

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO. 072 OF 2012

FUAD MAHAMUD MOHAMED.....

PLAINTIFF

VERSUS

DIAMOND TRUST BANK OF KENYA LIMITED1ST

DEFENDANT

DIAMOND TRUST INSURANCE AGENCY LIMITED....2ND DEFENDANT

(CONSOLIDATED WITH MOMBASA HCCC NO. 16 OF 2021)

FUAD MAHAMOUD

MOHAMED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....

DEFENDANT

RULING

1. This court in its judgment dated 25/01/2021 entered judgment in favour of the Plaintiff for Kshs. 82,129,963 with interest at a rate of 16.25%. the 1st Defendant's Counterclaim for Kshs. 35,940,514.49 and Kshs. 877,753.68

was allowed with interest at a rate of 16.25%. Aggrieved by the said judgment, the 1st Defendant filed an appeal in Mombasa COA Civil Appeal No. E074 of 2021. The appeal was allowed where the judgment against the 1st Defendant was set aside and the judgment on counterclaim upheld.

2. It is pursuant to the judgement of the Court of Appeal that the 1st Defendant/Applicant filed a Notice of Motion application dated 27/02/2025 seeking for orders that;

- i. *This court do set aside the Judgment and Decree of this court dated 25/01/2021 and substitute the same with the Judgment and Decree of the court of Appeal dated 14/04/2023 and issued on 05/03/2024.*
- ii. *That this court be pleased to adopt the Certificate of Costs dated 01/07/2024 issued in the Court of Appeal matter as judgement and decree of this court.*
- iii. *That the Judgment and Decree issued as per prayers above be executed and enforced as if it were a judgment of the High Court.*
- iv. *Costs of the application to the 1st Defendant.*

3. The Plaintiff/ Respondent filed a Notice of Preliminary Objection dated 20/03/2025. It was stated that this court having rendered its judgment dated 25/01/2021, this court was rendered *functus officio* to revisit the said judgment or issue further remedies as prayed in the application, and it is

untenable to make this application on a matter already dealt with by the Court of Appeal.

4. The Plaintiff/ Respondent further filed a Replying Affidavit dated 04/12/2025 stating that the Plaintiff/ Respondent had filed an application for review of the Court of Appeal judgment in Civil Application No. E041 of 2025, and that this application should be stood over generally or placed aside pending the outcome of the application for review.
5. The application and the P.O ere canvassed by way of written submissions. Both parties complied by filing their respective submissions which I have duly considered.

Analysis and Determination

6. I have considered the pleadings, parties respective rival submissions, authorities cited and the law and the issues falling for the court's determination are: -
 - a. *Whether the Preliminary Objection dated 09/10/2024 has merits;*
 - b. *Whether the application dated 27/02/2025 has merits; and*
 - c. *Who bears the costs?*
7. The parameters for consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The

principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696***. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

8. This point was underscored by J.B. Ojwang, J (as he then was) in the case of ***Oraro v Mbaja [2005] eKLR*** where the court held as follows: -

“...I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and

declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed...”

9. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
10. The Plaintiff submitted that this court is *funtus officio* after rendering its judgment on 25/01/2021. This court cannot be called upon to sit in review or implement a superior court judgment. The court cannot substitute its own judgment with that of the Court of Appeal as this would be procedurally irregular and constitutionally untenable.

11. The 1st Defendant on the other hand submits that this court ought to execute the judgment and decree of the Court of Appeal under **section 4** of the ***Appellate Jurisdiction Act, Rule 113 (2)*** of the ***Court of Appeal Rules 2022*** and **section 29** of the ***Civil Procedure Act***.
12. The 1st Defendant seeks to have this court set aside its judgment and substitute it with the judgment of the court of appeal. This would amount to amending and/ or reviewing its judgment dated 25/01/2021. I do agree with the submissions by the Plaintiff and the reliance on the case of ***Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited [2014] eKLR***, where it was held that the principle of *functus officio* prevents the reopening of a matter before a court that rendered the final decision.
13. By allowing the application to substitute the judgment of this court with the judgment of the Court of Appeal would set a dangerous precedent where trial courts would be amending their judgments to align with the appellate court judgments. This would greatly cause a disruption of the laid down procedures in execution of judgments and decrees of the appellate courts.
14. The Preliminary Objection is therefore merited and upheld and the application dated 27/02/2025 dismissed.

15. The application having been dismissed does not mean that the 1st Defendant is denied the fruits of its judgment. The judgment of the Court of Appeal is subject to execution. **Section 4** of the **Appellate Jurisdiction Act** provides that:

“Any judgment of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court.

16. Further **section 29** of the **Civil Procedure Act** provides as follows;

29. Definition of “court which passed a decree”

The expression “court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and

(b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

17. **Section 30** of the **Civil Procedure Act** provides as follows;

30. Court by which decree may be executed

A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

18. From the above, the Court of Appeal has powers to execute decree or orders as it they were their own judgments. In the case of ***Kinluck Holdings Limited v Mint Holdings Limited & another [2025] KEEELC 7381 (KLR)***, the Court of Appeal directed/ authorized the Deputy Registrar to execute transfer documents of the suit property in order to give effect to its judgment on appeal.

19. In the alternative, nothing stops this court from executing the decree of the court of appeal. In the Replying Affidavit dated 04/12/2025, the Plaintiff sought to have the application stood over or set aside to await the outcome of the application for review of the Court of Appeal judgment. The filing of an application for review does not operate as a stay of execution of judgment. The application to have the execution stayed is hereby declined.

20. The Deputy Registrar is therefore directed to issue a decree in accordance with the judgment of the Court of Appeal for purposes of giving effect to the said judgment.

21. On costs, the same follows the event. Though the Notice of Preliminary Objection has succeeded, execution of the judgment of the court still proceed.

In the circumstances, I direct each party to bear own costs.

8. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

a) The Notice of Preliminary Objection dated 20/03/2025 has merits and is hereby upheld;

b) That the Deputy Registrar of this court to extract and issue a decree in accordance with the Judgment of the Court of Appeal; and

c) Each party to bear own costs.

Orders accordingly.

Dated, signed and delivered at Mombasa this 19th day of March, 2026.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Plaintiff/ Respondent

Mr. Kisinga Advocate for the 1st Defendant/ Applicant

Ms. Getrude, Court Assistant

Original