



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**HIGH COURT CIVIL CASE NO. 1176 OF 2003**

**NICHOLAS SUMBA ..... PLAINTIFF**

**VERSUS**

**RADIO AFRICA LTD .....1<sup>ST</sup> DEFENDANT**

**JIMMY GATHU .....2<sup>ND</sup> DEFENDANT**

**THOMAS OKAL .....3<sup>RD</sup> DEFENDANT**

**RULING**

On 18<sup>th</sup> August, 2010 the High Court gave judgment in favour of the plaintiff against the defendants jointly and severally as follows,

**“(i) General damages           Kshs. 3,000,000/=**

**(ii) Special damages           Kshs. 35,503/=**

**(iii) Costs &**

**(iv) Interest.”**

The defendants were aggrieved by the said judgment and filed Appeal No. 78 of 2012. The plaintiff also filed a cross appeal in the same matter. On 5<sup>th</sup> November, 2015 the Court of Appeal dismissed both the appeal and cross appeal. The plaintiff then moved to execute the decree prompting the filing of the present application by the defendants seeking orders that there be a stay of execution of the decree issued on 7<sup>th</sup> September, 2016 to Messrs. Muhatia Pala Auctioneers, and that the warrants issued to the said auctioneers be set aside; that the court be pleased to interpret the interest rate that is applicable in the present suit and that the decree issued on 9<sup>th</sup> March, 2012 be amended to reduce the interest rate on the decretal sum from 12% per annum to 6 % per annum.

The grounds upon which the above orders were sought are that, the commencement of execution process against the applicant was irregular in that the attachment and sale of the movable property in execution of the decree issued on 7<sup>th</sup> September, 2016 to the auctioneers are based on a decree issued on 9<sup>th</sup> March, 2012; that more than 6 years have lapsed since the decree was given and more than 4 years have lapsed since it was issued.

It is the defendants’ case that contrary to Order 22 rule 18 (1) (a) of the Civil Procedure Rules, the

plaintiff has made an application or execution more than one year after the date of the decree without issuing a notice to show cause to the defendants why the decree should not be issued against them.

The defendants contend that there have been no other orders or attempts to execute against them to warrant the dispensation of issuance of a Notice to show cause as provided in the proviso to Order 22 Rule 18 (1) (a) of the Civil Procedure Rules.

Further, the defendants have been condemned to settle the auctioneer's bill of Kshs. 150,000/= for the execution process which was irregularly commenced. The defendants also contend that there was a dispute between the parties on the interest rate that was used to compute the amounts in the decree which had not been resolved by the time the warrants were being issued.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants are said to have settled the plaintiff's costs and are waiting for a resolution on the proper interest rate in this matter. There is a supporting affidavit sworn by Patrick Quarcoo the group Chief Executive Officer of the 1<sup>st</sup> defendant. The application is opposed and there is a replying affidavit sworn by the plaintiff herein.

Both parties have filed submissions to address the contentious issues before the court. I shall first deal with the issue of whether or not a notice to show cause should have been issued to the defendants before the commencement of the execution process. Order 22 Rule 18 (1) (a) reads as follows,

**“18 (1) Where an application for execution is made –**

**(a) More than one year after the date of the decree;**

**(b) .....**

**the court executing the decree shall issue a notice to the person against whom the execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him:**

**provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.....”**

The application for execution in this matter was filed on 29<sup>th</sup> August, 2016 and the warrants issued on 7<sup>th</sup> September, 2016. The last order against the defendant in this matter is the dismissal of their appeal on 5<sup>th</sup> November, 2015 by the Court of Appeal. The application having been made within one year from the date of the last order against the defendants (the date of the Court Of Appeal judgment) then the proviso to Order 22 Rule 18 (1) applies. It is the duty of the court under this rule to issue the notice contemplated but as a matter of courtesy however, the plaintiff should have moved the court to issue such notice. That notwithstanding, no such notice was necessary and therefore the plaintiff was in order not to have served such a notice.

On whether or not the warrants should be stayed, I am inclined to agree with the defendants that there is reason to stay the same. The judgment of the lower court awarded interest without specifying the rates. This is now an issue raised in the present application. I note that the defendants have submitted that they have already paid the decretal sum plus costs due and payable to the plaintiff. The plaintiff has submitted that the move to execute was as a result of the defendants' failure to pay the taxed costs. This has not been seriously contested and it would appear that the execution process was justified. Whatever the case, I have already agreed that the same should be stayed for the time being.

Section 26 of the Civil Procedure Act reads as follows,

**“26 (1) Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rates as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier dates as the court thinks fit.**

**(2) Where such a decree is silent with respect to the payment of further interest or such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum.”**

A decree must of necessity tally with the content and context of the judgment. I have noted the argument by the plaintiff that the rate applied in the decree was given by the defendants. That may be so, but the defendants cannot amend the judgment and provisions of law as appears in this case. I also do not think that the defendants intended to impose a burden upon themselves which is clearly the case.

The plaintiff has submitted that the issue is *res judicata* as the Court of Appeal has determined the appeal and cross appeal. The issue of interest payable was not part of the appeal, at least going by the judgment of the Court of Appeal. Granted that the decree is part of the central documents in the record of appeal, it still remains the order of the High Court. I believe therefore, that I have the jurisdiction to address the same in this ruling.

The order of payment of interest is discretionary and in the present case the High Court judge intended to and did award interest in favour of the plaintiff. However, no rate was given. It is reasonable to conclude therefore that the court shall be deemed to have ordered interest at 6% per annum going by the provisions of Section 26 (2) of the Civil Procedure Act aforesaid. It behoves this court therefore, to amend the decree as sought by the defendants by substituting 6% in place of 12% interest used in calculating the amount due and payable. This I believe is the intention and purpose of Section 99 of the Civil Procedure Act to meet the ends of justice.

In that regard, I agree with the decision of the court in the case of **Sanam Investments Limited Vs. Pointex (K) Limited & 2 Others (2004) e KLR and Civil appeal No. 135 of 2001 Ajay Inravandam Shah Vs. Guilders International Bank Limited.**

It is common practice that interest on special damages applies from the date of the filing of the suit, while interest upon general damages commences from the date of judgment. I have not come across any decision that has presented a contrary position. In this case therefore such practice should apply.

In effect, the application by the defendants hereby succeeds. Parties must go back to the drawing board to address the figures based on 6% interest with a view to settling this very old matter. Each party shall bear their own costs.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> Day of February, 2017**

**A. MBOGHOLI MSAGHA**

**JUDGE**