REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 228 OF 2016

GEORGE GICHANA KARANJA.....1ST APPELLANT

JOMON AGENCIES LIMITED..... 2ND APPELLANT

VERSUS

MWANGI NDERITU NGATIA..... RESPONDENT

RULING

1. *Mwangi Nderitu Ngatia*, the respondent in this appeal moved this court through a Notice of Motion dated 14th February 2019 in which he sought the following orders:

> *i. That the Honourable court be pleased to review and/or vary its judgment dated 13th December 2018.*
>
> *ii. That the Honourable court be pleased to grant interest to the respondent/applicant on special damages from 6th June 2011, the date of filing the suit in the lower court and interest on general damages from 8th April 2016, the date of judgment of the lower court.*
>
> *iii. That the costs of this application be provided for.*

2. The application is premised on *Section 80* of the *Civil Procedure Act* and *Orders 45 and 51* of the *Civil Procedure Rules*. It is anchored on the grounds stated on its face and the depositions made in the respondent's (applicant's) supporting affidavit sworn on 14th February 2019. It is the applicant's case that there is a clear error on the face of the court's record in that the court in its judgment dated 13th December 2018 after setting aside the trial court's decision on damages and substituting it with its own award erroneously awarded him interest on both special and general damages from 13th December 2018 until payment in full instead of awarding him interest on special damages from 6th June 2011 when the suit in the lower court was filed and interest on general damages from 8th April 2016 being the date of judgment of the trial court.

3. The applicant also asserted that the application had been filed timeously and that the interests of justice require that the court reviews its judgment and have it varied to include an award of interest on special damages from the date the suit was filed and on general damages from the date of judgment of the lower court.

4. The application was contested by the appellants (respondents). Learned counsel for the respondents, *Mr. Justus Maronga Omagwa* swore a replying affidavit in which he deponed that the application lacked merit as in his view, there was no error apparent on the face of the court's judgment and that in any event, the relief sought cannot be granted through a review but can only be granted by way of an appeal. Learned counsel further averred that the application was filed four months after the judgment sought to be reviewed was delivered and was not therefore filed timeously.

5. By consent of the parties, the application was prosecuted by way of written submissions. Those of the applicant were filed on 20th May 2019 while those of the respondents were filed on 8th July 2019. The submissions basically buttressed the different positions taken by the applicant and the respondents with regard to the prayers sought in the application.

6. I have carefully considered the application, the affidavits on record and the rival written submissions filed by the parties as well as the authorities cited. I have also read the judgment I delivered on 13th December 2018 in which I partially allowed the respondents appeal by dismissing their appeal on liability and allowing their appeal on quantum. In the judgment, I substituted the trial court's judgment on quantum with a judgment awarding the applicant special damages in the sum of KShs.458,375 and general damages in the sum of KShs.700,000. Both sums were to attract interest from the date of this court's judgment until payment in full.

7. The powers of this court to review its own decisions is provided for in *Section 80* of the *Civil Procedure Act* (the Act) which states 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."***

8. The court's power of review is exercised within the parameters set out in *Order 45 Rule 1* of the *Civil Procedure Rules* (the Rules). *Order 45 Rule 1 (b)* provides that the court upon application by an aggrieved party who had not appealed against the decision or order sought to be reviewed can review its decision if the applicant satisfies any of the following conditions:

> i. That he had discovered a new and important matter or evidence which after the exercise of due diligence was not within his knowledge and was not available at the time the decree or order was made;
>
> ii. That there was a mistake or error apparent on the face of the record; and
>
> iii. That there was some other sufficient reason warranting the proposed review and that the application was filed without unreasonable delay.

9. Having set out the law governing the court's exercise of its power of review, I now turn to consider whether the applicant has met the threshold of review as set out hereinabove.

10. I wish to start with a consideration of whether the application was filed timeously. As stated earlier, the judgment sought to be reviewed was delivered on 13th December 2018 and the instant application was filed on 22nd February 2019 about two and a half months thereafter not four months as alleged by the respondents. It is common knowledge that the applicant had to obtain a copy of the court's judgment before deciding whether to appeal against the court's decision or to apply for review. In the circumstances, it is my finding that the delay of about two months in filing the instant application cannot be said to be inordinate or inexcusable. I thus find that the application was filed without unreasonable delay.

11. Having found as I have above, the next issue for my consideration is whether the order awarding interest on both special and general damages from the date of this court's judgment until payment in full amounted to an error on the face of the record.

12. In order to resolve that question, it is important to examine what constitutes a mistake or error apparent on the face of the court record within the meaning of *Order 45 Rule 1 (b)* of the *Rules*. The Court of Appeal in ***Nyamongo & Nyamongo Advocates V Kogo, [2001] 1 EA 173***, addressed its mind to the definition of that term and 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."***

13. In ***National Bank of Kenya Limited V Ndungu Njau, CA No. 211 of 1996, [1997] eKLR***, the Court of Appeal gave guidelines on how courts should distinguish between an error that can be subject to review and errors of law which can only be corrected on appeal. The court stated as follows:

> ***"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."***

14. Under *Section 26* of the *Act*, this court has wide discretion in determining the rate of interest to be paid on an award of damages and when it should be paid. But as is always the case, the court's discretion must be exercised judiciously in accordance with established legal principles.

15. As a general rule as evidenced by the decisions in the persuasive authorities cited by the applicant notably the cases of ***Joseph Kiarie Njoroge V Njue Kiarie, [2007] eKLR*** and ***100 Minor (Suing Through Father And Next Friend) MOR V Franciscan Sisters of the Immaculate, [2018] eKLR***, interest on special damages should run from the date the suit was filed while interest on general damages where an appeal had been allowed should run from the date the trial court pronounced itself in the judgment that was the subject of appeal. I thus agree with the applicant that my order regarding when interest on both special and general damages was to accrue was an error apparent on the face of the record as defined by the Court of Appeal in ***Nyamongo & Nyamongo Advocates V Kogo, [supra]***. The error is self-evident

and does not require much elaboration.

16. In view of the foregoing, I find merit in the applicant's Notice of Motion dated 14th February 2019 and it is hereby allowed. Consequently, the judgment dated 13th December 2018 is hereby varied to read that special damages awarded to the applicant will accrue interest at court rates from 6th June 2011 being the date suit in the lower court was filed while interest on general damages will start running from 8th April 2016, the date of judgment of the lower court.

17. Given the nature of the orders sought in the application, the order that best commends itself to me on costs is that each party shall bear its own costs.

18. It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI this 31st day of July, 2019.**

C. W. GITHUA

JUDGE

In the presence of:

Ms Moragwa holding brief for Ms Gicheha for the respondents

Mr. Githua holding brief for Mr. Githongo for the applicant

Mr. Salach: Court Assistant