



**Osir v Olima (Environment & Land Case E004 of 2022)
[2025] KEELC 882 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E004 OF 2022
LC KOMINGOI, J
FEBRUARY 27, 2025**

BETWEEN

MILDRED OSIR PLAINTIFF

AND

HELLEN ACHIENG' OLIMA DEFENDANT

RULING

1. On 25th January 2024, this Court entered Judgement in favour of the Plaintiff as follows:
 - a. That an order of Specific Performance is hereby issued in respect of the sale agreement dated 14th July 2017 in respect of LR. No. Kajiado/Kaputiei North/15688. In essence the defendant is hereby ordered to effect transfer in favour of the plaintiff within Ninety (90) days from the date of this Judgement. In default the Honourable Deputy Registrar of this Honourable Court do execute the necessary documents to effect transfer.
 - b. That the plaintiff is hereby ordered to release the original title deed in respect of LR No. Kajiado/Kaputiei North/15689 to the defendant and thereafter the defendant do refund Kshs.330.000/= within Ninety (90) days from the date of this Judgement.
 - c. That each party do bear own costs.
2. Following this Judgement, the Defendant filed a Notice of Motion Application dated 27th May 2024 seeking that:
 - i. Spent.
 - ii. Spent.
 - iii. The Honourable court be pleased to order that the Defendant/Applicant do settle the decretal amount of Kshs 330,000 by monthly instalments of Kshs 20,000 until payment in full.



- iv. The costs of this application be in the cause.
3. The Defendant premised this application on the grounds that on 25th April 2024, the Plaintiff notified her of execution of the decree dated 14th February 2024. However, she was not in a position to pay at once due to her economic situation and sought court's order to allow her to pay the decretal sum in instalments.
4. The Plaintiff in her Replying Affidavit dated 8th July 2024, stated that when she filed the Plaint, the Defendant did not raise an objection on the issue of payment and could therefore not raise that issue once judgement had been entered against her adding that she ought to have sought stay of execution of judgement as per Order 42 Rule 6 of the Civil Procedure Rules, or filed an appeal which she did not. The application was therefore an attempt to delay the settlement of the amount due. She urged that the Application be dismissed.
5. The Plaintiff's Notice of Motion dated 8th July 2024 and filed on 17th July 2024 seeks orders that;
 - i. The Court be pleased to review and or amend the Judgement issued on 25th January 2024 and Decree issued on 14th February, 2024 to reflect interest to be paid by the Defendant/ Respondent from July 2017 as prayed in the Plaint dated 16th May 2022;
 - ii. Costs of this application.
 - iii. Any other relief that this court may deem fit to issue.
6. The grounds were that despite the Plaintiff having sought interest on the amounts due and owing of Kshs. 330,000 in its pleadings, the Court failed to capture the same in the judgement which was an error apparent on the face of the record, and unless the same was granted, the Plaintiff would be prejudiced by being denied the fruits of her judgement.
7. The Defendant in her Replying Affidavit, contested this application on grounds that the Plaintiff upon terminating the sale agreement for parcel Kajiado/Kaputiei North/15689 refused to hand back the original title deed for the said property which would have enabled her to sell it and refund the amount of Kshs. 330,000. It is her case that, the Plaintiff had approached the Court with unclean hands and should not benefit from her actions. As such, the Court in its discretion did not prejudice any party by ordering a refund of the Kshs. 330,000 without interest. She also noted that the application had been brought six months after the judgement which was inordinately late and should be dismissed with costs.
8. The two applications were canvassed by way of written submissions.

The Plaintiff's Submissions

9. On whether the Defendant had satisfied conditions to warrant the grant of the orders sought in her application, counsel submitted that while Order 21 Rule 12 of the Civil Procedure Rules provided for payment of amount decreed in instalments, the Defendant herein the judgement debtor, had not demonstrated sufficient reasons to warrant exercise of Court's discretion to allow payment of money due in instalments citing Conrad Maloba & Associates Advocates vs Bashir, Noor & Co. Advocates [2024] KEHC 683 (KLR). Counsel added that since the judgement was passed, the Defendant had not made any payment as a show of good faith warranting issuance of the orders sought as was held in Lavington Security Ltd vs Nairobi City Water & Sewerage Co. Ltd [2014] eKLR, Hildegard Ndelut vs Letkina Diaries Ltd & another [2005] eKLR, Nainkumar Megji Shah vs Mumias Sugar Co. [2015] eKLR and Singh Gitau Advocates vs City Finance Bank Ltd [2013] eKLR. Counsel also submitted



that the proposed instalments were neither sufficient nor proportionate to the amount owed and should be dismissed.

10. On whether the Plaintiff's application for review should be allowed, counsel submitted that as per Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides for review on grounds of mistake or error apparent on the face of the record. Counsel submitted that the Plaintiff was entitled to interest on the Kshs. 330,000 owed to her by the Defendant from July 2017 by dint of Section 26(1) of the *Civil Procedure Act* citing Highway Furniture Mart Ltd vs Permanent Secretary Office of the President & another [2006] eKLR. Thus, failure to award that interest was an error on the face of the Court's record warranting a review.

The Defendant's Submissions

11. On whether the review application was merited as per Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, Counsel submitted that in not granting the interest, the Court exercised its discretion taking into consideration evidence adduced and this did not prejudice any party. Therefore, this discretion was not a ground for review and if the Plaintiff was aggrieved she ought to have appealed but not sought a review citing the Court of Appeal in National Bank of Kenya Ltd vs Ndung'u Njau [1997] eKLR. Counsel also submitted that an award of interest being discretionary, it could only be interfered with if it was exercised injudiciously as was held in Kenya Planters Cooperative Union Ltd vs Interchem Co. Ltd & 6 others [2024] eKLR. Therefore the court was functus officio and the application should be dismissed as was held in John Kiragu Kimani vs Rural Electrification Authority [2020] eKLR. Counsel also added that the review application had been brought six months after the judgement was delivered which was inordinately late without reason making reference to the Kenya Planters Cooperative Union Ltd case and John Kiragu Kimani both cited above.
12. On whether the Defendant's application should be allowed, counsel submitted that Order 21 Rule 12(2) of the Civil Procedure Rules provided for payment of decree in instalments and the application had been made timeously and should therefore be allowed.

Analysis and Determination

13. I have considered the Notice of Motions, the affidavits in support and the responses thereto, the rival submissions and the authorities cited, I find that the issues for determination are:
 - i. Whether the Defendant has shown sufficient cause for payment of the amount decreed in instalments;
 - ii. Whether the Plaintiff's application for review of the Judgement dated 25th January 2024 is merited;
 - iii. Who should bear costs of the applications?
14. The Defendant has approached this Court seeking to pay the decretal sum of Kshs. 330,000 in monthly instalments of Kshs. 20,000 until payment in full on grounds that due to hard economic times, payment of the whole amount as ordered is arduous. The Plaintiff has contested this claim on grounds that the Defendant did not provide evidence of her inability to pay neither had she made an attempt to pay any of the claimed sums.



15. Order 21 Rule 12 of the Civil Procedure Rules indeed provides for payment of decretal sum in instalments. It stipulates:

“(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

16. It is clear from the above provision, that the Court has discretion to allow payment of decretal sum in instalments if it is satisfied that sufficient reasons or cause has been provided.

17. It is not in contention that the judgement was delivered on 25th January 2024 and a Decree issued on the 14th of February 2024. The amount of Kshs. 330,000 ought to have been paid within Ninety (90) days from the date of Judgement, which would lapse on or about 25th April 2024. Thereafter the notice to execute the decree was issued to the Defendant. The Defendant then filed the application dated 27th May 2024, about one month after the notice of execution was issued. During this time, there is no evidence of any attempt to settle the decretal sum. Justice Githinji in *Madi & 3 others v Madi (Miscellaneous Application 34 of 2020)* [2023] KEHC 1016 (KLR) held:

“A cursory reading of Order 21 Rule 12 of the Civil Procedure Rules empowers the Court to order settlement of the decretal sum by instalment or postponement thereof. The Court in *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260 laid down the principles that should guide the Court in the exercise of discretion in such matters and states as follows:

- a. whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
- b. the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
- c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
- d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”

18. The learned Judge in this case found that Applicants had not given any sufficient reasons as to why the Court should exercise its discretion in their favour.

19. Relying on the above authority, I find that Defendant has not satisfied the court as to why it should exercise discretion in her favour. The Application is hereby dismissed.



20. The second issue for determination is, whether the Plaintiff has established grounds for grant of review of the judgement delivered on 25th January 2024 that the court ought to grant interest on Kshs. 330,000 due to the Plaintiff from May 2017.

21. Section 80 of the *Civil Procedure Act* provides as follows;

“ Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

22. Order 45, rule 1 of the Civil Procedure Rules provides that;

“ 1. Any person considering himself aggrieved-

- (1)
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

23. The Plaintiff claims that the Court erred in not awarding interest on the refund of Kshs. 330,000 as sought in the Plaint, which is an error apparent on the face of the record. That the Court should review it’s decision and grant the same.

24. While taking cognisance of the Plaintiff’s argument, the issue of interest which is before Court for review, was brought several months after the judgement was delivered. The Plaintiff has already issued the Defendant with a notice to execute. This was done before this application was brought. Section 26 of the *Civil Procedure Act* provides as follows in regard to interest:

- “(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.”

25. From the above provision, it is clear that the issue is at the discretion of the court. The issue of interest and costs are issues that Court thoroughly considers and makes a determination on based on evidence tabled. I find that the issue of interest was not erroneously left out. If any party is aggrieved, the cause of action should therefore be to appeal against the decision. I am of the view that asking Court to review its decision and grant interest is akin to asking the Court to sit on appeal over its own decision.

26. While the Plaintiff claims that she had been deprived of Kshs. 330,000 from July 2017, this Court noted that she had equally deprived of the Defendant of the use of her suit property by withholding the title deed. Therefore, no party should be allowed to reap where they did not sow. The Court thus deemed it fit and just not to grant the interest sought due to the evidence presented. It is thus not a typographical error that can be corrected by the stroke of the pen. Justice Mativo (as he then was) in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR had this to say on the issue of review:

- “ 36. ...A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.”

27. I find no merit in the application for review and the same is dismissed with no orders to costs.

28. In essence both applications having been dismissed, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF FEBRUARY 2025.

L.KOMINGOI

JUDGE.

In the presence of:

Ms. S. Mogeni for the Plaintiff.

Mr. Ochanda for the Defendant.

Court Assistant – Mutisya.

