



**Development Bank of Kenya Limited v Riva Oils Company Limited & 3 others (Commercial Civil Case 59 of 2013) [2021] KEHC 231 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 59 OF 2013  
DAS MAJANJA, J  
NOVEMBER 11, 2021**

**BETWEEN**

**DEVELOPMENT BANK OF KENYA LIMITED ..... PLAINTIFF**

**AND**

**RIVA OILS COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EZEKIEL KARISA KITSAO ..... 2<sup>ND</sup> DEFENDANT**

**SAMUEL KAZUNGU KAMBI ..... 3<sup>RD</sup> DEFENDANT**

**DAVID KOMEN TUITOEK ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before the court is the Notice of Motion dated 28<sup>th</sup> June 2021 filed by the 4<sup>th</sup> Defendant. It is made, inter alia, under Order 45 rule 1 of the *Civil Procedure Rules* and seeks an order that, “the Consent Judgment dated 8<sup>th</sup> January 2016 and the subsequent Decree of 2<sup>nd</sup> February 2016 and issued on 12<sup>th</sup> April 2016 together with all consequential orders be and are hereby set aside.”
2. The application is supported by the affidavit of David Komen Tuitoek, the 4<sup>th</sup> Defendant, sworn on 28<sup>th</sup> June 2021. Philip Nyanchoti, the Advocate acting for 1<sup>st</sup> and 3<sup>rd</sup> Defendants, supports the application through his affidavit sworn on 8<sup>th</sup> July 2021. The Plaintiff opposes the application through the replying affidavit of its Legal Manager, Doreen Kimori, sworn on 6<sup>th</sup> July 2021. Both sides have filed written submissions in support of their respective positions.
3. I have considered the depositions and submissions and the issue for resolution is whether the court should set aside the entire judgment or only the consent judgment in respect of the 4<sup>th</sup> Defendant. In order to put the matter in its proper perspective let me set out the salient undisputed fact leading up to the application.



4. The Plaintiff filed suit against the Defendants seeking KES. 304,906,835.40 together with interest and costs. The 4<sup>th</sup> Defendant entered appearance through the firm of Wandugi and Company Advocates on 14<sup>th</sup> March 2013. On 19<sup>th</sup> March 2019, the Plaintiff applied for judgment in default of appearance and defence against the 3<sup>rd</sup> Defendant which was accordingly entered on 2<sup>nd</sup> April 2013 and a decree issued on 5<sup>th</sup> April 2013. On 6<sup>th</sup> October 2014, Ogola J., allowed the 3<sup>rd</sup> Defendant's application to set aside the default judgment against him whereupon he filed his defence. Thereafter and by a ruling dated 19<sup>th</sup> June 2013, Havelock J., entered summary judgment against 2<sup>nd</sup> and 4<sup>th</sup> Defendants.
5. On 8<sup>th</sup> January 2016, the court recorded a consent between the Plaintiff's firm and the firm of the Nyachoti and Company Advocates acting on behalf of all the Defendants on the following material terms:
  - (3) THAT the Defendants (RIVA OILS CO. LTD, EZEKIEL KARISA KITSAO, SAMUEL KAZUNGU KAMBI and DAVID KOME TUITOEK) herein do pay the Plaintiff (DEVELOPMENT BANK OF KENYA LIMITED) herein Kshs. 305,000,000/= (Three Hundred and Five Million) in the following instalment sums:-
    - (i) Kshs. 30,000,000 (Thirty Million) on or before the execution of the said Consent letter.
    - (ii) Kshs. 275,000,000/= (Two Hundred and Seventy Five Million) to be paid in full within Six (6) Months of execution and filing in Court of the Consent Letter.
    - (iii) The firm of Hamilton Harrison and Mathews to remit the sum of Kshs. 30,000,000/= (Thirty Million) to the court Riva Oils Account No. \*\*\*\*\* held at Development Bank of Kenya. The Swift address being DEVKENA.
  - (4) THAT each party to bear its own costs in all the above mentioned cases.
  - (5) THAT in the event of default of payment on the dates and in the sums mentioned in clause (3) above, the Plaintiff be at liberty to execute for the entire outstanding sums in clause (3) hereinabove.
  - (6) THAT the file be marked as closed.
6. It is apparent from the record that when the suit was filed, the firm of Wandugi and Company Advocates entered appearance on behalf of the 4<sup>th</sup> Defendant on 14<sup>th</sup> March 2013 and continued to be his advocates until the firm of Mtange and Company Advocates took over the conduct of the matter to prosecute the present application. The firm of Nyachoti and Company Advocates, which recorded the consent on behalf of all the Defendants, filed a Notice of Appointment of Advocates dated 8<sup>th</sup> April 2015 on behalf of the 3<sup>rd</sup> Defendant and another dated 26<sup>th</sup> October 2015 on behalf of the 1<sup>st</sup> Defendant. Mr Nyachoti depones that he was never instructed by the 4<sup>th</sup> Defendant.
7. It is clear from the record, that the firm of Nyachoti and Company Advocates was not on record for the 4<sup>th</sup> Defendant and as such, he could not have issued instructions to the firm to record the consent since he was represented by firm of Wandugi and Company Advocates. The firm of Nyachoti and Company Advocates, however, had full instructions to record the consent from the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. In the circumstances, there is no reason to set aside the entire consent judgment in that regard as the 4<sup>th</sup> Defendant can be severed from the consent and consequent decree. For the avoidance of doubt, despite setting aside the consent in his favour, the judgment entered against him on 19<sup>th</sup> June 2013 remains.



8. Since the 4<sup>th</sup> Defendant has taken five years to lodge this application and the Plaintiff conceded to it to the limited extent, I will not award the 4<sup>th</sup> Defendant any costs.
9. For the reasons I have set out above, the Notice of Motion dated 28<sup>th</sup> June 2021 is allowed only to the following extent:
  - (a) The Consent Judgment dated 2<sup>nd</sup> February 2016 is amended only to the extent that the 4<sup>th</sup> Defendant is removed from the consent and the consent judgment against him be and is hereby set aside.
  - (b) The Decree issued on 12<sup>th</sup> April 2016 shall be amended accordingly.
  - (c) For avoidance of doubt, the judgment against the 4<sup>th</sup> Defendant entered 19<sup>th</sup> June 2013 still remains in force.
  - (d) There shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Ojiambo instructed by Acorn Law Advocates LLP for the Plaintiff.

Mr Nyachoti instructed by Nyachoti and Company Advocates for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

Mr Mtange instructed by P. K. Mtange and Company Advocates for the 4<sup>th</sup> Defendants.

