REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 460 of 2007

EDWIN ASAVA MAJANI…….....……1ST PLAINTIFF/RESPONDENT

ENGINEER GEOFFREY GATHURI NJOROHIO…2ND PLAINTIFF/RESPONDENT

GEOFFREY KIUGU GAKURE…….....……3RD PLAINTIFF/RESPONDENT

VERSUS

TELKOM KENYA LTD…….....……DEFENDANT/APPLICANT

RULING NO. 4

The background information, to this application are that the plaintiffs herein, who are the respondents to this application presented a plaint accompanied by an application for summary judgement. This court delivered a ruling on the 25th day of April 2008. At page 26 of the said ruling, line 5 from the top, this court, made the following observations:-

"*Having determined the plaintiffs have made out a case for summary judgement, but that not withstanding the defence raises triable issues, the next question is whether the defendant is to be given a conditional or unconditional right to defend. In this courts considered opinion this is a proper case for a conditional right to defend because:-*

1. The plaintiffs are not responsible for what made the defendant back out of the specially negotiated early retirement package.

2. There is a heavier responsibility on the defence to justify their action in the first instance, and then bring it within the law.

3. The plaintiff had gone a head as a result of these negotiations and altered their positions of employment with the defendant.

4. They were not consulted on the change of terms before the same were implemented.

The final question now is to determine the conditions for the defence.

In this courts opinion, interest of justice demands that the defendant be given a right to defend, on the condition that he complies with the conditions to be set by this court. The conditions set are:-

1. The defendant do and is hereby given a right to defend the plaintiff claims on condition that he deposits the amount claimed by each plaintiff, in prayer (a) of the plaint, into interest earning accounts,

in the joint names of counsels of both parties within 90 days from the date of the reading of this ruling.

2. Each specific claim, is to form a subject of a separate interest earning account in favour of each plaintiff.

3. In default of number 1 above, the order which is hereby given for summary judgement in favour of the plaintiffs, as prayed for in prayer (a) of the plaint, together with interest thereof, as well as costs of the suit as prayed for in prayer (b), of the said plaint shall take effect, and have force from the date of such default.

4. Upon taking such effect, and force as in number 3 above, the parties will be at liberty to proceed according to law as regards execution of the said resultant summary judgment in default.

5. The plaintiff will have costs of the application"

This court, has been informed that the defendant failed to comply with the conditions set in order to fructify the right of defence. This court, has knowledge that the defendants attempted to seek enlargement of time within which to comply, but that move was declined by this courts's ruling delivered on the 31st day of July 2008. By reason of that declining, the judgement in favour of the plaintiffs took effect. The court, is also informed that, taxation was done, decree drawn, and the principal sum as well as costs have been paid. What has brought parties back to this court, is the issue of the effective date from which interest is to be calculated.

The disagreement over when interest is to start running on the principal sum, led the defendant into filing the application subject of this ruling, by way of notice of motion, dated 10th December 2008, and filed the same date. It is brought under order XLIV rule 2 of the CPR, CAP 21, of the laws of Kenya and all enabling provisions of the law. 5 (five) prayers are sought namely:-

1. "Spent

2. Spent

3. That the honourable court be plead to review its orders given on 25th April 2008.

4. That this honourable court be pleased to interpret and rule on the issues of interest payable to the plaintiffs herein, on the decretal amount and on the taxed costs.

5. That the Honourable court, be pleased to rule on when time starts to run on the issue of interest payable to the plaintiff."

The grounds in support of the application are found in the body of the application, supporting affidavit, oral submissions in court, and both provisions of the law, as well as case law, on the subject. In a summary form these are:-

1. The principal sum has been paid.

2. Issue of interest arose when taxation was done

3. That the plaintiff has computed interest to run from 30th October 2003 a date before the filing of the suit, contrary to the ruling no. 2 of this court, where by interest was ordered to run from the date of default.

4. That it is on the basis of the afore said complaint that they ask this court, to revisit its ruling number 2 and then review the same on the issue of interest, and or interpret its order as regards interest awarded.

In his oral high lights in court, counsel for the applicant stressed the following:

(i). Prayer (b) of the plaint had sought interest to run from 30th October 2003 where as the ruling says that interest was to start running from the date of default.

(ii). The court, is invited to note that the suit was filed 4 years after termination, no trial took place as the plaintiffs application for summary judgement was allowed by this court, hence no evidence was led as to show why interest should run from a date of filing of the suit or the date of judgement.

(iii). Counsel is a ware of the provisions of section 26 of the CPR which says that interest is a matter of discretion of the court, seized of the matter, which discretion has to be exercised judiciously.

(iv). Confirmed that the principal sum prayed for in prayer (a) of the plaint had been fully paid.

(v). The defendant was wiling to pay interest, but declined to do so when the plaintiff demand of the same vide annexture KM1 showed that the interest had been calculated from 30/10/2003, contrary to the order of this court.

(vi). It is their stand that in the prayer for summary judgement the plaintiff did not demonstrate as to why, interest should run from a period before the filing of the suit and as such the same cannot now be ordered to run from that date.

(vii). They contend that the defendant should not be penalized because the failure to pay was occasioned by a civil servant.

(viii). They maintain that there is jurisdiction on the part of this court,to revisit that matter and correct the error mentioned.

(ix). The court, is urged to hold that interest awarded was ordered to run from the date of default.

(x). The applicant is not asking for costs for this application because the bill of costs has already been taxed.

The respondent has responded to that application by way of a replying affidavit sworn by one Edwin Asava Majani on 11th December 2008 and filed on the same date. Oral high lights in court, and both provisions of the law and case law on the subject. The salient features of the same are as follows:-

1. That all along the defendants have known that the plaintiffs' claim on interest was from 30th October 2003, the date when they ought to have received the said payment, and for this reason, they issued a demand to the defendants to that effect even before filing their claim in court.

2. They contend that there is no ambiguity in this courts', ruling of 25/4/2008 as this court, clearly ruled that judgment was to crystallize when the defendant defaulted in depositing the money claimed by the plaintiffs in a joint account, but in the event of judgment crystallizing the interest on the decretal amount, was to be in accordance with prayer (b) of the plaint.

3. The court, is invited to agree with their contention that the application has been presented with extreme malice and with the sole intention of delaying the finalization of this matter.

In his oral highlights learned counsel for the respondents' stressed the following points:-

(i). The defence raised no objection to the interest claim at the earliest opportunity, either in an issuance of demand or in the defence.

(ii). The court, is invited to hold that there is no ambiguity on condition number 3, as this court,

clearly specified that upon default, judgement was to be entered as prayed in prayer (b) of the plaint, which judgement was to crystallize from the date of default.

(iii). Maintain that the plaintiffs were explicit in their prayer for interest, because they ought to have been paid that money on 30/10/2003 and that is why they sought interest to run from that date.

(iv). Still maintain that the defendants' application is an after thought, intended to delay the finalizations of this matter.

(v). Maintain the decree issued herein is proper as the same was sent to the defendants' for approval.

(vi). There has been in ordinate delay in the applicant moving the court, for the relief sought. The court, is urged to decline to grant review as there has been undue delay on the part of the applicant which undue delay has not been explained more so when no accident, mistake or error on the part of the court, has been demonstrated.

(vii). The court, is urged to hold that it is clear on what the court, meant by issuing the orders complained of.

(viii). The court, is also urged to take note of the fact that the defendant applicant had filed a notice of appeal, that it is not clear whether the said notice was withdrawn or not and as such the defendant/applicant cannot be allowed to pursue both processes namely an appeal as well as review.

(ix). What the court, has discretion to award interest from the date when the payment was due to the plaintiff and it should so order.

In response counsel for the defendant applicant reiterated the earlier submissions in support of the application and added that since trial never took place the court, is not in a position to determine if there are any special circumstances to warrant the court, ordering in an award of interest beyond the date of filing and or the date of judgment.

- Still maintains that the correct position, is that this court, did not give the plaintiff what they had prayed for in the plaint.

- It should be noted that taxation was done after the principal sum had been paid and if the decree was approved as drawn, and yet it did not conform to the judgement of the court, then that was an omission.

- Herein the concern is not on the notice of appeal, filed but on the rate of interest and when the same is to start running. According to them the same was ordered to start running from the date of default and that is when interest was to start running.

- They have demonstrated good cause to warrant the intervention of the court.

The court, was referred to case law. **The case of DALMAS B. OGOYA VERSUS KNTC LIMITED NAIROBI CA 125 OF 1996.** The appeal arose from a judgement of Githinji J as he then was (now JA) in which the learned judge had found that the appellant had been unlawfully dismissed and gave him judgement for salary from 24th May 1987 to 15th July 1987, three months salary in lieu of notice, salary for earned leave, and the surrender value of the appellants' own contribution to the pension fund. These sums carried interest at court, rates, from the date which the judge determined the appellant was effectively dismissed. The appellant was also awarded costs of the suit. On appeal, the CA awarded interest at 14% to run from the date of dismissal.

The case of **SALIM AND ANOTHER VERSUS KIKAVA (1989) KLR 534,** in which the trial court, awarded interest to run from the date of the filing of the suit. On appeal, it was contended among others that, the learned judge erred in law in ordering the interest on damages to run from the date of filing of the suit. The CA sitting in Mombasa, held interalia, that, the award of interest, on a decree for the

payment of money for the period from the date of the suit to the date of the decree, is a matter entirely within the discretion of the court, but this discretion, being a judicial one, must be exercised judicially.

(2) According to authorities, interest on general damages should be, from the date of assessment, which is the date of judgment.

(3) The judge had given no reason for ordering that interest, including interest on general damages, was to be paid from the date of filing of the suit. This lead to the conclusion that the judge had wrongly exercised his discretion to award interest.

The case of **SAPRA STUDIO VERSUS KENYA NATIONAL PROPERTIES LIMITED (NO.2) (1985) KLR 1011.** The case was decided by the court, of appeal, at Nairobi. In the facts, it is noted that, the court of appeal, allowed the applicants appeal, but none of the three judges constituting the bench addressed the issue of interest on the damages through a prayer, for it had been made in the memorandum of appeal, and in the argument of the appellants counsel. However the court on its own motion, on a mention date, brought up the issue and addressed the matter of interest. It was held inter alia that:

1. "As far as the issue of interest is concerned the judgment of the court contained an Obries error arising from an accidental omissions as contempted under rule 35 of the court of Appeal Rules.

2. *The court which has to correct an accidental omission is the same court that gave the judgment out of which the accidental omissions arises."*

The case of **KENYA COMMERCIAL BANK LIMITED VERSUS THOMAS WANDERA OYALO BUSIA HCCC NO. 23 OF 2003** decided by J.K. Sergon on the 8th day of April 2005. From the facts, this was an appeal to the high court, of Busia arising from a decision of the subordinate court, at Busia where by the lower court, had awarded interest at 32% p.a., on the basis that the claim was not challenged by the appellant. At page 9 of the judgment line 2 from the bottom, the learned judge made the following observations:-

"*It was incumbent upon the respondent to prove that he was entitled to claim interest at the rate asserted in his plaint. The record of appeal shows that the Respondent did not offer any evidence to prove that he is entitled to interest. He just plucked from the air that he is entitled to a rate of interest of 32% p.a. His advocate did not also submit on interest. The trial magistrate was of the view that the rate of interest of 32% p.a. was unchallenged. I agree with her, to the extend that then appellant, did not offer evidence to challenge the assertion. But it is clear also that it was not necessary for appellant to offer contrary evidence when the Respondent has failed to lead evidence to prove that he was entitled to claim interest at a rate of 32% p.a.…… stated that the Respondent should have led evidence to justify why he claims interest at the rate of 32% per annum. Since the Respondent failed to prove that fact, then the trial court, should have exercised its discretion to award interest under section 26 of the civil procedure Act. In this case, the trial magistrate awarded the rate of interest as prayed although it was a matter of course, yet the same was not proved. The learned trial Senior Resident Magistrate therefore acted outside the laid down rules governing interest. There was no basis at all to award interest at the rate of 32% p.a. At best the trial magistrate should have awarded the rate within her discretion. In such case, the court, will award interest at the contractual rate up to the date fixed for payment, and thereafter at the usual court, rates. But in this case there was no evidence that a contractual rate existed. In the circumstances the usual court, rates prevailing at the time shall apply"*

In addition to the above there is also the case of **MOHAMED S/O MOHAMED VERSUS ATHMANI SHAMTE (1960) EA 1062** decided by the High court of Tanzania on 5th October 1960. The brief facts are that, the appellant obtained judgment against the Respondent for Shs. 1,000/= with interest thereon amounting to Shs. 1,190/= to the date of filing proceedings, and further interest on the principal sum at the rate of 6 percent p.a. from the date of filing proceedings to the date of final payment. The advocate for the appellant had submitted that the appellant should be allowed interest at this rate (84%) for the period between the date of filing of the suit to the date of judgment. The trial magistrate regarded interest at 84% as un consionable and awarded interest at the rate of 6 percent not only from the date of

judgement to the date of payment, as is mandatory, but also from the date of filing the suit to the date of judgement.

On appeal it was held interalia that:-

(i). *"The court, may or may not at its discretion, award the contractual rate of interest, between the date of the institution of the suit and judgement. Whether it does so or not depends upon whether the rate is reasonable.*

(ii). *When the rate of interest exceeds 48% p.a. the court, may assume unless the contrary is proved, that the interest is excessive.*

(iii). *Whilist in a defended case the fact that the rate of interest is harsh and unconscionable should be pleaded; the court, could not accept the proposition that in an un defended suit, the court, must approve a harsh and unconscionable but contractual rate of interest. The court, has an inherent equitable jurisdiction to re-open unconsiobale bargains even when suits are un defended for one reason or another.*

(iv). *It could not be said that the trial magistrate had exercised his discretion un judicially"*

The case of **DAUDA VERSUS AHMED AND 2 OTHERS (1987) KLR 665**, decided by Githinji Ags as he then was, where consent judgement was silent on the issue of interest, it was held inter alia that, though the consent judgement was silent on interest, the interest could be deemed to have been ordered as provided in section 26 (2) of the CPA. More over, the omission to order payment of interest can be corrected under section 99 of the Act (cap 21).

The case of **SANSORA WIRE AND NAIL WORKS LIMITED VERSUS SHREEJI ENTERPRISES KENYA LIMITED** decided by Ochieng J on 18th July 2005, where the court, held interalia that *"The court, has a discretion to order for the payment of interest, on the decretal amount, at such a rate as it seems reasonable, whether from a date before the institution of the suit, the date of the suit, or from the date of the decree. The interest may be directed to be payable either to the date of payment, or until such earlier date as the court thinks fit."*

Section 26 of the CPA has featured prominently, in the case law, and as such it is prudent to set it out herein, also as it is the basis on which the cited decisions were made. It reads:- *" 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 in full or to such earlier date as the court, thinks fit.*

(2) Where such a decree is silent with respect to the payment of further interest in such aggregate sum as afore said, from the date of the suit, to the date of payment, or other earlier date, the court, shall be deemed to have ordered interest at 6 percent per annum."

Applying the afore set out principles in case law, as well as the cited section 26 (1) (2) of cap 21 laws of Kenya, the following appears to be the correct position in law as regards payment of interest on any decretal sum:-

- Where there is provision for contractual rate of interest, the court has to take cognizance of the said rate.

- That even where there is provision of a contractual rate of interest, as the one applicable, the court, seized of the matter is not precluded from making a determination as to whether the contractual interest is unconscionable and or unreasonable.

- Where the court, seized of the matter considered the interest rate to be unconscionable and or unreasonable, in the circumstances it has jurisdiction to interfere with it and make orders appropriately.

- It is desirable that interest be pleaded and where possible, proved or a demonstration be made that the applicant or intended beneficiary is entitled to the interest sought.

- The exercise of awarding and or determining an award of interest is a matter of discretion on the part of the court.

- The type of the discretion donated to the court, is a judicial discretion, and like all other judicial discretion, it has to be exercised judicially.

-The court, has a discretion to order interest, to run from the date events complained of occurred, that is before the filing of the case, from the date of the filing of the case.

- Interest, on general damages is usually awarded from the date of the assessment.

- Where interest is ordered to run from t he date before filing of the suit, the court has to give reason.

- Where the decree is silent as regards the award of interest on the decree, the same is deemed to be at court, rates on a liquidated claim being from the date of filing and on general decree, from the date of assessment.

This court, had occasion to construe the section 26 (1) (2) CPA provision in own ruling delivered on the second day of February 2008, in the case of **GATATHA FARMERS COMPANY LIMITED VERSUS FRANCIS NJUNGE NAIROBI HCCC NO. 9 OF 2006.** At page 6-7 of the said ruling the court set out the provisions of section 26 (1) (2) of the CPA and then proceeded to make the following observations:-"the centrol theme in section 26 (1) is found in the words:- *" 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."* On the basis of that observation this court, ruled that therefore "*there is discretion on the part of the court, to a ward interest before the filing of the suit. The provision does not say that such interest must be pleaded…….the only source of interference would perhaps arise where the period covered is lengthy, and the resultant amount unconscionable"*

Turning back to the facts herein, there is no dispute that the plaintiff Respondent pleaded interest. Paragraph 17 (b) on the reliefs seeks the following:

" *(b) Interest on (a) above at court rates with effect from 30th October 2003 until payment in ful.l"* There is also no dispute that in their notice of motion dated 29th June 2007 for summary judgement, and filed on the same date, they prayed for summary judgement to be entered in favour of the plaintiff against the defendants as prayed. It read: - "*That summary judgement entered in favour of the plaintiff against the defendant as prayed for in the plaint"* It is on record that this initial application was struck out on technical grounds, but the same orders were replicated in the subsequent application dated 24th day of January 2008, and filed on 25th January 2008, though wrongly dated as 24th January 2007. This is the application which gave rise to the conditional orders of this court, made in its ruling of 25th day of April 2008.

The conditions set by the court are as follows:-

" *(1) The defendant do and is hereby given a right to defend the plaintiff claim on condition that he deposits the amount claimed by each plaintiff in prayer (a) of the plaint into interest earning accounts in the joint names of counsels of both parties within 90 days from the date of the reading of this ruling.*

(2) Each specific claim is to form a subject of a separate interest earning account in favour of each

plaintiff.

(3) In default of Number 1 above the order which is hereby given for summary judgement in favour of the plaintiff as prayed for in prayer (a) of the plaint together with interest thereof as well as costs of the suit as prayed for in prayer (b) of the said plaint shall take effect and have force from the date of such default"

(4) Upon taking such effect and force as in number 3 above the parties will be at liberty to proceed according to law as regards execution of the said resultant summary judgement in default.

(5) The plaintiff will have costs of the application"

The foregoing are the orders that this court, has been invited in the application subject of this ruling, either to review and or interpret. More particularly condition 3. The source of the grievance is because the total principal sum as at the time it was paid was Ksh. 17,492,820.00 where as interest judged as at the time defendant came to court to present the application subject of this ruling was Ksh. 12,784,999.00 calculated from 30th October 2003.

A reading of the prayers in the application subject of this ruling is simply requiring this court to determine either through review and or interpretation when interest is to start running. If review is to apply the court is obligated to bring itself within the ambit of the ingredients qualifying one for review. These are found in order XLIV rule 1.1. (b) Namely:

- 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. This ingredient is not being relied upon.

- Or on account of some mistake or error apparent on the face of the record. The application seems to be relying on this ingredient, in that they seem to be saying that there is an error apparent on the face of the record in that the ruling did not specify the date when the interest was to start running.

- Or for any other sufficient reason. This too is relied upon in that the argument by the applicant is that if the plaintiffs' calculation was to be allowed to stand, then the resultant figure, on the calculated interest will be exhorbitant and or prohibitive and thus merits interference by the court.

Turning to interpretation, it simply means that the court, is to interpret condition 3 on the issue of interest. This courts' interpretation of condition 3 is simply to the effect that upon default on the payment of the deposit, the plaintiffs were to become beneficiaries of the principal sum prayed for in prayer (a) of the plaint as well as beneficiaries of interest and costs as prayed for in prayer (b) of the plaint. Indeed prayer (b) sought interest to be paid for from 30th October 2003. since it was awarded as prayed, then it would appear that the interest should in effect be worked out to run from 30th October 2003.

As submitted by counsel for the Defendant/Applicant the issue of when interest allowed should start running was not canvassed or submitted upon by either side as the bone of contention in the rival arguments of both parties was whether summary judgement was to issue or not to issue and the terms upon which the summary judgement was to be granted. The issue of when the rate of interest was to be charged and its implication on the resultant decretal sum inclusive of the interest charge was not gone into. It has now transpired that the resultant sum if the interest were to be allowed to run as prayed for in the plaint is huge. Infact slightly less than the principal sum. A question arises as to whether that issue is now fore closed and cannot be revisited or whether there is jurisdiction on the part of this court, to revisit that issue through review and or interpretation.

In this courts' opinion, interpretation avenue will not be an appropriate avenue as the same does not leave room for correction of any error and or omissions. Once interpretation is discounted, then the other only avenue left is the review. The ingredients for invoking the same have already been set out, and all that is required of this court is simply to determine whether the facts presented satisfy the ingredients

firstly, and secondly that there is jurisdiction to make a move to correct the same.

The case of **SAPRA STUDIO VERSUS KENYA NATIONAL PROPERTIES LIMITED (NO.2) SAPRA** ,decided by the court of appeal, is proof that there is jurisdiction to correct an omission regarding an award of the costs and the best forum for doing so is the same court, which made the order or occasioned the omission or error.

It is therefore necessary to determine whether on the facts presented, there is an omission or error capable of being corrected. In this courts', opinion, this has been demonstrated; because this court, should have interrogated the issue of when interest prayed for should be allowed to run. It should have considered the circumstances or option open to the court, under which interest can be allowed to run before the filing of the suit, and from the date of filing of the suit, and or the date of the decree. There is no doubt as mentioned by the court, herein, that section 26 (1) (2) of the CPA is authority for the exercise of the courts', discretion to allow interest before filing of the suit, from the date of filing of the suit, or from the date of the decree. Section 26 (1) (2) CPA how ever does not provide the yard stick to be applied by the court, when exercising its discretion to choose any of the three options. The yard stick has been provided by the case law. There is guide lines in the case cited with approval by this court of **MOHAMED S/M MOHAMED VERSUS ASMON SHOMTE (SUPRA)** where the parameters provided are that, the court, should not loose sight of the length of the period involved and ensure that the resultant figure awardable does not qualify to be termed as unconscionable or unreasonable. This court, can safely also add that such a resultant figure on interest payable to a successful litigant should not appear to be too punitive or appear to be enriching the plaintiff unfairly.

Herein it is on record that the counsel for the plaintiff decree holder has urged the court, to consider the pleaded date of when interest should start running, namely 30th October 2003. The reason 30th October 2003 has been chosen and pleaded as the date interest should be ordered to start running from is because it is the date when the said monies were supposed to have been paid to the plaintiffs' decree holders, or should have been paid to them. A calculation of the period involved from this date to the date of filing of the suit gives a period of three years and seven months. Where as the period from the date of filing of the suit to the date of judgement, which judgement date is taken to be the 90th day from the date the ruling on the application for summary judgement was given, which gives a period of one year and about three months. This period when added to the calculated period of the period claimed before the filing of the suit gives a record period of 4years and 10 months.

It is on record that this is the length of the period that has given rise to the resultant figure of the amount forming calculated interest in the annexture, exhibited by the applicant, to the application subject of this ruling, which figure is said to represent the calculation of interest upto and inclusive of the date of 31st December 2008.

The court was informed that the principal sum had been paid as at that date. The actual date when the said principal sum was paid is not given, but this court, has no doubt that payment of the decretal sum must have been shortly after the delivery of this courts', ruling of 31st July 2008, when an application for the extension of time within which to deposit the amount forming the liquidated claim in the plaint in order to have a right to defend the suit was declined by this court, on the 31st day of July 2008.

It is on record and as submitted by the applicants' counsel', the calculation gives a resultant figure forming the figures in paragraph 3 of the supporting affidavit and annexture KM1 which is Ksh. 12,784,999.00 calculated upto 30/8/2008, having a shortfall of Kshs. 4,707,821.00 to add up to the decretal sum. It is therefore clearly that the amount claimed as interest is more than half the decretal principal sum paid to the plaintiffs. This is the sum that the applicant alleges to be unconsionable or unfair to ask the defendant to pay to the plaintiff. In other words according to them it can be termed as an unfair enrichment of the plaintiff or an act of over compensation if not punitive.

It is on record and as submitted by the applicants' counsel, that the issues of the period when the interest was to be calculated was not canvassed by both sides at the stage the application for summary

judgement was argued. It is also on record that either by reason of this lack of argument or default on the part of the court, the issue of when interest should start running was not interrogated by this court, in its ruling of 25/4/2008, hence the blanket order that upon failure to deposit the sum claimed by the defendant, within the 90 days, allowed, judgement as prayed for in the plaint would issue in favour of the plaintiff with interest as prayed. This would mean that a correct interpretation of that ruling is that the interest given by the court was the interest pleaded namely from 30th October 2003.

The question that arises for determination is whether, there is jurisdiction to revisit that issue in view of the complaint raised by the defendant/applicant. The answer to this question is yes. The reason being that the applicant has prayed for interpretation of the courts,' order on interest and in the alternative of review of the same. This means that, if review is to be called into play, then there has to be a basis for it. This basis is no other than the establishment of the existence of the ingredients required to be established as per the provisions of order XLIV rule2 of the CPR. The applicant has come under order XLIV rule 2 because he is seeking review before the same judge who made the order sought to be reviewed.

The applicant seeking review on grounds other than " *the discovery of such new and important matter or evidence."* The exclusion of this grounds by rule 2 leaves for consideration by this court, the other grounds set out in order XLIV rule 1 namely:-

(i). *"……Or on account of some mistake or error apparent on the face of the record.*

(ii). *Or for any other sufficient reason"*

Applying these two ingredients to the facts demonstrated herein as considered in the light of the Rival arguments, herein, it is clear that there is an apparent error or mistake apparent on the face of the record, in that counsels of both parties failed to address the court, adequately or sufficiently as regards the period calculation of the interest on the judgement sum should run. There is also an apparent error or mistake on the part of the court, that it too failed to invoke its inherent jurisdiction under section 3A of the CPA and its judicial discretion under section 26 of the CPA and interrogate the interest payable and then rule appropriately on the same. It is also the finding of this court, that there is some other sufficient reason for revisiting the issue of interest because one party has complained that an interest calculated to an amount shortly below the decretal amount if allowed to stand would qualify to be termed unconscionable, unfair and un just enrichment to the plaintiff.

Due consideration has been made of the above ingredients and the same considered in the light of the rival arguments for and against review of the order on interest, also considered in the light of the case law on the subject already cited herein, as well as the wide and judicious discretion donated to the court, by section 26 of the CPA on the subject, which discretion case law says in wide and un fettered, but whose only fetter is that it has to be exercised judiciously and with reason. The court, moves to exercise the same judiciously and with reason. The reason being that section 26 donates power to the court, to award interest for the entire period before the filing of the suit, from the date of the cause of action or for any part of it. There is also jurisdiction to award interest from the date of filing to the date of judgement and from the date of judgement till payment in full.

In this courts considered opinion,there are two distinct periods to be considered for the award of interest, namely, the period before the filing of the suit, in the first instance, and the period after, the filing of the suit, in the second instance. In this courts opinion there is no serious contest on the award of interest on the period after the filing of the suit and this is allowed.

There is however serious contest on the award of interest on the full length of the period from the date of the cause of action, namely 30th day of October 2003, to the date of filing of the suit. What transpired in between has not been argued a fresh before this court, but that not withstanding, the court, is not precluded from taking cognition of the documentation exhibited for and against the application for summary judgement. These show that upon failure to pay the said sum on the due date of 30th October 2003 for the reasons given, the parties through counsels embarked on urging their clients' case through correspondences which qualifies to be termed negotiations with a view to resolving the matter out of

court. There is no dispute that parties were negotiating at pairt with each other. There is no mention that one party was in a more advantageous position than the other. There was room open for the plaintiffs to issue a demand notice immediately and upon failure to meet the demand by the given date, then plaintiffs move to court, to enforce their rights. By reason of them taking that long to negotiate, and then coming to court, at the point in time they came to court, it will be unfair to punish the defendant alone and rule that they are entirely to blame for the delay and are therefore to pay interest for the entire period.

To be considered along side the above reasoning, is the fact that, indeed the plaintiffs had made sacrifices, namely, the forgoing of the remainder of their working life and earnings. However it is on record that this has been compensated for by the court awarding them the amount forming the early retirement packages, they had been promised, and which they had accepted. For this reason, the court, is of the considered opinion that the two negotiating parties who were negotiating at par should share the negotiation period on a 50-50 basis.

As mentioned the period involved before filing suit for which interest is claimed is 3 years 7 months, converted into months it comes o 36 months representing three years plus 7 months, comes to 43 months shared equally between the two negotiating parties would give each a benefit of 21 ½ months.

Justice to both parties would therefore demand that the court proceeds to review its order on interest in its ruling of 25/4/2008, set aside, the blanket order on interest made therein, and then substitute the same with the following order on interest for the reasons given in the assessment.

1. The interest on the judgement from the date of filing to the date of payment in full of the decretal sum inclusive of taxed costs is allowed to stand.

2. On the other hand the interest claimed from the date of the cause of action namely 30th October to the date of filing of the suit a period of 3 years and 7 months has been translated into 43 months. The plaintiff is allowed interest for 21 ½ months out of the 43 months.

3. There will be no order as to costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2009.

R.N. NAMBUYE

JUDGE