



REPUBLIC OF KENYA



**Bhangra v Kitololo (Civil Appeal 200 of 2016)  
[2022] KECA 807 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 807 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 200 OF 2016  
DK MUSINGA, P, HM OKWENGU & MA WARSAME, JJA  
JUNE 24, 2022**

**BETWEEN**

**P S BHANGRA ..... APPELLANT**

**AND**

**AUSTIN S KITOLOLO ..... RESPONDENT**

*(An appeal from the Ruling and Order of the High Court of Kenya at Milimani  
(Muga Apondi, J.) delivered on 3rd May 2012 in Misc. Appl. No. 350 of 2015)*

**JUDGMENT**

1. The brief background to this appeal is that the appellant filed a claim in the High Court to recover the sum of Kshs.9,500,000.00 which he had lent to the respondent as a personal loan in the years 1996 and 1997. Following a full hearing of the suit, judgment was delivered in favour of the appellant on 29<sup>th</sup> April 2005 in the sum of Kshs.16,346,246.50 together with interest at 12% per annum from 5<sup>th</sup> May 2005 until payment in full. A decree was thereafter issued on 5<sup>th</sup> October 2005.
2. The respondent failed to settle the decree and the appellant applied for the respondent's committal to civil jail for failure to satisfy the decree. The application was allowed with the consequence that the respondent was committed to civil jail.
3. On 13<sup>th</sup> March 2009, the parties entered into a consent where the respondent undertook to pay the appellant a sum of Kshs.5,000,000.00 in partial satisfaction of the decretal amount upon which the order for his committal to civil jail would be suspended. Subsequently, the respondent made an application proposing to deposit in the court a sum of Kshs.1,000,000.00 and liquidate the balance of the decretal amount by monthly instalments of Kshs.200,000.00 till payment in full. The application was allowed vide a ruling delivered on 24<sup>th</sup> July 2009.



4. In her ruling, Lesiit, J. (as she then was), observed that the sum of Kshs.1,000,000.00 deposited in court by the respondent represented 20% of the decretal sum and that by making instalments of Kshs.200,000.00 the respondent would be able to pay off the balance of the decretal sum within 20 months. The learned judge further directed that the order for payment of monthly instalments of Kshs.200,000.00 was subject to review for upward increment of the amount on application by either party.
5. The appellant contends that the finding by Lesiit, J. regarding the amount payable was not entirely correct in that at the time of issuing the order the respondent owed the appellant a sum of Kshs.22,888,287.00 which was the decretal sum and the accrued interest at the rate of 20% per annum. Therefore, 20% of the decretal sum would have been Kshs.4,577,657.40 and not Kshs.1,000,000.00 as observed by the learned judge.
6. Subsequent to the ruling of 24<sup>th</sup> July 2009, the appellant made an application dated 6<sup>th</sup> April 2010 for review of the aforesaid order, seeking an increment of the monthly instalments from Kshs.200,000.00 to Kshs.500,000.00.
7. The application was heard by Apondi, J., and in his ruling delivered on 3<sup>rd</sup> May 2012, the learned judge observed that the parties were not in agreement on the amount that had been paid and the amount that was outstanding. The judge then concluded the ruling as follows:- “under those circumstances, it would be prudent and reasonable for the parties to take accounts within a period of the next 90 days so that the issues will become much clearer. I hereby direct that the parties should appear before the Deputy Registrar on 25<sup>th</sup> May 2012 to enable them reconcile their accounts. In the meantime, in the interest of justice, all further monthly repayments are hereby stopped. The upshot is that the application dated 18<sup>th</sup> April 2010 is hereby dismissed with costs since the same has no merit at all.”  
That is the ruling that gave rise to this appeal.
8. Being dissatisfied with the said ruling, the appellant preferred this appeal on grounds that the learned judge erred in law and fact: in directing the taking of accounts whereas a judge of concurrent jurisdiction had made a similar order and accounts taken and a ruling on the issue made on 15<sup>th</sup> December 2011; in failing to appreciate that the order of Lesiit, J. of 24<sup>th</sup> July 2009 had an error regarding the amounts that were outstanding; in suspending further payments of the instalments; in holding that he could not review the order that had been made by a judge of concurrent jurisdiction whereas Lesiit, J. had directed that an application for review of the monthly sum payable could be made by either party; and in incorporating and deciding issues that were not subject of the application before him.
9. This appeal was virtually heard on 16<sup>th</sup> June 2021. Mr. Paul Mwangi, learned counsel, appeared for the appellant while the respondent was unrepresented, following the withdrawal of his advocates, Kabue Thumi & Company. Mr. Mwangi relied on his written submissions dated 5<sup>th</sup> October 2020 which he briefly highlighted. On the other hand, the respondent did not file any submissions but briefly responded to the appellant’s submissions, arguing that there was a consent between the appellant’s advocates and his erstwhile advocates that the entire sum that was due and payable was Kshs.5,000,000.00 which he had fully paid and therefore according to him the appeal had no merit.
10. The appellant’s counsel submitted that the substantive issues for determination in this appeal were:
  - a) Whether the learned judge had jurisdiction to order the retaking of accounts;
  - b) Whether the learned judge had jurisdiction to suspend further payments of the instalments; and



- c) What the exact outstanding decretal amount owed to the appellant by the respondent was.
11. We agree with the appellant on the issues for determination as set out here above and we shall proceed to determine them seriatim.

**(a) – Whether the learned judge had jurisdiction to order the retaking of accounts.**

The record of appeal shows that on 1<sup>st</sup> October 2010, Koome, J. (as she then was), directed parties to appear before the Deputy Registrar to take accounts with a view to determining the outstanding amount that was due and payable. Parties appeared before the Deputy Registrar as directed, and on 15<sup>th</sup> February 2011 the Deputy Registrar issued a ruling stating that the outstanding amount was Kshs.8,194,247.00 exclusive of interest.

12. In the circumstances, we find and hold that Apondi, J. erred in law in directing the retaking of accounts since that had already been done pursuant to the earlier orders of the court. We adopt the same position taken in *Stephen Mwaura Njuguna vs Douglas Kamau Ngotho, Civil Appeal No. 90 of 2005* where this Court held:

“The learned judge had no jurisdiction to determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi, J, a judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a judge of the High Court as the appellant sought.”

**(b) Whether the learned judge had jurisdiction to suspend payments of the instalments.**

13. A perusal of the record reveals that there was no application by the respondent for suspension of the monthly payments of Kshs.200,000.00. To the contrary, the appellant had sought an order to have the monthly instalments reviewed upwards from Kshs.200,000.00 to Kshs.500,000.00 in terms of the orders by Lesiit, J. of 24<sup>th</sup> July 2009. We agree with the appellant that the learned judge’s decision to suspend further payment of the monthly instalments was tantamount to granting a stay of execution of the decree in the absence of an application for such an order by the respondent. We find and hold that Apondi, J. did not have jurisdiction to suspend further payment of the monthly instalments.

**(c) What was the exact outstanding decretal amount?**

14. As per the judgment delivered on 29<sup>th</sup> April 2005 and the decree that was extracted therefrom, the decretal sum was Kshs.16,646,246.50. That judgment and decree has never been set aside to date. On 5<sup>th</sup> February 2011, the Deputy Registrar after taking accounts made a ruling that the outstanding decretal amount was Kshs.8,194,247.00 exclusive of interests. That finding has not been set aside to date. It follows therefore that the outstanding decretal amount that was due and payable by the respondent to the appellant as at 5<sup>th</sup> February 2011 is Kshs.8,194,247.00 exclusive of interest, which should be applied thereon at the court rates of 12% per annum.
15. Having arrived at this conclusion, we allow this appeal and set aside the ruling by Apondi, J. of 3<sup>rd</sup> May 2011 and substitute therefor an order allowing the appellant’s application dated 6<sup>th</sup> April 2010. The respondent shall bear the costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**D. K. MUSINGA, (P)**

**JUDGE OF APPEAL**

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**HANNAH OKWENGU**  
**JUDGE OF APPEAL**

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**M. WARSAME**  
**JUDGE OF APPEAL**

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*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

