



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.1965 OF 2000**

**RICHARD KIRAGU MWANGI .....PLAINTIFF**

**VERSUS**

**MUTHAURA KIOME & MWARANIA ADVOCATES .....RESPONDENT**

**RULING**

1. The application before this Court is a Notice of Motion dated 24<sup>th</sup> February, 2014 brought pursuant to section 3A of the Civil Procedure Act, Cap 21 laws of Kenya, Order 51 of Civil Procedure Rules, 2010.
2. The applicant seeks the following orders.
  - i. That the amount due to the plaintiff's be deemed paid and the court records be marked settled and/or paid.
  - ii. That any warrant issued or to be issued be returned to court unexecuted and cancelled.
  - iii. That my judgment creditor do pay up a sum of Kshs. 170,000/- to the judgment debtor paid erroneously to him.
3. The application is grounded on the grounds that;
  - a. The plaintiff has received the cancellation of the payments from the judgment debtor.
  - b. That Section 4 of the limitation of actions act does not allow payment of arrears of interest after 6 years.
  - c. That the judgment creditor admits having received a sum of Kshs. 1,550,000/- from the judgment debtor and judgment was for Kshs. 1,380,000/-
4. The application is supported by the sworn affidavit of Muthaura Kiome dated 24<sup>th</sup> February 2014 the applicant. He deposes that he was a partner at the firm of Muthaura Kiome and Mwaraniria Advocates handling the matter ; that the plaintiff got a judgment of Kshs. 1,380,000/- against the defendant on 30/10/2006; that it is now 7 years and 3 months since the judgment and Cap 22 of the laws of Kenya does not allow recovery of arrears of interest after 6 years, in any action; that execution is an action in law and that has been decided; that the plaintiff admits that it is only interest that is now outstanding and tabulation of amounts paid is annexed ; that he has been erroneously paid Kshs. 170,000/- after the said years expired beyond the judgment amount; that the said amount is now recoverable.

5. The application was opposed and the respondent filed a replying affidavit sworn by Richard Kiragu Mwangi. He depones that on 30<sup>th</sup> October 2006 the judgment was delivered against the defendant/applicant where he was ordered to pay the decretal amount plus interest and costs of the suit; that the judgment debtor has only filed the application dated 24<sup>th</sup> February, 2014 as a delaying tactics; that the firm of Mwaniki Gachoka & Co Advocates are on record and the judgment debtor has not filed notice to act in person and therefore he has no mandate to file the said application; that on 20<sup>th</sup> February, 2014 this Honourable Court issued warrant of arrest which was clearly indicating the decretal amount of Kshs. 2,169,409; that the judgment debtor has paid a total of Kshs. 1,485,228 and the balance is Kshs. 737,268.00; that this Honourable Court has a record of how the judgment debtor has made the payments of the decretal amount since they have to appear before the court for the judgment debtor to make any payment because his intention is to punish him since 1994; that this Honourable Court has properly done the calculation of the unpaid balance and the judgment debtor should pay it without any further delay.
6. The matter came up for hearing on 26<sup>th</sup> March 2014 and parties made oral submissions. Mr. Kiome for the applicant submitted that the amount claimed is less the advocate's costs and was Kshs. 1.38 million and any other amount above that was interest and that no action has been entertained of a judgment after 12 years and in respect to interest it is not recoverable after 6 years. He referred the Court to section 4(4) of Limitations of Actions Act Cap 22. The applicant submitted that the interest in this matter became due on the 30/10/2006 and the plaintiff received Kshs. 1,485,228/- and claiming that there was a balance of Kshs. 737, 268 can only be interest.
7. He referred the Court to Civil Appeal no. 2 of 1980 where it was held that;  
  
***“ in the context of Section 4 (4) of the Limitation of Actions Act the word “action” is not intended to bear a restricted meaning and it includes all kinds of legal including execution proceedings and the time limit for execution of a judgment is twelve years”***
8. Counsel contended that the firm had fully complied with the law having paid the principal amount and exceeded and therefore the Judgment creditor is not entitled to any further payment as the judgment has been satisfied as per the law and also that the amount attached to the warrants of arrest amount to Kshs. 2, 169, 409/- does not reflect the true position. That it is matter of mathematical calculation. That the decree is plus interest and that the Registrar shouldn't have issued warrants of arrest. That on the face of the law and without notice as required under Order 22 rule 18 and the judgment being of more than a year, there should be a notice to show cause. He urged the Court to allow the application and deem the judgment as having been satisfied and that the court should order a refund for the amounts over paid.
9. Mr. Mwangi the respondent appearing in person, submitted that he was to pay Kshs. 100,000/- per month and hadn't paid anything since Sept 2013 and that this was a delay on his part. The warrant came out as he had refused to defend himself he should continue to pay.
10. I have carefully considered the affidavits and oral submissions made by both parties. I have carefully gone through this court file, there has been a series of applications of execution between the parties from the time Justice Osiemo entered judgment for the plaintiff on the 30<sup>th</sup> of October 2006. Since then the defendant has not pay the amount due as per the decree that was issued after judgment and the plaintiff has moved to recover the sum from the defendant. Can section 4 (4) of Cap 22 be of assistance to the applicant?

Section 4(4) of Limitation of Actions Act Cap 22 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. ”**

In my view this section applies only where there has been no action from the date of judgment was delivered. It cannot help the applicant. The plaintiff has from the year he got judgment against the defendant moved to execute and various orders has been given on what the defendant owes. The defendant has not demonstrated that the amount due to the plaintiff has been fully paid. It's apparent from the record that every time the defendant has been brought before the court he has paid some monies leaving an amount not paid.

From the proceedings when the parties were in court on the 13<sup>th</sup> of November 2013 the plaintiff decree holder informed the court that the amount paid was Kshs. 1,744,181 /= and that Kshs. 684,181/- was the balance left. On the 13<sup>th</sup> of February 2014 the court issued warrants against the defendant judgment debtor (JD) after he failed the decretal amount as promised of kshs. 100,000/- as was ordered on the 1<sup>st</sup> of August 2013. The JD/applicant application is indeed an abuse of the court process, I decline to grant the orders sought as I find no merit in the application and it is dismissed with costs to the plaintiff/ respondent.

Orders accordingly.

Dated, signed and delivered this **10<sup>th</sup>** day of **July**, 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:-

..... For the Defendant/Applicant.

..... For the Plaintiff/Respondent

.....Court Clerk