



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 10 OF 1998

**PATRICK KIMANI NGANGA.....PLAINTIFF /DECREE
HOLDER**

VERSUS

**KENYA POWER & LIGHTING CO. LIMITED.....DEFENDANT/JUDGMENT
DEBTOR**

RULING

The Plaintiff is the decree holder while the Defendant is the Judgement Debtor in this old suit filed in 1998 based on negligence. On 17th February 2006, final judgment was entered for a sum of Kshs. 2,654,390/- less 30% contribution thus the sum of Kshs. 1,858,073/- was to be paid. On 4th July 2012, costs were taxed at Kshs. 345,047/- also subject to 30% contributory negligence.

The Judgment Debtor has now applied through notice of motion dated 30th July 2014 claiming that the decree as drawn and issued on 25th June 2014 does not accord or agree with the Judgment of the Court. That when faced with warrants of attachment and sale issued in the suit, it ended up paying an erroneous amount which is not recoverable by virtue of the provisions of Section 4(4) of the Limitation of Actions Act. According to the Judgement Debtor, the Court interest rate of 12% per annum is not applicable to the sum of Kshs. 349,606/- being the total of the unpaid judgment sum of Kshs. 108,073/- and costs of Kshs. 241,533/- totaling to Kshs. 587,338/- as at the time when the application for execution was made to the court, because an execution process predicated upon a defective decree cannot stand in law. There is a supporting affidavit sworn by Fredrick Katui, an Insurance Assistant with the Judgment Debtor.

The Decree Holder swore a replying affidavit 18th October 2014. Grounds of opposition emanating therefrom include –

- i. That upon hearing and conclusion of the case, he was awarded special damages with costs and interest from the date of filing suit until payment in full which special damages the Judgment Debtor attempted to set aside in vain.
- ii. That he filed his bill of costs and served it upon the Judgment Debtor who failed to attend court on the hearing date where the bill was taxed *ex-parte* at Kshs. 345,047/-. A certificate of costs was issued which has never been set aside.
- iii. That in 2014 he attempted in vain to have the decree issued by court approved by the Judgment Debtor and even applied for a notice to show cause why execution should not issue as the

- Judgment Debtor never appeared despite service.
- iv. That an auctioneer was accordingly instructed to attach its movable goods to satisfy the decree which notice it was served with on 18th July 2014 and moved to settle the decree which amount was paid to him by his advocates.
 - v. That the decree as drawn is in accordance with the Judgment of the court.

In a Supplementary Affidavit filed on 7th November 2014, the Judgment debtor while echoing its sentiments made in the application further explained –

- i. That the Decree holder was only entitled to Kshs. 154,390/- with interest at court rates from 7th January 1998 up to 7th January 2004 because in accordance with section 4(4) of the Limitation of Actions Act interest could only be calculated for only six years.
- ii. The costs taxed amounting to Kshs. 345,047/- was to attract interest at the rate of 12% per annum from 7th January 1998 to 7th January 2004.
- iii. That the court should order the Decree Holder and his Advocate to pay back the sum they got which they are not entitled to as this is unjustly enriching them.

The Judgment Debtor has also attempted to argue that the Decree Holder was in contempt of court orders as he did not deposit the decretal amount in court as ordered on 31st July 2014 by Waweru J. It has however not followed the correct procedure in contempt of court applications which cannot be handled in an omnibus manner with other applications. The court has thus disregarded that portion of the application.

The Decree Holder's learned advocates filed written submissions on 18th February 2015. The Judgment Debtor's submissions were filed on 13th November 2014. I have considered the submissions, including the case cited.

Section 4(4) of the Limitation of Action Act provides –

“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 payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

As at 17th July 2014 when the Deputy Registrar issued the warrant of attachment in execution of decree against the Judgment Debtor, the judgment, which was delivered on 17th February 2006, was over 8 (eight) years old. The latest proceedings taken by the Plaintiff in 2014 to enforce payment of interest on that Judgment were clearly forbidden by law as it was over six years since the interest became due. Therefore, the damages are payable excluding the interest on those damages.

However, when it comes to costs of the suit, once the bill of costs has been taxed, that is when it becomes a judgment of the court and therefore, Section 4 of the Limitation of Actions Act which provides that no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due, is not applicable in this case. The costs of this suit were taxed on 4th July 2012. The claim is still within time as six (6) years has not lapsed since delivery of the certificate of taxation. In the circumstances, the costs as taxed and interest accrued on the costs are recoverable.

As a result, the Decree Holder is entitled to payment of the special damages. Interest on those special damages is time barred. As for the taxed costs, interest is payable from the date of delivery of certificate of costs until payment in full.

The Judgment debtor shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 17th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE