

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E028 OF 2025

EXPORT CONSOLIDATION SERVICES (K) LTD.....
APPELLANT

-VERSUS-

REGINAULD
CHIGUMBA.....RESPONDENT
NGALA

(Being an appeal from ruling and orders in the Chief Magistrate's Court at Thika (Hon. Y.M. Barasa PM) case number 659 of 2020 dated 30th January 2025)

JUDGMENT

The respondent sued the appellant in the lower court for a sum of Kshs 16,595,009.00. By a notice of motion dated 19th September 2024, the applicant prayed that;

1. **THAT** this application be certified as urgent and heard *ex parte* in the first instance.
2. **THAT** this Honourable Court be pleased to issue stay of execution of the decree dated the 22nd August 2024 pending the hearing and determination of the application herein.
3. **THAT** this Honourable Court do issue an order to expunge the decree dated the 22nd August 2024 and all consequential orders thereto.

4. **THAT** alternate to (3) the Honourable Court be pleased to issue stay of execution of the decree dated 22nd August 2024 pending hearing and determination of the suit.
5. **THAT** the Honourable Court be pleased to grant leave to the applicant to amend its defence within 14 days of its ruling.
6. **THAT** this Honourable Court do issue any other order that it may deem just and fit to issue.
7. **THAT** the costs of this Application be provided for

Before the application was filed, the trial court presided over by Honourable P. Mutua CM had by ruling dated 21-08-2024 allowed an application by the respondent in which it entered judgement on admission for the respondent against the appellant for Kshs 1,700,800.00 and ordered that the balance of the claim do proceed for hearing.

It is the decree which emanated from the above ruling that the appellant sought to be expunged from the court record arguing that the drawing of the decree should wait for the outcome of the full trial of the rest of the claim. In the ruling delivered on 30th January 2025 which is being appealed, the Honourable Magistrate held that he was not competent to reverse the ruling of his predecessor and that the appellant should have appealed instead of filing the application.

The appellant has approached this court on appeal in which it has raised the following grounds;

1. **THAT** trial Magistrate erred in law and fact by failing to appreciate the prayers sought in the application before it which it misconstrued as an application for review.
2. **THAT** the esteemed Magistrate erred in law and fact by summarily dismissing the applicant's application without considering the facts and law applicable.
3. **THAT** learned Magistrate erred in law and fact by endorsing a decree which was procedurally flawed having been issued in contravention of Section 2 of the Civil Procedure Act.
4. **THAT** Honourable Magistrate erred in law and fact by failing to appreciate the provisions of law in relation to amendment of pleadings with leave of court.
5. **THAT** trial Magistrate erred in issuing a ruling not taking into consideration the issues raised by the applicant in their counterclaim essentially touching on the issues in dispute having disclosed material facts which the court had not been previously appraised on.

The appellant's submissions

In its submissions dated 18th August 2025, the appellant argues that the lower court erred in that, it misapprehended his application as if it were an application for review and adds that the court did not deal with any of his prayers and failed to give weight to the facts and law that were relevant to the proceedings before it.

The appellant submits further that, the definition of a decree in Section 2 of the Civil Procedure Act as read together with Section 34 of the same Act does not allow for a decree to be drawn before all the issues in the suits are decided in finality. According to the appellant, the drawing of the partial decree has no force of the law and was therefore premature and irregular and should be expunged from the court's record.

The appellant has also argued that if it has to remain standing, the decree should be stayed pending hearing and determination of the suit. It's the appellant's submissions that failure to stay the decree may lead to confusion and superfluous financial expences if its intended counterclaim succeeds. It bases this argument on the fact that, if the counter-claim succeeds, the decree would be required to be set off from what is found due to the appellant.

On issue the issue of the proposed amendment, the appellant submits that, Order 8 Rule 3 gives parties to the suit liberty to apply for amend their pleadings and urges that amendments should be freely allowed. It is the submissions of the appellant that the trial court did not deal with the issue of amendments. In addition, the appellant argues that the proposed amendments are vital in helping the court deal with all real issues in controversy.

The respondent's submissions

The respondent filed his submissions dated 13th September 2025 in which he argues that the application is bereft in procedure. The respondent goes on to make submissions on the conditions for success of an application brought under Order 42 Ruel 6 of the Civil Procedure Rules. He also submits that the judgment in the ruling dated 21-08-2024 was regular and proper.

On the prayer for expunging the decree from the record, the respondent submits that there is no provisions in law for expunging a decree and that a decree can only be set aside through the process provided for in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

On the issue of prayer for amendment, the respondent submitted that the intended amendment was bad in law since it was aimed at introducing a new cause of action and was meant to remedy the appellant's admission which had already resulted to a judgment. It is the respondent's position that the amendment was intended to circumvent the law and reverse the court's ruling. The respondent adds that the intended counterclaim was time barred and came after the court had pronounced itself on the issues in its earlier ruling. It is also submitted that the appellant did not give explanation for the delay of three years in applying for the amendment.

Analysis and determination.

To start with, the respondent's submissions on stay of execution and whether the ruling delivered on 21-08-2024 was regular or not are off the mark. This appeal is about the ruling delivered in 30-01-2025. It has nothing to deal with regularity or irregularity of the court's ruling dated 21-08-2024. As far as I understand, the appellant's case is that the drawing or extraction of the formal decree was irregular as it should have awaited the finalization of the issues which were left pending after the ruling entering judgement on admission was issued.

Having read the submissions and the record of the court, it is my opinion that there are two issues for determination in this appeal viz;

- a. Whether the decree drawn following the ruling dated 21-08-2024 was regular.
- b. Whether the application for amendment of the defence and counterclaim was merited.

As stated above, the appellant has not raised issue with the ruling of Honourable P. Mutua CM dated 21-08-2024. His problem and position are that extraction of preliminary decree is not known in law and the decree should be expunged. He alternatively prays that the decree be stayed pending hearing and determination of the suit to finality.

In its submissions, the appellant has correctly cited the definition of the decree under Section 2 of the Civil Procedure Act. The Section provides that;

"decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include-

(a) any adjudication from which an appeal lies as an appeal from an order;

or

(b) any order of dismissal for default.

The Section proceeds to give an explanation thus;

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such

adjudication completely disposes of the suit. It may be partly preliminary and partly final.

In my interpretation of the above definition, there can be a decree for some of the issues in a matter. The definition is clear that the decree is a formal expression of the court's adjudication on all or any of the matters in controversy. The definition goes on to state that it may be preliminary or final then the explanation describes what is a preliminary decree. That means that the decree issued by the court was in respect of part of the issues raised by the parties and it perfectly fits in the explanation of a preliminary decree. The Court of Appeal while dealing with a similar issue in ***Weston Gitonga & 10 others v Peter Rugu Gikanga & another (2017) KECA 24 (KLR)*** held as follows;

'It seems to us that the decree ensuing in this matter was partly preliminary and partly final, but nevertheless a decree that was capable of execution. There is no doubt that the rights of the parties that arose from the suit had been finally determined. The order that was made as part of that decree was meant to effectuate it and not to create any new cause of action.'

A similar challenge to a preliminary decree arose in ***Kariuki v Attorney General (2014) KECA 713 (KLR)*** where the Court of Appeal held that;

'That conclusion was based on the fact that the preliminary decree which the appellant alleged had breached his constitutional rights had been validly issued by a competent court; the appellant had attempted to appeal against that decree; he had made several applications to review the same; and had also challenged the same by way of a counter-claim, the hearing of which was still pending before the High Court. This Court concluded that the

petition was no more than an illegitimate collateral attack on the preliminary decree.'

What comes out of the above holdings is that a preliminary decree is a legally recognized instrument which is capable of being independently executed and it doesn't have to await the outcome of the remaining part of a case. The respondent's reference to Section 34 of the Civil Procedure Act is a clear misapprehension of the law. There is nothing in Section 34 of the Act that prevents the court from issuing decree in respect of part of the issues in controversy. Section 34 simply makes provisions that in the event of need to answer questions on the extent of satisfaction or settlement of the decree, the same shall be determined by the court that is executing the decree and not in a separate suit.

The appellant argues that the decree cannot be drawn before the entire suit is determined. Order 21 Rule 7 makes provisions for drawing of decrees. The appellant has not told this court what Rule was breached in the process of preparing the decree. Decree emanates from a judgment. The ruling dated 21-08-2024 had the effect of entry of judgement against the appellant and consequently it was capable for producing a decree. In the circumstances, it is my holding that there can be more than one decree in a suit depending on the nature of the case and the orders the court makes in the process of the prosecution.

Perhaps the appellant's problem with the decree was the fear of the same being executed against it and that is why it made an alternative prayer for stay of execution pending the hearing and determination of the suit. In my view a stay of execution of a decree can only issue pending hearing and determination of a process which is expected to upset the judgment. Most likely this was the reason

that drove the respondent to make long submissions on Order 42 Rule 6 of the Civil Procedure Rules.

The respondent has a decree in its favour and can only be delayed in enjoying fruits of judgement if there was a challenge to the judgment. The judgment is not being challenged. What we have is an application to delay the enjoyment of the fruits of the judgment until another event unrelated to validity of the decree is determined. The only reason the appellant gives for the need to stay the decree is that if its counter-claim succeeds, there will be need to set-off of the decretal sum in the counter-claim from what would be owing in the current decree. A party who has a judgement in its favour cannot be stopped from benefiting from it in anticipation of an act he may not have control over or where no security or the outcome is guaranteed. This prayer is declined.

I now turn to the prayer for amendment of the defence and counter-claim. It is true and correct position in law that amendments of pleadings should be freely allowed unless the same will result to introduction of a new cause of action or cause prejudice to the other party. Amendments can be made at any stage of the proceedings but in my view where the same are sought after judgment, the court must be extremely cautious so that it does not cause re-opening of issues or have the effect of setting aside the judgment. Order 8 Ruel 3 provides that;

‘Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.’

It has been held in many judicial authorities that amendments which may cause prejudice or embarrass the position of the other party or introduce a new cause of action should be disallowed. In ***Simiyu & 2 others v Chepkosgei & 2 others (2024) KEHC 1223 (KLR)***, it was held that;

‘The Appellants have referred to several decisions to the effect that amendments ought to be freely allowed. This Court wholly agrees with such being the general position. However, there are exceptions. The Court’s discretion can only be exercised in favour of a party which plays within the rules of litigation. Where an amendment is likely to prejudice the other party, say by introducing different issues or expanding the subject matter, such is not to be allowed.’

It is not in dispute that there is a partial judgment in this matter. If the amendments the appellant sought to introduce affected part of the claim in respect of which the court had entered judgment against the appellant, the same should not be allowed. I have looked at the proposed amendments contained in the draft amended defence. The appellant sought to strike out paragraphs 5(viii) to (xi) of its defence and counter-claim and add paragraphs 5(a) to (c). Paragraphs 5(viii) to (xi) were discussed by the trial court in its ruling dated 21-08-2024 and it is clear to me that the discussion informed the court’s decision in entering judgment for the respondent. Striking out these paragraphs would mean allowing amendments after the judgement. The intended new paragraphs 5(a) to (c) pleads issues of a motor vehicle which the plaintiff was holding. At page 6 of its ruling the court stated as follows;

‘Of course paragraph 5(x) appears to be conditional on the plaintiff releasing the motor vehicle but as correctly submitted by the advocates for

the plaintiff, the motor vehicle has no connection with the plaintiff's case/claim and in any event there is no counter-claim by the defendants.

It is true that admission on paragraph 5(viii) is made without prejudice to paragraph (ix), (x) and (xi) which relate to motor vehicle KBD 303T which is alleged to be with the plaintiff. However, as already stated that motor vehicle has no relations to the plaintiff's claim as pleaded and there is no counter-claim by the defendant.'

It is clear from the above that the attempt to amend the defence was informed by the above court's findings. Even now, the draft does not have any prayer about the motor vehicle. The only prayer in the counter-claim is that the suit be dismissed. It says nothing about right to ownership or possession of the motor vehicle except that the respondent tricked the appellant to cede possession of it. In view of this, I see the application to amend to have been an attempt to correct or patch up the case following the finding of the court on the issue. Allowing these amendments will not only be prejudicial to the respondent but also likely to embarrass the trial of the remainder of the claim and in the circumstances, the same is disallowed.

The upshot of the above is that this appeal lacks merits and it is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this **28th** day of **November**
2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Muthoni holding brief for Mr. Michuki for the appellant and Mr. Mathenge for the respondent.

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