



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL SUIT NUMBER 2 OF 2000**

**DANIEL OCHIENG OKOTH.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SETH NYAWARE OMAO.....DEFENDANT/APPLICANT**

**R U L I N G**

The applicant, Seth Nyaware Omamo, who was the judgment-debtor in this suit, filed a Notice of Motion seeking among others reliefs, that: -

***That this honourable court do review the decree herein.***

***That the honourable court, for the purposes of satisfaction of the decree herein by the Defendant/applicant, do calculate or order to be calculated, the interest payable by the applicant under the decree.***

***That the court does find that under the law and in the circumstances of the Judgment, the interest chargeable on the sums of the decree was 6% per annum, before the decree and at court rates after the decree.***

**Costs.**

The plaintiff had sought recovery of Ksh.1,900,000/- being monies paid to the defendant by the plaintiff under a land sale agreement which eventually the defendant failed to honour. The plaintiff also sought costs of the suit and interest. Although the plaintiff included a claim for general damages arising from the Defendant's failure, the Deputy Registrar did not pay much attention to it and after striking out the Defendant's frivolous defence, he entered summary judgment in the following form: -

***“Judgment is entered in terms of the Motion dated 27<sup>th</sup> July 2000.”***

The said Notice of Motion had sought **“Summary Judgment for the plaintiff as prayed in the plaint”**

This takes us back to the plaint dated 20<sup>th</sup> June 2000 which sought reliefs as below: -

- a) As per paragraph 3 of the plaint
- b) Costs of the plaint and interest

Paragraph 3 of the said plaint effectively sought: -

(i) Refund of Ksh.1,900,000/-

(ii) General damages

(iii) Costs of the plaint and interest

Clearly therefore, the summary judgment entered for the plaintiff is: -

a) Ksh.1,900,000/-

b) Costs of the plaint and interest

That is so because the court did not pay attention or take regard of the claim to general damages sought in paragraph 3 of the plaint and impliedly, in the final reliefs paragraph at the bottom of the plaint.

As there was no dispute about the judgment figure of Ksh.1,900,000/- the court intends to pay attention only to the award of costs of the plaint and interest.

The dispute between the parties herein then, as far as I can see it, lies in the interpretation of the clause "**Costs of the plaint and interest**".

The judgment debtor/applicant argued that the clause meant costs of the plaint and "**interest on costs**". That way he argued, the plaintiff did not plead or pray for interest on the major claim figure of Ksh.1,900,000/-. The applicant in the circumstances added that the interest sought would be interest on costs only and not costs on the judgment figure of Ksh.1,900,000/-.

I have carefully perused the plaint and what I see is quite different from what applicant/defendant asserts. In my view what the plaintiff sought was costs on the subject matter of the claim which was Ksh.1,900,000/- and interest being interest on the said sum and probably on any sum that might arise under the general damages head. Had the plaintiff sought "**Costs of the suit and interest thereon**," the interpretation given by the Defendant/applicant might come nearer to what the applicant says. Even then, it would only be merely inadvertent for a pleader who seeks costs on such a large sum of money to fail to seek interest thereon. As things stand however, it is the courts view and finding that the plaintiff in his plaint, had sought costs and interest on any judgment amount or sums that the court would give.

The applicant also sought review of the court decree. Although he has not with clarity, guided the court as to what review he has in mind, it is possible to conclude that what he intended is that incase the court reviewed the issue of interest in his favour, the decree figures would clearly change and that should lead to the reviewing of the decree figures.

The court observes also that the final decree of court includes and orders for general damages for breach of agreement. As earlier pointed out, the summary judgment had not granted or awarded general damages and inclusion of general damages in the decree was accordingly not only erroneous but also uncalled for. The error should have been pointed out in good time to have it removed before the decree was signed and issued. As things stand however, the inclusion of general damages as additional award in the decree, without specific sums being stated, was improper and unauthorized and could easily have rendered the decree null and void. Fortunately, no specific sum of general damages were included and the said inclusion, brought no substantive change or difference to the rest of the decree. The inclusion also did no harm to the applicant until full settlement was achieved. Accordingly, any correction or rectification of the decree in that specific respect, will make little difference.

I will now turn to issue of what interest was due in respect to the decree sum of Ksh.1,900,000/- awarded to the respondent.

The suit was apparently filed on 30<sup>th</sup> June 2000. Judgment in favour of the plaintiff/respondent was entered on 2<sup>nd</sup> February, 2006. A decree was signed and issued on 23<sup>rd</sup> May 2006. Perusal of the decree

shows that the Deputy Registrar granted costs and interest without specifying the rate(s) of such interest and the periods such interest would cover. In these circumstances, we can only fall back to section 26 of the Civil Procedure Act for guidance. It states thus: -

**26.1 “Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such 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 courts deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.**

**2. Where such a decree is silent with respect to 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.**

The above section provides on interest in respect of three periods: -

- i) Interest for the period before institution of suit
- ii) Interest from institution of suit to date of issuing of decree
- iii) Interest from decree to date of full settlement.

In this case, interest before institution of the suit is not an issue. It is usually a contractual rate between the parties before the dispute between them, arises. Where such is exorbitant and unreasonable taking into account the circumstances of the case, the court has power and discretion to reduce it to a reasonable rate even when it is contractual. The court exercises inherent equitable jurisdiction to do justice by re-opening the contract to prevent unconscionability by one party (See **Mohamed Vs Athman Shamte [1960]EA, 1062**).

The next part is the interest after institution of the suit. In my view, the proper rate of interest which should apply in this case should be 14% or the actually court interest applicable at the time this suit was filed until judgment was entered on 2<sup>nd</sup> February, 2006. Thereafter, the decretal sum would consist of the principal, the certified taxed costs and interest on the principal sum from entry of judgment until the issuance of the decree. From then until full settlement the decretal sum or part thereof that remains unpaid, would attract interest at the court rate, which is 14%, until full settlement. In stating this, I am aware that subsection (2) of section 26 provides that such interest shall be 6%. In my view, the rate of 6% interest was included in the section because it was the prevailing bank interest rate at the time of promulgation or revision of the Act. Otherwise, that rate of interest would be unreasonable in the economic circumstances prevailing today and would not have been so intended by the legislature.

Having arrived at my findings above, I have perused the application for Execution form filed on 22<sup>nd</sup> June, 2006 which does not show the rate of interest applied upon the principal sum of Ksh.1,900,000/- to arrive at an earned interest figure of Ksh.1,596,000/- between 20<sup>th</sup> June 2000 and 20<sup>th</sup> June 2006. The same applies to the interest of Ksh.10,168/- earned after 20<sup>th</sup> June 2006. If the interest rate applied was different from 14%, then either party has liberty to apply to court for adjustment accordingly.

It is my final view, however, that the applicant/defendant in his discretion, can let the matter lie where it was before this application was filed. If he takes and adopts this recommendation then, I order that this matter be closed once and for all, whether it is in his favour or against him. If he does not accept this recommendation, then he should be prepared to handle the possible consequence incase he finds himself being liable to pay more. I so order.

Dated and delivered at Bungoma this 6<sup>th</sup> day of March, 2012.

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**D A ONYANCHA**

**JUDGE**