



REPUBLIC OF KENYA



**KENYA LAW**  
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**Hashi Empex Limited v Mwangi & another (Civil Case 272 of 2008)  
[2025] KEHC 11477 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11477 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 272 OF 2008**

**JN MULWA, J**

**JULY 31, 2025**

**BETWEEN**

**HASHI EMPEX LIMITED ..... PLAINTIFF**

**AND**

**WANGETHI MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendant/Applicants have moved this court vide a Notice of Motion application dated 17<sup>th</sup> April 2024 brought under Sections 1A, 1B and 34 of the *Civil Procedure Act*, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, Sections 462 and 463 of the *Insolvency Act* and any other enabling provisions of the law. Seeking the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this application, the honourable court be pleased to stay execution of the judgement dated 8<sup>th</sup> December 2016.
  - c. That the Honourable court be pleased to lift and set aside the proclamations of attachment dated 15<sup>th</sup> April 2024, serial nos. 374, 375, 390 & 391 and warrants of attachment and sale both dated 19<sup>th</sup> March 2024.
  - d. The costs of this Application be provided for.
2. The application is supported by the grounds appearing on its face and the Affidavit of Mr. Sekou Owino Legal Officer in defendant's company.



3. The Plaintiff/Respondent opposed the Application through Replying Affidavit sworn by one K.V.S.K Sastry the duly appointed Liquidator of the Plaintiff herein.
4. Briefly the Plaintiff's case is :-
  - a. That it is not in contest that a Judgment was entered in favour of the Plaintiff against the Defendants, by this court on 8<sup>th</sup> December 2016 for the sum of Kshs. 33,450,000 plus costs and interest from the date of Judgment until settlement in full. That as a condition for the defendants to proceed with an appeal at the Court of Appeal they were directed to pay 50% of the judgment sum and the other 50% was directed to be deposited in an interest earning account in the parties advocates name pending the determination of the Appeal. The said Appeal was eventually dismissed by the Court of Appeal and as such the total outstanding decretal amount plus interest became due and owing from the Defendants.
  - b. That subsequent to the dismissal of the Defendants Appeal, the Plaintiffs advocates reached out to the Defendants advocates with the aim of agreeing on the amount then due and owing and to further facilitate payment of the agreed upon sums without the necessity of commencing execution proceedings.
5. The plaintiff shared highlights of the "On without prejudice communication" between the parties from which an offer to settle the decretal sum was made by the Defendants and accepted by the Plaintiff at the sum of Kshs. 30,941,250/= from the initial demand of Kshs. 33,450,000/= the Defendants failed to settle the agreed amount, necessitating the Plaintiff to take out execution proceedings.
6. That at the end, the Plaintiff having been paid the 50% of the decretal sum, and the other 50% deposited in an escrow account without interest, the only issue remaining ,and for which the Plaintiff took out execution proceedings is the interest on the sum of Kshs. 16,650,625/= as per the court order on the conditional stay pending hearing and determination of the appeal which was eventually dismissed.
7. The Defendants case is that the Plaintiff's execution process to recover the balance of the decretal sum was procedurally irregular, relying on Order 22 Rule 18 1(a) of the Civil Procedure Rules, for lack of a notice to show cause issued to the Judgment Debtor, and reliance on the without prejudice settlement of the amount payable as interest, Citing the case of IATA – vs- Connect Travel Ltd and Rendru Nzau –vs- mbuni Transport Co. Ltd and HC. COM E014 of 2020:Cordison LTD International Limited – VS- Innovation and Growth Academy BV where the Hon. Justice Majanja (as he was then) stated that:-

“The general principle is that a without prejudice offer is inadmissible to prove the contents of the admission unless the admission is accepted and leads to a binding agreement.”

### **Analysis and determination**

8. Upon analysis of affidavit, material provided to the court, the following issues arise for determination.
  - a. Whether the defendant can revenge on the proposal of settlement made by the plaintiff on and duly accepted by the defendant a without prejudice communication.
  - b. Whether the execution proceedings taken out by the defendant is lawful and regular.
  - c. What is the amount of interest due and payable to the plaintiff by the defendant.
  - d. Who bears costs of the application.



**a. On the first issue - Whether the defendant can renege on the proposal of settlement made by the Plaintiff on and duly accepted by the Defendant a without prejudice communication.**

9. The Plaintiff agree that on without prejudice communication between parties in negotiations is generally inadmissible where the proposals are rejected and foul; but that if the proposals of settlement are accepted, then the Defendants cannot be allowed to renege on the agreement.

10. In the case of HC.COMM E014 of 2020: Cordisons International Kenya Limited vs Innovation and Growth Academy BV the learned judge stated that: -the learned Judge stated that:-

“The general principle is that a without prejudice offer is inadmissible to prove the contents of the admission unless the admission is accepted and leads to binding agreement. In *Geology Investments Ltd v Behal t/a Krishan Behal and Sons* [2002] 2 KLR 447, Mwera J., expressed the rationale for this position as follows: The rubric “without prejudice” has been used over the ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlement of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any party. The rubric simply means “I will make you an offer, if you do not accept it, this letter should not be used against me. Or I make the offer which you may accept or not, as you like, but of you do not accept it, my having made it is to have no effect at all.” It is a privilege that is jealously guarded by the court otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlement”.

11. It is therefore the court’s finding that the offer send out to the Plaintiff by the Defendant to settle on interest payable at Kshs. 31, 285/= but which by further engagement, the plaintiff send a counter offer of Kshs. 30,941,250/= which the defendant accepted in a letter dated 4/04/2024 upon which the plaintiff in the said letter requested the defendants to remit to them.

12. The above proposition was earlier stated in the case of *Lachab Transport Ltd v. Kenya Arab Orient Insurance Ltd* [1986] eKLR where the court observe that:-

If an offer is made, “without prejudice” evidence cannot be given on this offer. If the offer is accepted, a contract is concluded and one give evidence of the contract and give evidence on that “without prejudice letter”

13. It therefore boils to the answer that, the Defendant, in these circumstances cannot renege on the settlement proposal made by the plaintiff and which it duly accepted despite the communication having been on

“a without prejudice basis” see also the case of *IATA v. Connect Travel Ltd and Another* for similar holding”.

**On issue No (b) on whether or not the execution process undertaken by the plaintiff was lawful and regular, guidance is sought from provisions of Order 22 Rule 18(1) CPR wherein it is provided:-**

“...Where on application for execution is made more than one year after the date of the decree the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed why the decree should not be executed against him”.



Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied...”

14. From the above, it emerges that the last order against the defendants was delivered by the court of appeal on 9/02/2024 when the appeal was dismissed. This instant application was made on 17/04/2024. Needless to state, it was within the one year of the last order of the court by the court of appeal.
15. In the case of James Theuri Wambugu v. Mellen Mbera, the court, in very similar situation, held that the proviso to rule 18(1) CPR is applicable where the application was filed within two months from the last order of the court.

This court is persuaded to also agree that the Proviso to Rule 18(1) applies to this matter.

It is also important to state that at all material times, both parties were fully involved in the negotiations seen in the communication exhibited in the Defendants and Plaintiff's affidavits and therefore, there was no necessity for issue of a notice to show cause to the defendant why they should not pay the sums owed to the Plaintiff.

The above was buttressed in the case of Nairobi HC. Comm 542 of 2007, Pankaj Vrajraj Somaia v. Bill Kipsang Rotah & 2 Others where the court held that :-

“... Order 22 Rule 8(2) provides exceptions where the court may waive the requirements of Rule 18(1) of Order 22 in the interest of justice for expediency and in the interest of justice”.

16. It is this court's finding that, this matter is one where the exception must apply for expediency and justice, that notice to show cause was not necessary. The court therefore cannot agree with the Defendant's submissions that the Plaintiffs initiated execution proceedings six years after the date of the amended decree without having issued a notice to show cause under Order 22 Rule 18(1)(a).

Consequently, the court finds and holds that the execution process initiated by the plaintiff against the defendant was lawful and regular.

**Issue No. (c) Determines what amount in interest is due and payable to the Plaintiff by the Defendants.**

17. There is provided an amended decree issued on 19/04/2018 and warrants of attachment and sale dated 19/03/2024 and 15/04/2024 respectfully.

The dispute is not on the judgment sum but on the interest payable on the judgment sum.

As earlier stated herein the court by the an order issued on 8/12/2016, the court, while granting the defendant stay of execution, directed that 50% of the decretal sum, being of Kshs. 16,725,000/- be deposited in an interest earning account in the names of the parties Advocates, and the other half Kshs. 16,725,000/= be paid directly to the plaintiff. This was duly complied with by the Defendant.

18. On the half to be deposited in an interest earning account, the plaintiff executed the necessary forms for opening and deposit of the money at Standard Chartered Bank, which the court gathers was duly done.

However, and interestingly after the said sums were deposited in the Bank by a letter dated 8/04/2024 the defendants Advocates MS. Mohamed Mungai Advocates notified the Plaintiff that the sum of Kshs. 16,725,000/= was deposited in a non-interest earning account which is contrary to the court order.

19. Clearly, the court order was specific that the funds were to be placed in an interest earning account.



20. The question therefore that begs an answer is, “Who should pay the interest on the deposit at the Standard Chartered Bank, in a non-interest earning account?”

21. The purpose of a deposit in an interest earning account pending hearing and determination in either an appeal or an application, the court in the case of Centre for Mathematics Science and Technology Education in Africa v. Apex Security Services Ltd [2019] KEHC eKLR held that :-

“...Once a decretal sum is deposited in a joint account of parties counsels, the judgment debtor is set free from any interest payable to the decretal sum as the purpose of providing security would have been fulfilled. The judgment debtor cannot be called upon to pay the difference in the bank rate and the court rate. Should the appeal fail, the judgment debtor would seek the release of the amount awarded on appeal from the joint account plus the prorated accumulated interest”.

22. In the instant matter, the Defendant provided the funds Kshs. 16, 725,000/= to be placed in the interest earning joint account. It appears to the court that the Defendants’ advocates did not comply with the court order on deposit of the money in an interest earning account. The court is left to ask itself on whose instructions that was done. Suffice to state that the defendant’s advocates notified the plaintiff of the development. There is no doubt the action by the defendants and or their advocates left the Plaintiff without any cushion on interest on the 50% decretal sum.

23. The court in the case of Later v. Mbiyu [1965]EA.592 rendered that:-

“... The party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by an award of interest”.

24. In the circumstances, the court has no option but to find that the plaintiff has been deprived of the would be interest on the deposit of 50% of the decretal sum by failure by the Defendants and or their advocates failure to place the deposit in an interest earning account as ordered by the court.

25. There being no sufficient or reasonable grounds as to why the court order was not complied with, the Defendants must be held liable to pay to the Plaintiff the sum of Kshs. 16,725,000/= plus interest at court rates from time of deposit until payment in full.

26. Interest shall accrue on the sum of Kshs. 16,650,625/= from the time it was deposited at the Standard Chartered Bank. The parties may engage services of the Deputy Registrar of the Court to assist in such calculations if the parties by their advocates are unable to undertake the task or cannot agree.

27. For the foregoing, the court is persuaded that it has addressed the issues in the application sufficiently. The upshot is therefore that the Defendants/Applicants application dated 17/04/2024 is not well founded and cannot be sustained.

It is dismissed with costs to the Plaintiff.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

.....

**JANET MULWA**

**JUDGE**

