



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Appli. 222 of 2005**

**ARTHUR KINUTHIA ALBERT.....APPLICANT**

**Versus**

**THE PERMANENT SECRETARY MINISTRY OF HEALTH.....RESPONDENT**

**JUDGMENT**

The ex parte Applicant Arthur Kinuthia Albert filed the Notice of Motion dated 29<sup>th</sup> November 2008 seeking an order of mandamus against the Permanent Secretary Ministry of Health. The order sought is to compel the Respondent to pay to the Applicant a sum of Kshs.1,198,793 being the decretal sum, costs, and interest awarded by the court in CMCC No., 773/03.

Counsel for the Applicant Ms Wambugu relied on the statement filed in court on 3<sup>rd</sup> May 2005 and skeleton arguments filed in court on 16<sup>th</sup> May 2005. I have seen an undated verifying affidavit of Wanja Wambugu filed in court on 22<sup>nd</sup> February 2005 in which she depones that the ex parte Applicant filed MCCC 773/03 at Milimani Court and judgment was entered on 26<sup>th</sup> July 2004 for Kshs.1,095,408/= There were demands made for payment (annexture AKA 3). The extracted decree (WGW 1) indicates that the decretal sum attracted an interest of 12%. The principal sum was paid in September 2006 and it is the Applicants submission that they are entitled to be paid interest of Kshs.252,598/= from the date of judgment to the date of payment and costs.

The Notice of Motion was opposed and Mr. Alan Otieno Meso swore a replying affidavit on 21<sup>st</sup> May 2007 in which he depones that on 26<sup>th</sup> July 2004, judgment was entered in CMCC 773/03 for Kshs.943,620. Counsel exhibited a copy of the judgment AOM1. That in the said judgment, there was no provision for interest on the decretal sum. The applicant obtained a decree on 9<sup>th</sup> December 2004 certifying the costs to be Kshs.87,005 (WGW 1). That on 2<sup>nd</sup> February 2005 the Applicant served the Respondent with a certificate of order demanding Kshs.1,095, 2008 (AOM 2) and the same was defective in that interest was applied to the decretal sum. The defective certificate of order was furnished to the Respondent. This application was filed on September 2006 for Kshs.1,095,408. The Respondent paid the said sum to the Applicant vide a cheque AOM 4. According to Mr. Meso the prayer for interest cannot issue.

The Respondents did not raise objection that the Applicants Counsel relied on a statement that was

not filed along with the Notice of Motion which offends Order 53 R 4(1) Civil Procedure Rules. The affidavit(s) and statement to be relied upon in arguing the Notice of Motion are those filed with the Chamber Summons application that seeks leave.

The above notwithstanding, I have considered the submission of counsel on the Notice of Motion and the authorities that have been relied upon. Counsel for the Applicant relied on the following cases (1) **798/03 THARA TRADING LTD V NK BROTHERS LTD**. HCC 798/06, in which Justice Waweru held that there is no reason to withhold interest from the Plaintiff, judgment having been entered in the Plaintiff's favour.

(2) **HC 1140/00 MANCHESTER OUTFITTERS LTD V KENGEN CO. LTD**, where Justice Mutungi found that there had been a claim for interest in the plaint and the same would not be denied of the plaintiff.

(3) Halsbury Laws of England 4<sup>th</sup> Edition paragraph 553 page 276 where it is said that every judgment debt including a debt due carries an interest rate of 10% P.A. from the time of entry of judgment until the debt is satisfied.

On the other hand the Respondent relied on the court's decision in **29/01 REP V SIMON QUIGGRERY OGILA** where the decree did not comply with the ruling of the court and the decree contained figures which were not granted in the judgment. The court allowed the application since the Applicant had not applied for a certificate of order.

Under Section 26 Civil Procedure Act, the court has discretion to award interest at such rate as it deems reasonable. Such an order can only be made by the court if the judgment of the court provides for payment interest. Under S. 26(2), where the decree is silent on the rate of interest then the court rates apply. In my view even for the court to direct that court rates apply, the judgment must have allowed for payment of interest.

I have seen the judgment of the Chief Magistrate's Court CMCC 773/03 from which these proceedings emanated. The judgment does not provide for payment of interest. However, the decree drawn includes interest at 12% per annum. This court has no idea whether interest had been prayed for in the plaint because none was exhibited. In **MANCHESTER OUTFITTERS CASE (supra)** the plaintiffs had in their plaint sought interest and the judge based his decision on the fact that there had been a clear intention that interest should be paid, in **THARA TRADING LTD**. the Court was not clear whether the interest had been sought in the plaint. The Applicant neither exhibited the plaint nor had Counsel exhibited the judgment of the lower court and until the Respondent to do so. The question I pose is whether it is this court to determine what sum is payable in terms of interest. Judicial Review merely deals with the decision making process but not the merits of a decision. In my view, the applicant's Counsel is calling upon this court to determine whether or not interest was payable to them and I am of the view that that is not the purview of this court's jurisdiction.

The figure of interest included in the decree is foreign to the judgment in CMCC 773/03. Interest may vary according to what the Plaintiff has pleaded in the plaint. It is outside this court's jurisdiction to assume and to determine whether or not interest was payable or how much is payable. Since the court in CMCC 773/03 had not specifically ordered for payment of interest it was upon the Applicant to move the court which gave the judgment for a review of its orders on account of there being an error on the face of the record.

This court's jurisdiction is limited to compelling the Respondent to pay based on the judgment, decree and certificate of order but it is not to determine what is due to the Applicant and this court would decline to grant the order prayed. Even a reading of the prayer in the Notice of Motion is contrary to the order of the court in CMCC 773/03. The Applicant seeks the compelling of the Permanent Secretary to pay Kshs.1,198,733 being the decretal sum, costs and interest awarded by the court in 773/03. No interest was awarded by that court and so this court cannot compel the payment of what was not awarded.

As regards costs, since the decretal sum was paid after the matter was filed. Costs follow the event unless otherwise directed by the court The Respondent should pay the costs of this application since the Respondent conceded the applicant's claim.

In the circumstances the outstanding issue in this case is only costs and the Applicant will have costs of the Notice of Motion. Prayer on interest dismissed.

Dated and delivered this 24<sup>th</sup> day of June 2008.

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of:

Mr. Meso for the Respondent

Kinyua: Court Clerk