



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 221 OF 2010

MAIZE MILLING CO. LTD APPLICANT/APPELLANT

VERSUS

JACKTONE O. OTINA RESPONDENT

RULING

1. By a Notice of Motion dated 26th September 2016, the applicant approached this court seeking two substantive prayers. They are as follows;

(i) That this honourable court be pleased to review the judgment delivered in court on 8th September, 2016 in so far as interest on general damages and costs is concerned.

(ii) That this honourable court be pleased to order that the Applicant is entitled to interest on general damages and costs of the suit from 2nd November, 2010 when judgment in the subordinate court was rendered.

The applicant also prayed that costs of the application be provided for.

2. The application is premised on *Section 3, 3A and 80 of the Civil Procedure Act and Order 45 Rules 1, 2, 3 and Order 50 of the Civil Procedure Rules.*

It is anchored on grounds that the subordinate court delivered its judgment on 2nd November, 2010 and awarded the applicant general damages of Kshs.250,000, costs of the suit and interest from the date of judgment till payment in full; that this court in its judgment dated 8th September 2014 upheld the lower court's decision but erroneously awarded the applicant interest from 8th September, 2016 instead of 2nd November, 2010 when the decision in the lower court was rendered; that this was an error apparent on the face of the record of this court; that the respondent will not suffer any prejudice if the application was allowed; that the application was made timeously and that it was necessary for the orders sought to be granted to enable the applicant fully enjoy the fruits of his judgment. These grounds were reproduced in the affidavit sworn by the applicant on 26th September, 2016 in support of the application.

3. The application is opposed. There is a replying affidavit sworn on 20th January, 2017 by *Gustine Othuro* learned counsel for the respondent. In his opposition to the motion, counsel deposed that the award of interest is a matter of the court's discretion and that this court's judgment delivered on 8th September, 2016 had no error apparent on its record; that granting of interest at this stage after judgment was delivered will not only be improper, illegal and unjust but will also be unfair and unconstitutional.

4. At the hearing, learned counsel *Mr. Ombati* for the applicant and learned counsel *Mr. Othuro* for the respondent made brief oral submissions buttressing their respective positions.

5. I have considered the application, the affidavits filed by the parties as well as the submissions made on behalf of the parties. I have also read the judgment I delivered on 8th September, 2016. I find that the applicant's appeal had challenged the trial magistrate's decision on both liability and quantum. The appeal was successful to a great extent as this court upheld the trial court's finding on liability and quantum of damages and only set aside the award of special damages in the sum of Kshs. 300.

6. The court was however clear in its pronouncement that the award of general damages in the sum of Kshs.250,000 was to attract interest from the date of its judgment until payment in full. This is the order that this court is being urged to review.

7. The question that arises for my determination is whether the applicant has satisfied the grounds upon which a court can review its judgment or orders.

The grounds for review are well set out in *Order 45 Rule 1(1)* of the *Civil Procedure Rules* which states as follows;

“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”.

8. I must start my determination in this matter by pointing out that the award of interest in monetary decrees is a matter of the court's discretion on terms it deems reasonable and just.

9. The application is grounded on the claim that the order regarding when interest was to start accruing on the sum awarded as general damages amounted to an error on the face of the record since interest ought to have run from the date of the lower court's judgment which this court upheld.

10. Learned counsel *Mr. Ombati* did not cite to me any law to support his contention that if an appellate court upheld the lower court's decision on a monetary decree, the interest on the amount due should not accrue from the date of its judgment but that it should accrue from the date of the lower court's decision. He did not also justify his claim that the order amounted to an error on the court's record. This court's order regarding interest was very clear and specific and there is nothing to suggest that I made it inadvertently. In my view, the order cannot be said to be an error on the court's record just because the court had upheld the lower court's decision. If indeed it was an error, it can only amount to an error of law or an incorrect exercise of this court's discretion which can only be corrected by an appeal to the Court of Appeal. My take is that it cannot be a ground for review.

11. I am fortified in this finding by the Court of Appeal's decision in *National Bank of Kenya Limited V Ndungu Njau Civil Appeal No. 211 of 1996 (1997) eKLR* where when considering circumstances in which a court can grant orders for review, the court expressed itself as follows:-

“ A review may be granted whenever 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”.

Consequently, if the applicant was of the view that this court erred in making the impugned orders, then his remedy lay not in seeking a review of the court orders but in filing an appeal to the Court of Appeal.

12. It is also important to note that the applicant is in effect asking this court not to correct obvious errors in its judgment like typographical or arithmetic mistakes or other errors which are self-evident. He is asking the court to reconsider and vary an order made in the exercise of its discretion. This in my opinion is tantamount to urging me to sit on appeal against my own judgment which is not permissible in law.

13. For all the foregoing reasons, I find that the Notice of Motion dated 26th September, 2016 is not merited and it is hereby dismissed with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of February 2017.

In the presence of:-

Mr. Lobolia Court Clerk

No appearance for both Parties.