



## REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 281 OF 2017

MOSES KAMANDE.....PLAINTIFF

VS

FRANCIS MUNYUA NGUGI.....DEFENDANT

### RULING

1. In this suit the Plaintiff vide an amended Originating Summons sought orders as follows; refund of Kshs 418,000/- together with interest at 20% as well as costs of the suit. The suit was heard and determined in its judgment delivered on the 19/4/18. The Court found that the Plaintiff was entitled to a refund of Kshs 200,000/- together with interest at Court rates until paid in full.

2. On the 26/11/18 the Plaintiff filed a Notice of Motion seeking orders that the Court be pleased to state the time from which interest shall be calculated, which according to the Plaintiff should be from the date of filing suit. The application is brought under section 26(1) of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules.

3. The application is based on the grounds annexed thereto and the affidavit of the Plaintiff sworn on the 14/11/18. The Applicant deponed though the Court awarded him Kshs 200,000/- refund and was silent as to when the interest should begin.

4. The application has been opposed by the Defendant in his replying affidavit filed by the Defendant on the 5/12/18. Opining that the award of interest is governed by section 26 of the Civil Procedure Act, he conceded that it is entirely in the discretion of the Court. That the Applicant has not explained why the Court should exercise its discretion in his favour. He argued further that in any event the Court had adjudged that both parties breached the agreement of sale and therefore there would be no justification to award interest from the date of filing suit.

5. The Defendant was of the view that since the Plaintiff has benefited from the use of the land to the exclusion of the Defendant, he should not benefit twice through the award of interest from the date of filing of the suit. In the alternative he proposed that interest if it must be awarded should be from the date of judgment.

6. Both parties have filed their Written Submissions which I have carefully read and considered.

7. The only issue for determination is whether interest adjudged should be from the filing of the suit or from the date of delivery of judgment.

8. It is commonly agreed by both parties that the award of interest is governed by section 26 of the Civil Procedure Act. That the grant of interest is at the discretion of the Court, which like all directions must be exercised judiciously.

9. For purposes of clarity and emphasis, I will reproduce section 26 of the Civil Procedure Act as follows;

“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”.

10. In **Lwanga vs. Centenary Rural Development Bank [1999] 1 EA 175** the Court held that:

“The award of interest prior to the institution of the suit is rationalized in two ways: (1). that the Plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the Defendant wrongfully withheld the Plaintiff’s money. The emphasis here is on the Defendant’s wrongful withholding of the Plaintiff’s money. On that basis, interest is to run from the date when the Defendant ought reasonably to have settled the Plaintiff’s claim. This is rather punitive.”

11. According to the evidence on record it is undisputed that the Plaintiff vacated the suit land in the year 2010. It is also on record that the suit land was sold by public auction to third parties. It is on record that the suit was filed in 2010 seeking orders for extension of time to apply for Land Control Board consent. In 2015 with leave of the Court the Plaintiff amended his claim to a refund of Kshs 418,000/- together with interest at the rate of 20%. The Plaintiff was silent on the period which the interest will run from. Be that as it may, and guided by the provisions of section 26 (1) the Court will exercise its discretion in that regard.

12. It is on record that the since the Plaintiff vacated the suit land some time in 2010, the Defendant continued to withhold his refund. If that money had been paid to him he probably would have put it into economic use and if he had placed it in an interest earning account, would have earned interest income therefrom.

13. Guided by section 26(1) and the decision in the **Lwanga case** above I exercise my discretion and award interest from the year 2010 when the suit was filed.

14. Fortified by section 99 of the Civil Procedure Act and in the exercise of conferred under Section 26 of the Civil Procedure Act I review the order made herein on 19/4/18 and vary the order to the extent that he gets a refund of Kshs 200,000/- together with interest at Court rates until it is paid in full and substitute therefor with an order that the said sum accrues interest at Court rates from the date of filing of the suit until payment in full.

15. In the upshot the application is allowed with no orders as to costs.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Plaintiff/Applicant – Absent

Defendant/Respondent – Present in person. Advocate is absent.

Irene and Njeri, Court Assistants