



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HCC NO. 318 OF 2012 – RULING**  
**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**PAMOJA WOMEN DEVELOPMENT**

**PROGRAMME.....PLAINTIFF**

**VERSUS**

**OIKO CREDIT KENYA.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**VALLEY AUCTIONEERS.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. For determination is the Notice of Motion of 8<sup>th</sup> February 2016 for the following substantive Orders:-

**3. THAT the Respondent be ordered to release the attached movable assets of the Applicants unconditionally.**

**4. THAT the Plaintiff/Respondent, their agents, servants, auctioneers and any persons claiming through them be hereby stopped by an injunction from selling parcels of land known as L.R. Nos.3554/20/21/22 situated at Kiambu County, attaching, advertising, and selling immovable and movable assets of the applicant until hearing and determination in HCC No.195 of 2012 pending at the Commercial Division of this Honorable Court.**

**5. THAT the officer commanding Kiambu Police Station do ensure compliance of the Respondents with orders 2, 3 and 4 above.**

2. These proceedings were commenced under the Provisions of Rule 4 and 11 of the Arbitration Rules 1997 in which an Arbitral Award dated 21<sup>st</sup> May 2012 was recognized as a Judgement of this Court. The Arbitral award was a Consent in the following terms:-

**a) That the Respondent does pay the Claimant a sum of Kshs.134,323,455/- (Kenya Shillings One Hundred and Thirty Four Million, Three Hundred and Twenty Three Thousand, Four Hundred and Fifty Five Only).**

**b) That the Respondent does pay the Claimant interest on (a) above at 12% from 15<sup>th</sup> August 2011 until payment in full.**

**c) That the Respondent shall further pay the Claimant its costs for this arbitration.**

**d) That parties do agree on the costs by 29<sup>th</sup> May 2012 failing which the same to be taxed by the Arbitrator.**

**e) That the Arbitrator's fees for this arbitration together with V.A.T thereon, which are set out in a V.A.T Invoice separately delivered to the parties, shall be borne in equal shares by the Claimant and the Respondent.**

**f) Any amount that may be paid by any party taking up this award in excess of its share of the Arbitrator's fees shall be refunded to it by the other party forthwith.**

3. Following that Consent, the parties herein held a meeting in which an Agreement was reached in respect to how the Decree would be settled. This was after the Applicant herein had failed to satisfy the Decree. One of the Agreements was that the Applicant was to sell Land parcels Reference No. 3554/20, 21 and 22 situated in Kiambu County and the sum realized from the sale which was hoped to be at least 80,000,000, would be applied towards payment of the Decretal sum. That land was registered in the name of Cute Homes Limited. To facilitate the sale the shares in Cute Homes Limited was transferred to the Advocates representing the parties herein.

4. Unhappy that the Respondent had taken out execution of the Decree herein before the intended sale had happened, the Applicant filed a Notice of Motion dated 13<sup>th</sup> December 2012. In partial compromise of the Motion the following consent was reached,

**“That by the consent of parties:-**

- 1. The Warrants of Execution issued herein dated 6<sup>th</sup> December 2012 be stayed.**
- 2. The Judgment Debtor deposits into the designated Oiko Credit Kenya Account Kshs.1,550,000.00 every 15<sup>th</sup> day of the month starting 15<sup>th</sup> January 2013.**
- 3. The matter be mentioned after 4 months for review of the amounts payable.**
- 4. In default execution to continue.**
- 5. Costs be in the cause”.**

5. The Court Record shows that a further Consent was reached by the parties on 7<sup>th</sup> February 2013 in the following terms:-

**“Whereas Judgment was entered by the Consent of parties on 29<sup>th</sup> May 2012 in the sum of Kshs.134,323,455.00 together with interest at a rate of 12% as from the date of the award ie.**

**AND**

**WHEREAS it is greed that the amount outstanding as at 1<sup>st</sup> February 2013 is Khs. 152,829,442.25.**

**AND**

**WHEREAS it is agreed between the parties that as at 1<sup>st</sup> February 2013 Kshs.3,700,000.00 has been paid towards the decretal sum.**

**IT IS HEREBY AGREED BETWEEN THE PARTIES BY CONSENT THAT**

- 1. The outstanding amount as at 31<sup>st</sup> January 2013 is Khs.152,829,442.25.**
- 2. That the Judgement debtor hereby hand over the following parcels of land Land Reference Number 3554/20, 3554/21 and 3554/22 all situated in Kiambu County registered in the Name of Cute Homes Limited to the Decree Holder or its nominees on the conditions that:-**
  - a) Kshs.70,000,000.00 be reduced from the outstanding amount.**
  - b) In the event that the said parcels are collectively sold for an amount less than Kshs.70,000,000 then the amount reduced from the outstanding amount shall be not less than Kshs. 70,000,000.**
  - c) Any amount realized from the sale in excess of Khs.70,000,000.00 shall be credited into the loan account.**
  - d) The Decree Holder shall at all times notify the Judgement Debtor of the progress made in the sales and shall keep it notified of all offers received and in the event that the Judgement debtor is able to scout and or source and or make better offers for the said parcels then it shall notify the Decree Holder of the same and forward details regarding the offers in writing.**
  - e) The Decree Holder acknowledges that there are six other persons with an interest in 1/8 acre plots and to whom refunds shall be made at a rate of Kshs.2,000,000.00 per plot, which the Decree Holder undertakes to refund to the said interested parties after sale of the parcels through the vendor’s advocates.**
  - f) It is hereby agreed between the parties that after implementation of this Consent ie. by Transfer of the one share in Cute Homes Limited held by Peter Waititu Macharia to Betty Ntinyari Kirai, the outstanding amount of Khs.152,829,442.25 as at and as from 1<sup>st</sup> February 2013 shall be reduced by Khs.70,000,000.00 and shall be Kshs.82,829,442.35.**

*g) The Consent Order recorded between the parties and filed on 20<sup>th</sup> December 2012 remains in force.*

*h) The said sum of Kshs.82,829,442.35 shall remain owing and shall continue to accrue interest at the awarded rate of 12% pa.*

**3. Within seven days of filing of this consent the Decree Holder shall file its amended Statement of Claim in HCCC No. 195 of 2012, after which the Judgement Debtor shall have seven days to file its Statement of Defence”.**

6. This matter which has a distinct feature for the number of Consents entered would be subject of a further Consent dated 22<sup>nd</sup> April, 2013;

**“Kindly record and minute the following consent order between the parties.**

**Further to the Consent Orders dated 20<sup>th</sup> December 2012 and 7<sup>th</sup> February 2013, it is agreed further that;**

**1. The matter be mentioned before the Honorable Judge for Review of the Consent Order dated 20<sup>th</sup> December 2013 in terms of Paragraph 3 of that Order.**

**2. The Review hearing be held on Tuesday 30<sup>th</sup> April, 2013.**

**3. As at the Date of Review Kshs.8,200,000.000 will have been paid towards the decretal sum which now stands at Kshs.80,679,325.57 and which form the basis of the review.**

**4. The Judgement Debtor to furnish the Decree Holder with a written proposal on settlement of the outstanding amount.**

**5. Interest shall continue to be applied at Court rates on the outstanding amount of 80,679,325.57 as from 1<sup>st</sup> May 2013”.**

7. It is against that backdrop of Consents that the Notice of Motion dated 8<sup>th</sup> February, 2016 should be considered.

8. In a Supporting Affidavit sworn on the same date as the Application, Mr. Julius Chege Muiruri who depones to be the Chief Executive Office of the Applicant furnishes the reasons for seeking the Orders. He depones that the debt herein is in respect to monies advanced by the Respondent to the Applicant sometime in 2010. That the facilities were secured inter alia by personal Guarantees of Members of the Board of the Applicant. In addition there was a further guarantee by the United States Agency for Internal Development (USAID) on behalf of the Government of the United States of America.

9. Following default by the Applicant, the Respondent commenced Hcc Civil Suit NO. 195 of 2005 (**Oiko Credit Kenya vs. Julius Chege Muiruri & 3 others**) against the Personal guarantees. The Applicant was not party to that suit. It seems that the Respondent also decided to pursue recovery of the debt by commencing Arbitration proceedings against the Applicant. The current proceedings are in respect to the Award that emanated from those Arbitral proceedings.

10. The Applicant asserts that it is unjust for its Assets to be sold without first sorting out certain unresolved issues in Civil suit No. 195 of 2005 and realizing the securities of the Guarantors. It is argued that to allow recovery against the Assets of the Applicant would paralyze the operations of a Micro finance Institution which is supporting poor women in a rural part of Kenya.

11. This Court is also told that as USAID had partly guaranteed the loan, execution should not proceed until it is established what amount, if any, has been paid by USAID.

12. Lastly there is a complaint in the manner in which the outstanding amount has been worked out. The Applicant is accusing the Respondent’s Advocates of compounding interest on the principal amount and thus charging double interest.

13. The application is resisted through an affidavit sworn by one Betty Kirai sworn on 25<sup>th</sup> February, 2016. She is the Legal Officer of the Respondent. The contents of her Reply together with the Notice of Motion and the submissions filed herein have been given due consideration by the Court.

14. All the Consents in this matter including the first Consent of 14<sup>th</sup> May 2012 which compromised the Arbitral Proceedings were entered by the parties in the full knowledge of the existence of Civil suit No. 195 of 2012. This suit having been filed on 30<sup>th</sup> March 2012. The Suit was against the Directors of the Applicant Organization one of whom is Julius Chege Muiruri who is the Chief Executive of the Applicant. Julius Chege Muiruri is the 1<sup>st</sup> Defendant therein. The Applicant cannot therefore feign ignorance of the pendency of the Civil suit at the time it entered the Consents. The last consent, which is the basis of the execution sought by the Respondent has neither been set aside, varied nor stayed.

15. For that reason, this Court is not persuaded that Execution of the Decree herein should be stayed until Civil suit No. 195 of 2012 is resolved. I bear in mind that in pressing execution in these proceedings, the Lender has made a conscious decision to go against the Principal Debtor as opposed to the Guarantors. Clearly, the Respondent is not obliged to pursue the Guarantors first.

16. In respect to the issue of the USAID Guarantee, this Court has not been told that the Applicant is unable to get information from the

Guarantor as to the amount, if any, that it has paid to the Respondent. In respect to this Guarantee it is simply stated as follows:-

***“THAT “USAID” had guaranteed the payment of Kenya Shillings Forty Million for the payment of the loan facility by PAWDEP but unfortunately the whole information as to whether USAID paid the guarantee or not and whether that monies were ever paid to the applicant has always been shrouded in secrecy despite demand form PAWDED (annexed hereto and marked J.CM. “6” (a) & (b) is the guarantee and demand letter from PAWDED Advocates dated 2<sup>nd</sup> February 2016).***

The Applicant does not say that it has sought this information from the USAID.

17. As to whether this Court should restrain the execution proceedings for the reason that there is a dispute as to the amount owing, I make this observation. While the Applicant complains of unlawful levy of interest, it does not state what, in its view, would be the amount, if any, that is justly due. Without a proposition as to what is the proper calculation, this Court doubts the seriousness of the assertion. On the other hand, it is not without significance that even after complaining that the interest levied is unlawful, the Applicant expressly admits still owing at least the sum of Khs.67,180, 504/= (See paragraph 14 of the Affidavit of Julius Chege Muiruri). The sum is not substantial and I am not inclined to stop execution of the Decree on an alleged contention of the interest levied and which contention has not been demonstrated to be weighty.

18. All in all it is difficult to see any merit in the Application of 8<sup>th</sup> February 2016 and it is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 6<sup>th</sup> day of July, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kihara for Defendant/Applicant

Mureithi for Plaintiff/Respondent

Nixon - Court Assistant