



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.3 OF 2014

JOSEPH KAMIRA WANJAU.....PLAINTIFF/RESPONDENT

-VERSUS-

1. REV. LLOYD K. KABAIYA

2. PRESBYTERIAN CHURCH OF EAST

AFRICA NAKURU WEST PRESBYTERY

3. THE PRESBYTERIAN FOUNDATION

OF THE of the PRESBYTERIAN

CHURCH OF EAST AFRICA.....DEFENDANTS/APPLICANTS

RULING

1. In its judgment dated the 29th September 2016, the court was silent on the matter of interest on the decretal sum.

The decretal sum awarded to the plaintiff was Kshs.5,500,000/= plus costs of the suit.

Taxed costs were certified at Kshs.624,912/=.

2. The defendants have also appealed against the judgment, and sought stay of execution of the decree pending hearing and determination of the Appeal – Notice of Appeal dated the 30th September 2016.

3. On the 30th November 2016, the defendants deposited a sum of Kshs.2,500,000/= in court being security should the intended appeal be unsuccessful.

I have considered warrants of attachment taken out against the defendants by the plaintiffs through Tango Auctioneers for for the sum of Kshs.4,531,782/= excluding the sum of Kshs.2,500,000/= paid on account. That was in October 2017 about one year after the delivery of the judgment. Interest on the warrants of attachment is stated as Kshs.906,867/=. This issue of **interest** on the decretal sum is the subject of the application before me.

4. By the said application dated the 7th May 2018 the Defendants/Judgment Debtors seek orders that:

(a) The plaintiff be ordered to refund or reimburse the 2nd Defendant the sum of Kshs.906,867/= which was improperly included in the warrants of attachment as interest.

(b) That costs of this application be borne by the plaintiff.

It is premised on the provision of Section 34(i) of the Civil Procedure Act.

5. Grounds for the application are that the respondent applied interest on the decretal sum yet it had not been ordered by the court, and proceeded to execute the decree, with an element of **Kshs.906,867/=** as interest. Rev. Vasco Muraguri secretary of the church swore the supporting affidavit on the 7th March 2018. The application is opposed by a replying affidavit sworn on the 18th June 2018 by the plaintiff.

Both parties filed written submissions which they also highlighted. I have considered the rival submissions.

6. While preparing the warrants of attachment on the 30th October 2017, the Deputy Registrar of this court rightfully captured the Balance of the decretal sum as Kshs.3,000,000/= as Kshs.2,500,000/= had been paid out to the decree holder by order of the court. Further court fees were added, at Kshs.72,700/= as well as taxed costs of Kshs.834,167. There is no dispute on these two.

7. In the warrants of attachment that I have seen, a sum of Kshs.906,867/= is added thereto and described as interest, making a total of Kshs.4,531,782/= as the balance.

This was no doubt under instructions from the Decree holders advocates, Karanja Mbugua & Co. Advocates vide their tabulation filed on the 30th October 2017.

That interest calculated at 14% per annum is stated to apply from the 29th September 2016 when judgment was delivered upto the 29th October 2017.

8. On this, the court notes that Kshs.2,500,000/= had been deposited in court and eventually released to the decree holder. Therefore no interest ought to have been applied on the sum deposited in court.

If interest is ordered as payable, it should be on the sum of Kshs.3,000,000/= not the total sum of Kshs.5,500,000/=.

9. Having stated so, I now come **to the gravaman of the application. Is interest payable on the court awards stated in the judgment when the said judgment is silent on the matter of interest?**

10. The plaintiff/respondent submits that by virtue of **Section 26(2) of the Civil Procedure Act**, when a judgment is silent on interest it is deemed to have awarded interest at court rates and cites several authorities:

- **Nakuru HCCC No. 254 of 2012 Joseph Macharia Nderitu -versus- Real Insurance Co. Ltd.**
- **Highway Furniture Mart Ltd -vs- Permanent Secretary & Another (2006) 2 EA 94**
- **Shah -vs- Guilders International Bank Ltd (2003) e KLR.**

11. **Section 26(2)** Civil Procedure Act states:

(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--- the court shall be deemed to have ordered-interest at 6 per cent per annum.”

12. In my view the above presupposes that interest on the decretal sum is already ordered and thus reference to **further interest – Nakuru Civil Case NO. 254/2012. - Joseph Macharia Nderitu -vs- Real Insurance Co. Ltd.**

13. In the **Highway Furniture** case (Supra) **the Court of Appeal** held that the applicable interest rates is 14%, fixed from time to time by the Chief Justice.

In the **Shah -vs- Guilders case(Supra)**, the Court of Appeal rendered on **Section 26(1) of Civil Procedure Act** that;

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at court rates as the court deems reasonable ---”

14. It went further to explain that the section confers upon the court discretion to award and fix the rate of interest to cover several stages – and only when the parties have not fixed or agreed on the rates of interest; and added that court interest is currently 14% per annum.

15. **When however the court is silent on the award of interest, it is different.** In my considered opinion, **Section 26 of Civil Procedure Act** applies only when the court awards interest in the first instance.

Onyago J in **Civil Appeal No. 6 of 2015 Otieno Nalwayo -vs- Mumias Sugar Co. Ltd (2015) e KLR** after discussing the purport and import of **Section 26(2)** Civil Procedure Act held that as the judgment was silent on interest, none could be paid. See also **Stephen Olwamba -vs- Chemilil Sugar Co. Ltd Kisumu HCCC NO. 398/2000.**

16. From reading of **Section 26(1)**, **it is evident that an award of interest is at the discretion of the court. It is also at the court's discretion to state the rate of interest.**

That not being mandatory but upon discretion then a court, upon its discretion may decide to remain silent on the matter of interest, and even if it does, it may also decline to state the rate of interest as provided in **Section 2(2).**

17. It is no wonder that different courts have held different opinions on the issue.

On the matter before me, my judgment was silent on interest.

First, the plaintiff that initiated the claim did not pray for an order of interest on the general and aggravated damages if the said claim succeeded.

18. It is trite that a party, as well as the court, is bound by the pleadings presented to the court. A court too is bound to make determination upon the pleadings and submissions tendered before it.

In his written submissions dated 19th March 2016 and filed on 21st March 2016, the plaintiff too did not submit or even urge the court to award interest on the damages he proposed to the court. On what basis then was the court expected to award interest that was not pleaded?

19. I was not about to award that which the plaintiff had not pleaded or sought. It is not automatic that an award of damages must have a rider of interest. It is upon the court's discretion upon consideration of the circumstances of the particular case.

IEBC & Another -vs- Stephen Mutinda Mule & 2 Others Civil Appeal No. 219 of 2013 (2014) e KLR and Global Vehicles Kenya Ltd -vs- Lenana Road Motors (2015) e KLR while quoting from the holding **David Sirona Ole Tukai -vs- Francis Arap Muge & Others – C.A No. & 6 of 2014**, the Court of Appeal expressed itself thus:

“- it is well established in one jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded----The duty of the court is to adjudicate upon specific matters in dispute which the parties have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation--- a decision given on a claim or defence, not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

The above holding summarises and reiterates the legal principle that parties are bound by their pleadings, and a court has no business determining an issue that is not pleaded.

20. That being the case, and there being no uniform and/or any acceptable common approach on the issue, and upon considering all submissions, **I am persuaded that my decision not to award interest on the judgment sum was not a mistake or omission, but a deliberate decision, based upon the plaintiff's pleadings and the peculiar circumstances of the case - Direct Ass. Co. -vs- Jeremiah Wachira Ichaura (2016) e KLR.**

To that extent, I find that the sum of Kshs.906,867/- loaded on the warrants of attachment were not properly so loaded. The said sum should be refunded to the judgment debtor. It was further paid under duress upon warrants of attachment having been taken out against the defendant.

21. It is noted that the decree holder loaded interest at 14% per annum even on the sum of Kshs.2.5 Million which had been deposited into court (by court order). That was unprocedural and cannot be allowed to carry the day.

22. None of the parties upon realization that I had not awarded interest approached me under **Section 99 or by application under Section 26 of Civil Procedure Act** for clarification or directions before warrants of attachment were applied for. Had that happened, the parties would not be crying foul on the court's exercise of its discretion on the issue of interest.

23. **For those reasons, it is my findings that the defendants application dated 7th May 2018 is meritorious.**

I direct that the sum of Kshs.906,867/= paid to the plaintiff following warrants of attachment of the Defendants property be paid back or refunded to the defendants within 60 days of this ruling.

24. **Once again and pursuant to Provisions of Section 27 Civil Procedure Act in the exercise of my discretion and upon circumstances aforesated, I order no costs payable by or to any of the parties hereof. Each party shall bear own costs of this application.**

Dated, signed and Delivered this 6th Day of December 2018.

J.N. MULWA

JUDGE