REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 256 OF 2002

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED........................PLAINTIFF/RESPONDENT

VERSUS

KENYA WILDLIFE SERVICE...................DEFENDANT/APPLICANT

RULING

1. The application before the court is the Notice of Motion dated 12th May 2021. It is brought under **Section 34 (1) of the Civil Procedure Act.** It seeks orders:

1. *Spent*

2. *Spent*

3. *The plaintiff is only entitled to recover interest on the principal sum of Kshs. 31,500,000/= for a period of 6 years from the date of judgement and not more as provided by Section 4(4) of the Limitations of Actions Act.*

4. *The decree arising out of the judgement of 27th July 2011 and issued by this court on 6th September 2011 has been fully satisfied by the defendant.*

5. *The plaintiff refunds the sum of Kshs.7,525,822.85 overpaid by the defendant.*

6. *The costs of this application be awarded to the appellant.*

2. The grounds for the application are on the face of the application:

1. On 27th July 2011, the court entered judgment for the plaintiff in the sum of Kshs. 31,500,000/= together with interest at 12% per annum.

2. The defendant has to date paid a total of Kshs. 63,372.595.85 towards settlement of the decretal sum.

3. *Pursuant to section 4(4) of the Limitation of Actions Act no arrears of interest in respect of a judgement debt may be recovered after the expiration of six years from the date on which the interest became due.*

4. *The decretal sum including interest up to a period of six years from the date of judgement is Kshs. 55,846,772.85 which amount the defendant has paid in full.*

5. *The defendant has made an overpayment of Kshs. 7,525,822.85 on account of interest on the decretal sum.*

6. *It is fair and just that the court confirms that the defendant has fully settled the decretal sum as required by law.*

7. *The plaintiff stands to be unjustly enriched in the sum of Kshs. 7,525,822.85 which the defendant has overpaid and this sum ought to be refunded to the defendant.*

8. *It is in the interest of justice that the orders sought be granted.*

3. It is also supported by the grounds in the Supporting Affidavit of Hellen Olwanda sworn on 11th May 2021. She restated grounds on the face of the application already captured above. She averred that the plaintiff through its advocates have threatened to commence garnishee proceedings against the defendant to recover Kshs. 17,000,000/= which it claims is still owing from the defendant.

4. The application is opposed by the Replying Affidavit of Benson T. Karanja sworn on 20th May 2021. He deposed that judgement was entered for the plaintiff in the sum of Kshs. 31,500,000.00 on 27th July 2011 and thereafter its party and party costs were taxed on 23rd November 2018 and a Certificate of Costs issued on 5th December 2016. He deposed further that after the defendant's appeal to the Court of Appeal was dismissed, the plaintiff's advocates filed its party and party bill of costs which was taxed on 18th May 2016 and a Certificate of Costs issued on 10th June 2016. That the defendants appealed again to the Supreme Court and the court issued its judgement on 27th April 2018 where it dismissed the appeal with each party bearing their own costs.

5. He deposed further that it was only after the Supreme Court had delivered its Judgement that they could now pursue this court's award and so before 27th April 2018, time cannot be said to have started running under **Section 4(4) of the Limitation of Actions Act.** That this was because there was an order for stay of execution which was discharged upon the conclusion of the appeal at the Supreme Court. That one of the reasons why the present court and the Court of Appeal had granted an order of stay of execution was because if the same was not granted, the plaintiff would have proceeded to recover the decretal sum and the defendant would have suffered substantial loss and the appeal rendered nugatory.

6. He also deposed that the award together with the costs of the High Court and the Court of Appeal amount to Kshs. 33,135,704.35 and that as at 13th November 2020, the defendant still owed the plaintiff Kshs. 17,000,000 plus interest.

7. Parties agreed to dispose off the application by way of written submissions:

8. For the defendant/applicant filed by Hamilton Harrison & Mathews Advocates dated 3rd June 2021 and for the plaintiff/respondent filed by Gordon Ogola, Kipkoech & Company Advocates dated 8th June 2021.

9. The applicant identified three issues for determination:

> *i. whether the plaintiff is only entitled to recover interest on the principal sum of Kshs. 31,500,000/- for a period of 6 years from the date of judgement and not more as provided by Section 4(4) of the Limitation of Actions Act,*
>
> *ii. whether the decree arising out of the judgement of 27th July 2011 and issued by the court on 6th September 2011 has been fully satisfied by the defendant and*
>
> *iii. whether the plaintiff should refund the sum of Kshs. 7, 525,822.85 overpaid by the defendant*.

10. On the first issue, the applicant relied on **Section 4(4) of the Limitation of Action Act** and submitted that the application is not concerned with the payment of the Judgement sum of Kshs. 31, 00,000/= which amount has been paid in full but is rather concerned with the interest which has accrued on the judgement sum. It was submitted therefore that the plaintiff cannot recover interest six(6) years from the date the interest became due, and since Judgement was entered on 27th July 2011, six (6) years from that date would be 27th July 2017 and so they can only recover interest up to that date. The applicant cited **Nicona Construction Co. Ltd vs Ken South Plastics Limited & Another [2021] eKLR** , **Justus Ogada Agalo vs MD Kenya Railway Corporation [2016] eKLR.**

11. On whether the decree arising out of the Judgment of 27th July 2011 and issued by this court on 6th September 2011 has been fully satisfied by the defendant, it was submitted that as per the statements of account at pages 41 and 42, the defendant has fully settled the decree arising out of the judgement. In conclusion, the applicant submitted that it had paid the Judgment sum of Kshs. 31,500,000/= plus accrued interest of Kshs. 22,711,068/= as at 27th July 2017 and the additional sum of Kshs. 7,525,822.85/= overpaid by the defendant was refundable and ought to be refunded. It relied on **Joseph Kamira Wanjau vs Lloyd K Kabaiya & 2 others [2018] eKLR**

12. The respondent in its submissions reiterated the facts of the case and submitted on the three issues identified by the applicant.

13. On ***whether the plaintiff is only entitled to recover interest on the principal sum of Kshs. 31,500,000/= for a period of 6 years from the date of judgement*** and not more as provided by **Section 4(4) of the Limitation of Actions Act,** it was submitted that **Section 4(4) of the Limitations of Actions Act** provides that if the judgement debt was paid fully and what remained outstanding was the interest on the judgement debt as it is in this case, then after the expiry of six (6) years from the date which the interest became due, the accrued interest was not recoverable. The same will also apply even if the judgment debt remained unpaid at the expiry of six (6) years. It was submitted further that the arrears of interest in respect of the judgement debt became due on 27th April 2018 when the Supreme Court delivered its judgment.

14. The respondent placed reliance on definition of *"arrears"* from **Black's Law Dictionary 8th Edition 2004**, and **online Cambridge and Webster Dictionaries.**

15. Regarding when times begins to run for purposes of **Section 4(4) of the Limitation of Actions Act** the respondent relied on the case in the case of **Thomas Adong Onuko Kisumu Expert Tailoring House vs Small Enterprising Finance Co. Limited [2017] eKLR** and **Section 94 of the Civil Procedure Act Cap 21.**

16. It was submitted that the plaintiff's party and party bill of costs at the High Court was taxed on 23rd November 2018 and a Certificate of Costs was issued on 5th December 2018 and that the plaintiff's party and party Bill of Costs at the Court of Appeal was taxed on 18th May

2016 and a Certificate of Costs issued on 10th June 2016. Therefore the plaintiff could not execute against the defendant to recover the judgment debt and interest as the interest became due only after taxation and issue of the certificate of costs. That the ascertained costs formed part of the decree that was to be executed and that it is only after the costs have been determined that this court could then issue warrant for execution after calculating the interest earned since the day judgment was delivered by the High Court.

17. ***On whether the decree arising out of the judgement of the court on 27th July 2011 has been fully satisfied*** by the defendant, it was submitted that the defendant still owes the plaintiff Kshs. 17,000,000/=

18. ***As to whether the plaintiff could refund the sum of Kshs. 7,525,822/25*** it was submitted that the interest became due after the delivery of the Judgment of the Supreme Court on the 27th April 2018 when the defendant's appeal was dismissed and that is when the judgment of the High Court delivered on 27th November 2011 became due, and that is when the interest on the judgment sum began to accrue.

Analysis and Determination

19. **Section 34 (1) of the Civil Procedure Act** states:

> "**34. Questions to be determined by court executing decree**
>
> **(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."**

20. After considering the application, the rival affidavits and submissions, the issue that calls for its determination in the circumstances of this case, is when did time begin to run with respect to the provisions of **Section 4(4) of the Limitation of Action Act.** Is it on 27th July 2011 when the High Court delivered its judgment or when the Supreme Court delivered its judgment on 27th April 2018?

21. Section **4 (4) of the Limitation of Actions Act** provides that;

> "*An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question**, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due**."*

22. Further, **Section 94 of the Civil Procedure Act** provides the *Execution of decree of High Court before costs ascertained;*

> *Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation*.

23. The operative term here is ***arrears of interest***. It would appear to pre-suppose that some interest had been paid and the applicant was in arrears. This is the definition of arrears to be found in **Black's Law Dictionary** (above) *'the state of being behind in payment of a debt or the discharge of an obligations'; an unpaid or overdue debt, an unfinished duty.*

24. Applied to this case the question becomes whether in view of the two appeals filed by the applicant and the orders staying execution of the judgment by the respondent, when did the debyt become due? In the instant case judgement was entered on 27th July, 2011 in the sum of Kshs. 31,500,000 which amount has since been paid in full and not contested. The defendant filed an appeal barely two weeks after the decree was extracted and nearly two months after judgment was delivered, before costs could be ascertained, and was issued with a stay of execution pending the hearing and determination of the appeal pursuant to a ruling delivered on 12th October, 2012. The appeal was heard and on 10th October, 2014. Itwas dismissed with costs to the plaintiff . thereafter the bill of costs was taxed and certificate of costs issued on 5th December, 2018. Before the plaintiff could execute, the defendant being still aggrieved by the Court of Appeal decision appealed to the Supreme Court and was also issued with an order for stay of execution pending the hearing and determination of the appeal.. On 27th April, 2018, the Supreme Court delivered its judgement and the appeal was dismissed.

25. In the persuasive decision of **Thomas Adong Onuko Kisumu Expert Tailoring House vs Small Enterprising Finance Co. Limited [2017] eKLR** the learned Judge was dealing with **Section 4(3) and 4(4) of the Limitation of Actions Act. Section 4(3)** states:

> **"(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action."**

26. In dealing with when time began to run the judge observed:

> "*Secondly in this case time cannot be said to have started running after the judgment. This is because there was a stay of execution which was discharged only upon conclusion of the appeal**. In my view time could only have started running from the date of the judgment of the Court of Appeal**. We are not told exactly when in 2014 that judgment was delivered but clearly the twelve years limitation period provided in Section 4(4) of the Limitation of Actions Act has not lapsed**. Even had the Plaintiff/Decree***

***Holder/Applicant intended to recover the decretal sum from the defendant/Judgment Debtor/Respondent he could not do so as there was a stay of execution**. The defendant/Judgment Debtor/Respondent has not told this Court how that could have been possible (emphasis added)."*

27. That was the exact situation in this case. There was stay of execution and there was no way the respondent could have executed the judgment. The same became due after the judgment by the Supreme Court.

28. The authorities cited by the applicant are distinguishable in that the facts are not similar.

29. The applicant made reference to the *in duplum* rule in banking. The applicant did not cite any authority to demonstrate how that rule would in the circumstances of this case. I found the rule discussed in **Francis Mbaria Wambugu vs Jijenge Credit Limited [2020] eKLR** where the court stated:

*"Concerning the **In duplum** rule imported via the enactment of Section 44A of the Banking Act in 2007, the Court of Appeal stated in **Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019]e KLR** that:*

"In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another [2016] eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

"The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

See Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR

*See **Mwambeja Ranching Company Limited & Another v Kenya National Capital Corporation [2019] e KLR.***

*27. The rule was recently reiterated by the Court of Appeal in **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another [2020] e KLR** as in the following terms:*

"As we have shown section 44A of the Banking Act came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):

"The maximum amount referred in subsection (1) is the sum of the following –

a) The principal owing when the loan becomes non -performing;

b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non- performing; and

c) Expenses incurred in the recovery of any amounts owed by the debtor."

By that provision if a loan becomes non -performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by** section 44A (6)* ***it is provided:

"This section shall apply with respect to loans made before this section comes into operation, including loans that have become nonperforming before this section comes into operation."

That is to say that the provision applies to loans and has retrospective effect……

The rationale for the "in duplum" rule was explained by this Court in the recent case of Mwambeja Ranching Company Limited and Another v Kenya National Capital Corporation [2019] eKLR as follows:

"The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."

***Section 44A has retrospective effect and this was explained by this Court in the case of James Muniu Mucheru v National Bank of Kenya Limited Civil Appeal No. 365 of 2017.*"

30. As can be seen from its plain wording it is about loans borrowed from banks, clearly distinct from this case where the monies involved emanate from a judgment in favour of the respondent.

31. In this case, the plaintiff was awarded damages plus costs and interest. That was due to the plaintiff until the defendant obtained stay of execution pending the appeal. In my view the provisions of **Order 42 rule 6 (2)** speak to this situation thus**:**

> "(2) No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

31. It is clear from this provision that the security is given by the appellant is for the performance of the decree that may ultimately be binding on the appellant. In this case the ultimate decree can only be discerned with effect from the date of the Judgment of the Supreme Court. Anything less would amount to denying the plaintiff the fruits of its judgment.

32. I find and hold that the provisions of **Section 4(4) of the Limitation of Actions Act Cap 22 Laws of Kenya** do not apply as there were stay of execution orders in force pending the hearing and determination of the appeals filed by the defendant/applicant.

32. For these reasons I find that the application is unmeritorious and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 5TH DAY OF OCTOBER, 2021.

MUMBUA T. MATHEKA

JUDGE

Edna C/A

Gordon Ogola Kipkoech & Company for the Plaintiff/Respondent

Hamilton Harrison & Mathews for the Defendant/Applicant