REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 372 OF 1999

JOHN PETER MUDHUNE.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED...DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion dated 18th October 2016 seeking the following orders:

> ***i. That the Honourable court be pleased to review the judgment delivered by Honourable Lady Justice R N Nambuye on 29th day of September 2016;***
>
> ***ii. That the Honourable court be pleased to award to the plaintiff/decree holder interest on damages at court rates from the date of filing of the suit; and***
>
> ***iii. That the costs of this application abide the outcome of the judgment***.

2. The application is premised on grounds that in its judgment delivered on 29th September 2016, the court awarded the applicant interest on general damages from the date of judgment until payment in full instead of from the date the suit was filed as envisaged under *Section 26 (1)* of the *Civil Procedure Act*; that the failure to award interest from the date the suit was filed amounted to an error on the face of the court record and that it was in the interest of justice that the court corrected that error by reviewing its judgment as prayed. These grounds were replicated in the supporting affidavit sworn by the applicant on 18th October 2016.

3. The application is contested by the respondent through a replying affidavit sworn on 24th November 2016 by *Paul K. Chelanga*, the respondent's recoveries manager. The deponent while admitting that the applicant was awarded general damages in the sum of KShs.1,100,000 together with interest at court rates from the date of judgment till payment in full averred that though the grounds advanced by the applicant in support of his application are good grounds for an appeal, they do not in law warrant a review of the court's judgment as proposed. The respondent urged the court to dismiss the application with costs.

4. When the application came up for hearing, learned counsel for the applicant *Ms Vitsengwa* and *Mr. Gaita* for the respondent agreed to have the same disposed of by way of written submissions. The applicant filed his written submissions on 18th September 2018 while the respondent filed its submissions on 16th May 2019.

5. I have considered the application, the affidavits filed in support and in opposition thereto as well as the submissions filed on behalf of the parties. I have also read the judgment which was delivered by *Hon. Njuguna J* on 29th September 2016 on behalf of *Hon. Nambuye JA*. The record shows that *Hon. Nambuye JA* heard this case to conclusion when she was serving as a High Court judge before she was elevated to the Court of Appeal but she wrote the judgment when she was at the Court of Appeal. When the application was filed, the Hon. Chief Justice gave directions on 4th October 2017 that the application should be heard by any judge of the High Court. In the premises, though the judgment was written by a judge of the Court of Appeal, for purposes of this application, it will be treated as a judgment of this court.

6. That said, having considered the parties rival submissions, I note that the thrust of the applicant's submissions is that given the provisions of S*ection 26 (1)* of the *Civil Procedure Act* (the *Act)* the learned judge erred when she ordered that the general damages awarded to the applicant will attract interest at court rates from the date of judgment and not at commercial rates from the date the suit was filed till payment in full. The applicant relied on two Court of Appeal authorities namely, ***New Tyres Enterprises Limited V Kenya Alliance Insurance Company Limited, [1987] KLR 380*** and ***Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited (No. 2), [1970] EA*** for the general proposition that where a person is entitled to a liquidated amount or to specific goods or has been deprived of land or moveable property through the wrongful acts of another person, he should be awarded interest from the date of filing suit.

7. It was the applicant's case that the learned judge failed to appreciate that the discretion envisaged in *Section 26 (1)* of the *Act* in awarding

costs was not absolute and was subject to the aforesaid considerations; that the court failed to consider that the respondent was a commercial bank which was in the business of making profits and that it had earned interest from the monies obtained from the unlawful sale of the suit property to the detriment of the applicant.

8. The respondent on the other hand submitted that the application ought to be dismissed for lack of merit since it sought to overturn the exercise of the court's discretion on the award of interest; that there was no error apparent on the face of the record and that the grounds advanced by the applicant did not warrant a review as sought in the application.

9. The power of a court to review its own orders is donated by *Section 80* of the *Civil Procedure Act* and *Order 45 Rule 1* of the *Civil Procedure Rules* (the *Rules*) which prescribe the circumstances which merit the exercise of the court's power of review. *Section 80* provides that:

> ***"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."***

Order 45 Rule 1 states that:

> ***"1. (1) 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***
>
> ***(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."***

10. In view of the position taken by the applicant as stated above, it is important to consider what constitutes a mistake or error apparent on the face of the court record. The Court of Appeal has had occasion to define the term "error on the face of the court record" in the context of *Order 45* of the Rules. In ***Nyamongo & Nyamongo Advocates V Kogo, [2001] 1 EA 173***, the court expressed itself as follows:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."***

11. In ***National Bank of Kenya Limited V Ndungu Njau, CA No. 211 of 1996, [1997] eKLR***, the court stated thus:

> ***"A review may be granted wherever 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 for review that another Judge could have taken a different view of the matter. Nor can it be a ground for 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."***

12. In this application, the applicant contends that the learned judge failed to properly interpret the provisions of *Section 26 (1)* of the *Act* as a result of which she erred by awarding him interest on the judgment sum from the date of judgment and not from the date of filing suit as required by the law. The applicant in his submissions also faults the rate of interest awarded by the court.

13. From the above summary of the applicant's complaints, it is clear that the applicant was attacking the legality of the learned judge's decision which in his view was based on the wrong interpretation of the applicable law. In my considered view and as can be seen from the definition given earlier of what would constitute a mistake or error on the face of the record, the error complained about by the applicant in this case does not amount to an error on the face of the court record. If it is an error as alleged, my view is that it amounts to an error of law which falls outside the parameters of review. Such an error can only be corrected on appeal by the Court of Appeal.

14. In addition, *Section 26* of the *Act* gives the court wide discretion in determining the rate of interest to be awarded to a successful litigant and whether it should start running from the date the suit was filed or from the date of judgement. A reading of the court's judgement clearly shows that in arriving at its decision on the award of interest, the court applied its mind to the provisions of *Section 26* of the *Act* and exercised its discretion in making its orders on the matter. In my opinion, a decision made in the exercise of a court's discretion cannot be the subject of review by the same court. If this court were to accept the applicant's invitation to review the orders made in the judgment dated 29th September 2016, it would be sitting on appeal over a decision made by a court of coordinate jurisdiction which is not permissible in law.

15. For all the foregoing reasons, I am satisfied that the Notice of Motion dated 18th October 2016 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of May, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mukuna holding brief for Mr. Eshuchi for the applicant

Mr. Gaita for the respondent

Mr. Salach: Court Assistant