



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 289 OF 2003

BERKSHIRE FOODS LIMITED.....PLAINTIFF

- VERSUS -

CRESCENT TRANSPORTATION CO. LIMITEDDEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 26th September 2012. The plaintiff prays for review of the judgment dated 1st December 2011 to the extent that the interest awarded on the principal sum be adjudged from the date of the suit. The applicant's case is that there is an error as interest is meant to compensate the plaintiff "for costs and inflation". It is deponed in the supporting affidavit that the plaintiff's counsel only learnt in May 2012 that interest was awarded from the time of the decree. It was submitted that in the interests of justice, the judgment should be reviewed.
2. The motion is contested. There are filed written submissions by the defendant dated 12th February 2013. The defendant submitted that there has been undue laches. The defendant contends that no plausible explanation for the delay has been tendered.
3. I take the following view of the matter. The parameters within which the court can review its decisions are well settled. Section 80 of the Civil Procedure Act reads as follows;

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.*

Order 45 rule 1(1) is largely *pari materia* with section 80 and provides;

1. (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 mater 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.

4. From a plain and natural meaning of the words of the law, an application for review is open to a party aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including Origo & another Vs Mungala [2005] 2 KLR 307, Kisya Investments Ltd Vs Attorney General and another Civil Appeal No 31 of 1995 (unreported), Refrigeration Contractors Ltd Vs Lieta [2005] KLR 506, Kuria Vs Shah [1990] KLR 316 and M'Anthaka M'Mwoga Vs M'Boore [2006] e KLR.
5. When I juxtapose those principles against the fact, I find as follows. Judgment was delivered on 1st December 2011. The motion for review was presented to court on 9th October 2012. That is more than 10 months since judgment. What is the explanation offered? It is found at paragraph 10 of the supporting deposition:

“That I am informed by my advocate, James Singh, which I verily believe that he was not aware of the fact that interest had been awarded from the date of drawing the decree until pointed (sic) out by the Registry in May 2012”.

That is not a reasonable or plausible explanation. I say so because on the date of delivery of the judgment, the plaintiff was represented by a Mr. Mituga advocate. That is clearly borne out by the record.

6. In a word, there has been lengthy and unexplained delay. For want of explanation, the delay in turn becomes inexcusable. The words of Salmon L J in Allen Vs Mc Alpine & Sons [1968] ALL ER 56 are instructive:

“As a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied”

See also my recent decision in Geoffrey Gakinya Kamau Vs Joseph Murori Mbochi Nairobi, High Court ELC No 186 of 2010 (unreported). See also Origo & another Vs Mungala [2005] 2 KLR 307.

The applicants have thus failed one key test for review. I will turn briefly to the merits of the motion. At paragraph 13 of the judgment, I had ordered as follows:

“I also award the plaintiff costs of this suit and interest on the above sums from the date of the decree till payment in full”.

The order on interest and the due date were thus express. The power and discretion of the court to award interest is set out at section 26 of the Civil Procedure Act. It provides as follows:

“26. (1) Where and in so far as 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 before 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 the decree to the date of payment or to such earlier date as the court thinks fit”.

I also agree with decision of the Court of Appeal in *New Tyres Enterprises Limited Vs Kenya Alliance Insurance Company Limited* [1987] KLR 380 on the court’s discretion.

See also *Clement Mwaura Kabbingu Vs Attorney General* Nairobi, High Court case 256 of 2001 [2012] e KLR. In short, the applicant has not shown that the court acted in error or out of consonance with normal practice or even unfairly. Fundamentally, it is not an error apparent on the judgment. This is not then a suitable case for review. It may as well be a good ground for an appeal to the Court of Appeal. I am then of the considered opinion that the motion has not risen to the threshold for grant of an order for review.

7. In the result, the plaintiff’s notice of motion dated 26th September 2012 is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Obel for Mr. Gitau for the Plaintiff.

Ms Etole for Ms Satchu for the Defendant.

Mr. Collins Court Clerk.