



**Shah & another v Fidelity Commercial Bank Ltd & 2 others; Fantasy Auctioneer
(Auctioneer) (Civil Case 212 of 2011) [2023] KEHC 20393 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 212 OF 2011
DKN MAGARE, J
JULY 17, 2023**

BETWEEN

MAHENDRAKUMAR CHANDULAL SHAH 1ST PLAINTIFF

KIRTIBALA MAHENDRAKUMAR SHAH 2ND PLAINTIFF

AND

FIDELITY COMMERCIAL BANK LTD 1ST RESPONDENT

KEYSIAN AUCTIONEER 2ND RESPONDENT

ARYAN LIMITED 3RD RESPONDENT

AND

FANTASY AUCTIONEER AUCTIONEER

RULING

1. The matter came before me for hearing of the application dated April 14, 2023 and main issue was that the cases were consolidated. They then required award of costs in both matters.
2. The Applicant posits that the subject matter is Kshs 141,866,459.55. The subject matter is to be obtained from the pleadings, Judgment or other compromise. The Court gave one consolidated Judgment for 26,556,347.00. The judgment was between defendants were not in both suits. Initially the suit No 212 of 2011 had only Fidelity Commercial Bank as the only defendant and the 1st Defendant s the plaintiff.
3. The 3rd defendant was introduced into 212 of 2011 upon consolidation with 130 of 2012. The 3rd defendant was a plaintiff in that matter There were no costs ordered against the Plaintiff in the original 2212 of 2011. That is Mahendra Kumar Shah and Kirtibala Mahendrakumar Shah. They are the ones



that sued the 3rd Defendant. The questions the court dealt with are same issues with were in a two different suits.

4. I am unable to agree that one is entitled to two sets instruction fees in two suits. In [*Arnold Kipkirui Langat v Atticon Limited & 7 others \[2021\] eKLR*](#) the court, A MABEYA, FCI Arb, stated as doth; -

' 28. The jurisdiction to consolidate suits is donated by order 11 Rule 3 of the Civil Procedure Rules. In Prem Lala Nahata & Anor vs Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551, the India Supreme Court held:-

'It cannot be disputed that the Court has power to consolidate suits in appropriate cases. The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.'

5. Once consolidated, the two suits become one action. The court did not award costs separately for each of the primary suits but for a consolidated suit. The purpose of consolidation is essentially to save costs among other reasons. In *Arnold Kipkirui Langat v Atticon Limited & 7 others [supra]*, the court continued: -

29. In [*Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others \[2014\] eKLR*](#), the Supreme Court of Kenya held: -

'The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.'

30. In [*Nyati Security Guards & Services Ltd vs Municipal Councilk of Mombasa \[2000\] eKLR*](#), the court held: -

'The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where: -

- a. Some common questions of law or fact arises in both or all of them.
- b. The rights or reliefs claimed in them are in respect of the same transactions;
- c. For some other reasons, it is desirable to make an order for consolidating them.'

31. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation. Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the [*Civil Procedure Act*](#), Cap 21 Laws of Kenya. See [*John Gakure & 148 Others vs Dawa Pharmaceuticals Company Ltd CA 299 of 2007*](#).'

6. Consolidation therefore avoids multiplicity of suits by creating one single suit. I am therefore of the view that the court correctly dealt with the question of instructions. In any case, if the court wished to have two sets of costs given, nothing could have been harder than to say it. The court specifically



awarded costs of the suit. I will however, not address the aspect whether this ‘reference’ is properly before me.

7. Costs are discretionally and as such the court ought to have awarded the two sets if it thought a party deserves the same. It cannot be presumed that the court will have given the same. Section 27 of the [Civil Procedure Act](#) states as doth: -

’ 27. Costs (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.’

8. In [Kenya Universities Staff Union & 7 others v Paul Odhiambo Gaya & another \[2019\] eKLR](#), the court stated as doth: -

’ In the case of Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR the Court stated that:

’Where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong.’

15. Was the reason given good reason in the sense of the law as to support departure from the general rule on costs? Or was the discretion exercised on wrong principles or capriciously?

9. Secondly, the final award was Kshs 26,556,349. This is the basis for instruction fees. The rest of the items are within the discretion of the Taxing Master. Once the Taxing Master exercises discretion, then this court can only interfere. If the same was not judiciously exercised I do not find any misdirection. In the case of [University of Nairobi & another v Moses \(Civil Appeal 119 of 2020\) \[2022\] KECA 45 \(KLR\)](#) (4 February 2022) (Judgment), the court of appeal stated as doth; -

’ On the mode of exercise of the mandate of the court in determining an application of the nature that the Judge was confronted with, the Judge took into consideration the holding in the case of First American Bank of Kenya vs Shah and Others [2002] EACA 64 that a court has no mandate to interfere with a Taxing Master’s decision on taxation unless it is shown that either the decision was based on an error of principle or the amount awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. The case of Joreth Ltd vs. Kigano & Associates [2002] 1 EA 92 was cited for the holding, inter alia, that a Taxing Master in assessing costs to be paid to an advocate on a bill of costs exercises judicial discretion and that such judicial discretion can only be interfered with where there is demonstration that the discretion was exercised capriciously and or in abuse of proper



application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive as to amount to an error in principle.'

10. I find nowhere where the taxing master abused her powers in taxing. The award is also not excessive or inordinately low. I have no basis to interfere with that discretion. I cannot find any merit in the Application dated April 4, 2023. Consequently, I dismiss as the application dated April 4, 2023.

Judgment Debtor's Application

11. There is also an application dated April 1, 2023. The application seeks the following orders: -
- i. That the instant Application be certified as urgent, service thereof dispensed with and heard ex-parte.
 - ii. That pending the inter-parties hearing of this Application this Honourable Court be pleased to grant an order of stay of execution of the Decree dated March 29, 2023 and the Proclamation Notice dated 30th March and all consequential proceedings arising therefrom.
 - iii. That pending hearing and determination of this Application this Honourable Court be pleased to grant an order of stay of execution of the Decree dated March 29, 2023 and the Proclamation Notice dated March 30, 2023 and all consequential Orders arising therefrom.
 - iv. That this Honourable court do and hereby order that the decree dated March 29, 2023 and the Proclamation Notice dated March 30, 2023 be and is hereby set aside.
 - v. That any auctioneer's costs chargeable in any execution process in this matter be computed strictly in accordance with the *Auctioneers Act*.
 - vi. That the Honourable Court be pleased to direct that any Decree arising from the judgment of the Honourable PJ Otieno dated May 25, 2022 be drawn in accordance with the judgment and that any computation of the interest on the Judgment sum be done on a simple interest basis.
 - vii. That this Honourable Court do make such other order (s) as it is may deem fit, fair and just in the circumstances in the interest of justice.
 - viii. That the costs of this Application be provided for.
12. The main issue is Decree Holder has executed a decree on basis of compound interest.
13. The same come to Kshs 105,180,119.70 and auctioneer's costs of Kshs 12,680,000/=. The respondent indicates that the same is a proper execution. I note that order 21 Rule 8 requires that a decree be settled by parties. It provides as follows: -
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 subrules 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 like 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.
14. This was not done. Therefore, the Decree of Kshs 105,180,119.20 was erroneously issued. The order of the court only gave the basis for interest never asked that the same be compounded. Under Section 26 of the *Civil Procedure Act*, it is the court that can grant leave for interest on interest to be accorded at 6%. It states as doth: -
- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 - (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.'
15. The court has not done so. Therefore, I set aside the decree drawn and direct that the same be drawn on simple interest basis upto the date of payment, which was within 21 days of my order of April 3, 2023.
16. The said amount cannot attract interest. Regarding the auctioneers' charges, I note that they executed on basis of an irregular order. However, it was not void but voidable. They helped the decree holder to recover Kshs 26,556,347. They are entitled to be paid. However, they should have their costs taxed. The auctioneers should file their bill of costs for taxation. The instruction fee should be on that basis of Kshs 26,556,347 recovered.
17. In any case this was still the basis for instructions. Instruction fees is always on that subject matter not on interest upon it. The instructions will always be. To recover Kshs 26,556,347/= together with interest. Luckily for some parties they did not recover interest. Therefore, the issue is moot.
18. 59 million was not the subject matter. It was the nullity. Nothing could be built on a nullity. The final award is the subject matter. Consequently, I find as follows: -
- a. The decree was improperly extracted.
 - b. The Deputy Registrar to settle the decree on the basis of 13% simple interest from the date of filing for the sums awarded under paragraph Kshs 26,556,347/=
 - c. General damages, if any shall have interest computed at 12% from May 22, 2022.



19. The prevailing commercial rates appear to have been settled at 12%. This is the rate both parties agree. However, there was not a loan to the 1st defendant and as such interest is not to be compounded daily and applied monthly.
20. The commercial rate is simply the rate of interest to be applied. This also does not change. The judgment crystalized on May 22, 2022. The prevailing rate of interest on the day of judgment is 13%. That is the rate of interest to be applied till the day of payment in April 2023 from May 22, 2022.

Determination

21. In the end I make the following orders: -
 - a. The application by the decree holder dated April 4, 2023 is dismissed with costs of 30,000/= to the judgment debtor to be deducted from the unpaid interest.
 - b. The application dated April 1, 2023 by the judgment debtor is allowed in the following terms.
 - c. The Decree extracted herein is hereby recalled. The party to settle on the decree as follows: -
 - i. The sum of Kshs 26,556,347 is to attract interest at prevailing interest rate, that is, as at May 22, 2022, which is 13%. The said interest is on a simple interest basis
 - ii. The decree holder has not sought and has not been granted leave under Section 26 of the *Civil Procedure Act*, to charge 6 % interest upon interest. There is no basis whatsoever, for charging compound interest.
 - d. The Auctioneers costs of Kshs 12,680,000 are set aside. The auctioneer to file a bill of costs to tax costs between them and the 1st defendant on the basis of the sum recovered of Kshs 26,556,347
 - e. The 1st Defendant shall pay the bill of costs only upon taxation.
 - f. The 1st Defendant to have costs of 40,000/= for the said application deductible from the interest due.
 - g. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 17TH DAY OF JULY 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Odongo for the 1st Defendant

Mr Ochieng for the Plaintiff

N/A for the 3rd Defendant

Court Assistant - Brian

