REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 860 of 2005

REPUBLIC ……. PLAINTIFF

V E R S U S

THE PERMANENT SECRETARY

IN THE OFFICE OF THE PRESEIDENT…..DEFENDANT

EXPARTE: MOSES KHAEMBA WASIKE

R U L I N G

By a Notice of Motion dated and filed on 14-9-2006, the Respondent herein sought three orders namely:-

(1) The Court do vacate and discharge its Ex parte orders issued on 25th July, 2005 and other subsequent orders.

(2) The decree issued in Nairobi H.C.C.C. No. 2993 of 1995 be re-drawn to accord with the judgement of Justice Aluoch delivered on 18th March, 2004.

(3) The costs of the application be costs in the cause.

The Motion was based upon the grounds set out on the face of the Application, and the Affidavit of Waigi Kamau learned Litigation Counsel, attached to the office of the Attorney-General and acting for the Respondent; the Permanent Secretary, Office of the President.

The motion of 14th September, 2006 was heard before me on 27-09-2006, when the ex parte Applicant was represented by Mr. Rumba Kinuthia and Mr. Waigi Kamau represented the Respondent. At the end of the hearing, I reserved my Ruling to 18th October, 2006.

However, before I got down to writing my Ruling, the Ex Parte Applicant's Counsel, Mr. Rumba Kinuthia filed an Amended Notice of Motion dated 2nd October, 2006 in which he sought leave of court to adduce further evidence, on the grounds that he had found a previously unseen communication regarding the matter at hand to the effect that the Respondent's Notice of Motion of 14-09-2006 was a gross abuse of the Court process, and that in view of the (previously unseen communication it was necessary to expose a web of corruption and extortion which led to the filing of the Respondent's said Notice of Motion.

When I first saw the Amended Notice of Motion by the ex parte Applicant's Counsel, I directed that it be served upon the Attorney General's office, and be heard before my Ruling on the Respondent's Motion of 14-09-2006. On 6th October, 2006, I made an order admitting the ex parte Applicant's Notice of Motion of 2nd October, 2006, and granted leave to the Respondent's Counsel to file a Replying Affidavit to the Amended Notice of Motion with corresponding leave to Mr. Rumba Kinuthia, the ex parte Applicant's Counsel to file a Further Affidavit in reply and fixed the matter for hearing on 17-10-2006.

On 3-11-2006, Miss Munene held brief for Mr. Rumba Kinuthias, and the matter did not proceed, and it was further fixed for hearing on 29-11-2006, against Miss Munene held brief for Mr. Rumba Kinuthia who was unwell. The matter was for that reasons taken out, and was fixed for hearing on 1-02-2007.

On 1-02-2007, Mr. Rumba Kinuthia was before Visram J. in H.C.C.C. No. 35 of 2007, and Miss Chelagat who was holding his brief took another hearing date of 1st March, 2007. However, the matter did not proceed to hearing on 1-0-3-2007 due to the hearing of a two-judge matter and it was fixed for mention on 8-03-2007, when the hearing date of 22-03-2007 was given.

This Ruling is therefore about the Amended Motion by the Ex parte Applicant, Moses Khaemba Wasike, as well the said ex parte's principal motion of 14th September, 2006, which was heard on 27th September, 2006, and whose Ruling was set for 18th October, 2006, except for the leave to adduce further evidence on Affidavit.

Commencing firstly with the Amended Notice of Motion and the Supporting Affidavit of Rumba Kinuthia sworn and filed on 27th September, 2006, and the grounds following-

(1) that previously unseen communication regarding the matter at hand conclusively shows that the said application of 14th September, 2006 is a gross abuse of the court process.

(2) that in view of the said communication, it has now become necessary to expose a web of corruption and extortion which led to filing of the said application;

(3) that the cheque copy annexed as** "WK 10" **in the application in question was not prepared as a gesture of so-called goodwill as alleged, but as actual payment, and the original thereof was actually delivered at the offices of the Attorney-General from where it was hurriedly recalled and a demand for Kshs. 200,000/= bribe was made for its release."

To this Application and the Affidavit of Rumba Kinuthia was filed on 12-10-2006, a Replying Affidavit sworn on the same day by Waigi Kamau also an Advocate of the High Court of Kenya also a State Counsel in the office of the Attorney--General. Said Counsel categorically denies receipt of the settlement cheque, or that it was recalled from the Office of the Attorney-General for the purpose of demanding a bribe, and deprecated the accusation against an officer who was not a party to the proceedings. Counsel also noted on oath *(paragraph 7)* that the source of the allegedly new information was not disclosed as a reference to an unanimous junior officer, is not disclosure of source as required, by order XVIII, rule 4 of the Civil Procedure Rules and should be expunged from the record.

Counsel further explained on Oath the background to his application of 14th September, 2006, that the same was prompted by off record remarks by my Senior Sister Judge Rawal that the decree in H.C.C.C. No. 2993 of 2005 could only be rectified by a formal application to the Court. In essence Counsel concluded on oath there was no new evidence to contradict the application of 14th September, 2006 and urged to dismiss the new application with so-called new evidence, and render a Ruling on the Application of 14th September, 2006.

The junior officer from the Office of the President was identified as Mr. Kimani and who allegedly scribbled a note for a bribe of Kshs.200,000/= to himself probably for processing the Applicant's cheque

for Kshs.740,000/=. He was identified by the Further Replying Affidavit of Rumba Kinuthia sworn and filed on 31st October, 2006. This revelation prompted Mr. Charles Kimani to swear on 27th October, 2006 a Replying Affidavit which was filed on the same day.

Charles Kimani, the officer concerned, states on Oath that-

(1) though Mr. Rumba Kinuthia is known to him, he last met him in the month of April/May 2006 on a completely different mission, making the allegation in paragraph 9 of the Affidavit of Rumba Kinuthia completely false,

(2) he never called Mr. Waigi Kamau Counsel dealing with this matter, on 13th/14th September, 0r any other date in the presence of Mr. Rumba Kinuthia,

(3) the ex parte Applicant Moses Khaemba Wasike has been a frequent visitor to the offices of Charles Kimani, and had learned with surprise that his claim had been settled way back in 2004 in full and final settlement,

(4) that he had instructed the Attorney-General per letter of 9th August, 2005 to vacate the ex parte orders granting the Applicant leave, and that it is not correct to maintain that the decision to apply to vacate the orders was made on 14th September, 2006,

(5) he had noted with concern the manner in which Mr. Kinuthia had extracted a decree at variance with the judgement of Justice Aluoch in H.C.C. No. 2993 of 1995 and had instructed the Attorney-General to pursue that claim on their behalf,

(6) on advice from his Counsel, and belief, the only issue before the court is from when does interest in general damages claim start to run especially when the judgment of the court is silent?

Before determining that basic issue, the question to determine in relation to the Amended Motion filed by Mr. Rumba Kinuthia is whether there is evidence, even if it was new which would compel the Court to deny the Respondents the orders sought in their motion dated and filed on 14th September, 2006.

In essence, the application of 14th September 2006 has absolutely nothing to do with the orders sought by the Applicant. The issue of bribery alleged or otherwise does not feature in the said Application. What features and is in issue in that application is whether the decree, the subject of the leave granted by this Court on 25-07-2005 to bring judicial review proceedings, was in accord with the judgement which gave rise to it. To my mind the allegations of corruption are really a side show, and in any event, such allegations are incapable of adjudication by this Court as it is not vested with any investigatory powers into such allegations. If indeed there were calls for bribery before the release of the settlement cheque as is alleged by Rumba Kinuthia the ex parte Applicant's Counsel, or that the cheque was recalled by Charles Kimani from the Office of the Attorney-General in furtherance of such bribery, then the proper action to take was to report the matter either to the Criminal Investigation Department of the Kenya Police (C.I.D.), or now directly to the Kenya Anti-Corruption Commission (KACC) for investigation and further appropriate action including prosecution of the persons concerned if evidence was found to support such claims.

I am therefore unable to say that there was new or credible evidence of the alleged corruption, and I therefore dismiss the ex applicant's Amended Notice of Motion dated and filed on 27th October, 2006.

Having disposed of that Application, I now turn to the Respondent's application of 14th September, 2006 in which the Respondent sought two principal prayers and one subsidiary prayer namely-

(1) ***that the Court do vacate and discharge the ex-parte orders issued on 25th July, 2005 and other subsequent orders,***

(2) that the decree issued in Nairobi H.C.C.C. No. 2993 of 1995 be re-drawn to accord with the judgment of Justice Aluoch delivered on 18-03-2004.

(3) that costs of the application be in the cause.

The application was supported by the Affidavit of Waigi Kamau, a State Counsel in the Attorney-General's Chambers sworn on 14-09-2006, and the grounds on the face of the Application.

Although the application was opposed by the Counsel for the Ex parte Applicant, on grounds ***inter alia*** that the application was for review of the judgement disguised as an application to set aside the ex parte orders, I am satisfied that the Application by the Respondent is not a review of the judgement by Hon. Lady Justice Aluoch delivered on 18th March, 2004. I am also satisfied that the sole issue raised by the application is whether the decree drawn and attached to the Supporting Affidavit of the ex Parte Applicant sworn on 7th November, 2005 and filed with the ex parte Chamber Summons of the same date, on 7th November, 2005 is not in conformity with the judgement of the court in H.C.C.C. No. 2993 of 1995.

When this matter was urged before on 19-09-2006, the issue for determination was whether the decree issued on 13th April, 2004 was in accord with the judgement of Hon. Lady Justice Aluoch.

It was Mr. Rumba Kinuthia's argument that once the decree has been drawn it is not challengeable. After all it is drawn by the Court, that a Deputy Registrar of this Court who is presumed to have read the judgement. The Respondent should not be allowed to riggle away from liability to pay the Applicant the fruits of its judgment. The first issue is what was the judgement, put differently, what did the judgement provide on one critical matter, interest. Perhaps before answering it is necessary to restate what a decree of court means.

Under the Civil Procedure Act, (***Cap 21, laws of Kenya***), a '***decree***' means-

"***the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a plaint and the determination of any question within 34 or Section 91, but does not include-***

(a) any question from which an appeal lies as an appeal from an order, or

(b) *any order of dismissal for default*.

PROVIDED ***that, for purposes of appeal "decree" includes judgement; and a judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgement may not have been drawn up or many not be capable of being drawn up;***

Explanation:- **A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."**

Section 34 (1) provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Section 91 (1) provides that where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such decree restitution to be made as well, so far as my be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed and for this purpose the court may make orders, including orders for the refund of costs and for payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

Whether final or preliminary, a decree completely disposes of the issue determined. The decree in this matter is a final decree. It arises out of the final judgment of the Court in H.C.C.C. 2993 of 1995, between the ex parte Applicant, and the Attorney-General representing the Respondent. The judgement itself arose out of the said suit in which three plaints were filed. The first two plaints are both dated 2nd October, 1995, and one was filed on 4th October, 1995 (***according to the Court stamp***), the other on a date which from the unclear court stamp, appears to be 25th October, 1995, and both claimed general damages and costs for the illegal and unlawful detention for 45 days of the Plaintiff (Applicant) in Naivasha Maximum Prison.

The third Plaint, called Amended Plaint was filed on 30th October 1995 and claimed-

(a) general damages on the same grounds of illegal and unlawful detention at Naivasha Maximum Prison for 45 days.

(b) Costs of this suit plus interest from the date of filing suit.

The Court after granting the declaration that the Applicant's (Plaintiff's) confinement for 45 days at Naivasha Maximum Prison (***Detention Block***) was wrongful, illegal, unlawful and unconstitutional, as prayed in prayer (1) of the Plaint dated 2nd October, 1995 awarded the Plaintiff the sum of kshs.700,000/= as general-damages, plus the sum of Kshs.7,000/= (comprising Kshs.2000/= for doctor's report, and Kshs.5,000= for court attendances) thus making a general total of Kshs.7,000/=.

Rumba Kinuthia, learned Counsel for the Plaintiff (Applicant) filed and referred to a host of decided cases, including (1) ***Nzau -Vs- Mbuni Transport Co. Ltd. (1990) L.L.R. 173*** (the rationale of the without prejudice doctrine, is to encourage parties to engage in pre-trial and out of court settlements, without fear that admissions of certain facts would be used against them to their prejudice, and that the effect of Section 23 of the Evidence Act (***Cap 80***) is to place a party who entered into pre-trial registrations at liberty to resile before judgement is entered (2) ***Brooke Bond Liebig (T) Ltd –vs- Mallya [1957]*** 266 (that a consent judgement may not be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement following ***Hirani -Vs- Kasman [1952) E.A.C.A. 131) (3) Diamond Trust Bank of Kenya Ltd. Vs. Ply & Panels Ltd. & Others*** (reiterating the circumstances in which a consent judgement may be set aside).

These authorities are of course correct in their respective contexts. They however have no application to a decree which has not only been drawn in accordance with the consent order, but is the subject of a considered judgement after evidence by the Plaintiff in proof of his claim. The decree can only be drawn in terms of that judgement, after all, it is the formal expression of that judgement. A judgement entered by agreement of the parties would constitute it into a consent decree for the decree must reflect not the spirit but the letter of the judgement. The issue therefore is not the consent decree or that the parties had engaged in pre-trial discussions or negotiations before the decree was drawn, but that the decree must reflect the letter of the judgement and the relevant law.

The law regarding payment of interest is set out in Section 26 (1) of the Civil Procedure Act (Cap 21, Laws of Kenya), and it is that where it is provided that 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 for any period, before the institution of 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 judgement or to such earlier date as the court thinks fit.

The judgement here was not for the payment of money. In a decree for payment of money, the court may order payment of interest from the date of filing suit to the date of judgement in addition to any interest on such principal sum for any period before the institution of suit, and 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.

On the other hand, a judgement awarding damages, and a subsequent decree is not a decree for payment of money. It does not attract interest from the date prior to or the date of the suit. The reason is simple, there is no sum upon which such interest would lie or accrue from the date prior to, or the institution of the suit. A Plaintiff in a suit claiming general damages has no vested right in any sum of money or damages. It is a claim at large. The claim is only vindicated and crystallised upon a judgement awarding such damages. The right to damages is conferred by the judgement. It takes effect from the date of the judgement, not from the date of filing suit. There is no basis for doing so. It is not a suit for payment of money. The computation of interest on damages from the date of suit is not merely wrong but contrary to Section 26 (1) of the Civil Procedure Act, and therefore illegal.

In the premises the decree drawn and issued by the Deputy Registrar on 7th April, 2004 is not merely contrary to the judgement, but is also contrary to the provisions of Section 26 of the Civil Procedure Act; and cannot therefore stand for this, and other reasons on the face of the Amended Plaint of 30th October, 1995, and the judgment.

On face of the Amended Plaint the prayer is for costs of this suit ***plus interest from the date of filing suit.*** There is no prayer for interest in respect of general damages awarded. The judgement is for Kshs.7000/= being special damages, plus Kshs.700,000/= general damages, and technically, according to that prayer, interest is only payable on the costs. That would be both unfair to the long-suffering Applicant, apart from being an absurd construction. The proper construction of the judgment in law would be that interest would be payable on damages awarded from the date of judgement until payment in full.

In the case of ***HIGHWAY FURNITURE MART LTD. –VS- PERMANENT SECRETARY, OFFICE OF THE PRESIDENT & ATTORNEY-GENERAL*** (Civil Appeal No. 52 of 2005), the Court of Appeal observed at page 14 as follows:-

"***By order XX Rule 6 (1) the decree should agree with the judgement and by Order XX Rule 7, in case of dispute the decree is settled by a judge before it is issued by the Court. A decree which is not in conformity with the judgement is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the Court. The Court would however, be*** *functus officio* ***if the decree conforms with the judgment……."***

And again….

"***The superior court had a duty to see that the appellant only recovered what it was entitled to under the judgement and had jurisdiction to set aside the decree which was a nullity*** *ex debito justitiae*, ***moreover the superior court had inherent jurisdiction to prevent the appellant from unjustly enriching itself at the great expense of the respondent and from public funds."***

That being the state of the law and the authorities, what is the position here?. It is this. The Plaintiff (Applicant) obtained judgement in the sum of Kshs.700,000/= in general damages, and Ksh.7,000/= - in special damages as outlined above, plus costs, and interest, not merely on costs but on that sum of aggregate sum of Kshs.707,000/=. Costs were taxed at Kshs.60,215/= and if interest calculated at Court rates which amounted to Kshs.28,000/= of the sum of Kshs.707,000/= taxed costs of Kshs.60,215/= is deducted from the payment cheque for Kshs.795,215, made on 30-04-2004, the total arithmetic would work as follows-

Judgment Sum

(1) Special damages – **Kshs.**7,000/=

(2) General damages - 700,000/=

Sub total - Kshs.707,000/=

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(3) Interest at Court rates from 18-03-2004 to 31-10-2004

Kshs.28,000

Subtotal Kshs.735,000

(4) Add Taxed Costs Kshs.60,215

Kshs.**795,215**

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It is thus clear from the arithmetic, the judgement, the law and the authorities, that the purported decree issued on 7th April, 2004 is a nullity ***ex debito justitiae*** as no interest is due to the Plaintiff (Applicant) for the period of 4th October, 1995 to 18th March, 2004. This being so it is clear that the application for leave to commence judicial review proceedings for orders of mandamus, (dated 8th June, 2005) and the subsequent ex parte orders granting leave on 16th June, 2005 were made and granted without disclosure of one material bit of information namely that judgement was not for payment of a money-decree, but for general damages, and therefore no interest would lie from the date of filing suit. In the premises therefore interest would lie only from the date of judgement, and for which the Plaintiff/Applicant has been paid in full. No other sum is due from the Respondent. In the circumstances, the orders of mandamus granted on 22nd July, 2005 and issued on 25th July, 2005 are hereby set aside, discharged and vacated.

For the avoidance of doubt, the orders made on 23rd May, 2006, and issued on 22nd June, 2006 on running of interest, and those made on 24th June, 2006 for the committal of the Accounting Officer, Office of the President for disobeying the orders of mandamus, are hereby set aside, discharged and vacated.

I direct for the record that the decree issued in Nairobi H.C.C.C. 2993 of 1999 be re-drawn to accord with the judgement of Hon. Lady Justice Aluoch delivered on 18th March, 2004 and this Ruling.

I further note that the faults revealed in this application are not of those of the Plaintiff (Applicant) but rather of his Counsel. I therefore direct that each party to bear the costs occasioned by these applications and the proceedings herein.

There shall be orders accordingly.

Dated and delivered at Nairobi this 17th day of May, 2007.

M.J. ANYARA EMUKULE

JUDGE.