



**Prime Bank Limited v Booth Extrusion Limited (Civil Case 339 of 2019)  
[2021] KEHC 139 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 339 OF 2019  
F TUIYOTT, J  
OCTOBER 14, 2021**

**BETWEEN**

**PRIME BANK LIMITED ..... PLAINTIFF**

**AND**

**BOOTH EXTRUSION LIMITED ..... DEFENDANT**

**RULING**

1. It was agreed by the Advocates of the parties that I determine the Notice of Motion dated 20<sup>th</sup> January 2021 on the basis of the supporting affidavit, grounds of opposition and responses.
2. The Application is for the following orders:-
  - i. ....
  - ii. ....
  - iii. THAT pending the hearing and determination of the defendant's appeal of the ruling, this Honourable Court be pleased to issue an order of stay of execution of the said decree granted herein in favour of the Plaintiff.
  - iv. THAT the Honourable Court be pleased to set aside the said decree and order that a fresh decree be extracted in accordance with the law and in strict conformity with the interlocutory judgment that was delivered herein in favour of the Plaintiff.
  - v. THAT the Honourable Court be pleased to issue an order of stay of execution of the fresh decree so extracted in accordance with prayer IV above, pending the hearing and determination of the appeal.



- vi. THAT the Honourable Court be pleased to issue an order that the uncontested portion sums due as stated in the freshly extracted decree be liquidated by the defendant through monthly instalments of Kshs.1.5 million until full payment.
  - vii. THAT the Honourable Court be pleased to set aside any costs illegally assessed and order that the costs be taxed in accordance with the law.
3. It is convenient to breakdown the motion into the three heads in which it is brought.
  4. The first is the challenge on the legality of the Decree. The grounds are that the decree was extracted without the knowledge or involvement of the Defendant in violation of the provisions of Order 21, Rule 8 of the *Civil Procedure Rules, 2010*; that the decree does not conform with the terms of the interlocutory judgment to the extent that the Defendant is directed to pay interests which were not awarded by Court; that costs have been illegally and irregularly assessed without taxation as provided by law and that under section 94 of the Civil Procedure 2010 no execution proceedings can be commenced unless and until the costs have been taxed.
  5. The history of the matter, however, shows why the challenge on the decree is not viable. By a Plaint dated 4<sup>th</sup> October 2019 and filed on 7<sup>th</sup> October 2019, the Bank filed suit against the Defendant for the following orders:-
    - a. The sum of Kshs.20,000,000/=.
    - b. Interest for (a) at the rate of 22% per annum from 25/06/2009.
    - c. Costs of the suit plus interest at Court rates from the date of Judgment until payment in full.
  6. It is common ground that the Defendant failed to enter appearance or file defence and on that failure interlocutory judgment was entered against it on 20/01/2020. The order by the Deputy Registrar who entered judgment was that judgment was entered as prayed. The request for judgment was not only for the principle but also for the interest as set out in the claim. For that reason, it is not the case, as claimed by the Defendant that there is no judgment on interest.
  7. On 30<sup>th</sup> January 2020 the Plaintiff wrote to the Deputy Registrar seeking certification of costs. Those costs, at Kshs.343,800/= were certified and a certificate issued on 17<sup>th</sup> February 2020.
  8. A day later, on 18<sup>th</sup> February 2020, the Defendant filed an application to set aside the interlocutory judgment which application was dismissed by this Court on 2<sup>nd</sup> November 2020. It is therefore trite that by the time costs were assessed and decree extracted, the Defendant had not entered appearance or come on record and the Defendant could not therefore be involved in the assessment of costs or extraction of the decree. In that event the decree cannot be faulted. Same that as costs were properly assessed by the Deputy Registrar, the complaint that section 94 of the *Civil Procedure Act* has been breached does not arise.
  9. I turn to the application for stay pending hearing and determination of the appeal from the Court order of 2<sup>nd</sup> November 2020. It is true that a Notice of Appeal has been filed in respect to that ruling. Order 42 Rule 6 of the Civil Procedure Rules on stay reads:-

“ Stay in case of appeal [Order 42, rule 6.]



1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  2. No order for stay of execution shall be made under subrule (1) unless—
    - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
  3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
10. An important ingredient for that grant of that order is that a suitor for such orders must establish substantial loss. In the present matter the only substantial loss adverted to by the Defendant is in ground 17 of the application which reads:-
- (17) THAT the Plaintiff and the defendant are at liberty to enter into a settlement agreement in fulfilment of any valid decree and regards such settlement as opposite given the fact that the defendant has begun to enjoy tremendous liquidity. Any execution through proclamation will be a huge set back to the defendant from which it may not recover.”
11. Unfortunately this ground is not supported with any evidence and the Court is unable to find that the Defendant has sufficiently proved that it will suffer substantial loss if stay is not granted.



12. I turn to the plea that the Defendant be allowed to pay the uncontested sums in monthly instalments of Kshs.1.5 Million until payment in full.

13. In response thereof counsel for the Bank states as follows in paragraph 15 of the replying affidavit;

“THAT without prejudice to the position taken in paragraph 5 and 6 hereinabove, in the event that the Honourable Court were to be minded to consider the prayer for payment of the decretal sum by instalments, I verily believe that taking into account the amount due and owing under the decree, the circumstances under which the debt subject of the claim in the suit was incurred as set out in the pleadings filed herein as well as the Defendant’s conduct since the filing of the suit, the most fair and reasonable terms of granting such a relief ought to be subject to the following conditions:

- i. That the entire decretal sum and all accruing interest be settled by way of monthly instalment of Kshs. 1,500,000/= with the 1<sup>st</sup> instalment payable from the date of the order and on each succeeding month till liquidation of the decretal sum and interest in full;
- ii. That for purposes of compliance with the instalment payment schedule and a show of commitment, the Defendant should accompany the 1<sup>st</sup> instalment payment with postdated cheques to cover the next 12 monthly instalments;
- iii. The Defendant to pay the auctioneers charges relating to the execution proceedings underway as well as the certified costs of the suit, such payment to be made together with the 1<sup>st</sup> instalment payment in (i) above; and
- iv. In default of compliance with any of the foregoing conditions, the entire amount then due under the decree herein to become immediately payable and the Plaintiff be at liberty to proceed with execution in recovery thereof.”

14. I think that the counter offer is reasonable.

15. Save for the application for payment of instalments the rest of the prayers in the application are dismissed with costs. On payment by instalment the following are the orders of this Court:-

- a. The Decree, costs and interest to be paid by way of monthly instalments of Kshs.1,500,000/= the first payment be made within 30 days of this order and thereafter on each succeeding month until payment in full.
- b. The Defendant shall together within the 1<sup>st</sup> instalment payment send to the Bank postdated cheques to cover the instalments for the next 12 months.
- c. The Defendant to pay auctioneers charges relating to the execution proceedings which have commenced together with the 1<sup>st</sup> instalment payment in (a) above.



- d. In default of compliance with any of the foregoing conditions, the entire amount due under the decree shall become immediately payable and the Plaintiff shall be at liberty to proceed with execution.
- e. Costs of the application to the Bank.

**DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2021**

**F. TUIYOTT**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**A. MABEYA, FCI Arb**

**JUDGE**

**PRESENT:**

