

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCIN. CASE NO. E132 OF 2023

BETWEEN

SUNU CAPITAL LIMITED.....DECREE-HOLDER/1ST
RESPONDENT

AND

GOSHEN FARM EXPORTERS.....JUDGMENT-
DEBTOR/APPLICANT

AND

JEREMIAH KIARIES MUCHENDU

T/A ICON AUCTIONEERS.....2ND
RESPONDENT

CO-OPERATIVE BANK OF KENYA.....
GARNISHEE

RULING

1. On 2nd December 2024, this Honourable Court at the application of the parties recorded a Consent Judgment settling the matter

before this Court. The said Consent Judgment was on the following terms:-

1) THAT the parties have mutually agreed that the Outstanding debt as at 25th August 2023 was USD 30,824 as the principal sum in default.

2) THAT it is agreed term between the Parties that the default interest that has accrued shall be waived in full by the Creditor/Respondent.

3) THAT the debtor/applicant undertakes to pay the sum of USD 30,824 as follows:-

a. The sum of USD 15,412 being 50% of the outstanding debt shall be paid by the debtor/applicant on or before 31st December 2024.

b. The balance of USD 15,412 shall be paid by the debtor/applicant on or before 31st March 2025.

4) THAT all payments shall be made to the Creditor/Respondent's designated mercury account as follows; -

**Beneficiary Name; Golden Era
LLC**

**Account Number;
202366878531**

Type of Account; Savings

**Beneficiary Address; 58 Pine Street
Peterborough, NH 03458**

Receiving Bank Details

ABA Routing Number **091311229**

Bank Name **Choice**

Financial Group

Bank Address **4501 23rd Avenue**

S

Fargo ND 58104

5) THAT it is agreed between the parties that neither party shall disclose, discuss or communicate the terms, contents, or details of this consent or the underlying disputes to any third party not involved in the proceedings, except as may be required by law or with the express written consent of both parties.

6) THAT in the event the debtor/applicant defaults in adhering to any of the terms of the consent, the Creditor/Respondents shall no longer be bound by order 5 above and shall be at liberty to proceed with execution for the entire outstanding amount, inclusive of the sums previously waived under order 2, being the sum of USD34,214 comprising USD30,824 as the principal sum in default and USD3,390 as penalty interest without further reference to the Debtor/Applicant and/ or the Court.

7) THAT each party shall bear its own costs with respect to this suit.

8) THAT upon adoption of this consent, the suit before this Honourable Court is marked as settled and closed.

2. Despite the elaborate terms in the above Consent Judgment, the Judgment Debtor did not honour the terms of the said Consent Judgment and on 31st January 2025, the Decree Holder filed an application seeking to garnish the Judgment-Debtor's funds held with Cooperative Bank. The Bank responded and informed the Court that it did not hold funds sufficient to satisfy the judgment debt and that the said account only held \$42 USD. A subsequent account by the Judgment-Debtor revealed that the said account had equally insufficient funds to satisfy the Judgment Debtor as it had a balance of shillings 644 only.
3. Undeterred, the Decree Holder proceeded to obtain warrants of attachment of the Judgment Debtors' movable assets and instructed the 2nd Respondent to proceed with attachment which resulted in the attachment of Motor vehicle KDK 237R. Attempts to have the said Motor vehicle sold by public auction were unsuccessful as the auction did not fetch the desired reserve price.
4. On 2nd April 2024 however, the Judgment Debtor filed the present application seeking to lift the warrants of attachment on Motor vehicle KDK 237R and have the same declared illegal. The Judgment-Debtor

also sought to set aside the Consent Judgment of 2nd December 2024 aside. Again, on 15th April 2025, the Judgment-Debtor filed yet another application seeking to set aside the attachment warrants of the Court for attachment of Motor Vehicle KDK 237R. It is these two applications that are before this Honourable Court for determination. The same are opposed and both parties have filed written submissions which I have considered.

Analysis and Determination

5. Having carefully considered the application and the supporting affidavit and the Respondents response filed alongside the parties' rival submissions, the Court has identified two issues for determination to wit:-

1) Whether the Consent Judgment entered into by the parties on 2nd December 2024 should be set aside.

2) Whether the warrants of attachment and subsequent notification of sale of Motor vehicle KDK 237R should be lifted and declared an illegality.

6. In its argument to support the application the Applicant, who is the Judgment-

Debtor herein argues that the said Consent Judgment was entered into by this Court without the requisite jurisdiction and therefore the same is an illegality ***ab initio*** and should be set aside. The Applicant argues that the contract subject matter of which the Consent Judgment was entered into for contained an exclusive foreign jurisdiction clause that ousted the jurisdiction of this Court and therefore the judgment herein is an illegality. The Applicant states that clause 7(f) of the said Working Capital Agreement entered into on 15th August 2022 read as follows; ***“Governing law; This Note shall be governed by and construed under the laws of the State of Minnesota, as applied to agreements among Minnesota residents, made and to be performed entirely within the State of Delaware, without giving effect to conflict of laws principles.”***

7. It is the Applicant’s argument that the above clause ousted the jurisdiction of this Court as it preserved the applicable law for dispute resolutions to that of the State of Minesota. Parties agree that jurisdiction is paramount and that a Court cannot proceed without jurisdiction as to do so will be to act in vain. In the *locus classic* case on jurisdiction in, **Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989)**

KLR1. At page 14 line 29-43 **Nyarangi JA** (as he then was) had this to say:-

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the Court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular Court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal including an arbitrator depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the Court or tribunal has been given power to determine conclusively whether the fact exists where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a Court on

its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the Court ...The moment a Court determines that it has no jurisdiction it has to down its tools and proceed no further”

8. It is therefore important for this Honourable Court to determine its jurisdiction in the present matter before proceeding to address the rest of the issues before it. I have noted the argument put forward by the Applicant. The Applicant has urged this Court to be guided by the Court’s findings on foreign jurisdiction in **Areva T & D India Limited vs. Priority Electrical Engineers & Another (2012)** eKLR where Visram J(as he then was) held that:-

“The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the Courts of some other country. The Exclusive Jurisdiction clause however should be normally respected because the parties themselves freely fixed the forums for settlement of their disputes; the Court should carry out the intention of the parties and enforce the agreement made by them

in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping them bound by their agreement.”

9. I agree with the above reasoning by the Court. Indeed, it is trite that parties are bound by the terms of the agreement they set for themselves. It is not the business of Courts to rewrite contracts between parties and parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved (See **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)**). The primary task of the Court is to construe the contract and any terms implied in it and as such, it cannot force parties into a bargain as it is not a matter of an entitlement bestowed upon the Plaintiff, whether by statute or by contract (**Muiga Enterprises Limited v Kenya Commercial Bank Limited [2016] KEHC 8509 (KLR)**).

10. This therefore call for an examination of the above clause 7(f)to determine if the same conferred exclusive jurisdiction in this matter to the laws of the State of Minnesota as alleged. I have looked at the said clause and note that indeed it provided that the governing law to be applied was the “***laws of the State of Minnesota, as applied to agreements among***

Minnesota residents, made and to be performed entirely within the State of Delaware, without giving effect to conflict of laws principles.”

11. My understanding of the above clause was that the laws of the State of Minnesota was applicable where the agreement was **made and to be performed entirely within the State of Delaware,”** I have looked at the Court record and note that the suit before this Honourable Court was commenced by a Statutory Demand Notice issued under the Insolvency Act, Laws of Kenya, for payment of the outstanding debt and that indeed a challenge to the jurisdiction of this Court was mounted pursuant to the said clause 7(f), of the Working Capital Agreement, to hear any dispute between the parties.

12. The Court however notes that the parties both confirmed that they were duly incorporated in the Republic of Kenya and registered as tax payers in Kenya and therefore had capacity to conduct business within the Republic. The parties subsequently agreed to compromise the matter and filed with the Court a Consent Order that was on 2nd December 2025 adopted as an order of this Court and a subsequent decree was extracted thereafter.

13. From the foregoing, it is clear that although a challenge to jurisdiction of the Court was mounted *ab initio*, the said challenge was abandoned and parties in filing a consent to compromise the suit in the terms of the Consent Order submitted themselves to the jurisdiction of this Honourable Court voluntarily. Having done so therefore, the only parameters that this Court can apply to set aside a Consent Judgment are those that are delineated by the laws of Kenya. Order 25 Rule 5 of the Civil Procedure Rules sets out those parameters as follows:-

5. Compromise of a suit [Order 25, rule 5]-

(1) Where it is proved to the satisfaction of the Court, and the Court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the

implementation and execution of the terms of the decree.”

14. The Court in ***Kenya Commercial Bank Ltd v Specialised Engineering Company Ltd (1980) eKLR*** established the guiding principles upon which a Consent Judgment can be set aside when it held as follows:-

“Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the Court to set aside an agreement.”

15. I have looked at the Applicant's arguments in the application seeking to urge the *Court* to interfere with the Consent Judgment herein and note that the Applicant has not set out any grounds to demonstrate if the said consent was tainted with fraud or the same was entered through collusion or misrepresentation. It is not enough for a party to blame its previous counsel when it fails to meet up its obligations

within the consent. I find therefore that the application seeking to have the Court set aside the Consent Judgment of 2nd December 2024 is unwarranted. The said prayer is therefore declined.

16. On the second limb of the Application seeking to lift the Warrants of Attachment and set aside the Notification of Sale of Motor Vehicle KDK 237R, I note that this attachment being a post judgment execution process was carried out pursuant to warrants of sale issued by this Honourable Court. I note also the argument put forward by the Applicant that the said Motor vehicle is jointly registered in the Judgments Debtors name and NCBA Bank who financed its acquisition and is therefore not available for sale.

17. From the response filed, I note that the said motor vehicle upon being attached was properly advertised and gazetted for sale and the 2nd Respondent deponed in his Affidavit that he indeed wrote to NCBA bank to confirm that it had any claim in the motor vehicle but has not received any response thereto. The Civil Procedure Rules under Order 22 Rule 41 provides as follows:-

“41. Attachment of share in movables [Order 22, rule 41]-Where the property to be attached

consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.”

18. I am satisfied therefore that NCBA was properly notified of the attachment and intended sale of the said motor vehicle and having declined to file its objection to the sale in accordance with the provisions of Order 22 Rule 41, the Judgment-Debtor cannot be seen to be the party objecting to the intended sale herein. This limb of the Application therefore fails.

Conclusion and Disposition

19. In conclusion the Court makes the following dispositive orders: -

- 1) The applications dated 2nd April 2025 and 15th April 2025 are without merit. The said applications are hereby dismissed and the Interim Orders issued therein are discharged and vacated forthwith.**

2) The costs of the two applications assessed at Kshs.30,000/= are awarded to the Decree Holder/Respondents. It is so ordered.

DATED SIGNED and DELIVERED virtually this 28TH DAY of OCTOBER 2025

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Gitau for the Decree-Holder.
2. Ms. Juma holding brief for the Judgment-Debtor.
3. Amos - Court Assistant