



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

EQUITY BANK LTD. PLAINTIFF/RESPONDENT

VERSUS

DAVID NJUGUNA MWANGI

FLORA MWARI MWENDA

MARGARET NJERI KARIUKI *t/a*

FLOJUMA METAL DEALERS DEFENDANTS/APPLICANTS

R U L I N G

Notice of motion dated 6.11.2008 was filed by Mr. David Njuguna Mwangi seeking orders to stay execution pending the hearing of this application and that the court be pleased to review the decree, ruling and/or judgment delivered on 11.7.2008.

The application is supported by the affidavit David Njuguna Mwangi who is acting in person. There is also a further notice of motion filed on 3.9.2008 by applicant. There is another application dated 28.8.2008 by Kimani and Michuki, advocates seeking similar orders.

By agreement of the parties the applications were heard together. The affidavit of Lawrence Kimondo, advocate in the firm of Kimani & Michuki, who were acting for the plaintiff shows that the plaintiffs' claim as pleaded in the plaint is for a specific sum of money being a liquidated debt owed by the 1st defendant, a business firm. That the judgment entered in its favour for payment of Kshs.6,000,000/= by 1st defendant and the decretal sum was ordered to be paid with interest to run from the date of judgment as opposed to running from the date of the suit.

The judgment is flawed in that the running of interest on a liquidated claim is paid from the date of the suit where the decree is for payment of money. And that the plaintiff/applicant stands to lose substantial money unless the error apparent on the face of the record is corrected and the interest ordered to run from the date of the suit instead of the from the date of judgment.

The 2nd notice of motion filed on 7.11.2008 is by David Njuguna Mwangi also seeking review of the decree delivered on 11.7.2008 on different grounds that there is discovery of new and important matter and evidence which could not be produced by the applicant when the judgment and decree was passed.

That there are some mistakes and errors on the face of the record and that there exist sufficient reason to warrant review.

In his supporting affidavit, David Njuguna Mwangi states that he had given all the documents regarding the case to his former advocate and among the documents supplied were irrevocable letter of credit from Prime Bank L.C. No.PBL 05/3115 amounting to Kshs.14.5 million and that he supplied to the said advocate delivery note showing payment received by Equity Bank. Those documents were important and could have enabled the court to determine the real question in controversy. He also swears that from information received is that his advocate did not appear in court for hearing when the matter proceeded ex parte and he did not inform them of the hearing date.

He states that the mistakes were made by his former advocate and the same should not be visited on him as a litigant. Upon perusing the record, it appears on the hearing date of the application for summary judgment on 19/7/2008 only the plaintiff appeared. There was no representation for the 1st defendant, or by the defendants themselves.

In their absence the court did make a ruling entering judgment for the plaintiff against the 1st defendant. A perusal of the ruling of the court (Hon. M.A. Warsame, J.) dated 11/7/2008, it appears clearly the court did take into account the sum of Kshs. 3,319,509/50 paid to the plaintiff by the applicants. The court also found that there was admission by the applicants (1st defendants) in their defence having admitted receiving the sum of Kshs.6,000,000/= from the plaintiff. Since the 1st defendants/applicants were not present in court, no evidence was adduced to show that the loan was substantially repaid through non-irrevocable letter of credit from Prime Bank. There was no evidence of the existence of the said letter and there was no material to show that the Prime Bank had repaid or had undertaken to pay the plaintiffs the sum advanced to the defendants.

In the circumstances, the court decided the application on the material before it and came to the conclusion and entered judgment for the plaintiff against the defendants in the sum of Kshs. 6,000,000/= together with interest of 18% from the date of judgment.

Regarding the application of the plaintiffs, the issue of the payment of interest on a decree Section 26 gives discretion to the court to order interest at such rates as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of 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 rates as the courts deems reasonable on the aggregate sum from the date of decree to the date of payment or to such earlier date as the court thinks fit.

The plaintiff submits that there is an error with the ruling that the court ordered interest from the date of judgment and not from the date of the suit.

I am hesitant to find that there is an error in the judgment for that omission. The matter is discretionary and the court was entitled to make the order as it thought fit.

In relation to the application made by the defendants, it is clear that they were not represented on the day the summary judgment application was heard by the Judge. But there was an affidavit in reply sworn by the 1st applicant which attached statements of account with plaintiff bank.

In the supporting affidavit of the plaintiff to the application for summary judgment sworn by Mr. Joseph Njoroge Muiruri, the documents now said not to be available were attached to that affidavit and the same were considered by the court.

In the circumstances, it is not correct to submit that there is new evidence discovered which could not have been discovered by the applicants at that time.

The point in their favour is that they were not present during hearing and they were not represented by

their advocate, so the court did not have the benefit of their submissions and particularly, that they had made some payment in the sum of Kshs.3,319,509/50. In my view, the 1st applicants are entitled to the orders they seek, the amount involved being colossal. I therefore, dismiss the plaintiffs' application with costs to the 1st defendants and I also find that the defendant's application has merit and the same is hereby allowed.

I have read the extract submitted by the Counsel for the plaintiff on **Mulla – The Code of Civil Procedure** at page 1191 and 1193. On the issue of error it is clearly shown that the court is not to act as on appeal but it is to rectify only a manifest error on the face of the record.

The upshot is that the judgment of the court dated 11/7/2008 is hereby set aside. The costs shall be in the cause.

DATED and **DELIVERED** at Nairobi this 26th day of January 2009.

JOYCE N. KHAMINWA

JUDGE