



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(COMMERCIAL & ADMIRALTY DIVISION)

CIVIL SUIT 414 OF 2004

FRANCIS JOSEPH KAMAU ICHATHA.....PLAINTIFF

VERSUS

**HOUSING FINANCE COMPANY OF KENYA
LIMITED.....DEFENDANT**

RULING

1. On 2nd February, 2015 I made a decision in this suit in which I entered judgement for the plaintiff against the Defendant in the said sum of Kshs 8,813,820.89 and directed that the sum shall accrue interests at court rate from the date of the judgement till payment in full. I also awarded the costs of the suit to the plaintiff to be paid by the Defendant.
2. The plaintiff has vide his application dated 23rd February, 2015 applied for review of the said decision. According to him, the interest ought to have been awarded at commercial rates and be calculated from the date of filing suit. In his view, as a result of the Defendant's action he was deprived of the use of his money which was transferred to the purchaser of his house and that the Defendant received interest accruing therefrom.
3. The application was opposed by the Defendant. In the Defendant's view, the amended plaint filed herein had specific prayers and in prayer (c) thereof the Plaintiff sought for refund of the amount due upon the accounts being taken. In the Defendant's view there was no prayer for interest or General Damages hence the Plaintiff was bound by his pleadings. It was further contended that the Plaintiff has not moved the Court as required under Order 45 hence the application is not merited and there was no reason to award interest at commercial rate from the date of filing suit.
4. The issue for determination before this Court is whether this Court ought to review its earlier decision as sought by the Plaintiff. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the **Civil Procedure Rules**, certain requirements must be met. The said provision provides as follows:

“(1) 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

5. Section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya upon which the said rule is based 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.”

6. The symbiotic relationship between the Rules and the Act were explained by Farrell, J in Sardar Mohamed Vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793 where he expressed himself as follows:

*“In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*ut res magis valeat quam pereat*”. If the words “Or for any other sufficient reason” can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review”.*

7. It was in this light that the Court of Appeal in Official Receiver & Provisional Liquidator & Another vs. Firestone EA (1969) Ltd. Civil Appeal No. 172 of 1998 held that is clear that the phrase “any sufficient reason” is not analogous to the other two heads for the purposes of review under Order 44 [now Order 45]. In that case the Court expressed itself as follows:

*“Section 80 of the Civil Procedure Act enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 rule 1 of the Civil Procedure Rules are not *ejusdem generis* with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record”. Those words extend the scope of the review. Where the point raised is a point of law, which underlie the proceedings which render, the proceedings a nullity that cannot be said to be a point of fresh evidence. There is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for review and so the words “for any*

sufficient reason” need not be analogous with the other grounds specified in the Order.”

8. The law is that interests on general damages accrue from the date of judgement as opposed to special damages which accrue interest from the date of filing of the suit. This was held by the Eastern Court of Appeal in **Dipak Emporium vs. Bond’s Clothing Civil Appeal No. 64 of 1972 [1973] EA 553** where the Court held:

“The court’s right to award interest is based on section 26(1) of the Civil Procedure Act (Cap 5) which states that where and in so far a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit...Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgement.”

9. In **Mugenyi vs. Ssekubwa [2008] 2 EA 249**, the Court expressed itself as follows:

“Section 26(2) of the Civil Procedure Act gives the court power to award interest on the decretal amount and a proper construction of the would show that it empowers court to award three types of interests at the rate it deems reasonable:

(1). Interest adjudged on the principle sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any.

(2). In addition to that, interest on the principal sum adjudged from the date of filing the suit to the date of the decree. Here, the court decides at its discretion, which must be made judicially, the rate of interest to be awarded.

(3). Further to the above, interest on the aggregate sum so adjudged, from the date of decree to date of payment in full. Whether or not interest is payable for the period prior to the date of the suit depends on the evidence available and that is why section 26(2) referred to that type of interest as ‘interest adjudged’.”

10. The Court of Appeal in **Samuel Philip Kidoti vs. Kenya Cargo Handling Services Ltd. Civil Appeal No. 76 of 1992**, however was of the view that General damages bear interest from the date of the Judgement while special damages bear interest from the date of filing of the suit.

11. These are however general propositions of law. In his amended plaint, the Plaintiff sought:

- 1. A declaration that the defendant is not entitled to charge the plaintiff any penalties whether described as ‘penalty interest’, interest on arrears’, default charges’ or by whatever name called and such penalties, variously described herein as ‘penalty interest’, ‘interest on arrears’, ‘default charges’ together with the cumulative interest thereon that the defendant has charged the plaintiffs in the past is in breach of contract herein is unconscionable, illegal, null and void and that the same constitutes a fetter or clog on the plaintiff’s equity of redemption.**
- 2. A declaration that the defendant has acted in contravention of the Banking Act (Cap 488 Laws of Kenya) and that the Defendant has applied interest rates on the plaintiff’s facility in breach of the specific terms of the contractual documents governing the facility.**
- 3. In view of the mathematical nature and foundation of the dispute herein accounts be taken of the loan amount herein due by the Department of Mathematics of the University of Nairobi**

or such other expert as the court may deem appropriate in accordance with the banking facility contracts between the plaintiff and the defendant taking into account the proceeds of sale and the plaintiff's indebtedness, if any, be adjusted in accordance with the findings of such an expert opinion.

4. Refund of amount due to the plaintiff consequent upon the said accounts being taken.
5. Loss of user of the suit premises and value thereof as may be assessed by this Honourable Court.
6. Costs of this suit be provided for.
7. Any other or further relief that this Honourable Court may deem fit to grant.

12. Based on Samuel Philip Kidoti vs. Kenya Cargo Handling Services Ltd. (supra) this Court would therefore have to determine whether the sum awarded was special or general damages. "Special damages", it has been held are compensation for special damage, which is not presumed by law to be natural and probable or direct consequence of the act, or omission complained of but which does in fact result in circumstances of the particular case and of the injured party's claim to be compensated. Special damages must be claimed specifically and proved strictly, and are recoverable only where they can be included in the appropriate measure of damages. See *Halsbury's Laws of England 3rd Edn. vol. 11 page 218 para 386.*

13. Whereas the law is that such damages must be specifically pleaded and strictly proved, the Court of Appeal in Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269 was of the view that whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. This was similarly the position in Sanitam Services (EA) Ltd vs. Rentokil (K) Ltd & Another Civil Appeal No. 228 of 2004 [2007] 1 EA 362; [2006] 2 KLR 70 where it was held that Although special damages must be specifically pleaded and strictly proved the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of. See Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

14. 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 judicially 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...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

15. Similarly in Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR it was held:

"The justification for an award of interest on principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant."

16. In the same vein it was held in Lwanga vs. Centenary Rural Development Bank [1999] 1 EA 175 that:

"The award of interest prior to the institution of the suit is rationalised in two ways: (1). that the plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the defendant wrongfully withheld the plaintiff's money. The emphasis here is on the Defendant's wrongful withholding of the Plaintiff's money. On that

basis, interest is to run from the date when the Defendant ought reasonably to have settled the plaintiff's claim. This is rather punitive.”

17. It is therefore clear that an award of interest is a form of reimbursement or 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.
18. That the Plaintiff was deprived of the use of his money by the actions of the Defendant is not in doubt. However, the sum which this Court has found to be due to the Plaintiff was spread over a period of time rather than from a specific date. Apart from that there were various rates of interests imposed rather than one particular rate of interest. To compound the problem the Plaintiff did not plead any particular rate of interest. The Court however recognises that the Plaintiff was deprived of the use of his money by a wrongful act on the part of the Defendant. That money had it been invested would have accrued interest. It is also not lost to the Court that the Defendant is a financial institution which is in the business of lending out money on interest and all things being equal the plaintiff's money must have been put to the same use.
19. Bearing in mind all the circumstances of this case and doing the best I can, in the exercise of the review powers conferred under Section 80 of the *Civil Procedure Act* as read with Order 45 rule 1 of the *Civil Procedure Rules*, and based on the ground of “any other sufficient reason” I review the order made herein on 2nd February, 2015 and vary the order that interest on the sum decreed accrue interest from the date of the judgement and substitute therefor an order that the said sum accrues interest at Court rates from the date of filing suit till payment in full.
20. There will be no order as to the costs of this application.

Dated at Nairobi this 27th March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Plaintiff in Person

M Ayisi for the Defendant

Cc Patricia