



Farid & another v Lekerai (Legal representative of the estate of Mateina Ole Looretet) & 3 others (Civil Appeal 12A of 2017) [2022] KEHC 15946 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 12A OF 2017
GMA DULU, J
NOVEMBER 29, 2022
FORMERLY MACHAKOS CIVIL APPEAL NO. 58 OF 2010**

BETWEEN

**HASSAN FARID 1ST APPELLANT
HUSSEIN SHARIFF ABDALLA 2ND APPELLANT**

AND

**KAKURO LEKERAI (LEGAL REPRESENTATIVE OF THE ESTATE OF
MATEINA OLE LOORETET) 1ST RESPONDENT
LEEPALA SAIDIMU 2ND RESPONDENT
LEPARAKUO OLE BACKSON 3RD RESPONDENT
THOMAS SANKEI PAUL 4TH RESPONDENT**

RULING

1. Before me is an application by way of Notice of Motion dated 03/04/2020 filed under section 80, 1A and 1B and 3A of the *Civil Procedure Act* (Cap. 21), and Order 45 of the *Civil Procedure Rules*, and Article 50 and 159 of the *Constitution* seeking the following orders –
 1. That this court deems it fit to consolidate this appeal with Makueni High Court Civil Appeal No. 12B and 12C for the purposes of disposition of this application.
 2. That the judgment given by the court on 17th October 2018 be partially reviewed in respect of the effective date of payment of interest.
 3. That in its place this honourable court do order interest to be payable on any amount outstanding from the date of the judgment on appeal.



4. That the Deputy Registrar of this court be directed to take account and ascertain the amount still outstanding of the suits subject matter of the appeal.
5. That the court do make such other or alternative orders as meets the interests of justice.
2. The application has grounds on the face of the Notice of Motion. The grounds are that the cases subject matters of the appeal, had been consolidated at the hearing stage in the lower court, that the issues canvassed in this application are similar in the three appeals 12A, 12B and 12C hence it would save time for both the parties and the court to hear the application in one file, that there is sufficient reason for review of the judgment of the court in that a substantial portion of the decretal sum that is Kshs.3,463,169 had been paid in November 2008 over a year prior to the decision in the lower court rendered on March 31, 2010, that by the time appeal was heard the respondents had paid a total of Kshs.5,272,831 leaving a balance of Kshs.659,662 plus costs of the lower court, that the appeal Judge was not aware of the prior payment of the substantial portion of the decretal sum otherwise he would not have ordered accumulation of interest from the date of judgment of the lower court, and that the respondent had been unwilling to take accounts and had unreasonably sought to be paid interest on money that is not outstanding.
3. The application was filed with a supporting affidavit sworn on 31st February 2020 by Dominic Njuguna Mbigi advocate for the applicants/appellants in which, it was deponed that his firm of lawyers conducted Machakos High Court Civil Appeal No.s 58, 59 and 60 of 2010, which became Makueni High Court Civil Appeals NO. 12A, 12B and 12C of 2017 which three (3) appeals arose from 23 cases from one road traffic accident involving motor vehicle KAV051T which occurred on November 14, 2006.
4. That an appeal Machakos Civil Appeal No. 142 of 2008 relating 17 out of the 23 cases, was on 12th November 2008 compromised by both parties filing a consent which allowed the appeal to facilitate a fresh hearing in the lower court, on condition that the appellant paid half the decretal sum of Kshs.3,463,169 which was paid on 10th December, 2008 through cheque No.01xxxx.
5. That the said cases were heard afresh together with six other cases and, the appellant being dissatisfied with the judgment in all those cases delivered on March 30, 2010, appealed in Machakos High Court Civil Appeals Nos. 58, 59 and 60 of 2010. That consequent on filing an application for stay of execution, the appellant paid the respondent through respondent's counsel Kshs.1,150,000 being half of the decretal sum.
6. It was also deponed that, at the time of judgment in the appeal herein, the appellant's counsel were not given notice, and that had the appellate court been aware that substantial portion of the decretal amount had been paid prior to and in the course of hearing of the appeal, the court would not have made an order on payment of interest from the date of decree in the lower court. Several documents were annexed to the affidavit.
7. The application has been opposed through a replying affidavit sworn on 7th May 2021 by Geoffrey Kilonzo advocate for the respondents, in which it is deponed that the application is bad in law and devoid of merit and an abuse of the court process.
8. It is deponed also that the appeal judgment was rendered on October 17, 2018 and that the Judge was not in error in the orders issued on interest payable. It is deponed also that the applicant herein did not appeal at all, and now appeared to be appealing through the back door.



9. It is further deponed that the applicant had not made out a case for taking accounts, and that taxation of the appeal costs had not yet been done. Annexed to the affidavit are letters demanding for payment of costs.
10. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Mbigi Njuguma advocate for the applicants and the submissions filed by Wambua Kilonzo advocate for the respondents.
11. I will first deal with the issue of consolidation of this matter with other two appeals No.s 12B and 12C. This request has not been specifically opposed by the counsel for the respondents herein.
12. Indeed, this court has discretionally powers to consolidate court cases that are within its jurisdiction. As argued by the applicants counsel, the parameters to be taken into account in determining whether to consolidate cases, have been stated in several cases including the case of *Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Ltd and Others* (2018) e KLR wherein the court stated as follows –
 - a. Same common question of law or fact arises in both or all of them, or
 - b. The rights or relief claimed in them are in respect of , or a rise out of the same transaction or series of transaction, or
 - c. For some other reasons it is desirable to make an order for consolidating them”
13. I have not been told that all the parties agree to the proposed consolidation. However, I am told that the other two appeals arise from the same accident and the judgment in contest herein affected both the other two appeals.
14. Having perused the documents filed with the application herein, I do not see a copy of the judgment of this court said to have been delivered on 17th October 2018 to ascertain whether it could affect the other cases. I am thus not able to exercise this court’s discretionary powers to consolidate this appeal with the other two appeals, as I have no information or facts to indicate that the cases are related and, whether all the parties therein are aware of the request for consolidation.
15. With regard to the request for review of this court’s orders in the said judgment, indeed this court has jurisdiction to review its decision. The review jurisdiction of this court in civil matters is discretionary and anchored under Order 45 Rule 1 and 3 of the *Civil Procedure Rules*.
16. As rightly submitted by both counsel for the parties, the considerations to be taken by a court in exercising its jurisdiction to review its orders are where there is –
 - discovery of new or important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced 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.
17. The applicant has stated that there was prior part payment which if this appellate court knew, it would not have ordered interest to run for the period when payment had already been made.



18. The appellant/applicant has however not stated when he or they became aware of that prior payment, and why they did not bring it to the attention of the Judge on appeal before judgment was delivered, or immediately after the judgment was delivered in 2018.
19. Instead, the appellant has come to this court through this application filed in February 2020, after the lapse of about 1 ½ years and, even then with no clear facts and evidence filed in the application to assist this court in exercise of its review jurisdiction. As stated earlier in this ruling, even the judgment of this court delivered on 17th October 2018 is not one of the annexures filed with the application.
20. Again, on the request for review, this court is not able to exercise its discretionary powers, as the judgment sought to be reviewed is not one of the documents filed with the application. In my view, it is not the function of this court to do research outside the application to find out what the applicant wants to be reviewed. It is squarely on the applicant to place all evidence and facts before this court in the application, to support his or her request for review. He has not done so, and this court cannot thus exercise its review powers.
21. On the issue of the Deputy Registrar giving directions with respect to the accounts, same could only arise from the determination of the above two issues. As the above two issues that is the request for consolidation of appeals, and review of judgment have been determined in the negative, I will say no more on the issue of the Deputy Registrar being involved in the taking of accounts as requested. The request fails.
22. Consequently, and for the above reasons, I find no merits in the application. I dismiss the application with costs to the respondents.

DELIVERED, SIGNED & DATED THIS 29TH DAY OF NOVEMBER, 2022, VIRTUALLY IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

