



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 72 OF 2004

DAVID MAKAU.....APPELLANT/APPLICANT

VERSUS

MAUA MUTIE NDUNDA.....RESPONDENT

RULING

1. This is a ruling on an application for the setting aside of a formal decree as drawn and certified by the Deputy Registrar of the Court pursuant to an application therefor made by the respondent without first obtaining the approval of the appellant or giving notice requiring such approval with or without amendments in terms of Order 21 Rule 8 of the Civil Procedure Rules.

2. By a Notice of Motion dated 21st April 2015, the Appellant/applicant sought substantive orders as follows:

1.

2.

3. That Decree should have been extracted in the Lower Court and not in the High Court and it should be set aside.

4. That this Honourable be pleased to set aside the decree issued on 9/3/2015 because the draft decree was not sent to the appellant's/applicant's Advocates for approval since the Respondent drafted the same and directly sent it to the Deputy registrar who signed and sealed it and it is contrary to the provisions of and this should be done before the Lower Court.

5. That Court do order that the Respondent is only required in law to recover the court interest on the Decretal Sum from the date of the Judgment for a period of 6 years and not more as provided by section 4 (4) of the Limitations of Actions Act

6.

3. The respondent filed a replying affidavit sworn by her Counsel Ms. Rosemary Kavita Advocate on 20th May 2015 in opposition to the application on the grounds, principally, that the decree as extracted agreed with the judgment of the Court; that the limitation of Actions Act did not bar recovery of interest in this case as it was not an action for recovery of interest on a judgment after the end of 12 years; that the application was calculated to delay the finalization of the matter which had been in Court since 1995 to allow the respondent enjoy the fruits of her judgment; and that the appellant had come to court with

unclean hands having failed to deposit the decretal money in a joint interest earning account pending the determination of the appeal as ordered by the Court.

4. It was not possible to determine the merit of the objection as to failure to deposit the decretal sum as documents attached to the affidavit indicate that a joint account was opened and a statement of account dated 12/9/2014 referred to in the affidavit was not attached to the Replying Affidavit as indicated.

5. The relevant part of the Judgment of the High Court on appeal delivered on 23rd September 2014 was in the following terms:

“15. Having evaluated the evidence it is apparent that the appeals succeeds partially. The award in respect of the respondent will be as follows:

Pain and Suffering: Ksh.10,000/-

Loss of Expectation of life: Ksh.70,000/-

Loss of dependency: $1306 \times 10 \times 12 \times 2/3 = 104,480/-$

Total Ksh.184,480/-

16. The respondent shall also be entitled to costs and interest in the lower court.

17. Cost of the appeal shall be borne by each party.

18. It is so ordered.

Dated, Signed and delivered at Machakos this 23rd day of September 2014.

L.N. Mutende

Judge”

6. The Decree the subject of the application is extracted in the High Court in the following terms:

“IT IS ORDERED:-

1. That the Appellant do pay to the respondent the sum of Ksh.184,480/- as more particularly set forth until payment in full.

a. Principal sum.....Ksh.184,480/-

b. Interest at 12% from 4/8/2004 upto date.....Ksh.358,272/-

c. Interest on Ksh.184,480 from

23/9/2014 – to date.....Ksh.8609/-

Ksh.551,361/-

Given under my hand and Seal of the Court at Machakos this 23rd day of September 2014.

Issued at Machakos on this 9th day of March 2015.

DEPUTY REGISTRAR

HIGH COURT OF KENYA AT MACHAKOS

Submissions

7. Counsel for the parties filed written submissions, the appellant elaborating on the procedure for extraction of a decree and the injustice in his being denied opportunity to consider and approve the draft decree, which in his view charged more interest than allowed by the law on limitation of actions, before it was presented for signature and sealing by the Deputy Registrar of the High Court. The respondent urged that despite the rules of procedure for extraction of decrees, the decree as drawn agreed with the judgment and its setting aside would only delay the finalization of the suit which would offend the Article 159 principle of substantial justice without undue regard to technicalities. Moreover, the respondent argued, the appellant's interpretation of section 4(4) of the Limitation of Actions Act as regards recovery of interest 6 years after judgment was erroneous.

Determination

8. The relevant paragraphs of the Civil Procedure Rules with regard to preparation of decrees on appeal are set out in Order 42 Rules 31-34 as follows:

“[Order 42, rule 31.] What judgment may direct.

31. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the court to which the appeal is preferred may pass a decree or make an order accordingly.

[Order 42, rule 32.] Power of appellate court on appeal.

32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

[Order 42, rule 33.] Preparation and contents of decree.

33. The decree of the court to which the appeal is preferred shall be dated, drawn up, sealed and signed as directed by rules 7, 8 and 9 of Order 21 with any necessary modifications.

[Order 42, rule 34.] Certified copy of decree to be sent to court whose decree appealed from.

34. A copy of the judgment and of the decree, certified by the High Court, or such officer as it appoints in this behalf, shall be sent to the court which passed the decree appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the court to which the appeal is preferred shall be made in the register of civil suits.

9. Order 21 rules 7, 8 and 9 of the Civil Procedure Rules provides for notice on the other party an opportunity for it to comment on the draft decree/order as follows:

“[Order 21, rule 7.] Contents of decree.

7. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.

(3) The court may direct that the costs payable to one party by the other shall be set-off against any sum which is admitted or found to be due from the former to the latter.

[Order 21, rule 8.] Preparation and, dating of decrees and orders.

8. (1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.

(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.

[Order 21, rule 9.] Costs.

9. (1) ***Where the amount of costs has been—***

(a) *agreed between the parties;*

(b) *fixed by the judge or magistrate before the decree is drawn;*

(c) *certified by the registrar under section 68A of the Advocates (Remuneration) Order; or*

(d) *taxed by the court,*

the amount of costs may be stated in the decree or order.

(2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), **after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate.**

(3) In this rule, “taxing officer” means a taxing officer qualified under paragraph 10 of the

Advocates (Remuneration) Order.”

10. The Respondents could not properly unilaterally obtain a certification of the Decree of the Court without giving the other side an opportunity within seven (7) days to approve, with or without amendments, the draft Decree of the Court. No draft was forwarded to the appellant for approval in accordance with the rules and the decree is therefore defective.

11. The decree as drawn does not agree with the Judgment in terms of Order 21 Rule 7 of the Civil Procedure Rules, as urged by the Respondent, in that the order for the payment by the respondent to the appellant of costs in the lower court is not captured in the Decree. This amount may pursuant to Order 21 rule 9 (2) be ascertained in a certificate of costs made under that rule. For this reason, the holding of Kasango, J in ***Eco Bank Limited v. Elsek & Elsek (Kenya) Limited & 3 Ors.*** (2015) eKLR that a decree would only be set aside for failure to forward a draft of the decree for approval by the other side if the decree is shown not to conform to the Judgment would support this finding. More importantly, however, the effect of failure to forward the draft decree in this case, as discussed below, curtailed the appellant's right to fair hearing with respect to the contentious issue whether interest after 6 years of judgment was recoverable through the decree.

12. The appellate Court did not award costs on appeal to any party. Costs were not agreed between the parties or assessed by the Court so that they could be stated in the Decree pursuant to Order 21 (9) (1) of the Civil Procedure Rules. The costs awarded on appeal were the costs of the suit in the trial court. The trial court being a subordinate court, the costs therein could only be ascertained by the Magistrate in accordance with Order 21 rule 9 (2) aforesaid. I would agree with counsel for the appellant that in that regard the High Court registrar had no jurisdiction to assess costs of the trial in the subordinate court. The decision of Mabeya, J. in ***Peter W. Mwangi t/a Thames Traders Auctioneers v. Ann Wairimu Wanyeki & Anor.*** [2013] eKLR with regard to an Auctioneer's Bill of Costs in an attachment underlines the necessity of jurisdiction of Deputy Registrar in assessment of costs.

13. Order 42 rule 34 of the Civil Procedure Rules requires that **“A copy of the judgment and of the decree, certified by the High Court, or such officer as it appoints in this behalf, shall be sent to the court which passed the decree appealed from, and shall be filed with the original proceedings in the suit,”** and the Court appealed from may then draw a decree and ascertain costs in accordance with the award of the appellate court.

Whether the defects may be cured by Article 159 of the Constitution on substantial justice without undue regard to technicality.

14. The issue of failure to afford the other party an opportunity to consider and approve a draft decree in accordance with Order 21 Rule 8 of the Civil Procedures is, with respect, one of breach of the affected party's right to fair hearing in accordance with Article 50 (1) of the Constitution and cannot therefore be a undue technicality.

15. In this case, the default denied the appellant an opportunity to challenge the inclusion in the Decree of amounts for interest after expiry of 6 years of the Judgment, which occasions an injustice in his being called upon to pay what may be (and in the view of this court as shown below) an unlawful claim.

16. In view of the jurisdictional issue of assessment by the Deputy Registrar of the High Court of costs awarded in the subordinate court that would follow the drawing of the Decree for execution by the High Court, the invocation of Article 159 would not remedy the situation. While the High Court must draw a decree of its decision in the judgment on appeal, it is the subordinate trial court that must draw the decree for execution for recovery of the decretal amount together with interest and costs to be ascertained by the Magistrate in accordance with Order 21 (9) (2) of the Civil Procedure Rules.

Interpretation of section 4(4) of the Limitation of actions Act

17. Section 4(4) of the Limitation of Actions Act is in the following terms.

*“(4) 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.**”*

18. The point of contention between the parties was whether the bar to recovery of interest for the period over 6 years after Judgement was **only** applicable when the recovery was initiated or sought by an **action**, or otherwise.

19. The term **“action”** is defined in the Interpretation and General Provisions Act as follows:

*“**“action”** means **any civil proceedings** in a court and **includes any suit as defined in section 2 of the Civil Procedure Act (Cap. 21);**”*

20. The Civil Procedure Act defines **“suit”** as follows:

*“**“suit”** means all civil proceedings commenced in any manner prescribed.”*

21. An **application for execution** is civil proceedings commenced under Order 22 rules 6 and 7 of the Civil Procedure Rules, and consequently an **action** for purposes of the Interpretation and General Provisions Act and the Limitation of Actions Act. Recovery of interest on a judgment through execution of the decree of the court as a formal expression of the Judgment of the Court must be an action for purposes of the law on limitation of actions. I would therefore find that an **action** within the meaning of section 4 (4) of the Limitation of Actions Act includes execution proceedings which are a suit for purposes of the Civil Procedure Act commenced by way of an application for execution under Order 22 of a decree of court extracted in accordance with Order 21 of the Civil Procedure Rules.

22. To be sure, however, from the clear words of the last clause of subsection 4 of section 4 of the Limitation of Acts Act, the prohibition against recovery of interest on a judgment after the end of 6years is on **recovery** howsoever, and not restricted to an **action** filed for that purposes.

23. For this reason, it would appear that the respondent’s answer to the appellant’s objection as to interest after the expiry of 6 years after the judgment that the limitation is only in relation to an action for recovery of interest, which does not include the present situation herein regarding execution of a decree is erroneous.

24. With respect, the decisions of the Court in ***Konahauthi Ltd. v. Wanyiri Kihoro*** (2015) eKLR and ***Damaris Wakinyi Gikaara v. Attorney General*** (2002) eKLR cited by the Respondent do not hold that interest is recoverable after 6 years of the Judgment which awards it. They are only examples if cases where interest is awarded **“until payment in full”**, without any decision that such interest would remain recoverable after 6 years of the Judgment. In the hierarchy of laws, under section 3 (1) of the Judicature Act, such statement in a judgment remains subject to the provisions of Statute.

Conclusion

25. A jurisdictional issue is not an undue technicality within the meaning of the Article 159 principle of the Constitution. Accordingly, as the High Court Registrar has no jurisdiction to assess costs for proceedings before the subordinate court which were awarded by the High Court on appeal, the same must be ascertained by the Magistrate in accordance with Order 21 rule 9 (2) of the Civil Procedure Rules.

26. The decree of the High Court as drawn and extracted on 9th March 2015 does not agree with the judgment as the order for costs in the lower court awarded to the appellant is not stated.

27. Section 4 (4) of the Limitation of Actions Act does not permit the recovery howsoever of interest after expiry of 6 years from the date of judgment. The provision affects both action by fresh suit for recovery thereof and recovery of the interest by way of execution applications in the same suit where judgment for the interest is made.

28. The failure by the respondent to give the appellant an opportunity to approve the draft decree in terms of Order 21 rule 8 of the Civil Procedure Rules has curtailed the appellant's right to a fair hearing in respect of the question of recoverability of interest on the decretal amount after 6 years the judgment, and in approving the draft decree as drawn including such interest in breach of the Rules, the Deputy Registrar has occasioned the appellant an injustice.

29. For the defaults in the extraction of the formal Decree of the Court, the Decree dated must be set aside. Of course, the parties are at liberty to move the Court for the settlement of the Order of the Court in terms of Order 21 Rule 8 of the Civil Procedure Rules in the event of disagreement on the terms of the court's order.

Orders

30. Accordingly, for the reasons set out above, the Decree of this Court issued on 9th day of March 2015 is set aside.

31. For expeditious disposal of the dispute herein, the Subordinate Court is directed to deal with the matter on priority upon receipt in terms of Order 42 Rule 34 of the Civil Procedure Rules of a certified copy of the Judgment and Decree of the High Court made on 23rd September 2014.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2017.

D. KEMEI

JUDGE

Appearances:

M/S. Manthi Masika & Company for the Applicant.

M/S L. M. Wambua & Co. Advocates for the 1st Respondent.