REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 104 OF 2014

FRED'S ACADEMY LIMITED...APPELLANT

VERSUS

EMMA KINYA MUGAMBI..1ST RESPONDENT

JOHNSON MBURU KINYANJUI...2ND RESPONDENT

STEPHEN MWIYORO MUCEGE..3RD RESPONDENT

(Being an appeal against the Ruling and consequential orders of Hon. Ole Keiwua

dated 14/6/2013 in Milimani CMCC No. 8311 OF 2004)

JUDGMENT

1. On 23rd November, 2011, the Lower Court entered Judgment in favour of the 1st Respondent against the Appellant and the 2nd and 3rd Respondents as follows;

1.General damages Kshs. 500,000/=

2.Cost of future medical expenses Kshs. 1,600,000/=

3.Costs.

4.Interest on (1) shall accrue from the date of this Judgment and on (2) from the date of filing suit.

2. The Appellant subsequently filed the application dated 21st February, 2012 seeking orders that **the Judgment entered in favour of the Plaintiff and the subsequent decree issued be reviewed particularly on the issue of interest awarded on the cost of future medical expenses.**

3. Secondly, that **interest on the cost of future medical expenses be awarded to the Plaintiff from the date of Judgment until payment in full.**

4. The application was based on the grounds that the award of interest on the cost of future medical expenses from the date of filing suit was an error apparent on the face of the record. That the cost of future medical expenses was an anticipated cost as at the time of trial on 19th September, 2011 when the evidence of the doctor was taken. That it was therefore unfair for the said interest to be awarded when the suit was filed in the year 2004 and that such interest was punitive and amount to unjust enrichment.

5. The application was opposed to as to the grounds of opposition dated 2nd March, 2012 which stated:

1. That there is no error apparent on the face of the record to warrant the review of the Judgment and decree.

2. That the award of the interest was properly made in exercise of judicial discretion donated by Law and the exercise of that discretion cannot be contested before the same court.

3. That the said application is an afterthought that is bereft of any merits.

4. That the said application is bad in Law, misconceived and incompetent as the court is being asked to seat on Appeal over its own Judgment.

6. The application was dismissed and thereby triggered this Appeal.

7. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

8. The Memorandum of Appeal reflects 5 grounds of Appeal. In the written submissions, the Appellant condensed the same into only one. That is whether the trial court erred in Law by awarding interest on future medical expenses as from the date of the institution of the suit until payment in full. It was submitted that no interest ought to have been awarded. The court was referred to two cases where the courts did not award any interest on future medical expenses.

9. On the other hand, the 1st Respondent's contention is that the trial court correctly exercised it's discretion. That if the Appellant had appealed on the Judgment, that is when this court could have determined whether it was necessary to interfere with such discretion.

10. The 2nd and 3rd Respondents did not participate in the Appeal.

11. The Appeal herein is against the ruling of the trial court on an application for review. The same therefore falls under the ambit of Order 45 (1) Civil Procedure Rules.

12. Under Order 45 (1) of the Civil Procedure Rules states**; Any person considering himself aggrieved—**

> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(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.**
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> > **(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**

13. As stated by the Court of Appeal in the case of **Mwihoko Housing Co. Ltd v Equity Building Society [2007] eKLR**:

> **"It is trite law, and we reiterate, that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.**
>
> **The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City council v Thabiti Enterprises Ltd [1995-98] 2 EA 251 (CAK)."**

14. The award of interest falls within the exercise of the court's discretion. The question of discretion to award interest is anchored on Section 26 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides;

> **(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.

15. On power to award interest, the Court of Appeal in **New Tyres Enterprises Ltd Vs. Kenya Alliance Insurance Company Ltd [1988] KLR**, held as follows in respect of Section 26 Civil Procedure Act;

"…It is evident from the reading of this provision that the court enjoys a wide measure of discretion on the question of interest. And being an Appeal against a trial Judge's exercise of his discretion this court is enjoined to treat the original decision with the utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong…"

(See also Court of Appeal's decision in Mbogo & Another Vs. Shah [1968] EA 1993 & 1996)

16. Back to the instant case, the application for review was based on the award of interest on future medical expenses. The trial court therefore exercised discretion in respect of the award of costs. The principles applicable on the exercise of such discretion remain the same whether the matter before the court is an Appeal or a review. The guiding principles in an application for review were set out by the Supreme Court of Kenya in the case of Parliamentary Service Commission as follows;

(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this court.

(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the court.

(iii) An application for review of exercise of discretion is not an appeal or a chance for the Applicant to re-argue his/her application.

(iv) In an application for review of exercise of discretion, the Applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.

(v) During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.

(vi) The Applicant has to satisfactorily demonstrate that the Judge(s) misdirected themselves in exercise discretion and;

(a) as a result, a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the Judge has been clearly wrong and as a result, there has been an apparent injustice.

17. Bearing in mind the aforegoing principles, this court's view is that there is no error apparent on the record. It has not been demonstrated how the trial court erred in the exercise of discretion. I agree with the decision of the trial magistrate that the matters raised amount to reasons for Appeal rather than for a review application.

18. In the upshot, the Appeal has no merits and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPT., 2021

B. THURANIRA JADEN

JUDGE