



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 21 OF 1997

AHMED FARAH RAGEH.....PLAINTIFF/APPLICANT

-Versus-

MARIAM AMIN.....1ST DEFENDANT/RESPONDENT

STANDARD CHARTERED BANK (K) LTD.....2ND DEFENDANT

RULING

Review

[1] By my order dated 23rd day of October 2017, I remitted this filed to Makau J for consideration of a Notice of Motion Application dated 24th October 2016. The good judge returned the file to me and asked me to consider the said application. I shall now give my decision of the application. In the application, the Applicant seeks the following orders:

- 1. This application be heard on priority basis as the same has pended before court for over 19 years.***
- 2. The Hon Court do review the judgment dated 24th June 2016 as there is an error apparent on the face of the record***
- 3. The Hon Court do make such further orders as may meet the ends of justice in this matter.***
- 4. Costs of this application be provided for.***

[2] The subject of review is paragraph 38 of the judgment delivered on 24th June 2016 which read as follows:

“The defendants are jointly and severally liable to repay Kshs 554,360 to the plaintiff plus interest at court rates from 13th December 1995 till 18th November 2002 as the 2nd defendant deposited Kshs 550,860 which was released to both counsel to be held in interest earning account in the names of M/S Mwangi E.G & Company Advocates and M/S J. Mbaya. The said Kshs 550,860 be released to the plaintiff’s counsel after expiry of 30 days from the date of this judgment. The difference of unpaid Kshs 2,860 shall continue to earn interest from 13th December 1995 till payment in full at court rates.”

[3] The specific portion thereof in contention is the line that reads:-

“...as the 2nd defendant deposited Kshs 550,860 which was released to both counsel to be held in interest earning account in the names of M/S Mwangi E.G & Company Advocates and M/S J. Mbaya.

M/S MWANGI stated that the above statement was not factually correct as the court did not release the said amount to the two counsels despite presenting the court order to it. And according to her, there is an error in the judgment- she called it an honest mistake. She therefore urged the court to review the said part and enter judgment in the sum of Kshs. 554,360 plus interest and costs at court rates from 10/12/1995 to the date of payment.

[4] The Respondent opposed the Application and filed a Replying Affidavit in court 15th March 2017 where it was deposed *inter alia* that the Applicant had not provided sufficient facts or evidence to enable the court grant the orders sought and that the Applicant was guilty of inordinate and unreasonable delay. To them, the Notice of Motion was misconceived, bad in law and incurably defective.

DETERMINATION

[5] Thoughtful consideration of this Application and the rival contentions by the parties brings me to say the following. The Applicant has fastened a quarrel that Kshs. 550,860 stated to have been released to counsels for depositing in an interest earning account of both counsels was not released as ordered. Therefore, that part of the judgment to the effect that the said sum had been released for purposes of being deposited in interest earning account in the names of both counsels is not factually correct. The court acted upon an erroneous assumption which caused the court to fall into error in the judgment. And, the error should be corrected. M/S Mwangi proposes that it be cured by entering judgment in the sum of Kshs. 554,360 plus interest and costs at court rates from 10/12/1995 to the date of payment.

[6] From the onset, I admit this application presents a kind of a squirm. First, the money in issue is still with the court. Second, I doubt whether such sums deposited in court would earn interest. Third, such moneys may be subjected to court collection fees. As a matter of good practice, such money should be invested so that the person who is ultimately entitled to it will receive it with interest earned. This practice has developed within the money-laundering jurisprudence and helps in obviating liability against asset recovery agencies for lost investment opportunities and interest in unsuccessful asset recovery or forfeiture proceedings. Perhaps the court and parties intended to achieve that objective when by consent, it was ordered that the money be released and be deposited in a joint interest earning account in the names of both counsels. But, that was never to be. The court in its judgment presumed that its order had been complied with and the money in question was in an interest earning account as had been ordered. Consequently, the court made orders in that assumption and this affected its decision on interest payable on the said sum of money. As I stated, there is a dilemma here. I am aware that it could be argued that such is a matter for appeal. But, one thing is clear; that, in entering judgment, the court relied on mistaken belief- albeit honest- that the money was in a joint interest earning account in the names of counsels. Clearly, there is an apparent but honest mistake. This money is still available and may still be released to the plaintiff in part payment of the decretal sum. But, the question of interest still abound. Of importance to note, and as pointer towards resolution of this application, the said sum of money was deposited as a condition of stay of execution which was granted by court on 11.11.2002. Thus, one cannot fail to ask; whose money is this? To me, the money remained 2nd Defendant's deposit as security for stay of execution. Accordingly, there was an error in the judgment herein. And paragraph 38 of the judgment is reviewed. Now judgment is entered for the plaintiff in the sum of Kshs. 554,360 plus interest and costs at court rates from 10/12/1995 until payment in full. It is so ordered.

Dated, signed and delivered in open court at Meru this 19TH day of March 2018

F. GIKONYO

JUDGE

In the presence of:

Ann Advocate for E.G.Mwangi for Applicant/Plaintiff

Mr. Mbaya advocate for defendant – absent

F. GIKONYO

JUDGE