



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 285 of 2004

VIJAY MORJARIA.....PLAINTIFF/APPLICANT

VERSUS

HARRIS HORN JUNIOR.....1ST DEFENDANT/RESPONDENT

HARRIS HORN SENIOR.....2ND DEFENDANT/RESPONDENT

RULING

The Applicant (*decree-holder*) seeks to execute a judgment against the Defendant/Respondents for the recovery of the decretal sum of Ksh 22,250,000/= together with interest thereon.

The Respondents (*judgment-creditors*) have taken out a Preliminary Objection on a point of law that under Section 4(4) of the Limitation of Actions Act (*Cap. 22, Laws of Kenya*) the judgment-creditor is not entitled to recover any interest after the expiration of 6 years from the date when the interest accrued. Subsection 4 of the Act says -

“S. 4 (1)

(2)

(3)

(4) **An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered ... and no arrears of interest in respect of a judgment-debtor may be recovered after the expiration of six years from the date of which the interest became due.**
(underlining added)

Counsel for the objectors contend that the judgment-creditor was awarded shs 22,500,000/= on 16th June 2006. His costs were taxed at shs 450,000/=. A sum of Ksh 2,500,000/= was put into a joint interest account, pending an appeal by the Respondent, and that that amount is still available to the Applicants. The court ordered interest to be calculated @6% and the amount due to the Applicant is shs 26,325,000/= and not shs 44,500,000/= claimed in the Notice to Show Cause.

The Respondents object to the execution of the said sum because it includes interest which they claim is not recoverable after 6 years under the said Section 4(4) of the Limitation of Actions Act.

I have not had the benefit of seeing the Notice to Show Cause and I am therefore unable to say what period is covered in the computation of interest to arrive at shs 44,500,000/=. This notwithstanding, Section 26 of the Civil Procedure Act (*Cap. 21, Laws of Kenya*) says -

“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.”

My understanding of these two provisions is that -

- (i) interest is payable from the date of filing suit to the date of the decree;**
- (ii) interest (if any) payable for any period before the filing or institution of the suit;**
- (iii) further interest on the aggregate of (i)&(ii) from the date of the decree to the date of payment or an earlier date.**
- (iv) unless an interest rate is first established by the parties, the rate is deemed to be 6%.**

The question therefore is, what does the sum of shs 44,500,000/= constitute? From my deduction the sum comprises the principal sum of Ksh 20,000,000/= which was left unpaid pending the appeal and interest thereon, as well as the sum of shs 2,500,000/= deposited in a joint account @6% interest rate. Again by deduction, the sum of shs 2,500,000/= has accrued interest of shs 3,825,000/=. The sum not deposited accrued interest at the same rate of 6% per annum so that at the end of the 6 years, the total decretal sum of Ksh 22,500,000/= would have accrued substantial interest which would make the double sum of shs 44,500,000/= from the original sum of shs 22,500,000/=. The judgment creditor says, that only the interest on 2,500,000/= deposited into the joint interest earning account is recoverable. I do not with respect agree.

Firstly, if the objector agrees that the sum of shs 2,500,000/= earned interest which they recognize, why would the sum of shs 20,000,000/= which was not deposited similarly earn interest?

Secondly, the sum of shs 2,500,000/= was deposited as security for stay of execution pending an appeal.

Thirdly, the appeal was not prosecuted, and if it was, it was unsuccessful and the original decretal sum of Ksh 22,500,000/= plus interest @6% remained payable.

Fourthly – the objector has failed to pay any part of the decretal sum.

Fifth, no party to litigation is allowed to use its own default to avoid a lawful obligation or decree of court.

Sixth if the reverse position were to be held, and that is my point of departure from the cases cited, it would be a mechanical application of the law, and works injustice to an innocent litigant who believes in the efficacy of the court orders, and the just application of law.

Seventh and not least, what is meant by the expression “arrears of interest”? In my view, “*arrears*” means moneys which have accrued, some of which has been paid and some has remained outstanding.

In this case the Objector has not paid any sum or a small portion of the decretal sum. There is a cost of money. Under the “*Ndonde*” duplum rule, the maximum a bank would recover by way of

interest is the equivalent of the principal sum. I do not know whether this is the principle applied in the sum of Ksh 44,500,000/= in the Notice to Show Cause.

Eighth to uphold the Preliminary Objection would in effect mean that a judgment-debtor would by motions and cross-motions, frustrate a judgment-creditor, and in the defeat a lawful judgment, and if such a litigant can get away with 6 years, nothing would stop him, or it from extending the frustrations to twelve years and escape satisfying the entire decree. That entirely would be an abuse of the process of the law, and would be against public and social policy, that judgments of the courts must be honoured.

For those reasons I disallow and dismiss the Preliminary Objection with costs to the judgment-creditor.

It is so ordered.

Dated, signed and delivered at Nakuru this 6th day of November, 2012

M. J. ANYARA EMUKULE

JUDGE