



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 934 OF 2004

EMMANUEL KURIA WA GATHONI PLAINTIFF

-VERSUS-

THE COMMISSIONER OF POLICE 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. This ruling seeks to determine the Notice of Motion dated 16th November, 2017 filed under the provisions of Order 45 Rule 1 (1), 2 and Order 51 Rule 1 of the Civil Procedure Rules and sections 3A and 99 of the Civil Procedure Act. The application seeks orders that the decree/judgment of this Honourable Court made on 2nd February, 2017 be rectified and/or amended so as to provide interest on the loss of earning of Kshs. 12,900,000/= from the date of filing the suit and aggravated damages of Kshs. 2,000,000/= from the date of judgment until full payment of the same.

2. The judgment upon which this application emanates was delivered by this court on 2nd February, 2018 in which the Plaintiff was awarded special damages of Kshs. 6,000,000, Loss of Earning Kshs. 12,900,000/=, General Damages Kshs. 5,000,000/= and aggravated damages Kshs. 2,000,000/=. The court also awarded interest on special damages from the date of filing and on general damages from the date of this judgment.

3. The Plaintiff's application is supported by the grounds on the face of the application and on the Supporting Affidavit of the Plaintiff of even date. The grounds being that the Court did not address the issue of interest on damages for loss of earnings and aggravated damages despite that the Plaintiff had specifically pleaded interest on loss of earnings from the date of filing the suit as well as interest on aggravated damages. It is averred that such an omission amounted to an error on the face of the record and is curable under the provisions of section 99 of the Civil Procedure Act. It is further deponed that the Plaintiff was of the view that interest on the said reliefs had been allowed under the head "special damages" and "general damages" and on that presumption, his advocates applied for and obtained a decree on 12th April, 2017 in which interest was allowed on the said loss of earning and aggravated damages.

4. It is however deponed that on 10th November, 2017 the Deputy Registrar declined to issue a certificate of Order against the Government as per the provisions of Order 29 Rule 3 of the Civil Procedure Rules on the grounds that judgment did not provide for them. The Plaintiff depones that he has a sickly daughter in need of specialized medical treatment from China. In the circumstances he depones that it is only fair and in the interest of justice that the Court makes clarification on interest in those two areas as he cannot move ahead and execute.

5. The application was opposed by the Defendant vide Grounds of Opposition dated 28th March, 2018 on the grounds that the application is misconceived and bad in law, that it is trite law that loss of earnings pleaded on its own head in a Plaint does not attract interest, that the judgment is silent on aggravated damages and that the application therefore lacks merit and should be dismissed.

6. The application was canvassed orally in court on 10th May, 2018. Mr. Kimondo appearing for the Plaintiff submitted that loss of income is in the nature of special damages and that it is trite law that interest on special damages is awarded from the date of filing the suit. The Plaintiff relied on the Court of Appeal case of **Cecilia W. Mwangi & another V Ruth W. Mwangi [1997] eKLR** where the court held that *loss of earning is a special damage claim*. The Plaintiff also relied on the Court of Appeal case of **Kenya Revenue Authority v Habimana Sued Hemed & another [2015] eKLR** where *the Court awarded the Respondent the sum of USD 60,000 per month or its equivalent in Kenya Shillings in lost income together with interest at 18% from the date of filing the suit till payment in full*.

7. Miss Makori appearing for the Defendants submitted that loss of earning should be calculated under the heading of general damages for interest to be granted but not independently. The Counsel relied on the case of **Simon Ano Mua v Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others [2013] eKLR**. The case is however not relevant in this matter as it relates to loss of earning capacity and not loss of earning which are two distinct damages.

8. I have considered the arguments advanced herein, the supporting affidavit and the grounds of opposition. Review of orders and decrees is provided for in Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.

9. Section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya provides:

“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.”

10. Order 45 of the Civil Procedure Rules, 2010 provides for the grounds upon which a court can review orders being that:-

1. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

2. There was a mistake or error apparent on the face of the record; or

3. There were other sufficient reasons; and

4. The application must have been made without undue delay.

11. The Plaintiff’s case is that there was a mistake on the face of the record and submits that the same ought to be addressed by way of review of the orders. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of record as follows:

“...In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”(emphasis mine)” interest from the date of judgment as opposed to special damages which accrue interest from the date of filing of the suit. This was held by the Court of Appeal in **Samuel Philip Kidoti vs. Kenya Cargo Handling Services Ltd. Civil Appeal No. 76 of 1992,**

12. The issue for determination herein therefore is whether loss of earnings is a special damage. This issue was addressed by the Court of Appeal in **CECILIA W. MWANGI & another v RUTH W. MWANGI [1997] eKLR** where it was held that , *“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. “*

13. Similarly in the case of **Douglas Kalafa Ombeva v David Ngama [2013] eKLR**, the Court of Appeal held that , *“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically’.*

14. It is now clear that a claim for loss of earning is special damage claim which must be specifically pleaded and proved. I have perused the Plaintiff and the Plaintiff had specifically pleaded for the loss of earnings together with interest from the date of filing the suit. The law is trite that special damages attract interest from the date of filing the suit. The rationale being that it is compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has wrongfully deprived him of the use of goods or money. The Plaintiff proved the loss of earnings as a result of the unlawful imprisonment, the particulars of which are contained in the judgment sought to be reviewed and he is therefore entitled to interest on the loss of earning from the date of filing the suit. It is apparent that there was an error on the face of the record as this issue was not addressed.

15. Aggravated damages are in the nature of additional damages imposed on the defendant whose conduct increased the injury to the plaintiff by subjecting him or her to distress, embarrassment, torture or humiliation. The award of interest is a matter within the discretion of Court which discretion, however, should be exercised judiciously. The rationale for awarding interest was explained in **Later vs. Mbiyu [1965] EA 392** where it was held:

“The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court’s discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judiciously exercised, and where no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown.....”

16. In the upshot, I find that the application is merited and the same is allowed as prayed. For avoidance of doubt the damages awarded under loss of earnings in the sum of Kshs.12,900,000 shall earn interest from the date of filing the suit. The award under aggravated damages of

Kshs.2,000,000 shall earn interest from the date of the judgment until payment is made in full.

Dated, Signed and Delivered at Nairobi this 28th day of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Appellant*

.....*For the Respondent*