



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 60 OF 1997

CHARLES WANJOHI WATHUKU.....PETITIONER/APPLICANT

-VERSUS-

GITHINJI NGURE.....1ST RESPONDENT

CHARLES MWANGI GITUNDU.....2ND RESPONDENT

RULING

The applicant has filed a summons in which he has invoked Rules, 49,63 and 73 of the Probate and Administration Rules and section 26 of the Civil Procedure Act, cap.21 and prayed for, *inter alia*, that the 2nd respondent be ordered to pay the applicant interest at court rates on the sum of Kshs. 8,983,356.00 being the amount awarded by this honourable court vide its order dated 3 June 2009; the interest is alleged to be due from June 2009 until payment in full. He also asked the court to order the 2nd respondent to pay a further sum of Kshs. 10,720,500.00 being the amount of lost income the Massey Ferguson Earth mover (herein “the earth mover”) would have earned for the balance of its economic useful life of seven (7) years for the period between March 2009 and March 2016.

The summons is dated 15 June 2017 and it is supported by the affidavit sworn on 19 June 2017 by the applicant himself. In that affidavit the applicant has sworn that on 22 October 2001, Juma, J. ordered the respondents to vacate various parcels of land they had irregularly taken possession of and to hand over to the applicant, in his capacity as the administrator, motor vehicles belonging to the estate including, a Massey Ferguson earth mover, registration number KDT 314.

The respondents filed an application to stay this order and in the course of time the parties entered into a consent the effect of which was to allow the respondents to deliver the motor vehicles including the earth mover within 30 days, apparently of the date of the consent order. The respondents did not comply with order and consequently, the order was vacated. By an application dated 23 February 2006, the applicant sought to hold the respondents in contempt of court, in particular, for their failure to deliver the earth mover as ordered by the Court. By its ruling dated 26 February 2009 this court held the respondents to be in contempt of court.

Despite the court’s holding, the earth mover had not been returned by June, 2009 and so the applicant moved the Court to order the respondents to pay the sum of Kshs. 4,074,899.00 being the equivalent of value of the earth mover. The applicant also sought for the loss of income in the sum of Kshs. 9,816,915.00 being the amount income the earth mover would have generated between the year 2001 and 2009.

As a result of this application, Makhandia, J., as he then was, ordered the respondents to pay a total sum of Kshs. 8,983,356.00 made up of Kshs. 4,074,899.00 being the value of the earth mover and Kshs 4,908,457.50 being the income the earth mover would have generated in the said period.

The court’s ruling, however, did not consider interest on the principal amounts in the event that they were not paid immediately and it is for this reason that the applicant has, in the present application, sought to have interest on these amounts calculated at 14% per annum since June 2009 to date. According to him, the total interest accrued is Kshs. 10,061,358.72. He also seeks the sum of Kshs. 10,720, 500.00 being the income that the earth mover would have earned during the period in question.

The respondent opposed the application and filed a replying affidavit to that end; in it he swore that the issue of interest had been determined by Juma, J while Makhandia J had already determined the question of income from the earth mover. In any event, so he swore, the lost income is a special damage which cannot be pleaded in a summons.

I scoured through the entire record but I could not find the application out of which the initial order by Juma, J. was granted; however, a copy of this order is exhibited to the affidavit in support of the summons and from it one can easily discern the prayers the applicant sought for and what he achieved. Due to its centrality to the present application, it is necessary that I reproduce this order verbatim; it is couched as follows:

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 60 OF 1997

CHARLES W WANJOHI WATHUKU.....PETITIONER/APPLICANT

-VERSUS-

CHARLES MWANGI GITUNDU

GITHINJI NGURE.....RESPONDENTS

ORDER

CLAIM:

- 1. THAT the Respondents and/or their agents do move, vacate out of land parcels LR 2280 Nyaribu Kiganjo, Euso Nyiro Suguroi Block V 11/186, Muhito/Mbiuni/689, Muhito/Mbiuni/684, Muhito/Mbiuni/1062 forthwith and return the documents of the title to the said properties.**
- 2. THAT the respondents do hand over to the Applicant/Judgment debtor motor vehicle(s) KAE 625Y Toyota DX, KVV 690 Toyota, International Tractor Model 444 (S/W 4191), Massey Ferguson Tractor marked 182840, Howard Rotaslater, One Gas Cylinder 2 Rolls of wire, one large mortar, Massey Ferguson KDT 314 Earth Mover,**
- 3. THAT the Respondents after the return of these properties do account for Kshs. 5,688,539.85 collected by the Respondents from Public Trustee, Kenya Commercial Bank Limited, Farmers Sacco purportedly for maintaining the estate.**
- 4. THAT this application be heard inter partes within 14 days.**

UPON the application dated 19/10/2001 by counsel for the applicant herein coming before Mr Justice J.V.O Juma on 19/10/2001 in the presence of Counsel for the Respondent IT IS ORDERED

- 1. THAT the Respondents and/or their agents do move and vacate out of land parcels LR 2280 Nyaribu Kiganjo, Euso Nyiro Suguroi Block V 11/186, Muhito/Mbiuni/689, Muhito/Mbiuni/684, Muhito/Mbiuni/1062 forthwith and return the documents of the title to the said properties.**
- 2. THAT the respondents do hand over to the Applicant/Judgment debtor motor vehicle(s) KAE 625Y Toyota DX, KVV 690 Toyota, International Tractor Model 444 (S/W 4191), Massey Ferguson Tractor marked 182840, Howard Rotaslater, One Gas Cylinder 2 Rolls of wire, one large mortar, Massey Ferguson KDT 314 Earth Mover.**
- 3. THAT no order as to the money taken by the Respondents as both parties should have a chance to explain to court how the same was utilized.**

GIVEN UNDER MY HAND AND THE SEAL OF THIS HONOURABLE COURT THIS 19TH DAY OF OCTOBER, 2001

ISSUED THIS 22ND DAY OF OCTOBER, 2001

Signed

DEPUTY REGISTRAR

HIGH COURT OF KENYA, NYERI

This is the order that set in motion the application for contempt against the respondents and it is also the origin of the subsequent order according to which the applicant was awarded the sum of Kshs. 8,983,356.00.

The ruling of 3 June, 2009 in which this award was made is also crucial in the present application. In it the learned judge noted that the respondents had made efforts to comply with the court order of 19 October, 2002. He noted that the earth mover had been valued at Kshs. 4,074,899/= which amount was inclusive of the salvage value. The applicant had also claimed Kshs. 9,816,915/= being the income that the earth mover ought to have earned.

The learned judge concluded that the claim on the value of the earth mover was well founded and therefore awarded the applicant the sum of Kshs. 4,074,899/=. As for the lost income, and the vexing question of interest, the learned judge had this to say:

However, knowing the vagaries of life, it cannot be assumed that the earth mover would have been in a perfect working condition throughout. It could as well have broken down or indeed there may have been occasions when there would be no work at all.

Bearing in mind the aforesaid I would only allow half of the aforesaid claim meaning Kshs. 4,908,457/50.

With regard to the interest that would have accrued on Kshs. 4,526,74/= I have looked at the order made on 16th August 2002 by Juma J and it is silent on the question of interest. Accordingly, I would disallow the same.

It is apparent from this ruling that what the applicant claims in this application has been determined by this honourable court; he was awarded an amount equivalent to the value of the earth mover and a sum assessed by the court to be the amount that the earth mover would have generated as income. As far as the applicant's quest for interest is concerned, it is equally apparent that it was rejected as early as 3 June, 2009 when this ruling was delivered. As a matter of law, it may have been rejected much earlier in the order of 16th August, 2002; I understand the learned judge to have meant that if Juma, J. was silent on the question of interest, he had effectively rejected it and therefore he (Makahandia,J.) could not purport to award it himself.

Against this background, I find the applicant's present application to be seeking nothing more than what he sought and failed to achieve before Juma and Makhandia, JJ. To this end, I am in agreement with the learned counsel for respondent that the applicant is seeking to regurgitate what this court has already determined.

Even assuming that the applicant had a justifiable cause, I doubt some of his claims, particularly those that are in the nature of special damages could be disposed of through a summons filed under Rule 49 of the Probate and Administration Rules. Such claims would properly be determined in an ordinary civil suit instituted by the applicant on behalf of the estate for which he is the administrator. If I am right, it follows that the applicant's application is misconceived and an abuse of the court process. I say so because if the applicant was, for whatever reason, dissatisfied with either of the two orders, the right course should have been to appeal against the order or seek its review, whichever course was applicable.

Be that as it may, I am minded that interest is provided for in section 26 of the Civil Procedure Act which, as noted, the applicant has invoked in his application. That section reads as follows:

26. Interests

(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.

This provision gives the court the discretion to order for payment of interest at whatever rate it deems reasonable and where the decree is silent on interest, the assumption is that it is at 6 per cent per annum. In the present application we are not dealing with a decree and even if we were, I doubt that this provision would have been of any use to the applicant. I say so because it is only in Rule 63 of the Probate and Administration Rules that provides when certain rules of the Civil Procedure Rules, and not the substantive provisions of the Civil Procedure Act, can apply in the Probate and Administration causes.

That Rule states in express terms that certain specific rules of the Civil Procedure Rules can be applied in succession proceedings. The Act itself does not provide for the application of any of the provisions of the Civil Procedure Act, including section 26 in probate and administration proceedings. I suppose that if it was the intention of the Legislature that other legislative instruments or the provisions thereof could be incorporated in the Law of Succession Act or applied alongside it, it would have expressly stated so in no uncertain terms. Without such express authority, it would be a perilous adventure for this honourable court to purport to import the provisions of other Acts, and in this case, the Civil Procedure Act, into the Law of Succession Act in the pretext of exercising its inherent powers with which it is clothed by rule 73 of the Probate and Administration Rules. I am of the humble view that the exercise of that inherent power only comes into play whenever the rules do not provide for specific situations which the probate and administration court may be confronted with from time to time. In such situations, the court will invoke its inherent powers and, as the rule states, 'make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court'. It certainly does not extend to importation of provisions of other legislative Acts into the Law of Succession Act.

The situation presented by the applicant as novel and purportedly not catered for in the Probate and Administration Rules should not have arisen in the first place; it could have been avoided if the prayers in the application out of which the order to pay the applicant the sum of Kshs. 8,983, 356.00 was made were properly framed. What I mean here is that if the applicant had, for instance, framed his prayers in such a way that he was seeking a specific sum or sums with interest at a certain rate until payment in full, it would not have been necessary for him to come back to court to seek for interest on the principle award, which in his view, he is rightly entitled to. As it were, he was only awarded what he must have sought and nothing more and if, for any reason, he was not satisfied then the worst he could do was to file the kind of application that is now before court.

For these reasons I am satisfied that the applicant's application is not well founded; in my view, it is misconceived and an abuse of the process of this honourable court; it is thus dismissed with costs.

Dated, signed and delivered in open court on 26th day of April, 2019

Ngaah Jairus

JUDGE