



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 1939 OF 1999**

**(formerly Central Registry Civil Case No. 2111 of 1999)**

**CATHERINE NJUGUINI KANYA.....PLAINTIFF**

**VERSUS**

**COMMERCIAL BANK OF AFRICA LIMITED.....DEFENDANT**

***Consolidated with***

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 531 OF 2002**

**(formerly Central Registry Civil Case No. 1661 of 2001)**

**RAPHAEL JONAH MUTAHI.....1<sup>ST</sup> PLAINTIFF**

**VIOLET MUMBUA NDAMBUKI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**COMMERCIAL BANK OF AFRICA LIMITED.....DEFENDANT**

**R U L I N G**

1. The above stated suits were consolidated because they had a common thread.

2. The background of the dispute was that the Plaintiffs, namely Catherine Njuguini Kanya, Raphael Jonah Mutahi and Violet Mumbua Ndambuki are ex-employees of the Defendant, commercial Bank of Africa Limited. Their employment was terminated in 1998 following industrial action where their union called for a strike. The Plaintiffs had their employment terminated after they failed to return on duty after notices return were given by the Defendant.

3. An action was filed by some 600 employees that had been dismissed before the Industrial Court. The Industrial Court by its award found that the dismissed employed should be deemed to have been declared redundant with effect from 17<sup>th</sup> August 1998. These employees were therefore entitled to be paid their full redundancy benefits as contained in the Collective Bargain Agreement.

4. The Plaintiff's herein were not included in that award because they had the present suits that were pending before the High Court.

5. Justice Ransley (now retired) by his Judgment of 25<sup>th</sup> May 2006, in respect to the Plaintiffs' consolidated suits, ordered the Defendant to pay the Plaintiffs interest on outstanding redundancy payments from the date when the Plaintiffs were dismissed until the date of that judgment of Justice Ransley at the commercial rate.

6. The Plaintiffs have brought a Notice of Motion application dated 3<sup>rd</sup> March 2018, which is the subject of this Ruling. The Plaintiffs seek the following prayers:

***“1(a) The Honourable Court be pleased to order that the amount on which interest is to be paid for Violet Mumbua Ndambuki, the 2<sup>nd</sup> Plaintiff in HCCC 531 of 2002 is Kshs. 1,320,373.55.***

***(b) The Honourable Court be pleased to order that the amount on which interest is to be paid for Catherine Njuguni Kanya, the Plaintiff in HCCC 1939 of 1999 is Kshs. 490,350.50.***

***(c) The Honourable Court be pleased to order that the amount on which interest is to be paid for Raphael Jonah Mutahi, the 1<sup>st</sup> Plaintiff in HCCC 532 2002 is Kshs. 789, 569.20.***

***2. The interest is to be paid on the outstanding redundancy payments from 17<sup>th</sup> August, 1998, the date when the Plaintiffs were deemed to have been declared redundant until the date full payment is made at the same commercial rates as are applicable to the loans granted to the Plaintiffs.***

***3. In the alternative to 2 above, that Defendant pays further interest on the redundancy benefits at commensurate rate of interest from the date of judgment by Hon. Mr. Justice Ransley (25<sup>th</sup> March, 2006) until payment is made in full.***

***4. The mortgaged properties shall not be sold until the redundancy benefits have been paid in full.”***

7. It is common ground that the Plaintiffs at the time their employment was terminated had outstanding loans with their employer which loans were secured by immovable properties. It is admitted by the Defendant that the amount the Defendant calculated as due to the Plaintiffs, as redundancy payments, were set off against the loan balance of the Plaintiffs' loan account. Following that set off the loan account of Violet Mumbua Ndambuki was fully paid and the charge over her property was discharged, and an amount of Kshs. 333,982.79 was paid to her by the Defendant.

8. The Plaintiff's through the affidavit of Raphael Jonah Mutahi, in support of the application, deponed that following the judgment of Justice Ransley the Defendant calculated the interest payable to the Plaintiffs on the basis of severance payment of one month pay for each completed year of service, but failed to include in the calculation the net pay of August 1998 and one month pay in lieu of notice, as provided under Clause A7 of the Collective Bargain Agreement.

### **ANALYSIS AND DETERMINATION**

9. The Plaintiffs in approaching this Court by the present application failed to clearly state whether their claim is that the Defendant has entirely failed to pay the amount ordered by Justice Ransley or that their claim is that the Defendant failed to pay some of their claim. Even the affidavit in support of the application fails to make this clear. This is because at some point the deponent of the Plaintiffs' affidavit, in support, stated that the Defendant did not calculate the net pay for August 1998 and failed to take into account the one month pay in Lieu. The deponent then proceeds in that affidavit to refer to the Plaintiffs' Learned Advocate's calculation of their redundancy pay and stated that the Defendant had failed to pay the same.

10. What however is clear is that the Plaintiffs seek, by their application, that this Court would (what the Plaintiffs call) ‘adjust’ the decree passed Justice Ransley.

11. The Plaintiffs in seeking the adjustment of that decree rely on Order 22 Rule 2(2) of the Civil Procedure Rules. That Rule is entitled Payment out of Court to Decree Holder {Order 22, Rule 2}. It provides:

***“(1) Where any money payable under a decree of any kind is paid direct to the decree-holder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder may certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.***

***(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.”***

12. That Rule as it becomes very clear does not empower the Court to adjust a decree. Rather it provides that where the Judgment Debtor makes payment out of Court, or makes payment direct to the Decree Holder, or the decree is adjusted to the satisfaction of the Decree Holder, the Decree Holder may inform the Court of such adjustment. The Judgment Debtor may also inform the Court of such payment out of Court or adjustment of the decree. The Plaintiffs are, in my view, being creative in attempting to invoke that Rule in the present application. There is a reason of such creativity. It is because the Plaintiffs have previously unsuccessfully sought, by application, to review the Judgment of Justice Ransley. Justice L. Kimaru by his Ruling, in this matter, dated 27<sup>th</sup> March 2009 dismissed the Plaintiff’s said application. It is then clear why the Plaintiffs creatively used the word adjustment of decree rather than used the word review.

13. When one looks at what the Plaintiffs seek by the present application it becomes clear that the Plaintiffs essentially seek a review of the judgment of Justice Ransley.

14. This is why I say so. Justice Ransley identified, in his judgment, the issues that were before him for determination. He set them out as follows:

- i. *Are there Plaintiffs entitled to be treated as approved retirees.*
- ii. *Are the Plaintiffs entitled to an injunction restraining the sale of their properties.*
- iii. *Is the Defendant in breach of the contract of employment of the Plaintiffs by dismissing them and if so are the Plaintiffs entitled to damages.*
- iv. *Are the Plaintiffs entitled to interest on the sum due redundancy.*
- v. *Are the Plaintiffs entitled to costs and interest.*

15. The Learned Judge by his judgment found in the negative in respect to issues number 1, 2, 3 and 5. In respect to issue 4 the Learned Judge ordered as follows:

***“The question of interest on the redundancy payments is in the discretion of the Court pursuant to Section 26 of the Civil Procedure Act and in the exercise of its inherent jurisdiction, I Order that interest be paid on the outstanding redundancy payments from the date when the Plaintiffs were dismissed until the date of this judgment at the same commercial rates as are applicable to the loans granted to the Plaintiffs.”***

16. The Learned Judge pronounced himself on the issues before himself. He ordered for interest to be

applied at commercial rate up to the date of judgment. For the Plaintiff by their present application to seek another pronouncement of the amount of interest to be paid to each of them is to seek a review of that judgment. The Plaintiffs are not entitled to seek review of that Judgment once again having failed to have the same reviewed before Justice Kimaru. The Plaintiffs before Justice Kimaru presented similar argument as they now present before me. This is how the Justice Kimaru captured the submissions before him.

***“At the hearing of the application, I heard the rival submissions made by Mr. A. Khaminwa for the Plaintiffs and by Mr. Fraser for Defendant. It was evident from the Plaintiffs’ application that the said Plaintiffs are seeking to review the judgment of Ransley J on the broad grounds that he committed an error or mistake apparent on the face of the record by failing to take into consideration the effect of the industrial Court’s award by which the industrial Court ruled that the Plaintiffs were to be deemed to have been declared redundant and therefore entitled to be paid their full redundancy benefits in accordance with the collective bargain agreement in force at the time. The Plaintiffs further argued that the learned judge ought to have reached a finding that the Plaintiffs were approved retirees and therefore entitled to enjoy concessionary rates of interest in respect of house loans advanced to them by the Defendant as contained in the employee Loan Policy of the Defendant.”***

17. It will be seen that the Plaintiffs sought review, on amongst other grounds, that Justice Ransley failed to consider the Industrial Court decision which found that the Plaintiffs were entitled to be paid their full redundancy benefits according to the Collective Bargain Agreement.

18. The long and short of the application before me seeks my determination of the same thing Plaintiffs sought before Justice Kimaru. Undoubtedly the Plaintiffs’ present application is *res judicata*. On that ground alone it fails.

19. Even if it was not *res judicata* the application would fail because of the delay in filing it. Since I have already found that the application essentially seeks the review of the judgment of Justice Ransley, Order 45 Rule 1(1) of the Civil Procedure Rules, under which a review maybe sought, requires an application for review to be filed without unreasonable delay. The judgment of 25<sup>th</sup> May 2006 the Plaintiffs sought to review, is by their application filed on 13<sup>th</sup> June 2018. That is a delay of 12 years. It is unreasonable delay. On that ground too the Plaintiffs’ application fails.

20. As correctly submitted by the Defendants the Plaintiffs’ application is defeated by the provisions of Section 4(4) of the Limitation of Actions Act Cap 22. That section provides:

***“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”***

21. The application is also defeated by that Section. It is time barred.

22. The Plaintiffs in seeking the adjustment of this Court’s decree gave tabulated calculation of what each Plaintiff is entitled to. The said calculation is disputed by the Defendant who in turn give their own calculation. It is pertinent to note that no issue was presented by Justice Ransley on the exact amount of redundancy each Plaintiff was entitled to. The Plaintiff is seeking, 12 years later and after unsuccessfully approaching the Court of Appeal, to have a determination of how much each Plaintiff should be paid. This cannot be allowed. The Plaintiffs were required as provided under Order 3 Rule 4 (1) of the Civil Procedure Rules to include the whole of their claim when they filed this case. In failing to pray for the Court to order, in the judgment, for the specific amount each Plaintiff was alleging they were entitled to, the Plaintiffs are taken to have relinquished that claim. They cannot 12 years later seek the Court’s determination of what each one is entitled to be paid by the Defendant.

23. I find the Plaintiff's Notice of Motion dated 3<sup>rd</sup> March 2018 to be misconceived and without merit. The same is therefore dismissed with costs to the Defendant.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie.....**COURT ASSISTANT**

.....**FOR THE 1<sup>ST</sup> PLAINTIFF**

.....**FOR THE 2<sup>ND</sup> PLAINTIFF**

.....**FOR THE 3<sup>RD</sup> PLAINTIFF**

.....**FOR THE 1<sup>ST</sup> DEFENDANT**

.....**FOR THE 2<sup>ND</sup> DEFENDANT**