



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL NUMBER 475 OF 1993**

**ELIZABETH KIHANYA**(suing as representative of the estate of  
**JOHN KIHANYA NDIRUKA**.....**APPLICANT**

VERSUS

**GEOFFREY KARIUKI KAMAU**.....**RESPONDENT**

**RULING**

1.Judgment in this case was delivered on the 17<sup>th</sup> October 2014 in favour of the plaintiff against the defendant in the sum of Kshs.298,450/= plus costs and interest.

I have seen a decree issued on the 1<sup>st</sup> August 2016 for a sum of Kshs.1,234,991/00 made up as follows:

- a) principal sum - Kshs.298,420.00
- b) Interest from 9<sup>th</sup> August 1993  
to 30<sup>th</sup> June 2016 (23 years)-Kshs.823,639.00
- c) Costs of the suit -Kshs.112,932.00

**Total - Kshs.1,234,991.00**

2.The judgment debtor did not pay the above sum. A Notice to show cause was therefore issued and served upon him to show cause why he should not be arrested and detained in civil jail.

It is upon that basis that he filed the application before me and dated 1<sup>st</sup> November 2016.

In the said application, the Defendant Geoffrey Kariuki Kamau seeks orders that the interest charged on the decretal sum be varied or reviewed and that he be allowed to pay by instalments. He swore an affidavit in support of the application on the 1<sup>st</sup> November 2016. He avers that a commencement of period for calculation of interest was not stated in the judgment delivered on the 17<sup>th</sup> October 2014 upon the principle sum of Kshs.297,450/= and that the calculation of interest from date of filing of the suit stated in the decree from 9<sup>th</sup> August 1993 is erroneous as it is barred by the **Section 4(4) of the Limitation of Actions Act**. He therefore urges that the interest be recalculated and in the meantime, an order of stay of execution do issue.

He has deponed that he is a farmer and has no other means of income but is willing to pay by instalments.

3. In opposing the application, the respondent states that the claim was a liquidated claim, a special damage, hence interest ought to accrue from the date of filing of the suit. It was submitted that no appeal has been lodged, and that the proposals given are too low and that it would take too long to clear the decretal sum if the Judgment Debtor is allowed to pay as such.

4. I have looked at an Affidavit of means filed by the Applicant Judgment/ Debtor on the 10<sup>th</sup> February 2017. He states that he retired from employment in 1984 and has been living on a pension of Kshs.16,500/= per month, certified by a payslip annexed to the affidavit.

He further depones that he has planted trees that he harvests every five years. He however did not state when the next harvest would be, and what is the expected income. I have perused the applicant's bank account at Standard Bank Limited. There are no credits for the month of December 2016 other than the pension of Kshs.15,108/=. He has not told the court whether he has other bank accounts or not. He has not disclosed his movable or immovable assets, having been a Bank manager upto retirement, a fact he has not denied in any of the documents he filed in court.

5. I have considered submissions by counsel on the application. In the applicants plaint dated 6<sup>th</sup> August 1993 and filed on the 9<sup>th</sup> August 1993, the claim stated by the plaintiff against the defendant was a liquidated sum of Kshs.298,450/=. A prayer for interest at 25% per annum from 18<sup>th</sup> February 1992 was pleaded. Another prayer was pleaded for interest on the principal sum and further interest on the interest applied from 18<sup>th</sup> February 1992 at court rates.

6. The courts judgment delivered on the 17<sup>th</sup> October 2014 was silent as to when interest would start accruing. While calculating interest for purposes of drawing the decree the court by its Deputy Registrar applied the court rates interest from the date of filing suit, a period of 23 years and arrived at Kshs.823,639/=.

7. The applicant through his Advocate has urged that the application of interest to the principle sum after **12 years is barred by Section 4(4) of the Limitations of Actions Act, Cap 22 Laws of Kenya.**

It states:

***4(4)An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payments of delivery in question, and no arrears of interest in respect of recovered after the expiry of six years from the date on which the interest became due.(emphasis mine).***

8. Reading the above provisions, I do not think the Decree holder is barred from applying interest on the liquidated sum as decreed by the court until after expiry of six years from the date it became due, meaning, in my considered opinion, from the date of the court order, in this matter from the 17<sup>th</sup> October 2014. Six years would expire on the 16<sup>th</sup> October 2020.

The decree holder would therefore be estopped from claiming the interest, if there is default in payment from the 16<sup>th</sup> October 2010. **Order 10 Rule 4 of Civil Procedure Rules** gives the court wide discretion to award interest from when money became due and owing but depends on circumstances of the case. See also **Section 26 of Civil Procedure Act**. In **Arthur Munyao Muuo -vs- Lilian Geruto & 5 Others**, the above sentiments were expressed by the **Hon. F. Kikonyo, J in HCCC No. 65 of 2013.**

9. Further in **Court of Appeal case No. 36 of 2014 Diamond Trust Bank Ltd -vs- Said Hemed Shamshi & 2 Others (2015) e KLR**, the rationale for awarding interest was explained, that the successful party was deprived use of his money by reason of the wrong by the judgment debtor.

**Section 26 of Civil Procedure Act states:**

*(1)“where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rates as the court deems reasonable to be paid on the principal sum adjudged from the date of suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest---*

*(2)where such decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum.*

From the above, it is evident that the court in its discretion may order payment of interest on a money decree from date of the suit or from date of the decree and where it is silent subsection (2) above grants the authority to award 6% interest on further interest on the aggregate, meaning, principal sum plus interest from date of filing suit to date of the judgment. See **Court of Appeal No. 36 of 2014 a (Diamond Trust Bank)** above.

The court's discretion is thus unfettered as to when interest should apply.

In the above case the court applied interest from date of filing suit as the claim was definite and ascertainable before judgment, until full payment.

10. Likewise, in the present suit, the claim arose from a guarantee the applicant signed for a specific sum of money. He did not pay the same when the borrower failed to pay. It is ascertainable and from the date of default, the plaintiff was kept away from it and therefore he can only be compensated by the award of interest. I therefore find that the interest at court rates ordered in the decree ought to apply from the date of filing the suit on the 9<sup>th</sup> August 1993 until payment in full. I further make a finding that the applicable interest at court rates from 9<sup>th</sup> August 1993 be applied in the calculation of the interest on the principal sum, with applicable variations over the period.

11. On the issue of payment by instalments, the Judgment/Debtor has not placed sufficient and demonstrable evidence that he is unable to pay the decretal sum.

Upon recalculation of the decretal sum as stated above, the decree holder will be at liberty to proceed with execution but will also satisfy the court that the Judgment/Debtor has no assets movable or immovable that may be attached before resulting to execution by way of arrest and committal to civil jail of the judgment debtor.

**Section 40 of Civil Procedure Act** provides for arrest and detention as a mode of execution of a decree. It is not unconstitutional. See **Civil Appeal No. 413 of 2014 Samuel Njenga -vs- Augustino Onanda & Another (2015) e KLR** where the court upheld the **Constitutionality of Section 40** as a mode of enforcement of a decree but should be applied only if it is demonstrated that the Judgment/Debtor is able to pay but has failed to pay and that the only mode of execution available to the decree holder is arrest and committal to civil jail.

12. I shall stay execution of the decree pending recalculation of the interest on the principal sum of Kshs.298,420/= as directed on Paragraph 1 above. This exercise should be commenced and completed within 30 days of this ruling, upon which the respondent/Decree holder shall serve the Applicant with the revised decree for his payment and in default, normal execution proceedings may follow.

There shall be no orders as to costs in this application.

**Dated, Signed and Delivered this 20<sup>th</sup> Day of April 2017.**

**J.N. MULWA**

**JUDGE**