



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CIVIL CASE NO. 2540 OF 1998

BENARD CHEGE NJUGUNAPLAINTIFF

VERSUS

FRANCIS K. GATHIGIADEFENDANT

RULING

The Defendant/Applicant has moved this Honourable Court by way of a Notice of Motion dated the 3rd December, 2014. The same is brought under Section 1A, 1B, 3A and 99 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

The Defendant/Applicant has sought the following orders:-

1. Spent
2. That there be a stay of execution of the Judgment and Decree herein and all other consequential proceedings, orders and actions, particularly the Warrants of Attachment and Warrants of Sale of Movable Property issued on 18th November, 2014, until the hearing and determination of this application.
3. That this Honourable Court do find and declare that the Judgment and Decree herein has been wholly satisfied and paid in full by the Defendant and/or his Insurer because:-
 - a. The decretal sum payable was Kshs.450,030/- and not Kshs.600,030/-
 - b. Interest adopted by this Honourable Court is simple interest and not compound interest.
 - c. The Defendant is not liable for interest on the general damages for the period 6th March, 2003 to 22nd October, 2013, during which the Plaintiff's appeal on the same was pending before the Court of Appeal.
 - d. General damages payable were Kshs. 112,500/- and in respect of which simple interest ran from date of withdrawal of appeal on 22nd October, 2013 to date of payment on or about 27th June, 2014.
 - e. Special damages payable were Kss.337,530/-, and in respect of which simple interest ran from date of filing suit on 17th November, 1998 to date of payment on or about 27th June, 2014.
4. That the Decree and all Warrants of Attachment and Warrants of Sale of Movable property issued by this Honourable Court based on the erroneous decretal amount of Kshs.600,030/- and the erroneous computation of interest and any and all consequential proceedings, orders, actions, execution and/or proclamation taken or commenced thereon, be set aside.

5. That the costs of this application and the Auctioneers costs be borne by the Plaintiff.

The application is premised on the grounds set out on the body of the same and is supported by the annexed affidavit of Marion Karaya sworn on the 3rd day of December, 2014.

From the record and the submissions by both learned counsels for the respective parties, the only prayers pending for determination by this Honourable court are prayers 3(c) – (e), 4 and 5 of the said application.

Bearing that in mind, this court will only consider the relevant part of the Supporting and Replying Affidavits.

The deponent in the Supporting Affidavit depones that judgment was delivered on 6th day of March 2003 in the following terms:-

a. Liability – 25%:75% in favour of the plaintiff

b. General damages – Kshs.150,000

c. Special damages – Kshs.450,040/-

Total before apportionment – Kshs.600,000

Total after apportionment – Kshs.450,000/-

d. Costs were taxed at – Kshs.101,580.

That the Plaintiff being dissatisfied with the award of general damages lodged on appeal in Civil Appeal No. 99 of 2014 which subsisted until the same was withdrawn by the Plaintiff on the 22nd October, 2013.

That under the doctrine of subrogation, the Defendant's insurer on 27th June, 2014 paid the Plaintiff's claim in the sum of a total of Kshs.1,191,790.20cts. The application is opposed by way of a Replying Affidavit by Peter M. Murage sworn on the 10th day of December, 2014 wherein he depones that after judgment was entered, there were no orders staying execution and that the existence of an appeal in the Court of Appeal did not stop the judgment debtor from settling the decretal sum more so as the Plaintiff herein was seeking a higher award before the court of appeal and there was no cross-appeal filed by the Defendant.

That he believes that the Defendant's application herein is brought in bad faith and it's vexatious as he made effort to compromise the appeal in the year 2008 but the Defendant failed to respond. He has annexed a bundle of correspondences marked PM2. That on the 1st day of July 2009, the Plaintiff through his advocate on record applied for warrants of attachment on behalf of the Plaintiff but they were directed to file a bill of costs but that notwithstanding, the Defendant failed to pay the decretal sum. That even after the bill of costs was taxed and the appeal had been withdrawn, the Defendant failed to settle the decretal sum until after the Plaintiff had engaged an investigator to trace the whereabouts of the Defendant and attachment done as borne out in the annexed copies of the proclamation marked "PM4".

The Plaintiff believes that the payment of part of the decretal sum by the Defendant was only activated by execution by baseline Kenya auctioneers and that the Defendant or his insurer had no intention to settle the decretal sum.

Parties agreed to canvass the application by way of written submissions which they both filed and which I have considered together with all the materials before me. I have also read through the judgment delivered by Ang'awa J which is the subject of this application. The same is clear that the interest on special damages is from the date of filing of the suit while that of general damages is from the date of judgment.

Section 26 of the Civil Procedure Act deals with interest and it provides:-

“26 (1) Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the 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 at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date as the court thinks fit.”

What I gather from the said section is that it is within the discretion of the court to order payment of interest from the date of the suit to the date of the decree in addition to any interest for any period before the institution of the suit with further interest from the date of the decree to the date of payment or such earlier date as the court thinks fit. To this extent, it is clear on when the interest is payable and the discretion of the court to make orders on various categories of interest in a suit.

It is not in issue that Justice Ang’awa awarded interest to the Plaintiff but the issue is, whether the Defendant should pay interest which accrued during the pendency of the appeal by the Plaintiff. It is a clear principle in law that an appeal does not operate as a stay of execution. It is also clear that there was no order staying interest pending appeal. As submitted by Counsel for the Plaintiff nothing stopped the defendant from paying the decretal sum ordered by the court. It is noted that the Defendant did not file a cross-appeal against the judgment and therefore, it would be right to assume that he was contented with the same and in the circumstances he ought to have paid the decretal sum or better still, apply to the court to have the money deposited in court or in an interest earning account to be opened by the respective advocates for the parties. There is no evidence on record that the defendant offered to pay the money and the offer was rejected.

This court is not persuaded by the Defendant’s contention that since it’s the Plaintiff who filed the appeal and later withdrew the same, he is not entitled to interest during the pendency of the appeal. The argument, to me, is ridiculous and lacks any substance in law. In fact simply put, the defendant enjoyed a financial benefit that did not belong to him from the date of judgment till payment in full and it’s the high time he refunded to the Plaintiff that which was rightfully his, plus the accrued interest and he cannot escape this liability.

The end result of this ruling is that the Defendant’s application dated 3rd December, 2014 has no merits and it is hereby dismissed with costs to the Plaintiff. The cost of the auctioneers should also be borne by the Defendant.

DATED, SIGNED and DELIVERED at Nairobi this 9th day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of:-

.....*for the Plaintiff*

.....*for the Defendant*

.....*clerk*