REPUBLIC OF KENYA

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

Civil Case 713 of 1998

PANTHION LIMITED…….……...……..PLAINTIFF

VERSUS

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION……..…DEFENDANT

R U L I N G

This is a Notice of Motion application dated 27th June 2008. It is brought under **Order XLIV rule 1 and 2** and **6, Order L Rule 1** of the **Civil Procedure Rules Cap 21** seeking the following orders:

1. THAT this Honourable Court be pleased to review the judgment and/or decree issued on 13th June, 2008.

2. THAT the costs of this application be provided for.

The application is based on three grounds which are on the face of the application as follows:

1. THAT there is an omission in the judgment to address the issue of interest from the date of filing the suit.

2. THAT it is just that the judgment delivered herein be reviewed.

3. THAT the Application for review is meritorious.

The application is opposed. The Respondent has filed a replying affidavit sworn by the Company Secretary of the Defendant Company. The affidavit dwells on matters of law which are also raised by the Advocate for the Respondent in his submissions. I have considered the contents of the affidavit.

Mrs. Macharia who argued the application on behalf of the Applicant submitted that there was an error or omission in the judgment of Hon. Warsame, J. in which he entered judgment for the Plaintiff in the sum of Kshs.10,698,844/-, with interest from the date of judgment until payment in full. Mrs. Macharia submitted that the Hon. Judge failed to address himself to the issue of interest from the date of filing suit to the date of judgment. For this preposition, counsel invoked **section 26** of the **Civil Procedure Act** where, Mrs. Macharia submitted that interest was provided for from the date of filing suit to the date of the decree. Counsel has urged the court to look at the plaint, which is annexed to the application, to confirm that it was a liquidated claim. She also relied on the case of **Mohamed s/o Mohammed vs. Athuman Shamte [1960] EA 1062,** holding 2 of that judgment where Mosdell, J. held as follows:

"***When the rate of interest exceeds 48 per cent, per annum, the court may assume, unless the contrary is proved; that the interest is excessive, and counsel for the appellant appeared to have assumed in the lower court that the burden of proving that 84 per cent per annum was not a harsh and unconscionable rate of interest was his but did not discharge it."***

Mrs. Macharia also relied on the case of **Silas Obengele v. Kenya Ports Authority [2004] eKLR**. Counsel did not rely on any particular part of this judgment but I have read the whole of the judgment of my sister Hon. Judge Khaminwa and I will get back to it later on in this ruling.

Mrs. Macharia also relied on the case of **Official Receiver and Provisional Liquidation Nyayo Bus Service Corporation vs. Firestone E.A. [1969] Ltd. CA No. 172 of 1998**. Counsel did not quote any part of this judgment. I have however read this judgment and find that it gives the general principles that should be had in mind by a court deciding an application for review of either a judgment, ruling or an order of the court. In that case the Court of Appeal observed:

"***The learned judge said that the incorrect exposition of the law is no ground for review. As a general rule, that is a correct statement. But the issue before the learned judge was not that of an incorrect exposition of the law. It was that of a void execution. Section 80 of the Civil Procedure Act enables a court to make such orders on a review application which it thinks just so that the words "or for any sufficient reason" as used in Order 44 rule 1 of the Civil Procedure rules are not ejesdem generis with the words "discovery of new and important matter" etc and "some mistake or error apparent on the face of the record." Those words extend the scope of review."***

I am well guided by these principles in my consideration of the instant application.

Mr. Mwendwa for the Respondent opposed the application. Counsel relied on the replying affidavit of Grace Magunga dated 23rd July, 2008. Mr. Mwendwa submitted that the Applicant has to show three things in order to obtain the orders for review. First, that they are entitled to the review; secondly, that the judge abused his discretion when he awarded interest from the date of judgment to the date of payment. Counsel relied on section 26 of the Civil Procedure Act and cited two cases to enhance his argument. The two cases show the test for an error or mistake on the record, and the use of the court's exercise of discretion to review. The first one is **Sansora Wire & Nail Works Ltd. v Shreeji Enterprises Kenya Ltd [2005] eKLR** where Hon. Ochieng', J., after setting out section 26 (1) of the Civil Procedure Act observed as follows:

"***From the foregoing wording, it is evident that the court has a discretion to order for the payment of interest at such rate as it deems reasonable. The said discretion of the court enables it to order that interest be payable: -***

(a) from a date before the institution of the suit, and

(b) from the date of the suit, and

(c) from the date of the decree

The interest that is ordered to be paid, may be directed to be payable either to the date of payment or until such earlier date as the court thinks fit."

The second one is **Ndungu Njau vs. National Bank of Kenya [2008] eKLR** where the Court of Appeal observed in part as follows:

"***Neither in that application, its grounds or supporting affidavit nor in this appeal before us was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of the exercise of due diligence which requires strict proof – see*** *Kimita vs. Wakibiru [1985] KLR 317* ***at page 321.***

Nor was there any submission before this court about any mistake or error apparent on the face of the record to warrant an order of review which was sought before the learned commissioner of Assize. As was put by this Court in *Civil Appl. No. 211 of 1996* ***arising from an application in the case subject to this appeal:-***

"*The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established."*

The third thing Mr. Mwendwa argued was that the Applicant must show that the Judge exercised his discretion unjudiciously. Mr. Mwendwa urged that for the purposes of review, the Plaintiff must show a discovery of a new or important evidence or an error apparent on the face of the record. Mr. Mwendwa submitted that no sufficient reason has been shown to warrant a review as sought by the Applicant. Mr. Mwendwa distinguished **Mohamed vs. Shamte,** supra, cited by the Applicant on the ground that the said case was not for a review, but was an appeal from an order of the trial magistrate for allowing interest at the rate of 6% instead of the contractual interest rate of 84%. On Mr. Mwendwa's observation on the case of **Mohamed,** supra, I agree with counsel that the cited case was an appeal to the decision of the subordinate court and not a review. The principles applicable in an appeal are totally different from those applicable to an application for review.

I have considered submissions by both counsel. The facts are not in dispute. Hon. Warsame, J. heard part of the case and wrote a judgment in which he awarded the Plaintiff judgment for part of its claim with costs and interest at court rate from the date of judgment until payment in full. The Applicant in this case has come to court for a review of that order on the grounds that the learned judge, in error or omission failed, to address himself to the issue of interest from the period when the suit was filed to the period that the judgment was entered. **Section 26 (1)** of the **Civil Procedure Act** stipulates as follows:

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 or to such earlier date as the court thinks fit."

Going back to the case cited by Mrs. Macharia, **Silas Obengele vs. Kenya Ports Authority,** supra, Hon. Khaminwa, J. in a well argued matter reviewed several local cases and came to the conclusion that payment of interest is a matter of the discretion of the court. Hon. Khaminwa, J. quoted from the decision of Ringera, J. (as he then was) in **Milimani HCCC 83 of 1998 KPA vs. Kobil (K) Ltd**. where the learned judge said:

"***However it is within the discretion of the court to award interest on the decree for the payment of money from the date of the suit until payment in full. In the circumstance of this case where it is clear that the plaintiff has been kept out of funds it would otherwise have had use of, I think it would be right to exercise that discretion in favour of the Plaintiff."***

I am persuaded by the decision of both Hon. Khaminwa, J. and Hon. Ringera, J. (as he then was) that the question of the award of interest on a decree is a matter within the discretion of the court. What I glean from the decisions of my brother and sister judges in the above cases, is that this discretion must be exercised upon consideration of the relevant facts and circumstance of the case. In **Obengele, supra**, Hon. Khaminwa, J. awarded interest to the Plaintiff from the month from which in her view, the Plaintiff was kept out of his money, as the proper time to start the calculations of interest in his favour.

Considering **section 26(1)** of the **Civil Procedure Act,** the tenure of the section in my view recognizes that the court can exercise its discretion and grant interest from three levels, as my brother Hon. Ochieng', J. recognized in his ruling in the case cited by Mr. Mwendwa, **Sansora Wire & Nail Works Ltd**, supra. The said discretion is that the section enables the court to order interest payable:

(d) from a date before the institution of the suit and,

(e) from the date of the suit, and

(f) from the date of the decree.

I would vary Hon. Ochieng', J. view a little bit by saying that the court has the discretion to order interest from any of the three levels above or from either combination of these three levels (a) (b) or (c) above. For instance, court can order interest from a period before the suit was filed up to the time the suit was filed. That exercise of discretion should however not be exercised in a vacuum. It must be exercised judiciously. The court must also consider the special circumstances of the case in order to determine from which of the three levels it should order interest. The court in exercise of its discretion could for instance order interest from the date the Defendant was given notice to pay the debt or to do an act forming the subject matter of the case.

I have had occasion to peruse the judgment of Hon. Warsame, J. which is the subject of review. It is quite clear from this judgment that the learned Judge made very specific findings to the effect that the Plaintiff was owed certain sums of money which sums were acknowledged to the Plaintiff by the Executive Director of the Defendant, by a letter dated 4th September, 1997 and which were admitted by the Defendant in a letter that was exhibited in court before the judge dated 4th September, 1999. The Hon. Judge specifically found that the Plaintiff supplied consideration, by vacating the premises, the subject matter of the consideration, after a consent was entered between the parties on 10th November, 1994. The consent was arrived at in 1994, while the letter of offer by the Defendant to the Plaintiff was dated 4th September, 1997 and an admission by the Defendant to the Plaintiff was made in 1999. The suit was itself filed in 1998. I will quote excerpts of the learned Judge's judgment to demonstrate where I am coming from.

"***And after several meetings and negotiations the defendant's Executive Director gave an offer to the Plaintiff to settle the claim at Kshs.10,698,844/- in a letter dated 4th September, 1997.***

My answer is that from the evidence on record before this court and from the documents produced by the parties, it is clear in my mind that there is a clear and uncontroverted evidence against the defendant, that it is liable for the sums admitted in the letter dated 4th September, 1999. The said sum was arrived at, after disallowing all repairs as agreed in a meeting held on 19th August, 1997 between the representatives of the plaintiff and the defendant…

The Plaintiff has indeed shown that the defendant was all along involved in the issues subject and forming its claim. The plaintiff supplied consideration by vacating the premises after the consent order of 10th November, 1994…

It is clear that after a protracted negotiation, the parties agreed to compromise the dispute for the sum of Kshs.10,698,844/- which was made by the defendant and accepted by the plaintiff…

It is therefore my decision that the claim of the plaintiff has been proved based on the accounts carried out by the parties and the evidence tendered by the parties to the satisfaction of this court."

For the purposes of the instant application, I do find that the Plaintiff was kept from its money from a period between 1994, when a consent order was entered into by the parties and 1997 when the Defendant wrote a letter admitting indebtedness to the Plaintiff. Going by the learned judge's judgment, it is very clear that the Hon. Judge intended to give the plaintiff interest for the money that was kept from him prior to the parties coming to court. I am so persuaded, considering the tenure of the judgment of the learned judge, including the few excerpts which I have quoted in the body of this ruling. The learned Judge made very specific findings that the Defendant had admitted its indebtedness to the Plaintiff long before this suit was filed in court and, as the learned judge observed, he did not think that a party should be allowed to benefit from its own wrong doing. This is so especially where the said party was actively involved in

negotiations aimed at arriving at a mutual and consensual figure of the amount owed. The situation was worsened by the fact that even after a mutual and consensual amount was arrived at bet, the Defendant was still unwilling to settle the debt necessitating the filing of the suit.

Having considered this application and all the relevant proceedings together with the annexed judgment, I am satisfied that there is an error apparent on the face of the record. The Hon. Judge, by some error or mistake, omitted to order interest on the sum entered in the judgment from the date of filing of the suit in addition to interest ordered from the date of judgment until payment in full. This court has the power under **Order XLIV rule 1** and **2** of the **Civil Procedure Rules**, in exercise of its discretion to review the judgment to order interest omitted to be ordered in the judgment. I am satisfied that the Applicant is entitled to an order in review as applied for in this application. I am satisfied, as I have stated in this ruling, that the learned judge had the intention to award interest from the date of filing of the suit, going by the tenure of his judgment which is on record. I do not agree with Mr. Mwendwa that the Applicant needed to prove, or that this court needed to find, that the Judge had misused or abused his discretion when he awarded interest as he did in this case, for a review to be allowed. It was sufficient for the court to be satisfied that the learned judge by some error or mistake, omitted to order interest fitting to the case, going by the unique circumstances and facts of the case.

Having come to this conclusion, I will allow the notice of motion application dated 27th June, 2008 by reviewing the judgment of this court dated 13th, June, 2008 and consequential decree in the following terms:

(a) That interest be and is hereby ordered for the Plaintiff against the Defendant on the sum of Kshs.10,698,844/- from the date of filing of this suit until the date of judgment i.e. 13th June, 2008.

(b) That the order in (a) shall be in addition to and not in substitution of the interest ordered by Hon. Warsame, J. herein in the judgment dated the 13th June, 2008.

(c) The Plaintiff will get the costs of this application.

Dated at Nairobi this 26th day of September, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Nyambate holding brief for Mrs. Macharia for the Applicant

Mr. Mwende holding brief for Mr. Mwendwa for the Respondent

LESIIT, J.

JUDGE