



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 1696 of 2001**

**JOSHUA ODANGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**TIM ONYANGO.....DEFENDANT/APPLICANT**

**R U L I N G**

By an amended Chamber Summons dated 6<sup>th</sup> May 2008, expressed to be brought under **Order XXI Rule 22(1)** and **91, Order XX rule 6** and **8** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**, the Plaintiff seeks a stay of execution of the decree therein and all other consequential orders pending the hearing and determination of the application. The Applicant also seeks to have the execution and all orders giving rise thereto, set aside and further the execution and proclamation levied against the Defendant be declared illegal and unlawful.

The basis for the application is that the decretal sum has been settled in full and the Defendant's household goods were proclaimed on 29<sup>th</sup> April 2008.

**Mr. Mathiu** the Applicant Advocate's contention is that he has paid Kshs.1,650,000/-, which is all the sum due to the Respondent as per the Consent judgment of 8<sup>th</sup> November, 2005. **Mr. Mathiu** submitted that despite full payment, the Respondent sent auctioneers who proclaimed the Applicant's goods for recovery of costs which had been taxed. **Mr. Mathiu** submitted that since the Consent judgment was all inclusive, interest and costs were not payable and therefore the decree issued after the costs were taxed should be set aside.

**Mr. Onyango** for the Respondent did not agree with the Applicant. Counsel submitted that the Consent judgment provided for a consequence in default and that since the Applicant defaulted on the third installment payment, the Respondent was entitled to charge interest on the entire outstanding sum which then became due. Furthermore, **Mr. Onyango** submitted, the Respondent raised a bill of costs which was taxed interpartes at Shs.176,551/-. That after the taxation, the Respondent added interest on the sum which the Respondent contends it was entitled to do.

**Mr. Onyango** submitted that the proclamation was in execution for the recovery of costs as taxed and that no reference was ever filed to challenge the said taxation.

I have considered the submissions by both counsel for the Applicant and the affidavits for and against the Applicant. There is no dispute that the Applicant and Respondent entered into a Consent judgment whose terms were as follows: -

“CONSENT

**BY CONSENT:**

- 1) *Judgment be and is hereby entered in favour of the Plaintiff against the Defendant in the sum of Kshs.1,650,000/- all inclusive.*
- 2) *The Defendant to liquidate the decretal sum by monthly installments of Kshs.100,000/- with effect from 30<sup>th</sup> November, 2005 and thereafter on the last day of each succeeding month until payment thereof in full.*
- 3) *In default of any one installment the amount then outstanding shall immediately become due and payable and the Plaintiff shall be at liberty to execute.*

*DATED at Nairobi this 8<sup>th</sup> day of November, 2005.*

.....

*MALONZA & COMPANY*

*(WE CONSENT)*

*ADVOCATES FOR THE PLAINTIFF*

.....

*OKUNDI & COMPANY*

*ADVOCATES FOR THE DEFENDANT (WE CONSENT)”*

It is not disputed that the Applicant defaulted in the payment of installments as agreed and as a result, a dispute arose as to the actual amount due, necessitating the parties to come to court. **Okwengu, J.** ordered the Plaintiff to file the accounts which was done. Eventually the parties settled the dispute out of court. The Respondents then filed a Bill of Costs, which was taxed interpartes through filing of submissions, on 8<sup>th</sup> March 2008. These facts are not disputed. What is creating a dispute is the fact that after the Bill of Costs was taxed at Kshs.176,551/-, the Respondent added a further sum of Shs.456,402/90 as interest. It is that figure that pushed the decretal sum to Kshs.636,953/90 upon which the warrants of sale of property in execution of decree for money dated 25<sup>th</sup> April 2008 was issued. It is that interest which the Applicant now contests together with the sum taxed by the Deputy Registrar.

**Mr. Onyango** justifies the charging of interest on the provisions of **Section 26(2) of Civil Procedure Act** and urges the court to order that the interest charged was payable.

**Section 26** of the **Civil Procedure Act** stipulates as follows:

*“S.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 demands 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 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 cent per annum.”***

The section is not coined in mandatory terms. It uses the word “may”. The Court “may” in the decree order interest. The order for payment of interest is therefore discretionary. There are two factors to be considered here.

The judgment and decree in the instant case arose out of a consent judgment between the parties. That is not disputed, neither are the terms of the judgment in dispute. That consent judgment is set out herein above.

There is no provision for payment of interest in the consent judgment, even in default of payment of the monthly installments ordered. Paragraph one of the consent judgment specifically provided that the amount entered as per the consent was an all-inclusive sum.

I do not think that the Respondent could unilaterally alter or change the terms of the consent judgment to charge what was not allowed under the judgment by the parties. The Respondent was bound by the terms of the consent judgment as agreed between them. The only action the Respondent could take in the event of default on the Applicant’s part, was to execute on the entire amount due at the time of default. That execution did not contemplate that interest of any amount was to be charged on the sum due.

The second factor that emerges is that the Respondent has unilaterally decided to impose interest and also unilaterally decided on the percentage of interest to charge.

**Section 26** of the Civil Procedure Act, which the Respondent invokes for its action is very clear. It is only a court which can order interest where none was provided for by the parties. The interest can only be ordered on a decree for payment of money. The decision to order interest under that section is also discretionary. It is clear therefore that the Respondent does not have any power to impose any interest charge. The interest imposed by the Respondent is therefore illegal, null and void and should be disallowed.

In regard to taxed costs, the Applicant casually stated that he participated in the taxation of the Respondent’s Bill of Costs by mistake and urges that the taxed costs be set aside. This is not the forum to challenge a Bill of Costs especially one taxed inter-partes. The procedure of challenging a Bill of Costs is clearly laid out under the Advocates Act and the Applicant cannot cut corners by approaching the court in a manner not prescribed.

Having come to the conclusion. I have of this matter. I will allow the application dated 6<sup>th</sup> May 2008 in part in the following terms.

- (a) The decree and the warrant of attachment issued herein on 25<sup>th</sup> April 2008 be and are hereby set aside.
- (b) The Deputy Registrar to issue a fresh decree for the sum in the taxed certificate of costs being Kshs.176,551/-.
- (c) The interest imposed on the decretal sum is disallowed in total.
- (d) The Respondent to have the costs of this application.

Dated at Nairobi, this 6<sup>th</sup> day of June, 2008.

LESIIT, J.

JUDGE

***Read, signed and delivered, in the presence of:***

Mr. Mathiu for the Applicant

Mr. Onyango for the Respondent

**WARSAME**

**JUDGE**

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