



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 12 OF 2008

MICHAEL RONO TANUI PLAINTIFF/RESPONDENT

VERSUS

KERIO VALLEY DEVELOPMENT

AUTHORITY DEFENDANT/APPLICANT

RULING

The application before court for determination is Notice of Motion dated 23rd November, 2012 brought under Order 51 Rules 1, 3, 4, 8, 9 and 10, Order 21 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A, 21 and 26 of the Civil Procedure Act. The Defendant is seeking the following main orders:-

- 1. That there be an interim stay of execution or further execution of the warrants issued in this suit pending the hearing and determination of this application inter -parties.***
- 2. That warrants already issued be recalled and or stayed in limine or set aside.***
- 3. That costs and interest payable be properly calculated and determined.***
- 4. That costs be granted to the Applicant.***

The application is premised on grounds;

- 1. That the court has already issued warrants of execution/warrants of attachment against the Defendant/Applicant, and the decretal sum shown in the warrants is erroneous on account of costs and interest payable.***
- 2. That the Plaintiff decree holder has already commenced execution process against the Defendant/judgment debtor and there is a high risk that the Defendant may be coerced into making an over payment.***
- 3. That there is an urgent need to have the costs and interest payable be properly determined before any further execution or payment is made.***
- 4. That there are numerous errors apparent on the face of the record.***
- 5. That this application has been presented expeditiously and in very good faith and it is also in the best interest of all the parties.***

6. That the Defendant/Applicant has made substantial payment and the Defendant/Applicant is apprehensive that any further payments may constitute an over payment herein.

The application is further supported by the affidavit of Peter K. Birir the legal officer of the Defendant/Applicant sworn on 23rd November, 2012. The same only expounds on the grounds upon which this application is premised and is also the basis of the submissions made by counsel for the Applicant which I will make reference to hereafter.

The application is opposed vide a Replying Affidavit sworn by Michael Rono Tanui, the Plaintiff/Respondent on 5th February, 2013. In summary he depones that the costs were properly taxed and interest properly calculated and so the execution should proceed as scheduled. He urged the court to dismiss the application.

In submissions, Mr. Kwambai for the Applicant stated that the execution is based on erroneous taxation of costs and interests that are due to the decree holder. That the decree holder was awarded half costs and yet the costs have not been reduced by the half. That the Plaintiff has already paid Kshs 526,323/= which is the decretal sum plus interest. That the Plaintiff taxed and amended Certificate of Costs. That interest cannot attract interest and that therefore the court should determine the interest payable.

Mr. Cheptarus learned counsel for the Respondent on the other hand submitted as follows: That based on the decree sum, costs were taxed at Kshs 258,539/=. That interest was at Kshs 466,865/= plus a further collection costs of Kshs 500,000/= and Kshs 1,500/=. That the decretal sum was Kshs 267,434/= and the amount due is Kshs 994,838/= of which Kshs 526,323/= has been paid leaving the balance unpaid. That the Respondent does not dispute that costs were awarded at half the taxed amount which is Kshs 129,000/=.

In rejoinder, Mr. Kwambai submitted that it is not disputed that the Respondent was paid more in costs. He submitted that the contention by the Applicant is that the interest was not properly calculated. According to him, the rate applicable is 12% as opposed to a rate of 6%.

Having taken into account the submissions made by the respective counsel, I conclude that the issue for determination is what rate of interest is applicable and whether the calculation was properly done.

Back to the judgment of the court, the decree was issued in the following terms:-

- 1. That the Plaintiff's suit is partly successful and partly unsuccessful.**
- 2. Judgment for the Plaintiff under the successful heads of 809 leave and off-days worked in the sum of Kshs 255,914/= plus a sum of Kshs 11,520/= being N.S.S.F contribution not remitted making a grand total of Kshs 267,434/=.**
- 3. The grand total of Kshs 267,434/= will earn interest at court rates from the date of filing suit until payment in full.**
- 4. The plaintiff is partly successful and is awarded half the costs of the suit.**
- 5. Those are the orders of the court.**

Interestingly, on 27th November, 2012 the Defendant filed another application also dated 27th November 2013 whose main prayers are that the Defendant's Dozer Shovel Kamatsu Reg. No. KZX 388 attached by M/s Igare Auctioneers be released forthwith on a running attachment pending the hearing and determination of the application and the Defendant's application dated 23rd November, 2012 and that the warrants of attachment issued to the Plaintiffs/Respondents be recalled and/or stayed in limine or set aside.

At the time of hearing the instant application, counsel for the Applicant did not make any reference to the latter application. Be that as it may, the orders sought in the latter application are similar to those sought in the instant application. Further, Prayer 3 in the latter application was to be granted pending the hearing and determination of the instant application. As such, once the instant application is determined the application dated 27th November, 2012 will as well stand determined.

Section 26 of the Civil Procedure Act provides as follows:-

"26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate 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 date as the court thinks fit.

(2) Where such a decree is silent with respect to decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at six (6) per cent per annum."

A look at the decree herein shows it is silent on the applicable rate of interest. However the Hon. Judge indicated that the applicable rate would be the court rate.

" The grand total of Kshs 267, 434/= will earn interest at court rates from the date of filing suit until payment in full"

If this order or the decree is interpreted in relation to S. 26 of the Civil Procedure Act, then the applicable rate of interest should be 6%. Incidentally and more so ironically, the Applicant's counsel is opposed to this rate and instead argues that the applicable rate is 12%. I say ironically because a 12% rate is more punitive than the 6% applicable. And I pose the question, *'why is he bent on having his client heavily penalised?'* He cited Practice Note No. 1 of 1982. The said

Practice Note was issued on 16th March, 1982 by the then Simpson, Acting Chief Justice Pursuant to Section 26 of the Civil Procedure Act. The same reads:-

"March 16, 1982, Simpson Ag CJ gave the following practice direction. The Civil Procedure Act (Cap 21 Laws of Kenya) Section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable.

In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%."

Whilst the Applicant has contended that the rate of interest was erroneously tabulated, it has not demonstrated how erroneously this was done. In any case, the counsel is proposing a tabulation at the rate of 12% compared to the lower rate of 6% applicable which he states was used. I hold that he (Applicant) ought to have guided the court in terms of the figures he expected to be calculated and arrived at which test he has failed.

It is also important to address myself to other issues raised, in particular the contention that the decree was amended without the knowledge of the Applicant. The Applicant thus contests the decree as drawn. The objection to the decree as drawn is reflected in paragraph 12 of the Supporting Affidavit which reads:-

" That there is no proper decree and the amended decree filed in court was not done/presented to the Defendants'/Applicants' Advocates as required by law. "

Unfortunately the deponent did not attach the purported amended decree to the Supporting Affidavit.

And in any case, only the Certificate of Costs was amended to include the interests at court rates. For this reason, I hold the Applicant's contention to be without merit.

Under paragraph 3 of the Replying Affidavit the Respondent tabulates the payable amounts as follows:-

"(a) **Principal amount Kshs 267,434.00**

Interests on the principal sumKshs 494,218,03

(b) Costs Kshs. 258,539.00

Interest on costs Kshs. 477,780.07

Kshs. 736,319.07

(c) Grant total of the totals in (a) and (b) above - Kshs 1,497,971.10 being the correct total of the principal amount costs and interest thereon.

(d) Grant total Kshs. 1,497,971.10

Less paid Kshs. 525,973.00

I will remain with at least Kshs 603,108.07 after half costs and interest if the half costs are deducted. I need to be paid Kshs 603,108.07."

This averment by the Respondent clearly demonstrates that he concedes that costs were payable at half the amount taxed. That is to say, if the costs were taxed at Kshs 258,539.00, the payable amount on this is Kshs 129,269.50. This amount was also orally conceded to by Mr. Cheptarus for the Respondent. In effect, interest payable on costs should be pegged on the sum of Kshs 129,269.50.

However, as the trial judge clearly stated, the interests were payable at court rates, and the Applicant has been unable to shed light at what rate the interests were payable, and bearing in mind that "**he who alleges must prove,**" I find that the Applicant has been unable to prove that indeed the Respondent applied incorrect rate to tabulate the interests.

I have already shed light on what costs are payable. There is no dispute on the decretal sum payable and so interests on both figures remain at court rates and nothing more.

In the upshot, this application must fail. I dismiss it with costs to the Respondent.

DATED and DELIVERED at ELDORET this 4th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Cheptarus for the Plaintiff/Respondent

Mr. Manani holding brief for Mr. Ngala for the Defendant/Applicant