



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Suit 329 of 1997

CHARLES KIMANI NG'ANG'A..... PLAINTIFF/APPLICANT

-VERSUS

TELKOMKENYA LIMITED..... DEFENDANT/RESPONDENT

RULING

On 15th July, 2005 I delivered judgment in the main dispute herein. The judgment was based on the consent letter of the parties, dated 30th March, 2005 and addressed by their respective firms of advocates to the Deputy Registrar, and filed in Court on 8th April, 2005.

The consent between the parties was expressed as follows:

“(i) By consent the Court to determine the effective date of retirement of the plaintiff.

“(ii) That if the Court rules that the plaintiff retired on 25th November, 1993 then the benefits payable to the plaintiff is agreed to be Kshs.156,979/80 together with interest at Court rate from 25th November, 1993 till payment in full and the plaintiff to continue receiving a monthly pension of Kshs.788/95.

“(iii) That if the Court rules that the plaintiff retired on 30th April, 2003 then the benefits payable to the plaintiff is agreed to be Kshs.1,806,435/40 less all statutory deductions and the plaintiff to continue receiving the monthly pension of Kshs.5,150/=.

“(iv) That the defendant to pay costs of the suit.”

Beginning from the foundation of the consent agreement, I rendered the Court's decision as follows:

“In my judgment, the plaintiff did retire on 25th November, 1993 and the benefits payable to him will be the sum of Kshs.156,979/80 together with interest at Court rate from 25th November, 1993 till payment in full; and the plaintiff is to receive a monthly pension of Kshs.788/95 with effect from that date. The costs of the suit shall be borne by the defendant.”

Nearly two months later the plaintiff again moved the Court, by Notice of Motion dated 5th September, 2005 and filed on even date. The motion was brought under ss.3A, 26, 80 and 99 of the Civil Procedure Act (Cap. 21), and its substantive prayer was —

“THAT the judgment and decree of the Court given on 15th July, 2005 be amended so that interest

on the arrears of monthly pension is awarded at Court rate from 25th November, 1993 till payment in full.”

The application is premised on the grounds, firstly, that the consent filed by the parties herein on 8th April, 2005 is silent on whether the plaintiff is entitled to interest on arrears of monthly pension. It is stated that the defendant has, from 25th November, 1993 been investing on the plaintiff’s monthly arrears of pension together with interest. It is contended that the defendant, having agreed to pay the sum of Kshs.156,979/80 together with interest at Court rate from 25th November, 1993 till payment in full, should also agree to pay the monthly arrears of pension together with interest at Court rate from 25th November, 1993 until the monthly arrears are cleared, or brought up to-date.

Evidence in support of the plaintiff’s application is set out in the affidavit of the defendant, Charles Kimani Ng’ang’a, sworn and filed on 5th September, 2005. He avers that the consent letter of 30th March, 2005 upon which the judgment of 15th July, 2005 was based, had been silent on whether interest was payable on the monthly pension arrears. In like manner, the judgment was silent on whether the monthly pension arrears was to attract interest. This, it is averred, was an oversight, as the deponent has now been advised by his counsel on record which advice he believes to be true. The deponent avers that the said oversight was not intentional, and that he is “fully entitled to be awarded interest on monthly arrears at Court rate from 25th November, 1993 to-date.” It is deposed that the defendant has for more than 11 years and 9 months, invested on the deponent’s monthly pension, and it is only just and expedient that the Court rectifies the judgment and decree, to allow interest on the monthly pension arrears at Court rate, as from November, 1993 to-date.

To the plaintiff’s application, the defendant, on 27th September, 2005 filed its grounds of opposition dated 26th September, 2005. As grounds, it is asserted that the application is misconceived; is bad in law; is an abuse of Court process; is frivolous and vexatious; lacks merit; is fatally defective.

The two conflicting positions were canvassed before me on 13th October, 2005 when learned counsel, Mr. Kimani appeared for the plaintiff/applicant, while learned counsel Mrs. Mbabu appeared for the defendant/respondent.

Mr. Kimani presented the prayers in the application, and discussed the grounds upon which it rests. The question he placed before the Court was: do the monthly arrears attract interest? This line of submission, however, appeared somewhat constrained by the fact that, the fact of there being any arrears at all to be paid, was not obvious. It would have helped if the supporting affidavit had embodied the mode of calculation, and shown by evidence how there came to be the alleged arrears.

There was thus an inexplicable leap from demonstrating fact, to assertion of claim and reliance upon principle, when learned counsel contended: “The plaintiff is entitled to interest on monthly pension arrears at Court rates.” It was still more confounding, in the absence of perceptible fact, when counsel affirmed that the claimed monthly arrears had been invested by the respondent over a considerable period of time and that these stood in principle, to the credit of the applicant. The point was pressed to the level of attribution of unjust enrichment on the part of the defendant, even though the Court had not been placed, by evidence, in a position to appreciate the emergence of such possible inequity.

So when learned counsel cited s.26 of the Civil Procedure Act (Cap.21) as authority for interest being awarded by the Court in situations of silence in party consents, the factual condition for the application of the proposed law would have eluded the Court.

Still without the probative fact-base, learned counsel invoked as persuasive authority the High Court’s decision (Kasango, J.) in Sanam Investments Ltd. v. Pointex (K) Ltd & Two others, HCCC No. 442 of 2000. In that case, one of the prayers was “That the judgment and decree of the Court...be amended so that interest is awarded on the decretal sum at Court rate from the said date until payment in full.” Lady Justice Kasango applied the following principle:

“In regard to the issue of interest I am guided by section 26(2) of the Civil Procedure Act. It

states:

‘Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent annum.’

That section I believe, says it all; the judgment of Justice Onyango Otieno ... was silent on interest applicable to the decretal amount and, going by this section, the Court is deemed to have ordered interest at 6% per annum.”

Learned counsel urged that this Court do adopt the general path followed in the Saman Investments case in which Kasango, J awarded interest at the rate of 6% per annum, when faced with a judgment that was silent on interest. Counsel urged, however, that in the instant case Court rate be adopted, since this rate had been in reference in the consent between the parties.

Learned counsel, Mrs. Mbabu doubted whether the application had any merits at all, for invoking silence in the judgment of 15th July, 2005 when that was a consent judgment, and only one question had been left for resolution freely by the Court: determination of the effective date of retirement. Once that point was determined, counsel urged, the case had been concluded. Thus, if any change to the content of the judgment had to be considered, then the parties had to revisit their own consent. In the words of counsel, “the parties had left no room for the Court to award any interest, or to determine any interest rate...” Mrs. Mbabu saw it as rather strange that the plaintiff only sought variation of the judgment and not the consent, yet the submissions were seeking reliance on aspects of the consent to achieve a variation of the judgment.

My understanding was that counsel for the defendant would hold the plaintiff to the strict terms of the consent, and would demand that any variation to the judgment be pursued through consent. The consent of 30th March, 2005 counsel urged, was in clear terms, and carried no mistake, fraud or misrepresentation, and it had moreover not at all been alleged by the applicant, that any new facts had emerged, dictating a departure from the consent. Counsel submitted that there had been no application to vary the consent, and so there was no mandate to interfere with the consent.

In my assessment it would not be right to restrict all silences or oversights in the judgment of 15th July, 2005 to the terms of the consent of 30th March, 2005. There may well be aspects of the judgment which call for modification, and these could be aspects which had not featured in the consent. Indeed, I am prepared to assume that the silence in the judgment, on the question of interest, fell outside the purview of the recorded consent; and therefore it is a matter which could very well be settled on the basis of its own merits, and of the Courts discretion.

My difficulty with the applicant’s prayer is a different one: no factual basis has been laid to enable the Court to appreciate the nature of the pension arrears and the interests such as would be attached to the same.

Counsel distinguished the Saman Investments case, as a case in which it was the Court, by its own criteria, determining the outcome, as opposed to a case in which the Court would be merely recording a consent. Mrs. Mbabu urged that the consent of the parties as expressed in the consent letter of 30th March, 2005 be upheld: as the parties had thereby provided for their own interests, and there was no oversight.

It is a general rule applied in civil litigation, that consents reached by the parties in matters touching on their interests, in relation to the issues in the motions before the Court, are to be upheld. It is on this principle essentially, that learned counsel Mrs. Mbabu contested the application for variation of the judgment. The relevant question for this Court is: suppose parties have reached a consent, but in the process of arriving at their consent they have overlooked a situation that touches on the rights of the parties; and then on the basis of a deficient consent, the Court comes to deliver a judgment; is it permissible that one of the parties to the consent may move the Court to review or vary its judgment?

There are situations in which a normal judgment, which is not based on consent, may be the subject of rectification where a patent error is identified. But, is it the case that a patent error or omission can never be rectified if the judgment was based on consent? I don't think so.

Therefore in principle, learned counsel Mr. Kimani is, in my view, right when he implies that the Court may be moved to rectify a judgment based on consent, where the consent had overlooked a particular fact or reality. It will, of course, be more convenient to the Court if the parties will reach another consent on the matter which had been overlooked.

Learned counsel, Mrs. Mbabu had also raised the point that, the critical issues in dispute having been embodied in the consent of 30th March, 2005 the Court's discretion had been directed at one and only one question: the effective date of retirement; and therefore the applicant is not again to be heard except in relation to effective date of retirement. I would not, with respect, here agree with Mrs. Mbabu's contention. A judgment, whether based on consent or not, is a comprehensive and conclusive determination by the Court of the issues in dispute, and its whole design is to effectuate just settlement. Therefore, if a party should be convinced that an error appears in a judgment, then regardless of the nature of that judgment, that party will be free to move the Court appropriately. And therefore, I would see nothing inappropriate in the applicant moving the Court in relation to the judgment which I had delivered on 15th July, 2005.

Learned counsel, Mr. Kimani, in his rejoinder, called upon the Court as a Court of equity to intervene where the parties cannot, as in the instant matter, agree on the terms and interpretation of a consent. The Court in such circumstances, counsel urged, "cannot leave the matter to be determined by the parties themselves; it was for the Court to bring the matter to a close."

Mr. Kimani submitted that counsel, Mrs. Mbabu, had only presented technical objections, but had not denied that the defendant had benefited at the expense of the plaintiff. In his words: "such is not to be allowed, in a Court of equity". Learned counsel Mr. Kimani urged that: "Leaving the consent as it is will leave the parties in a dilemma; the Court has a discretion to look again at the consent, the intent of the parties, in the interests of equity and justice."

It is clear from my earlier analysis that I would accept the general argument advanced for the applicant: that where a consent has been, by oversight, incomprehensive and has led to a judgment that omits a consideration affecting the rights of the parties, a party prejudiced can move the Court to effect a rectification, in a proper case. I also agree with counsel for the applicant that the Court, in such a case, will be exercising its equitable jurisdiction and has a substantial scope for the exercise of its discretion.

However, it is worthy of note that the exercise of the Court's discretion is dependent not on arguments of principle, and not on legal submissions in particular; it is essentially dependent on the existence of cogent evidence which feeds into the stream of equity. The equitable jurisdiction issues forth in response to practical needs, which must be established by evidence.

In the instant case the Court's discretion is being invoked in relation to pension arrears the factual basis of which is entire unclear; and in relation to interest rates for such unspecified arrears. This is a state of darkness. The equitable jurisdiction cannot be exercised in darkness, for equity affects the conscience. Parties seeking equity must lay their evidence on the table. They must give all relevant facts and must be transparent. Such a requirement has not been complied with in the instant case, and for this reason I hereby dismiss the applicant's Notice of Motion of 5th September, 2005 with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of November, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Kimani, instructed by M/s. F.N. Kimani & Associates Advocates

For the Defendant/Respondent: Mrs. Mbabu, instructed by M/s. Kiptui Mbabu &Co. Advocates