



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Case 140 of 1998

LOICE KAARI SOLOMON

**(suing as the legal rep of the late SOLOMON NGUURA THIMANGU).....
PLAINTIFF**

VERSUS

**SILAS KAIYONGO MUGAMBI & 3 OTHERS.....
DEFENDANT**

R U L I N G

The application is a Notice of Motion dated 27th April 2012. It has been brought under Order 45 Rule 1(1) (a) and Order 51 Rule 1 of the CPR and section 3A of the CPA. The Application seeks orders in terms of Order 2 thus:

“ 2. That the decree herein dated 16th April be reviewed.”

The Application is premised on six grounds on the face of the application which are:-

1. That judgment of this court was delivered on 29th September, 2011 where after parties proceeded to execute a consent rectifying an error on the apportionment of liability.

2. That the plaintiff has since had the costs of the suit taxed at Kshs. 88,707/=

3. That the Plaintiff's Advocate then proceeded to extract a decree without forwarding the same to the Defendants' Advocates for approval as required.

4. That the decree has an error apparent on the face thereof in that the same has interest amounting to Ksh.667,978.20/= whereas no interest was awarded to the plaintiff in the judgment. In any event the calculation of interest was clearly erroneous.

5. That in the circumstances the decree ought to be reviewed so that the said sum of

Kshs.667,978.20/- is removed from the decree.

6. That unless a stay order is granted the plaintiff will proceed to execute for the entire amount as shown in the decree.

The Application is also supported by an affidavit in support sworn by Dunstan Mutuku Wambua dated 27th April, 2012. The Applicants counsel has deposed that the Decree in this case dated 16th April, 2021 was received by their firm and that upon perusal he noted that it included an interest in the sum of Kshs.667,978.20. Counsel deposes further that the Plaintiff was not awarded any interest in the judgment and that thus the inclusion in the Decree is an error on the face of the record which should be corrected by way of review.

The application is opposed. The Respondent filed grounds of opposition in which 15 grounds are cited as follows:

- 1. That the 2nd and 4th Defendants application lacks merit.**
- 2. That the 2nd and 4th Defendants application is frivolous, vexatious and outright abuse of the court process.**
- 3. That the 2nd and 4th Defendants have always been notified of the dates when the matter has been before court even the time of taxation when the matter came for hearing.**
- 4. That this matter has been in court for more than thirty seven (37) times since the time of its filing which has been due to frequent transfer of the judges in the station.**
- 5. That the case has been in court for nearly fourteen (14) years and the award given to the Plaintiff without interest will make the claim irrelevant.**
- 6. That the award made in favour of the plaintiff if made those fourteen (14) years ago would have different monetary value.**
- 7. That there is nothing outrageous mala fide or ill-advised or misconceived in the decree made including the computed interest as the interest computed is computed at a lower scale of six percent (6%) other than the normal and standard twelve percent (12%) rate.**
- 8. That it does not mean that when the judgment has or mistakenly overlooked to award interest that the interest is not payable.**
- 9. That indeed costs and interest are pleaded as prayer (e) of the plaint and it is trite law that costs and interest shall follow the event.**
- 10. That the Civil Act and Rules are very clear on the rate of interest payable or applicable in case where the court has not given the interest and order section 26 of the Civil Procedure Act is explicitly clear.**
- 11. That the court took into consideration the aspect of the absence of interest in the judgment and the provision of section 26(2) of the Civil Procedure Act in approving the 6% interest.**
- 12. That the 6% interest indeed is unfavourable and unfair to the Plaintiff and not the 2nd and 4th Defendants.**
- 13. That the greatest question the Plaintiff is asking is, is the 2nd and 4th Defendants better off with the 6% interest or 12% interest and what prejudice is being suffered by the Defendants in respect of the decree?**

14. That this court has powers to, on its own motion, correct apparent errors of omission as in this case under Section 99 of the Civil Procedure Act.

15. That this Honourable Court should take this opportune time and declare the correct interest payable and which is twelve (12%) p.a. from the date of filing the suit.

Mr. Wambua urged the Application on behalf of the 2nd and 4th Defendants who are the Applicants. Mr. Nyamu Nyaga appeared for Mr. Gitonga Muriuki for the Plaintiff/Respondent. There was no appearance for the 1st and 3rd Defendants.

I will begin by considering a preliminary point raised by the Respondent. Mr. Nyaga urged that the Applicants ought not to have paid any part of the Decree if they had any issues with it and that the complaint was an afterthought. The facts before the court are that the Respondent did not forward a draft decree to the applicants for approval. That flew in the face of Order 21 Rule 8 of the CPR. By the time the Applicants were served, it was with a signed and sealed Decree. The Applicants in my view had several options and they chose one which is to pay the part of the Decree they had no complaint of and challenge the rest. The Respondent cannot be heard to say that the issues now raised by the Applicants are afterthoughts. I am satisfied that the challenge to the Decree has been made without undue delay.

There is no dispute that judgment in this case was delivered on the 29th September, 2011. There is no dispute that the learned judge did not order any interest whatsoever in that judgment. The Applicants complaint is that the Respondent's advocate did not consult them over the Decree and that the filed Decree included an item on interest which they urge is an error on the face of the record as the court did not make an order on interest. The Applicants complaint is threefold; one that the interest in the Decree was based on an unspecified part of the award; two that it was indicated to have been calculated from the date of filing suit; and thirdly that even if interest were ordered from the date of filing suit, it could only be ordered on the Special Damages and that it could not add up to the figure quoted of 667, 978.20.

The Respondent has urged that interest was payable and that failure to order same was an error on the part of the court which this court had the power on its own motion under section 99 of the Civil P. Act. The Respondent urged that this court should not only order interest but base it on 12% and not the 6% upon which interest complained of was based by the court.

Section 26 of the Civil Procedure Act provides for interest and gives the court power to order the same. It 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 the payment of further interest on 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 cent per annum.”

The Applicants urge that interest is ordered at the discretion of the court, that where the court was silent, as in this case, interest could only be deemed to have been ordered on the aggregate sum at 6%. Mr. Nyaga on his part urged that if the Applicants conceded that Special Damages attract interest from date of filing suit, then it should also be the position that the aggregate sum also attracts interest from date of judgment at the rate of 6%.

I have considered the rival arguments of the counsels to the parties. The ruling on this application hinges on the interpretation of section 26 of the CPA. Section 26(1) of the Act gives the court discretion to order interest at any rate it deems reasonable on the principal sum from date of filing suit to date of decree and

from any period before the suit was filed and in addition on the aggregate sum adjudged from the date of decree to the date of payment. It is clear that subsection (1) only applies at the time of judgment. After judgment is delivered unless an application for review is made, then the provisions of subsection (2) should be applied. That means that the interest attracted is only 6%. Secondly it can only attach on the aggregate sum. The court under the subsection (2) has discretion only to determine from which period the interest should run.

In this case the court did not order interest on any part of the sums adjudged. The Respondent did not seek any review of the judgment or decree of this court. When the Applicants filed this application for a review to remove the interest introduced by the Respondent in the Decree, the Respondent filed Grounds of Opposition challenging the Applicants application.

The Decree in question is not clear on which basis the interest has been calculated, whether on the aggregate sum or the Special Damages or other sums adjudged in the judgment. In the circumstances I find the order on interest vague, arbitrary null and void. Consequently I set aside the order on interest.

The Applicants sought a review of the interest. Having considered this application I order as follows:

1. In exercise of my discretionary power under section 26(2) of the Civil Procedure Act I order interest at 6% per annum on the aggregate sum from the date of judgment to the date of payment of the Decree.

2. The Costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED THIS 5TH JULY, 2012

**LESIIT, J.
JUDGE.**