



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 531 of 2006

MURGIAN TRANSPORT LTD.....PLAINTIFF

VERSUS

HUNKAR TRADING COMPANY LTD.....DEFENDANT

R U L I N G

1. This is an application for the review of the decree of this court made on 11th November, 2009 and to provide that the applicable rate of interest shall be 12% per annum. The Defendant's contention is that in the ruling of 11th November, 2009, the court had struck out the Defendant's Defence and allowed judgment as prayed for in the plaint, that the decree was for Kshs.4,883,918/74 with interest at 24% per annum from 1st October, 2005 until payment in full, that the claim arose out of a contract for services rendered to the Defendant which did not have any contractual terms stipulating that interest would accrue in the event the Defendant defaulted in paying for the services, that the rate of interest provided in the decree was erroneous and not payable, that the amount payable under the decree if a proper rate of interest was applied would be Kshs.8 million instead of the amount now claimed in the sum of Kshs.11 million. That it was just and equitable to review the decree. Mr. Okumu for the Defendant submitted that the correct rate of interest to be applied should be the court rate. Counsel referred the court to the cases of **NCC –VS- Thabiti Enterprises Ltd (1997) e KLR** as to the unfettered nature of the court's discretion while considering such an application, that interest over and above court rate will be awarded only where there is a specific contract between the parties for such interest (**Manchester Outfitters Ltd –vs- Nairobi City Council (2004) e KLR** and that under any other sufficient reason a court can vary an erroneous rate of interest (**Shanzu Investments Ltd –vs- Commissioner of Lands (1993) e KLR.**)

2. In opposing the application, the Plaintiff filed a Replying Affidavit sworn by O.A Murgian on 12th April, 2011. The Plaintiff contended that a consent order had been recorded before Hon. Apondi J on 2nd December, 2009 on the Defendant's own application for settlement of the decretal sum by instalments of Kshs. 1 M per month, that the Defendant had failed to comply with the said consent order, that the Defendant had failed to disclose these facts to the court, that the Defendant has been issuing bad cheques to the Plaintiff, that the Defendant is facing execution in HCCC No. 1785 of 2001 for over Kshs.10 million. Mr. Njagi, learned Counsel for the Plaintiff relying on the case of **National Bank of Kenya Ltd –vs- Ndungu Njau CA No. 211 of 1996 (UR)** and urged that the application be dismissed.

3. Having carefully considered the Affidavits on record, written and oral submissions of counsel and the authorities relied on, this court's view is as follows. An application for review is in the discretion of the court. The applicant must show that there is an error apparent on the record, that there is discovery of new

evidence which could not be produced at the time the order was made despite diligence on the part of the applicant and for any other sufficient reason. Under the third ground, it is any reason, in the circumstances of the case, the court will consider to be sufficient enough to revisit and review its order. In the present case, the Defendant has relied on the first ground that there is an error apparent on the face of the record.

4. The Defendant has contended that the rate of interest of 24% per annum awarded in the decree was erroneous, that such interest was not contractual and that the correct rate applicable should have been 12% per annum. I have looked at the Plaintiff. The Plaintiff specifically prayed for the sum of Kshs.4,833,918/73 with interest thereon at 24% per annum from 01/10/05 until payment in full. I have also looked at the application for summary judgment filed by the Plaintiff on 1st March, 2007, the same makes a similar prayer. I have also looked at the Replying Affidavit in opposition. At page 1 of the ruling dated 2nd November, 2009, the court stated:-

“The Plaintiff/Applicant comes to court by way of a Notice of Motion stated to be brought under order XXXV Rule 1 (1) (a) of the Civil Procedure Rules praying for the sum of Kshs.4,833,918/74 with interest thereon at 24% per annum from 01/10/05 until payment in full as prayed in the Plaintiff.”

5. From the foregoing, it is quite clear that the issue of interest of 24% per annum was an issue raised from the commencement of the suit. It was a matter before court at the time the application for summary judgment was argued. The court was alive to that fact. If the court was wrong in awarding that interest, I am afraid it is not an issue for review. It is quite clear from the Defendant’s written submissions that the Defendant is faulting the ruling of 2nd November, 2009 on the basis that interest should have been 12% per annum in terms of Section 27 of the Civil Procedure Act and not 24%, the latter not being contractual. In my view, that is not an error on the face of the record but an alleged error of law. To my mind, that is a ground for appeal and not review. In my view, for me to re-visit the decree on that basis, I will be sitting on appeal on a decision of my sister judge.

6. I believe this is the position taken by the Court of Appeal in the case cited by Counsel for the Plaintiff of **National Bank of Kenya Ltd –vs- Ndungu Njau (C.A No.211 of 1996)** wherein the court stated:-

“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 evidence 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.” (Emphasis added)

7. If I am wrong on the foregoing, I am not inclined to exercise my discretion in favour of the applicant either. It was contended by the Plaintiff, that there is in force a consent order for the Defendant to settle the decretal sum by instalments of Kshs.1 million per month. That order was made at the instance of the Defendant. This was not denied by the Defendant. To-date, that order has not been set aside or varied. Granting any review order, the court would invariably be upsetting that consent order without any proper application to do so.

8. In the premises I am not convinced that I should exercise the court’s discretion in favour of the Defendant.

Accordingly, the Defendant’s application dated 24th February, 2011 is hereby dismissed with costs to the Plaintiff.

DATED and delivered at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE