769,731.82, which amount did not include the interests and costs which were yet to be determined. The defendant cannot now turn around to challenge the process already agreed upon.
 24. On the issue that the decree was more than a year and a Notice to Show Cause should have been issued, it is clear from the record that the process of execution has been on going since 2020. There has been three other rulings on execution and the Court had cleared that process. It is worthy to note that the parties even appeared before the deputy registrar and agreed on the settlement of terms of sale.
 25. Accordingly, it cannot be argued that the process of execution is now illegal at its tail end. That contention is rejected.



26. For the foregoing reasons, I find that the Notification of Sale dated March 10, 2023 is valid. That the application has no merit and is therefore dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

