



REPUBLIC OF KENYA

**N THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 78 of 2009

ANN MUKAMI MUCHIRI APPELLANT/RESPONDENT

VERSUS

DAVID KARIUKI MUNDIA RESPONDENT/APPLICANT

*(Appeal from the Judgment and orders of the Chief Magistrate's
Court at Nyeri in*

Civil Case No. 853 of 2003 dated 20th July 2005 by R. Nyakundi – S.M.)

R U L I N G

The applicant, David Kariuki Mundia filed this application against, the respondent, Ann Mukami Muchiri seeking to “review, vary and or set aside the judgment of this honourable court delivered on 9th October 2009 and subsequent Decree issued on 15th May 2009 in relation to the amount of interest payable to the appellant/Respondent THAT in the alternative this Honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.....” The application also sought for costs.

The substantive provisions of the law under which the application was brought are Section 3A and 63(e) of the civil procedure Act and Order XLIV rules 1 and 2 of the civil procedure rules.

From the grounds in support of the application as well as the supporting affidavit, the applicant’s grievance seems to be the order of interest made by this court on general damages when allowing the appeal. The order was to the effect that the general damages awarded of Kshs.1,310,000/= would attract interest at court rates with effect from date of judgment of the lower court. In other words the applicant is seeking a review of the judgment limited to the issue of interest that the respondent is entitled to and when it should start running.

Briefly, the facts leading to this application are that the applicant was a successful litigant in the suit commenced against him by the respondent in the chief magistrate’s court, Nyeri. He successfully defended the suit and it was dismissed. Dissatisfied by the judgment and decree aforesaid, the respondent filed an appeal to this court in order to reverse the said judgment and decree. Her appeal was successful. According to the judgment delivered by this court, the appeal was allowed and the respondent was awarded damages in total a sum of Kshs.1,355,398/= with general damages accounting for

Kshs.1,310,00/=. The court ordered general damages to attract interest at court rates from the date of the judgment by the lower court to wit 20th July 2005. Special damages of Kshs.45,398/= however were to attract interest at court rates from the date of filing the suit.

It is the appellant's contention that the order of interest on general damages was wrong on the basis that the applicant should only pay interest from the date of judgment by this court on appeal and not before. Accordingly the applicant should pay interest on the same from 9th October 2008 to 10th March 2009 when the settlement cheques were drawn and paid.

The response is that the application was filed in bad faith, an after thought, scandalous, frivolous, vexatious and a blatant abuse of the process of court. Nothing had been shown in the application to warrant a review of the judgment in relation to the aspect of interest payable. That if the applicant was dissatisfied with the said aspect of the judgment, he ought to have appealed. That in her submissions before this court on appeal, the respondent had asked for interest to be awarded from the date of judgment of the lower court but the applicant did not counter the same.

When the application came up before me for interpartes hearing, Mr. Mugambi and Mr. Ngugi learned counsel for the applicant and respondent respectively agreed to canvass it by way of written submissions. Subsequently they filed and exchanged written submissions which I have carefully read and considered together with authorities cited.

The determination of this application will however turn on a narrow but technical issue, whether the application is competent. On the face of the application, the applicant is categorical that he is seeking to review, vary and or set aside the judgment of this court delivered on 9th October 2009 and the subsequent decree issued on 15th May 2009 in relation to the amount of interest payable to the respondent. A perusal of the record herein does not show that any judgment was delivered on 9th October 2009. Instead the record shows that the only judgment in the appeal was delivered on 9th October 2008. Further it is apparent also that the decree issued on 15th May 2009 is in respect of miscellaneous civil application number 112 of 2005 and not this appeal. That being the case, the application is seeking to review, vary and or set aside a non-existent judgment and or decree. A court can only issue and or grant what it has been asked for. In the circumstances of this case if I was to accede to the applicant's prayers, I will be acting in vain. Courts of law do not ordinarily act in vain. Reference to 9th October, 2008 and miscellaneous civil application number 112 of 205 may have been a typographical or inadvertent error. However the error was not noticed by the parties in good time so that remedial measures could be undertaken. However it is not for me to take up that role or initiative. As the prayers sought refer to a non-existent judgment and or decree, I find the application incompetent and unmerited. Accordingly is struck out with costs to the respondent.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE