



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1483 OF 2000

VALEO (K) LIMITED PLAINTIFF/RESPONDENT

VERSUS

**BARCLAYS BANK OF KENYA LIMITED
DEFENDANT/APPLICANT**

R U L I N G

1. Following upon the delivery of this Court's Judgement on 20th December 2012, the Applicant/Defendant filed a Notice of Motion dated 23rd April 2013 under Certificate of Urgency. That Application sought two substantive Orders:

“3. THAT pending the hearing and determination of this application, there be a stay of further proceedings and execution of the decree issued pursuant to the final judgement delivered on 20th December 2012 and this suit.

4. THAT this Honourable Court be pleased to review in respect of interest awarded in relation to the dollar component in its Judgement delivered on 20th December, 2012.”

The Application was brought under the provisions of **Order 45 rule 1** of the *Civil Procedure Rules* as well as **sections 1A, 3A and 80** of the *Civil Procedure Act*. The primary ground in support of the Application was that in determining the rate of interest as awarded in the Judgement, this Court had overlooked the fact that the rate of interest on the lending in foreign currency is different from the rate of interest on lending in local currency.

2. The Application was supported by the Affidavit of the Recoveries Manager of the Applicant/Defendant bank one **Ken Kiurah**, sworn on 23rd April 2013. The deponent stated that he had studied the transcript of the witnesses who had testified at the trial hereof on behalf on the Plaintiff and he had noted that PW 2 had testified in relation to interest rates being related to the Central Bank of Kenya lending rates with respect to the locally denominated currency. He maintained that interest rates on the local denominated currency are different from interest rates on foreign denominated currency as the latter was regulated by the London Inter-Bank Offered Rate (LIBOR). The deponent maintained that this Court proceeded to enter Judgement from the mistaken position that commercial interest rates with respect to local denominated currency is uniform with the interest rate in respect of foreign denominated currency. Accordingly, Mr. Kiurah believe that there was sufficient reason to review the said Judgement. He maintained that the only issue that the Defendant/Applicant prays the Court to review is the rate of interest as

expressed in the Judgement as the Defendant/Applicant was ready to comply with the remainder thereof.

3. The Plaintiff/Respondent responded to the Defendant/Applicant's Application through the Replying Affidavit of a director of the Plaintiff Company one **Krishan Kumar Kapoor** sworn on 8th May 2013. The deponent recorded that he was aware, of his own knowledge, that this Court had awarded interest at commercial rates as pleaded by the Plaintiff/Respondent payable at 18% per annum. The Affidavit continued by making a number of references to advice that the deponent had received from the Plaintiff/Respondent's advocates on record. Principal amongst the same was that this Court cannot sit on appeal of its own decision and the Defendant/Applicant having proffered an appeal to the Court of Appeal to challenge the whole decision of this Court, this Court ought not and should not delve into the matter. There were other matters to which the deponent referred which were more the subject of submissions on the law rather than matters of fact which are what affidavits should be concerned with. The deponent went on to say that he felt that the Defendant/Applicant was merely trifling with this Court in order to seek further delay in satisfying the Judgement. He also considered the said Application by the Defendant/Applicant was merely a ruse intended to delay the taxation of the Plaintiff's Bill of Costs.
4. As well as the Replying Affidavit, the Plaintiff/Respondent filed grounds of opposition to the Application dated 23rd April 2013. Such maintained that the Plaintiff wished to oppose the said Application on the following grounds:

“1. The Defendant's application that seeks to review the decree is issued pursuant to the final judgement delivered in this matter on 20th December, 2012 is incompetent and totally devoid of merit as it does not meet the requirements of Section 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and/or the provisions of Order 45 Rule 1 of the Civil Procedure Rules because:-

a. The Defendant/Applicant has already preferred an appeal to the Court of Appeal against the whole of the judgement delivered by this Honourable Court on 20th December, 2012 and having opted to file an appeal, the remedy of review is not available to the Defendant.

b. The Defendant/Applicant has not alluded to the discovery of any new and important matter of evidence of mistake or error apparent on the face of the record and there is therefore no sufficient ground or material disclosed by the Defendant upon which the court can exercise jurisdiction under Order 45 Rule 1 of the Civil Procedure Rules.

2. The Defendant's application is misconceived, incompetent, fanciful, bad in law and fatally defective and the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, have no application.

3. By pursuing both an appeal and the present application for review, the Defendant is acting mala fides and abusing the process of court with the intention of frustrating the Plaintiff/ Respondent from enjoying the fruits of its judgement.

4. The Defendant is merely trifling with the Court by seeking orders that are not capable of being granted by this Honourable Court in view of the pendency of an appeal preferred by the Defendant against the whole of the judgement delivered by this Honourable Court on 20th December, 2012.

5. Having filed a Notice of Appeal before the present application for review, the Defendant/ Applicant has lost it right to apply for review and this Court is functus officio and has no jurisdiction to entertain the application for review.

- 6. The Defendant's grievance is a matter that can appropriately be tackled in an appeal and an erroneous view of evidence or law is not a ground for review. In any event, this Court cannot sit on appeal of its own judgement.**
- 7. No sufficient cause has been adduced to show the urgency of the orders sought and the application filed by the Defendant does not stand any chance of success.**
- 8. This court has inherent powers to dismiss the Defendant's application because the same is vexatious and has been brought in bad faith".**
5. Quite properly when counsel for both parties appeared before this Court on 23rd July 2013, Mr. Naeku for the Plaintiff/Respondent conceded to the jurisdiction of this Court to review its decision in respect of interest awarded in relation to the dollar component in its Judgement delivered on 20th December 2012. This concession took into account the Plaintiff/Respondent's main ground of opposition to the Application before Court that the Defendant/Applicant, having filed a Notice of Appeal prior to the filing of the instant Application, had lost its right to apply for review. As a consequence, the cases cited to this Court by the Plaintiff/Respondent being **African Airlines International Ltd. v The Eastern & Southern African Trade & Development Bank Civil Appeal No. 50 of 2002, In Re the Estate of Allan Ngugi Muchai (deceased) (2005) eKLR, Njunge & Anor v Housing Finance Company Ltd (2005) eKLR** as well as **Haryanto v E. D. F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992** no longer need to be referred to.
6. The Defendant/Applicant filed its submissions in relation to the Application before this Court on the 31st May 2013. Leaving aside its submissions in relation to whether it had lost the right to apply for review having filed Notice of Appeal, the Defendant/Applicant referred this Court to **section 80** of the *Civil Procedure Act* as well as **Order 45 (1)** of the *Civil Procedure Rules*. Having set out the pertinent provisions of **Order 45 (1)**, the Defendant/Applicant referred the Court to the finding in the High Court case (on Appeal) of **Sardar Mohamed v Charan Singh Nand Singh & anor. (1959) EA 793** as per **Farrell J.** who had held that section 80 of the Civil Procedure Act conferred an unfettered right to apply for review in the circumstances specified and an unfettered discretion on the court to make such order as it thinks fit. The Defendant/Applicant submitted that the grounds for review under **Order 45 (1)** do not limit the unfettered jurisdiction of the Court as provided for under **section 80** of the Act. It noted that the evidence that was before the Court only referred to interest rates related to the Central Bank of Kenya lending rates with respect to locally denominated currency. There was no material evidence placed before court with regard to the rate of interest applicable to foreign currencies. Such, was regulated by the LIBOR interbank rate and such should have been applied by this Court with respect to the award of US dollars 130,000 as detailed in the said Judgement. This Court had overlooked the fact that the rates of interest on foreign currency is different from the rate of interest charged in respect of local currency. In conclusion, the Defendant/ Applicant referred the Court to the case of **Said v Maitha (2002) 2 EA 505** as per **Shah JA** where the learned Judge had stated:

“Whilst it is always desirable to wish to end any litigation it is equally desirable that a party ought to be allowed to canvass fully any relevant germane point he may have. That is a matter of course in our adversarial system.”

7. The Plaintiff/Respondent identified two main issues arising from the Defendant/Applicant's Application before Court being whether the Court had jurisdiction to entertain the Application for review and whether such satisfied the grounds. If the latter, should the Court review that part of its Judgement in relation to interest awarded? The question of the Court's jurisdiction having been waived by the Plaintiff/Respondent it was submitted on the part of the Defendant/ Applicant that for an application for review to succeed, 3 matters must be present:

“(a) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party applying for review or could not be produced by such party at the time

when the decree was passed or the order made; or

(b) There must be some mistake or error apparent on the face the record; or

(c) There must be any other sufficient reason.”

Further, the Plaintiff/Respondent noted that the application for review must be made without unreasonable delay. The Plaintiff/Respondent submitted that none of the ingredients (a), (b) or (c) had been shown or demonstrated by the Defendant/Applicant. As regards the LIBOR interbank interest rate, the Defendant/Applicant was well aware of such at the date of the trial of this suit. The Defendant/Applicant had opted not to introduce this element before Court. The Plaintiff/Respondent further submitted that the amount of interest awarded by a court could not form a new or important matter or evidence or be the subject of a mistake or error apparent on the face the record. There was no evidence or material produced by the Defendant/Applicant to show that information, as regards differing rates of interest as applicable to local and foreign currency, was available before Court. It maintained that the Defendant/Applicant herein was basically asking this Court to reconsider its earlier decision by introducing the element of LIBOR. The Defendant/Applicant’s grievance was best placed to be canvassed in the Court of Appeal by way of an appeal as to this Court having failed to consider all the necessary factors before exercising its discretion to award a commercial rate of interest. The Plaintiff/Respondent cited the case of **Abasi Balinda v Frederick Kangwamu & Anor (1963) EA 557** in which it had been found that a point which may be a good ground of appeal may not be a ground for an application for review. Further, an erroneous view of evidence or the law by the trial Judge is not a ground for review but it may be a good ground for an appeal.

8. The Plaintiff/Respondent maintained that the Defendant/Applicant’s Application goes to the root of the case and if it was granted, the whole substratum of the Judgement would change. The Plaintiff/Respondent submitted that the Court had already made an assessment of what it considered to be the best and fair rate of interest in the circumstances of the case. It was obvious that the Defendant/Applicant considered that the trial Judge had exercised his discretion wrongly. The difference between rates of interest in relation to foreign currency as opposed to local currency was, in the view of the Plaintiff/Respondent a litigious point, a fit subject for appeal and not a proper point upon which this Court do exercise its discretion upon review. Thereafter, the Plaintiff/Respondent referred the court to **section 26 (1)** of the *Civil Procedure Act* which provided that the court may order interest at such rate as the court deems reasonable, to be paid on the principal sum. In the Plaintiff/Respondent’s opinion the rate of interest awarded was reasonable and this Court had exercised its discretion judiciously and flexibly. The Plaintiff/Respondent drew the court’s attention to the ruling of **Ojwang J.** (as he then was) in the case of **Jane Wanjiru Gitau v Kenya Power & Lighting Co Ltd (2006) eKLR** in which the learned Judge had found:

“On the effective date of the various interests granted, similarly, I have seen no evidence of an error apparent on the face of the record. For the law relating to the grant of interests, and to the setting of effective dates thereof, is clearly stated in sections 26 and 27 of the Civil Procedure Act (Cap. 21); and the crucial element therein is that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests. Obviously, all discretion donated by law to the Court is to be exercised judicially. I see good cause in the mode of awarding the interests which are now being questioned through an application for review. But on grounds of proper procedure, grants of interest made in the exercise of discretion donated by law cannot, I would hold, be contested before the same Court. This must be taken up on appeal; and the expectation must be that the appellant will then be able to satisfy the appellate Court that the mode of grant of the interests in question was in departure from the requirements of the law”.

Based on the above authority the Plaintiff/Respondent submitted that an award of interest by a court is a discretionary remedy that cannot be questioned by review. It maintained that discretion in itself is an abstract principle not readily visible from the record of the proceedings before Court and, as such, it cannot be questioned by review since it is not an error apparent on the face of the record. As there was no obvious error, the Defendant/Applicant needed to convince this Court that an award of interest at 18% per annum was an error of significance. The Plaintiff/Respondent concluded its submissions by pointing out that the rate of interest sought in the Plaint was 24% per annum and that the Court had been lenient in awarding interest at only 18% per annum.

9. Mr. Odera for the Defendant/Applicant made his submissions that **section 80** of the *Civil Procedure Act* stood alone as regards this Court's discretion to allow a Review of the Judgement or Order and was not shackled by the conditions for Review detailed in **Order 45 rule 1 (1)**. That viewpoint does not seem to be shared by the authorities cited to me by counsel for both parties and, indeed, does not seem to have met with approval of the Court of Appeal. One must remember that **section 81** of the *Civil Procedure Act*, in providing for the establishment of a Rules Committee, details that the same shall have power to make rules not inconsistent with the Act and, subject thereto, to provide for any matters relating to the procedure of civil courts. To my mind, this section may be interpreted as meaning that Rules of Court are made supplemental to but in expansion of the provisions of the Act. I am of the view that for a Review before this Court to succeed, the conditions as set out in **Order 41 rule 1 (1)** need be complied with. In reviewing the law in this connection, this Court received considerable assistance from the **Gitau v Kenya Power** case (supra) in that **Ojwang J.** went to considerable trouble in reviewing various authorities in relation to the discretion to review judgements and rulings. In his Ruling dated 21st July 2006, he referred to the Court of Appeal decision in **Nyamogo v Nyamogo (2001) EA 173** in which the Court ruled as follows:

“We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there be 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 a real distinction between a mere erroneous decision and an error apparent on the face the 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 a 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 the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

10. Later in his Ruling, **Ojwang J.** referred to the case of **National Bank of Kenya Ltd v Ndungu Njau Civil Appeal No. 211 of 1996** in which the Court of Appeal had stated the law thus:

“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 of 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 the law cannot be a ground of review.”

Taking these extracts into account as well as the passage referred to by the Plaintiff/Respondent in its submissions as above, I am of the view that the Plaintiff/Applicant would need to have brought its Application before Court based on the conditions that there be (a) discovery of new and

important matter or evidence (b) some mistake or error apparent on the face of the record or (c) for any other sufficient reason. Rather than relying upon the provisions of **section 80** of the *Civil Procedure Act*, perhaps the Defendant/ Applicant would have been better to concentrate its submissions in relation to the Application before Court in the arena of “any other sufficient reason” as contained in **Rule 1(1)** of **Order 45**.

11. Accepting for the moment that the Review requested falls within the conditions of **Order 45** as set out above, it would appear that the Plaintiff/Applicant’s submission is that this Court failed to take into account that in lending in local currency a different rate of interest is applied to a lending in foreign currency. The Plaintiff/Applicant assumes that the figure of 18% interest that this Court awarded on the judgement amount as contained in its said Judgement delivered on the 20th December 2012 was based on Kenya shilling lending. The Plaintiff/Applicant, as pointed out in the submissions of the Defendant/Respondent, has not produced any evidence or figures before this Court of how substantially lower a dollar lending rate of interest would be in comparison to a shilling lending rate of interest. So where did the Court get the 18% rate of interest from? It is certainly higher than the Court rate of interest at 12% per annum. The Plaintiff/Applicant’s List of Authorities filed herein on 6th October 2009 contained at page 1, what it termed a “*Summary of Interest Charges on Principle Amount of USD 130,000*”. Commencing at page 2 and going to page 66 the Plaintiff/Applicant listed the Central Bank of Kenya lending rate from 4th September 1998 through to 9th October 2009. The Plaintiff/Applicant had noted that the interest rate charged on the lending to it by the Defendant/Respondent was the Central Bank’s Lending Rate plus 4%. During the aforesaid period, the Central Bank’s Lending Rate varied as between a high of 29.08% in September 1998 and a low of 11.97% in November 2004. When arriving at the 18% figure in my Judgement delivered on 20th December 2012, taking into account the 4% above the Central Bank lending Rate charged by the Defendant/Respondent, I came to an average figure over the lending period.

12. As a result, I do not consider that it is necessary to review my said Judgement in relation to the US\$ interest lending rate. Furthermore and bearing in mind that the Defendant/Applicant was aware of the Plaintiff/Respondent’s said interest schedule as above, this was not a new and important matter or evidence which the Defendant/ Applicant did not have notice at the time of the trial. **Order 45 rule 1 (1)** provides that any application for review should be made to the court which passed the decree or made the order “without unreasonable delay”. My said Judgement was delivered as above on 20th December 2012. The Defendant/Applicant only filed its Application for review herein on 23rd April 2013, 4 months after the delivery of the Judgement. In my opinion, such amounted to unreasonable delay particularly when one takes into account that the Defendant/Applicant was not bringing before this Court any new and important matter of evidence of which it did not have cognizance of, at the time of the trial.

13. The up-shot of the above is that I dismiss the Defendant/ Applicant’s Notice of Motion dated 23rd April 2013 with costs to the Plaintiff/Respondent.

DATED and delivered at Nairobi this 1st day of August, 2013.

J. B. HAVELOCK

JUDGE