



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 281 OF 2017**

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**MOSES KAMANDE NYAMBURA.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**FRANCIS MUNYUA NGUGI.....DEFENDANT/ APPLICANT**

**RULING**

1. This ruling is in respect to the Notice of Motion dated the 28/1/2020 in which the Applicant seeks the following orders;

- a. In the decree the amount calculated as interest be Kshs 252,000/- varied and or set aside.
- b. The whole amount declared as owing Kshs 452,575/- be reviewed or set aside.
- c. Any other relief this honourable Court may deem fit to grant.
- d. Costs be in the cause.

2. The application is grounded on the following; citing the Limitations of Actions Act Section 4(4) that no arrears of interest in respect of a judgement debt may be recovered after the expiration of 6 years from the date on which the interest became due; that the computation of interest in the decree on the face of the decree is from 21/12/10 to July 2019 well after the expiration of 6 years which is an error on the face of the record; the error is made by the registry and the Court can correct it; the amount being sought is exaggerated and should not be allowed by the Court.

3. In his Supporting Affidavit sworn on the 28/1/2020 the Applicant avers that he has not objected to the payment of the principal amount in the sum of Kshs 200,000/-. That his main objection is on the payment of Kshs 252,000/ wrongly drawn and exaggerated. That an interest of 12% is allowable and not 14%. That interest cannot be recovered after 6 years limitation period. That the suit was filed on the 21/12/2010 and 6 years expired on the 21/12/2016 and no amounts can be recovered thereafter.

4. The Respondent in opposition to the application raised filed grounds of opposition dated the 3/2/2020 thus;

- a. The application is incompetent bad in law and is a non-starter for being in defiance of order 9 Rule 9 of the Civil Procedure Rules.
- b. That the decree or order sought to be varied or reviewed and or set aside is dated the 10/7/19 hence the Applicant is guilty of unexplained and inordinate delay.
- c. That the order on interest was granted by the Court after full arguments of the parties on an application dated the 14/11/18 and filed in Court on 26/11/18 and any party aggrieved should have filed an appeal or otherwise comply with the known parameters on review of which the present application lacks more so nothing stopped the Applicant from raising the same issues then.
- d. That there is no error on the face of the record even on computation as alleged.

5. The application was heard orally in open Court. The Applicant reiterated the contents of his Supporting Affidavit and the grounds of the application and stated that the interest should be 12% and not 14% on the principal giving the total amount of interest to be Kshs 144,000/- and not 252,000/-.

6. The Respondent argued that the Applicant has no audience before the Court for flouting the provisions of Order 9 Rule 9 since he was

being represented by counsel before and neither has he filed a consent or sought leave of the Court to represent himself. Further that the Applicant has suffered from inordinate delay as he has moved the Court after 5 months from the date of delivery of the judgement. That the rate of interest was canvassed by the parties in the Notice of Motion dated the 14/11/19 which orders are still in force.

7. In response to the issues of flouting Order 9 Rule 9 the Applicant insisted that he was served in person and assumed the previous case had come to an end. That he has continuously raised the matter of interests before and in any event the same was not agreed upon hence the Court should determine it once and for all.

8. Without going into the merits of the application, I need to deal with the issue of whether or not the Applicant has complied with Order 9 Rule 9 of the Civil Procedure Rules. It is on record that the Applicant was represented by Counsel upto and until the delivery of judgement in this case. Thereafter he filed an application on the 26/11/18 seeking the Court to state the time from which interest shall be calculated. This application was determined by the Court and delivered its ruling on the 21/2/19. On the 28/2/18 the Applicant filed the present application seeking a review of the decree and in particular that the interest calculated at Kshs 252,000/- be set aside as well as the whole amount of Kshs 452,575/- be reviewed and/or set aside.

9. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or Appeal.”

Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

10. **Order 9, Rule 9** of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

11. **Order 9, Rule 10** provides;

“An application under Rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

12. The Court agrees with the Respondent that the Applicant has not complied with the provisions of the above procedural rule. The Applicant had the option of securing a consent of his previous Advocate in respect to acting in person or with the leave of the Court. None of these have been procured clearly spelling non-compliance by the Applicant. The wordings of the order are in mandatory terms. He has not demonstrated any compliance at all.

13. In the circumstances, the justice of this case is to strike out the Notice of Motion dated the 28/1/2020 without getting into the merits of the same.

14. The cost of the application shall be borne by the Applicant in favour of the Respondent.

15. **It is so ordered**

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 14<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**