

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E155 OF 2025

**CANNON ASSURANCE
LIMITED.....APPELLANT**

VERSUS

**STANLEY T. MUGACHA, ELIUD M. KING'ARA & PETER G.
WAWERU T/A PANGANI AUCTION CENTRE.....**

1ST RESPONDENT

GRANTOM BABZ SERVICES LTD.....2ND

RESPONDENT

*(Being an appeal from the ruling of Hon. Thomas T.
Nzioki (CM) delivered on 31st January 2025 in Milimani
CMCC No. 1170 of 2016)*

JUDGMENT

Background

1. The dispute herein emanates from a decree issued by the trial court in favour of the Respondents for Kshs. 1,283,279/= together with interest till payment in full.
2. The Appellant claims that the decretal sum and associated costs were fully paid through a combination of direct payments and funds held in a joint interest-earning account pursuant to earlier court orders.
3. Subsequent correspondence between the parties in July 2024 indicated that an outstanding balance of Kshs.

1,285,937.55/= was to be paid within 30 days in order to avert execution. A counter-proposal was made by the Appellant to settle at Kshs. 913,167/= based on interest on a reducing balance. The parties did not record any formal consent on the reduced figure.

4. The Appellant made payments in stages comprising an earlier payment of Kshs. 690,313/=: Kshs. 661,253/= paid on 22nd August 2024 and Kshs. 251,914/= paid on 8th October 2024.
5. Execution proceedings were initiated on 9th September 2024, and warrants of attachment were issued on 18th October 2024.
6. The Appellant maintains that despite full settlement of the decretal sum, the Respondents instructed auctioneers who issued a proclamation notice on 23rd October 2024 and proceeded to obtain warrants of attachment dated 18th October 2024. The Appellant challenged these actions before the lower court, arguing that they were unlawful as they were undertaken after full settlement of the decretal sum.
7. The trial court however dismissed the Appellant's application thereby precipitating the filing of the present appeal.
8. The appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

9. The Appellant's case was that the entire decretal sum and costs were fully settled prior to the issuance of the proclamation on 23rd October 2024 after parties had agreed on a reduced settlement figure of Kshs. 913,167.04. According to the Appellant, payment was effected partly through direct remittance and partly through release of funds held in a joint account operated by the parties' advocates. The Appellant added that the Respondents had acknowledged receipt of payment, including the final remittance made on 8th October 2024 and that the sums claimed in the warrants included unlawfully calculated interest, resulting in unjust enrichment.
- 10.** It was submitted that the proclamation and subsequent attachment proceedings were therefore unlawful and irregular and further, that interest was wrongly computed thereby leading to unjust enrichment.

The Respondents' Submissions

11. The Respondents opposed the appeal and maintained that the decretal sum had not been fully settled as at the time execution proceedings were initiated as the payments made by the Appellant were insufficient to clear the outstanding balance, which included accrued interest.
12. It was submitted that there was no binding agreement between the parties to compromise the decretal amount or waive interest. According to the

Respondents, the execution process, including the issuance of warrants and proclamation, was lawful and properly undertaken.

13. It was the Respondents' case that the Appellant's position misrepresents the extent of payment and ignores the outstanding balance due under the decree.
14. The Respondents argued that there was no consent on the reduced figure as it was only a counter-offer and that payment was required within 30 days which was extended to 6th September 2024. The Respondents noted that the Appellant defaulted and only completed payment on 8th October 2024, after execution had commenced.
15. It was submitted that execution proceedings were lawfully initiated on 9th September 2024 and interest properly computed in accordance with the decree. The Respondents relied on the principles of waiver, execution, and the authority of court-issued warrants.

Analysis and Determination

16. I have carefully considered the record of appeal and the parties' rival submissions. I find that the following issues arise for my determination: -
 - a) Whether the decretal sum was fully paid before execution commenced.***
 - b) Whether there was a binding consent between the parties on the amount payable.***
 - c) Whether interest on the decretal sum was properly calculated.***

17. The chronology of events was not disputed. Payment deadline was set as 25th August 2024 but later extended to 6th September 2024. Execution commenced on 9th September 2024 and the final payment made on 8th October 2024.
18. The above narration of the series of events reveals that the Appellant completed payment after execution had commenced.
19. Section 34(1) of the Civil Procedure Act provides that all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not in a separate suit.
20. My finding is that execution properly arises where a decree remains unsatisfied and that in the instant case the full decretal sum had not been paid as at the time execution commenced.
21. On the issue of whether there was a binding consent/waiver, the Appellant relied on alleged agreement to settle at a reduced figure. The record however shows that the proposal was conditional upon payment within time and that no formal consent was executed. Furthermore, as I have already noted in this judgment, payment was not made within the agreed period.
22. The law on waiver is captured in the authorities cited by the Respondent such as the case of ***Sita Steel Rolling***

Mills Ltd vs. Jubilee Insurance Co. Ltd (2007) eKLR, where the Court held that:

“An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

23. Further, in ***African Commuter Services Ltd vs. Kenya Civil Aviation Authority & 2 Others (2019) eKLR***, the Court stated a party in default cannot ride on the principle of waiver attributed to the other.

24. Applying the principles set in the above cited cases, I find that there is no evidence to show that the Respondent abandoned its right to full payment with interest. On the contrary, it consistently insisted on payment within timelines and proceeded to execution upon default.

25. I therefore find that no binding consent or waiver was established.

(3) Whether interest was properly calculated

26. Turning to the issue of whether interest was properly calculated, I note that the decree expressly provided for “interest till payment in full.” In this regard, upon application for execution, the court considered payments already made, independently computed the balance due and issued warrants accordingly.

27. The nature of a decree and warrants is explained in ***Masinde Muliro University of Science & Technology vs. Alfatac Contractors Ltd; Kenya Commercial Bank Ltd (Garnishee) (2021) eKLR*** as follows: -

“A decree is an instrument that issues from the court, duly executed by the registrar and bearing the seal of the court. It is, therefore, a court instrument, issued at the instance of the court... The registrar has the final say in the process.”

Similarly:

“A warrant of attachment is an instrument that issues from the court, duly executed by the registrar and bearing the seal of the court... as a purport of the outcome of court proceedings/execution as set out in the decree.”

28. In the instant case, the Appellant did not provide any alternative computation to challenge the Court’s figures. I therefore find that the computation of interest and issuance of warrants was proper and lawful.

29. My above finding notwithstanding, and considering the undisputed fact that the Appellant made some payments to the Respondents, albeit later after the issuance of the warrants of attachment and proclamation, it is expected that the said amount paid by the Appellant will be accounted for by the Respondent and factored in when calculating the total amount due, if any.

30. From the totality of the evidence, applicable law and bearing in mind the contents of the preceding paragraph, I find that the appeal is without merit and I hereby dismiss it with costs to the 1st Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH
DAY OF MAY 2026.**

HON W. A. OKWANY
JUDGE

In the presence of
Ms Atieno for Ooko for Appellant
Makumi for Respondent
Abdirzak - Court Assistant