



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 174 OF 2013

PHILIP NYANJUI MACHARIA & 2 OTHERS.....PLAINTIFFS

-VERSUS-

SYNOHYDRO CO. LTD & 2 OTHERS.....DEFENDANTS

RULING

The Plaintiffs filed this suit seeking special and general damages. The court delivered its Judgment on 10th October, 2017. The 1st Plaintiff was awarded Kshs. 785,304.93 special damages, Kshs. 3 Million general damages and Kshs. 250,000 future medical expenses. The second plaintiff was awarded Kshs. 151,547 as special damages, Kshs. 400,000 general damages and Kshs. 70,000 for future medical expenses. The judgment of Justice L. Njuguna awarded the plaintiffs costs of the suit but is silent on interest.

The plaintiffs filed an application dated 3rd July, 2019 seeking the following orders:

1. **THAT** this Application be certified as urgent and the same be directed to proceed to hearing immediately in view of its urgency.
2. **THAT** this honourable court be pleased to review/vary or interpret its judgment of 10th October 2017 in terms of granting the Plaintiffs/Decree Holders an award for interest on general damages, special damages and costs.
3. **THAT** the cost of this Application be awarded to the Plaintiffs/Decree Holders.

The court record of 30th July, 2019 partly reads as follows: -

Mr. Ndeda: - I do not have any objection to the application dated 3rd July, 2019.

“By consent the application dated 3rd July, 2019 is granted as prayed.”

Court: - Special damages to earn interest from the date of filing of the plaint while the general damages shall earn interest from the date of judgment.”

The defendant filed the current application dated 22nd September, 2020 seeking the following orders: -

1. **THAT** this application be certified urgent and be heard ex-parte in the first instance.
2. **THAT** this honourable court be pleased to grant a stay of execution of the decree dated 10th October, 2017 pending hearing and determination of this application.
3. **THAT** this honourable court be pleased to grant a temporary injunction against the plaintiff/decree holder whether by himself or through his agents from carting away, removing, selling by public auction or otherwise the defendants household goods pending hearing and determination of this application.
4. **THAT** this honourable court be pleased to grant an order that interest calculation on the decretal sum should be at the rate of 6 per cent per annum.
5. **THAT** costs of this application be provided for.

The application is supported by the affidavits of **JAMES THUO NJUHU** and **BERNARD JAMES NDEDA** both sworn on 22nd September, 2020. The respondent filed a replying affidavit sworn by **PATRICK KIMATHI MUCHENA** on 9th October, 2020.

Mr. Ndeda appeared for the applicant/judgment debtor. Counsel submitted that the total decretal sum is Kshs. 4,656,783/93 inclusive of Kshs. 501,014 taxed costs. The applicant's insurers paid Kshs. 3,780,308 while the applicant personally paid Kshs. 850,000 leaving a balance of Kshs. 530,256. Counsel maintain that he did not object to the plaintiff's application for interest as he is of the view that they are entitled to interest. Counsel signed a consent on interest in appreciation of Section 26(2) of the Civil Procedure Act.

According to counsel, the application raises two issues namely: -

- 1) Whether given the fact that the court was silent on interest, Section 26(2) of the Civil Procedure Act applies.
- 2) Whether the different execution warrants which provide different decretal sums are improper and offends the law.

On the first issue, it is submitted for the applicant that when the court declared its judgment on 10th October, 2017, it became *functus officio* for all purposes of this matter and the matter became *res judicata*. The mandate of the court expired on 10th October, 2017. Further, counsel urge that when the court became silent on the issue of interest, Section 26(2) of the Civil Procedure Act is automatically activated. The plaintiffs could only appeal on the issue of interest and this court could not review its decision. According to Mr. Ndeda, a finding essential to the decision, though not embodied in the decree, operates as a *res judicata*. Decisions pronounced by courts of competent jurisdiction should be final unless they are modified or reversed by appellate authorities. The plaintiffs cannot revive this matter and move the court to reconsider it as done in their application dated 4th July, 2019.

On the second issue, Mr. Ndeda contends that the plaintiffs obtained warrants through different Auctioneers. On 1st December, 2019 they proclaimed for Kshs. 2,100,000 while on 3rd September, 2020 they proclaimed through a different auctioneer Kshs. 1,614,507. According to counsel, both sets of warrants are improper, exaggerated, unjustified and offends the law. The plaintiffs cannot justify the exaggerated sums claimed in the warrants.

Mr. Kimathi appeared for the respondents. Counsel maintain that the application relates to the calculation of the rate of interest. The applicants would like to have the interest rate fixed at 6% per annum. In their plaint dated 24th May, 2015, the plaintiffs prayed for special and general damages plus costs of future medical expenses together with interest at the prevailing commercial rates from the date incurred until payment in full.

It is further submitted that the plaintiff's application dated 3/7/2019 was not opposed and the applicants are trying to sneak points of law at this stage. After delivering its judgment, the court did not become *functus officio*. Counsel relies on the case of **JOHN KIRAGU KIMANI – V- RURAL ELECTRIFICATION AUTHORITY (2020) eKLR** where the court held: -

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once the proceedings are finally concluded the court cannot review or alter its decisions; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

Mr. Kimathi submit that counsel for the applicant did not allow the plaintiff's application of 3rd July, 2019 subject to capping of interest at 6%. The court varied its Judgment of 10th October, 2017 and the current application is asking the court to reverse the ruling of the court of similar jurisdiction. This is tantamount to praying for an appeal from the same court that issued the orders. Since the court varied its judgment and awarded interest, Section 26(2) of the Civil Procedure Act is not relevant. The court pronounced itself on the issue of interest. The applicant is obligated to settle the full decretal sum including interest.

The application raises only one issue involving interest. What is the interest rate applicable in the matter. Should it be at court rate or 6% as per the provisions of Section 26(2) of the Civil Procedure Act. According to the applicant/defendant, the original judgment was silent on costs and therefore Section 26(2) automatically became active. On their part, the plaintiffs maintain that the silence on interest in the judgment was rectified through the application dated 3rd July, 2019 which application was adopted by consent.

The record shows that the original judgment did not mention anything on interest. The original plaint was filed on 15h May, 2013. Paragraph 18 of the plaint which contain the summarized prayers partly read as follows: -

The cause of action arose at Nairobi within the jurisdiction of this Honourable court.

REASONS WHEREOF the 1st and 2nd Plaintiff's prays for judgment against the 1st, 2nd and 3rd Defendants jointly and severally for: -

a) **Special damages for the 1st Plaintiff in the sum of Kshs. 1,528,677.38 together with interest thereon at prevailing commercial rates from the date incurred until payment in full.** (emphasis added)

b) **Special damages for the 2nd Plaintiff for the sum of Kshs. 490,142.00 together with interest thereon at prevailing commercial rates from the date incurred until payment in full.** (emphasis added)

c) General damages for pain, suffering and loss of amenities for the 1st Plaintiff.

d) General damages for pain, suffering and loss of amenities for the 2nd Plaintiff.

The original plaint was amended on 24th September, 2015.

Paragraph 18 was partly amended and introduced paragraph 18 (f) which states: -

(f) Costs of this suit and interest at court rates thereon. (emphasis added)

The application dated 3/7/2019 did not plead for a specific interest rate but urged the court to review or vary or interpret the judgment of 10th October, 2017 and grant interest.

Ground (c) of the application makes reference to the pleadings which had initially sought interest at the prevailing commercial rates. The application was granted by consent. There is an amended decree issued on 22nd August, 2019 after the granting of the plaintiff's application dated 3rd July, 2019. The decree captures the proceedings of 30/7/2019 and reads as follows: -

THIS MATTER coming up for hearing on 1st September 2016, 14th February 2017 and 3rd April 2017 and for judgment on the 10th day of October, 2017 and Ruling on 30th July, 2019 before the Honourable Lady Justice L. Njuguna.

AND UPON HEARING Counsel for the Plaintiffs and Counsels for the Defendants;

IT IS HEREBY ORDERED AND DECREED

1. THAT judgment be and is hereby entered for Plaintiffs against the Defendants as follows: -

a) Special Damages with interest from the date of filing suit.

i. First plaintiff – Kshs. 785,304

ii. Second plaintiff – Kshs. 151,574

b) General Damages with interest from the date of judgment.

i. First plaintiff – Kshs. 3,000,000

ii. Second plaintiff – Kshs. 400,000

c) Future medical expenses with interest from the date of filing suit.

i. First plaintiff – Kshs. 250,000

ii. Second plaintiff – Kshs. 70,000

2. THAT the special damages to earn interest from the date of filing the plaint while general damages shall earn interest from the date of the judgment. (emphasis added)

The current application which is the subject of this ruling was filed on 22nd September, 2020. This is a period of over one year from the date the amended decree was issued. The amended decree does not state the interest rate applicable. It is normal practice for courts not to indicate the applicable interest rate in the judgment. Sometime courts indicate that interest shall be at the court rates or prevailing commercial rates depending on the circumstances of each case:

The effect of the plaintiffs' application seeking the court's position on interest is that the court was being asked to grant interest on the decretal sum. It is my considered view that once the court revisited the issue of interest, the presumption is that interest was awarded in the judgment and therefore the silence on interest was erased. The orders of 30th July, 2019 activated the prayers on interest. When the application by the plaintiffs was granted, there was no mention of interest at 6% in line with Section 26(2) of Cap 21.

The court's discretion to award interest on the decretal sum is not in dispute. In the case of **SANSORA WIRE & NAIL WORKS LTD –V- SHREEJI ENTERPRISES KENYA LTD [2005] 2 KLR, 127**, Ochieng J held: -

1. The provisions of order 16 rule 5 of the Civil Procedure Rules are only applicable to suits, as opposed to applications.

2. In the absence of any legal provision for the striking out of an application on the ground that the applicant was not prosecuting it, the only recourse available to the respondent is to have the application listed for hearing and if the applicant does not turn up to prosecute it, it court be dismissed.

3. The court has a discretion to order for the payment of interest on the decretal amount at such rate as it deems reasonable, whether from a date before the institution of the suit, the date of the suit or from the date of the decree. The interest may be directed to be payable either to the date of payment or until such earlier date as the court thinks fit. (emphasis added)

The applicant contends that the court became *functus officio* when it delivered its judgment. That cannot be the case. There are several applications that were filed after the delivery of the judgment. These include an application by a third party objecting to the attachment of goods the third party considered did not belong to the Judgment debtor. The applicant also filed applications seeking stay of execution of the decree. There was nothing wrong for the plaintiffs to file the application dated 3rd July, 2019 seeking the court's position on interest. Even after the court delivers its judgment, several applications can be entertained by the same court. These can relate to review of the judgment, correction of errors apparent on the face of the record, setting aside the judgment, payment of the decretal sum by way of instalments, leave to appeal or file a notice of appeal, release of security deposited in court or joint account or any other application related to the dispute between the parties. I do therefore find that the court rectified the issue of interest. I do further find that interest was not granted on the prevailing commercial rates but on court rates as per the amended plaint.

Taking into account the fact that the defendant has paid a substantial part of the decretal sum, I do find that it will be fair if the interest can be computed afresh as per the decree. The plaintiffs should explain how the interest accrued for each aspect of the awarded sum, that is the incurred special damages, the general damages and the future medical expenses. I do direct that any pending warrants shall be suspended pending the computation of the unpaid balance plus interest. The applicable interest rate shall be the court rate. The decretal sum was paid at different periods and the computation should take that into account.

In the end, I do find that the application dated 22nd September, 2020 lacks merit and the same is hereby dismissed with no orders as to costs. However, I do further order that the existing execution warrants are hereby suspended pending the computation by the plaintiff on how the decretal sum plus interest was paid and how the remaining balance was arrived at. Thereafter the plaintiffs to seek fresh warrants, if need be. This matter shall be mentioned before the Deputy Registrar for purposes of confirming the actual balance on the decretal sum.

Dated and Signed at Nairobi this 9th day of February 2021

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S. CHITEMBWE

JUDGE