



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO 442 OF 2000**

**SANAM INVESTMENTS LIMITED .....PLAINTIFF**

**VERSUS**

**POINTEX (K) LIMITED .....1ST DEFENDANT**

**PATRICK KINGORI WARUGONGO .....2ND DEFENDANT**

**MARIE WAIRIMU WARUGONGO.....3RD DEFENDANT**

**RULING**

The plaintiff has filed a Notice of Motion which is brought under Sections 3A, 80 and 99 of the Civil Procedure Act. The plaintiff seeks the following orders: -

- (1) That the order for stay of execution pending appeal entered on 16th July 2002 be set aside.**
- (2) That the judgment and decree of the court given on 5th April 2002 be amended so that interest is awarded on the decretal sum at court rates from the said date until payment in full.**

The plaintiff has cited the following grounds in support of the application: -

- (a) That the orders for stay of execution were granted on the premise that the defendants had preferred an appeal in this matter.
- (b) That the appeal cannot be filed in view of the fact that the court of appeal dismissed the defendant's application for leave to appeal out of time.
- (c) That the Honourable court over looked the issue of interest while entering judgment.
- (d) That the defendants have failed and/or refused to satisfy the plaintiff's claim in full and are making measly installments while the plaintiff is losing interest.

Mr. Nyawara for the plaintiff submitted that the stay granted hereof was conditional on an appeal being filed within 14 days and in view of the fact it was not so filed and indeed to date has not been filed that stay should be vacated.

In support of prayer No. 2 of the application counsel argued that the judgment delivered hereof on 5th April 2002 had an accidental slip in that the Honourable judge failed to award interest on the judgment sum. Mr. Nyawara said that the judge did not give reasons for not awarding interest. He submitted that interest follows judgment at court rate unless the court for specific reasons declines to grant interest. Such interest, he finally submitted was intended to compensate a decree holder, in the present case he accepted

as stated in the replying affidavit that the defendants have been making monthly payments of kshs 25, 000/- per month and the judgment creditor needed to be compensated for the delayed payment.

Mr Kimani for the defendants opposed the application on the basis that the same was an afterthought, and not brought in good faith. He said that judgment was awarded for kshs 1, 096, 451.95 together with half the costs. To date the plaintiff had paid kshs 801, 000/- and they continue to pay kshs 25, 000 per month and the remaining balance is kshs 377, 311/-. The defendant filed a notice of appeal but because it was filed out of time the same was dismissed and that dismissal meant that the stay was automatically vacated. The suit related to termination of unexpired lease where the defendants were guarantors.

He said the judge made a finding that the defendants did not benefit and proceeded to award only half costs but no interest, which was not an accidental slip. Mr. Kimani said to allow the application would be to arbitrate afresh the issues. He was also of the view that the delay in bringing the present application should be held against the plaintiff who had waited from February 2003 to so apply.

In considering the ruling I have looked at the order issued by this court and dated 2nd July 2002 and I notice that stay order was conditional to an appeal being filed. The plaintiff stated that in view of that stay, to be able to execute, an order has to be issued by the court. That I think is reasonable and the court will grant the plaintiff that order.

In regard to the issue of interest I am guided by Section 26 (2) of the Civil Procedure Act. It states: -

**“Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of 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.”**

That section I believe, says it all, the judgment of Justice Onyango Otieno (as then was) was silent on interest applicable to the decretal amount and going by this section the court is deemed to have ordered interest at 6% per annum. The orders of this court are as follows: -

- (1) That the order of stay of execution granted by this court on 2nd July 2002 be and hereby set aside.**
- (2) That the decree passed by this court on 5th April 2002 be amended so that interest is awarded to the judgment amount at the rate of 6% per annum from the date of judgment until payment in full.**
- (3) The costs of the application dated 10th August 2004 are awarded to the Plaintiff.**

Dated and delivered this 30th day of November 2004.

**MARY KASANGO**

**AG JUDGE**