



**Nur v Transami (Kenya) Limited & another (Commercial Case 267 of 2005)
[2023] KEHC 24511 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 267 OF 2005
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

ABDI ALI NUR PLAINTIFF

AND

TRANSAMI (KENYA) LIMITED 1ST DEFENDANT

KOBIL PETROLEUM LIMITED 2ND DEFENDANT

*(Being an Appeal from the ruling of Hon. S. Githogori, Deputy Registrar,
delivered on 1st November, 2021 in HCCOMM No. 267 of 2005)*

JUDGMENT

1. This appeal was filed under the provisions of Order 49 Rule 7(2) of the Civil Procedure Rules. The 2nd defendant is the appellant herein. For ease of reference, the parties shall be referred to by the same titles they had in HCCC No. 267 of 2005. The 2nd defendant through its Advocates on record filed execution proceedings against the 1st defendant on 22nd March, 2021, whereupon a Notice to Show Cause dated 30th July, 2021 was issued against the 1st defendant requiring it to show cause why its properties should not be attached for failure to pay costs taxed in HCCC No. 267 of 2005 and HCCC No. 657 of 2003. In opposition to the said Notice to Show cause, the 1st defendant filed a replying affidavit sworn on 8th July, 2021 by Maurice Lugadiru, the Senior Legal Officer of the 1st defendant company.
2. In its affidavit, the 1st defendant averred that the plaintiff filed this suit against the defendants in the year 2005 and the plaintiff's suit against the 2nd defendant was dismissed on 24th October, 2005. The 1st defendant further averred that on 27th May, 2008, it sought leave to issue a third-party notice to join the 2nd defendant as a third-party to the proceedings which leave was allowed, however vide an application



- dated 8th October, 2008, the third party (the 2nd defendant herein) sought for orders striking out the third-party notice.
3. The Court allowed the said application and issued an order striking out the third-party notice with costs. The third-party then proceeded to tax its costs, which were taxed at Kshs.476,775.00 and paid by the 1st defendant through its Advocates on record Kaplan & Stratton Advocates on 3rd September, 2012 vide cheque No. 980503. The 1st defendant asserted that it had fully met its obligation and liability to the third-party (the 2nd defendant herein) and was fully discharged from any liability.
 4. It was stated by the 1st defendant that the plaintiff's suit was ultimately determined in favour of the plaintiff against the 1st defendant vide a judgment dated 29th October, 2010. The 1st defendant being dissatisfied with the said judgment, lodged Civil Appeal No. 164 of 2014 at the Court of Appeal. The 1st defendant stated that pending the hearing and determination of the said appeal, it deposited Kshs.36,322,675.90 being the decretal sum, costs and interests at CFC Bank Limited in the joint names of the plaintiff's and the 1st defendant's Advocates as security, pursuant to an order issued by this Court on 9th February, 2012.
 5. The 1st defendant also stated that Civil Appeal No. 164 of 2014 was compromised vide a consent dated 12th April, 2016 which was adopted as an order of the Court on 16th June, 2016, thus liquidating the money deposited by the 1st defendant at CFC Stanbic Bank as agreed between the plaintiff and the 1st defendant. The 1st defendant concluded that from the foregoing, it is not a judgment debtor to the 2nd defendant to warrant execution against it by way of attachment and sale of its property. Nevertheless, even if the 2nd defendant was entitled to attach the decree issued in this matter against the 1st defendant in favour of the plaintiff, it lost its opportunity to attach the said decree by its indolence and non-compliance with the provisions of Order 22 of the Civil Procedure Rules, 2010 and cannot now seek to execute against the 1st defendant.
 6. In a rebuttal to the 1st defendant's averments, the 2nd defendant filed an affidavit sworn 30th July, 2021 by Felix Ng'ang'a Karanja, learned Counsel for the 2nd defendant. Counsel averred that the parties herein got into a consent on 23rd July, 2021 to the effect that the decree issued in favour of the plaintiff as against the 1st defendant be attached to satisfy the costs of Kshs.355,831.00 awarded to the 2nd defendant on 3rd March, 2009 in this suit and the costs of Kshs.209,210.00 awarded to the 2nd defendant on 28th July, 2006 in HCCC No. 657 of 2003. That the said consent was subsequently adopted as an order of the Court. He deposed that the 1st defendant was legally obligated to pay to the 2nd defendant its full costs which are not in dispute, before releasing the decretal amount to the plaintiff but it failed to do so.
 7. Counsel for the 2nd defendant contended that the Court file in this matter went missing sometime in the year 2012 thus they were unable to extract the orders made by Judge Ogola in the said year. That they were only able to extract the said orders in the year 2018 which were issued by the Court on 9th March, 2018 after the original Court file resurfaced. Counsel for the 2nd defendant deposed that it is evident from the 1st defendant's affidavit sworn on 8th July, 2021 that payment of Kshs.30,000,000/= was made by the 1st defendant to the plaintiff on 26th June, 2016 in total disregard of the Court Order issued by Judge Ogola on 23rd July, 2012 and the 2nd defendant who was also excluded from the negotiations and notification of time of payment.
 8. From the Court record, the Deputy Registrar dismissed the 2nd defendant's Notice to Show Cause dated 30th July, 2021 with costs to the 1st defendant vide a ruling dated 1st November, 2021. Being dissatisfied with the said decision, the 2nd defendant filed a Memorandum of Appeal dated 16th November, 2021 raising the following grounds of appeal -



- i. The learned Deputy Registrar erred in principle and misdirected herself in dismissing the Kobil's Notice to Show Cause against the first defendant;
 - ii. The learned Taxing Master having accepted that on 23rd July, 2012 an order was made by consent of the plaintiff, first defendant and Kobil, attaching the decree herein in favour of the plaintiff, failed to appreciate that this order was made pursuant to an application by Kobil under Order 22 Rule 47 (i) (a) of the Civil Procedure Rules ("CPR"), and not any other provisions of law;
 - iii. The learned Deputy Registrar failed to appreciate that this binding consent order has never been set aside, and is still in force;
 - iv. The learned Deputy Registrar misdirected herself in holding that Kobil was a holder of a garnishee order as against the first defendant;
 - v. The learned Deputy Registrar failed to appreciate that Kobil was deemed to be a representative of the decree holder under Order 22 Rule 47(3) of CPR;
 - vi. The learned Deputy Registrar failed to appreciate that under Order 22 Rule 47(3) of CPR, Kobil was further authorized to execute the attached decree in any manner lawful for the decree holder thereof;
 - vii. The learned Taxing Master erred in law by holding that the first defendant stood discharged from its obligation to make payment to Kobil, by making payment of the attached amount to the plaintiff, when the aforementioned attachment was still in force, and without knowledge or consent of Kobil; and
 - viii. The learned Taxing Master failed to appreciate that under Order 22 Rule 47 (7) of CPR any payment or adjustment made by the first defendant, with knowledge of the said attachment order (made by consent), is not recognized so long as the attachment order remains in force.
9. The 2nd defendant's prayer is for this Court to set aside the ruling delivered by the Deputy Registrar on 1st November, 2021, allow the 2nd defendant's application to execute the decree to proceed and award costs of this appeal as well as costs of the proceedings before the learned Deputy Registrar to the 2nd defendant.
 10. The appeal herein was canvassed by way of written submissions. The 2nd defendant's submissions were filed by the law firm of Esmail & Esmail Advocates on 1st March, 2023 and 18th May, 2023 while the 1st defendant's submissions were filed on 6th April, 2023 by the law firm of Kaplan & Stratton Advocates.
 11. Mr. Esmail, learned Counsel for the 2nd defendant submitted that the learned Deputy Registrar fell into serious error when she held that the applicant submitted that the debt was attached pursuant to Order 23 Rule 1 of the Civil Procedure Rules, 2010. He stated that to the contrary, the 2nd defendant's submissions before the learned Deputy Registrar were that the judgment (and decree that followed) given in favour of the plaintiff against the first defendant was attached pursuant to the provisions of Order 22 Rule 47 (1) (a) of the Civil Procedure Rules, 2010.
 12. He cited the provisions of Order 22 Rule 47(3) of the Civil Procedure Rules, 2010 and stated that after the 2nd defendant attached the decree issued to the plaintiff, it was entitled to execute the decree as a representative of the decree holder. Counsel further cited the provisions of Order 22 Rule 47(7) of the Civil Procedure Rules, 2010 and submitted that since both the plaintiff's and the 1st defendant's Advocates had full knowledge of the attachment order, payment of the decretal sum to the plaintiff



- by the 1st defendant to the exclusion and/or without reference to the 2nd defendant is not only in breach of the attachment order but is also not recognized thus the 1st defendant remains liable to the 2nd defendant.
13. Mr. Oyoo, learned Counsel for the 1st defendant submitted that in this case, the 2nd defendant is purporting to execute against the 1st defendant for costs awarded to the 2nd defendant against the plaintiff, but the 1st defendant is not a judgment debtor to the 2nd defendant as it settled the decretal sum of Kshs.476,775.00 in respect of the costs taxed in favour of the 2nd defendant against it. He further submitted that the purported order attaching the decree in favour of the plaintiff against the 1st defendant does not make the 1st defendant liable to pay costs awarded to the 2nd defendant against the plaintiff and it does not permit personal execution against the 1st defendant's property.
 14. Counsel for the 1st defendant referred to the provisions of Order 23 Rule 1(1) of the Civil Procedure Rules, 2010 and the case of Maurice M. Munya & 148 others (suing on their own behalf and on behalf of the other members of beneficiaries of the Kenya Ports Authority Pension Scheme affected by the averaging of the Pensionable Salary and freezing of the Pensionable House Allowance (pursuant to the Order made by the Honourable Justice Maraga J on the 28th November, 2007 v CFC Stanbic Bank Limited (formerly Stanbic Bank of Kenya Limited) [2019] eKLR and stated the 2nd defendant's recourse for recovery of its costs awarded against the plaintiff if any, is against the plaintiff and not the 1st defendant.
 15. The 1st defendant's Counsel contended that having settled the 2nd defendant's costs as against it and as the decree issued in favour of the plaintiff against the 1st defendant was settled in the year 2016, the 1st defendant has no liability whatsoever towards the 2nd defendant or the plaintiff and any threatened execution against the 1st defendant's property is unlawful, Mr. Oyoo relied on the Court's holding in the case of David Njuguna Ngotho v Family Bank Limited & another [2018] eKLR. He stated that in any event, the order issued on 9th March, 2018 is questionable since the proceedings of Justice Ogola show that one Muriithi appeared for both the plaintiff and the 1st defendant but, there is no such Mr. Muriithi in the employment of the 1st defendant's Advocates on record. Counsel cited the case of Landmark Holdings Limited v Robert Macharia Kinyua [2018] eKLR and stated that the said consent order was never forwarded to the 1st defendant for approval before it was extracted.
 16. Mr. Oyoo indicated that the demand for payment of Kshs.209,210.00 and Kshs.355,821.00 was made more than two years after settlement of the dispute between the plaintiff and the 1st defendant and after liquidation of the deposit in respect to the decretal sum which was done on 22nd June, 2016. He stated that for the said reason, the 2nd defendant is guilty of inordinate delay and the order attaching the decree issued against the 1st defendant in favour of the plaintiff was extracted more than six years after the order was made thus coming too late in the day, as the decree it was seeking attachment of, was settled way back in the year 2016.
 17. Counsel contended that the fact that the Court file went missing did not preclude the 2nd defendant from forwarding a draft order for the 1st defendant's approval. To this end, he relied on the decisions in James Kanyiita Nderitu v Attorney General & another [2013] eKLR and Peter Kuria Wanyoike v Barclays Bank of Kenya Limited [2020] eKLR. It was submitted by Counsel for the 1st defendant that the 1st defendant was never served with the order issued on 9th March, 2018 as required under Order 22 Rule 47(6) of the Civil Procedure Rules, 2010. In conclusion, Mr. Oyoo contended that there is no amount held by the 1st defendant on which execution can issue as purported by the 2nd defendant.



18. In a rejoinder, Mr. Esmail submitted that the 2nd defendant did not apply for, and that no order was made on 23rd July, 2012 or on any other day pursuant to the provisions of Order 23 of the Civil Procedure Rules, 2010 attaching the debt due to the plaintiff. He further submitted that the 1st defendant has not cross-appealed against the learned Deputy Registrar's finding that the decree issued in favour of the plaintiff was attached by consent on 23rd July, 2012. In addition, he stated that no evidence had been placed before this Court by the 1st defendant that it did not receive notice from the Court and/or that it was not aware of the attachment order.
19. It was stated by Counsel that the 2nd defendant had no obligation to send any notice of attachment to the 1st defendant as it was for the Court to do so. He also stated that the 1st defendant was fully aware of the attachment of the decree issued in favour of the plaintiff against the defendant since the consent order was made in the presence of and with approval of the 1st defendant's Advocate. Mr. Esmail further stated that in regard to the allegations made by the 1st defendant on inordinate delay, the issue is res judicata having been dealt with by Lady Justice Chepkwony, and delay cannot affect enforcement of the 2nd defendant's legal right. He relied on the case of D.T. Arap Moi v Mwangi Stephen Muriithi [2014] eKLR and asserted that the contents of paragraphs 16, 25, 26 and 27 of the 1st defendant's submissions are not supported by any evidence because they are false and they have been made deliberately to mislead the Court. Counsel contended that the averments contained therein cannot be brought in submissions, as submissions cannot take the place of evidence.

Analysis And Determination.

20. I have re-examined the entire record and given due consideration to the written submissions by the parties' respective Counsel. The instant appeal challenges the exercise of discretion by the Deputy Registrar. The 2nd defendant is of the view that the learned Deputy Registrar misdirected herself in dismissing the 2nd defendant's Notice to Show Cause dated 30th July, 2021. The legal parameters for the exercise of judicial discretion by an appellate Court were considered by the Court in the case of Shah v Mbogo [1968] EA 93 as hereunder -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”
21. It is worth noting that the 2nd defendant was awarded costs against the 1st defendant when the Court dismissed the third-party notice that had been issued joining the 2nd defendant as a third-party to the proceedings. It is not disputed that the 1st defendant paid the said costs which were taxed at Kshs.476,775.00 to the 2nd defendant through its Advocates on record, Kaplan & Stratton Advocates, on 3rd September, 2012 vide cheque No. 980503.
22. The costs that the 2nd defendant seeks to execute against the 1st defendant were awarded to the 2nd defendant against the plaintiff. The 2nd defendant averred that it filed two applications seeking to attach the decree issued in favour of the plaintiff as against the defendant in this suit in satisfaction of its costs of Kshs.355,831.00 issued on 3rd March, 2009 and costs of Kshs.209,210.00 issued on 28th July, 2006 in HCCC No. 657 of 2003. When the two applications came up for hearing before Judge Ogola on 23rd July, 2012, the parties herein got into a consent wherein it was agreed that the decree issued in favour of the plaintiff as against the 1st defendant be attached to satisfy the costs of Kshs.355,831.00 awarded to the 2nd defendant on 3rd March, 2009 in this suit and the costs of Kshs.209,210.00 awarded to the



- 2nd defendant on 28th July, 2006 in HCCC No. 657 of 2003. This consent was subsequently adopted as an order of the Court.
23. The 2nd defendant submitted that in total disregard of the aforementioned consent, the plaintiff and the 1st defendant vide a consent dated 12th April, 2016 and adopted as an order of the Court by the Court of Appeal on 16th June, 2016, compromised Civil Appeal No. 164 of 2014 thus liquidating the sum of Kshs.36,322,675.90 which had been deposited as security for stay of execution pending the hearing and determination of the said appeal. The said amount had been deposited by the 1st defendant at CFC Bank Limited in the joint names of the plaintiff's and the 1st defendant's Advocates.
24. It was stated by the 2nd defendant that since both the plaintiff's and the 1st defendant's Advocates had full knowledge of the attachment order, payment of the decretal sum to the plaintiff by the 1st defendant without reference to the 2nd defendant is not only in breach of the attachment order but is also not recognized thus the 1st defendant remains liable to the 2nd defendant.
25. The 1st defendant on the other hand submitted that it is not a judgment debtor having settled the costs taxed against it in favour of the 2nd defendant. It further submitted that the Mr. Muriithi who appeared for both the plaintiff and the 1st defendant on 23rd July, 2012, when the parties herein purported to enter into a consent attaching the decree issued by this Court in favour of the plaintiff against the 1st defendant in satisfaction of the 2nd defendant's costs is not in the employment of the 1st defendant's Advocate. The 1st defendant also contended that the order attaching the said decree was never served upon it as required under Order 22 Rule 47(6) of the Civil Procedure Rules, 2010.
26. In respect to the above submissions by the 1st defendant, the issue of whether the decree issued by the Court in favour of the plaintiff against the 1st defendant was attached in satisfaction of the 2nd defendant's costs by consent of the parties, which consent was adopted by this Court on 23rd July, 2012, was dealt with by the learned Deputy Registrar. In her ruling dated 1st November, 2021, the Deputy Registrar held as follows –
- “Pursuant to a consent adopted in Court on 23rd July, 2012 between the plaintiff, 1st and 2nd defendants that the decree issued in favour of the plaintiff as against the 1st defendant in this suit and in HCC 657 of 2003 be attached to satisfy the costs granted to the 2nd defendant/ third-party of Kshs. 209,210.00/= and Kshs. 355,821.00. This was because the third party has tried to execute the costs as against the plaintiff but according to the applications filed in Court, it was proving difficult...”
27. From the foregoing, I agree with Counsel for the 2nd defendant that since the 1st defendant did not cross-appeal on the said decision, this Court is precluded from disturbing the holding by the learned Deputy Registrar as reproduced above. In addition, it is now settled law that where a party is represented by an Advocate, the party is deemed to have knowledge of a Court order if the party's Advocate is aware of it, regardless of whether service of the said order was effected upon a party or not. The Court of Appeal in the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR held as hereunder in that regard –
- “The dispensation of service under rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This



would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements...”

28. I therefore find that the 1st defendant was fully aware of the fact that the decree issued by this Court in favour of the plaintiff against the 1st defendant was attached in satisfaction of the 2nd defendant’s costs by consent of the parties, which consent was adopted by the Court on 23rd July, 2012. The submissions by Counsel for the 1st defendant that Mr. Muriithi who appeared for both the plaintiff and the 1st defendant on 23rd July, 2012, was not in the employment of the 1st defendant’s Advocate cannot be entertained by this Court at this juncture since it was not raised when this matter went before the Deputy Registrar. In any event, entertaining the said allegation would amount to admitting new evidence at the appellate stage whereas no application has been made by the 1st defendant to adduce additional evidence in this appeal.
29. I agree with Counsel for the 2nd defendant that the learned Deputy Registrar misdirected herself in finding that the applicant submitted before her that the decree issued by the High Court was attached pursuant to the provisions of Order 23 Rule 1 of the Civil Procedure Rules, 2010 which provide for attachment of debts. All through the proceedings before this Court, the 2nd defendant has made reference to the provisions of Order 22 Rule 47 of the Civil Procedure Rules, 2010 and not Order 23 Rule 1 of the Civil Procedure Rules, 2010.
30. The question that now arises for determination by this Court is, what are the consequences of disregarding the consent order issued by the High Court on 23rd July, 2012? Order 22 Rule 47 (6) of the Civil Procedure Rules, 2010 provides that –

“On the application of the holder of a decree sought to be executed by the attachment of another decree, the court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the court or otherwise, shall be recognised by any court so long as the attachment remains in force.”
31. It is not in dispute that the 1st defendant was not served with the order dated 23rd July, 2012 until sometime in March, 2018 since it was extracted on 9th March, 2018. However, this Court has held here before that the 1st defendant was fully aware of the said attachment since his Advocate was not only in Court on the day the order of attachment was made, but also agreed to the consent attaching the decree. The provisions of Order 22 Rule 47 (6) provide that the judgment-debtor is bound by the attached decree, and in this instance the 1st defendant could have received notice of the said attachment either through the Court or otherwise. I am of the finding that the said provisions do not provide for strict service of the order since the use of the word “otherwise” could very well mean through its Advocates on record, who in this case, were in Court when the order was made.
32. Order 22 Rule 47 (6) further provides that if the judgment debtor bound by the attached decree has knowledge of the existence of the attachment order such as is the case herein, no payment or adjustment of the attached decree shall be recognized by any Court so long as the attachment remains in force. It is not in dispute that the plaintiff and the 1st defendant settled the attached decree on 26th June, 2016 by the 1st defendant making payment of Kshs.30,000,000/= to the plaintiff pursuant to a consent dated 12th April, 2016 adopted as an order of the Court by the Court of Appeal in Civil Appeal No. 164 of 2014 on 16th June, 2016.



33. All the parties herein agree that by the time the attached decree was settled, the attachment order had not been varied and/or set aside by a Court with competent jurisdiction to do so, hence this leads to the logical conclusion that the order attaching the decree issued by the High Court in favour of the plaintiff against the 1st defendant was still in force when the attached decree in the Court of Appeal was settled by the 1st defendant. This Court finds that the payment of the decretal sum to the plaintiff by the 1st defendant made on 26th June, 2016 is not recognized by this Court and the 1st defendant is still legally obligated to fulfill and/or satisfy the 2nd defendant's decree against the plaintiff pursuant to the consent order dated 23rd July, 2012.
34. This Court further finds that the 2nd defendant's explanation on what occasioned the delay in extracting the consent order dated 23rd July, 2012 and in pursuing its costs is satisfactory as the Court file went missing for a considerable duration of time. In addition, the 2nd defendant was not a party to Civil Appeal No. 164 of 2014 thus it had no way of finding out whether the same had been finalized or not, except through notification by either the plaintiff or the 1st defendant. The 2nd defendant can thus not be blamed for seeking to execute its decree issued by this Court in favour of the plaintiff against the 1st defendant approximately four years after the attached decree was settled.
35. In the end, this Court finds that the appeal herein is merited and it is hereby allowed as prayed. Costs of the appeal are awarded to the 2nd defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Karanja for the 2nd Defendant/Applicant

Mr. Wasonga h/b for Mr. Muthui for the 1st Defendant

