



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

Civil Case 2767 of 1994

**MICHAEL MUBEA KAMAU.....
.....PLAINTIFF**

VERSUS

**ROBERT WANJIKI MACHUA.....
.....DEFENDANT**

RULING

This is the defendant Application for review dated 1.2.2001. It is brought under Order XLIV Rule 1 CP Rules. By the application, the applicants ask court to review and set aside the Decree dated 8th October 1998, order dated 2nd July 1998 and order dated 22nd January 1999

The genesis of the dispute is the Agreement of sale entered into on 27.5.94 between plaintiff and the first defendant.

By that agreement, first defendant agreed to sell his land title no. Mutira/Kiaga/690 to the plaintiff. The purchase price was shs 400,000. The completion date was 30.6.94. The sale was subject to Law Society Conditions of sale (1989 Edition) At the time of sale, the land was charged to Kenya commercial Bank and the loan balance was about Shs 160,000.

The necessary consent of the Land Control Board was obtained.

The parties had one common Advocate. Plaintiff avers that he paid shs 416,000 to the Common lawyer on or about 31/5/94 to cover shs 400,000 purchase price and shs 16,000 stamp Duty. The shs 163,000 was paid to the Bank by the Common lawyers and the title was discharged But on the presentation of the transfer, for Registration at the land office, plaintiff discovered that the sellers wife – 2nd defendant had placed a caution on the land. The transfer was not therefore registered.

By the Amended plaint, plaintiff sought an order for specific performance of the Agreement of sale or in the alternative

“ (cc) Judgment against both defendants for shs 201,570 (i.e she 163,000 plus shs 38,750 stamp duty and registration fees) with interest at the rate of 28% pa calculated on monthly balances from 2.6.94 until payment in full

(d) General damages for breach of contract

(e) Exemplary or aggravated damages

(f) Costs of the suit

(g) Interest on general damages, exemplary damages and on costs at court rates from 30.6.94”

First defendant filed an Amended Defence on 20.1.98 through Mbulo & Co., Advocates. First defendant pleaded that the contract was not enforceable because it was null and void

He avers in para 6 that the only relief available to plaintiff is the refund of shs 160,000 but without interest as no interest has been accruing ever since the loan was cleared.

A consent letter dated 24.3.98 was filed in court on 12.6.98. It is signed by the respective Advocates for all the three parties it reads;

“By consent:

1. Judgment be entered in favour of the plaintiff against defendants for shs 201,570 with interest as prayed in prayer (cc) of the Amended plaint and costs in respect thereto.

2. The plaintiffs remaining claim in terms of prayer (d) of the Amended plaint to proceed for hearing and determination by this honourable court”

Judgment was entered in terms of that consent letter on 2.7.98 and a preliminary decree was issued on 8.10.98. According to the decree, the interest calculated on monthly balances from 2.6.94 to 2.7.98 at 28% p.a was shs 422,824/=

Another consent letter dated 10.12.98 was filed in court on 13.1.99. it is signed by the respective counsels for the three parties and it says

“BY CONSENT

1. The plaintiffs claim in terms of prayer (d) and (e) of plaint to marked as withdrawn

2. The defendants do pay to the plaintiff the costs of the suit to be taxed by this Honourable court.

3. The plaintiff is at liberty to execute the preliminary decree of 2nd July 1998 before taxation”

The consent order was recorded by the Deputy Registrar of this court on 22.1.99.

On 16.3.2001, a further consent order was recorded before the Deputy Registrar thus:-

“By consent plaintiff D/H’s accounts against the 1st defendants J.D is agreed and allowed at shs 1 million 076,429/05 as at

30th /3/2000; further interested at the rate of 28% per annum calculated on monthly balances from 1.4.2000 until payment in full”

There are three main grounds stated on the body of the application to support the application namely,

(i)

(ii) The award of interest at 28% in the decree dated 8.10.98 and order dated 2.7.98 was unlawful as the agreement for sale specified interest at a lower rate.

(iii) Only financial institution are allowed to charge interest at a lower rate.

(iv) Only financial institutions are allowed to charge interest at a rate that is above the court rates

(v) All the consent entered into by the first defendants Advocates were entered into without the knowledge and instructions of the first defendant and amount to fraud.

Applicant says in his supporting affidavit that the interest rate at 28% is illegal and void and against the contractual provisions governing the contract between the parties.

Mr. Wena, learned counsel for the applicant, submitted, inter alia, that the interest rate at 28% p.a is not based on the Agreement of sale, and that according to the definition of interest” in section 2(g) of the Law Society Conditions of sale, as the interest rate was not specified in the conditions of sale, it should have been two percentage points above the maximum rate of interest which may be charged by banks for loans and advances pursuant to S. 39 of the Central Bank of Kenya Act.

According to him, interest rate at 28% p.a calculated on monthly balance would be about 300% p.a

Paragraph 9 C of the Amended plaint explains why plaintiff claimed interest at 28% p.a calculated on monthly balances from 2.6.94

According to that paragraph, the payment of shs 163,000 to the Kenya Commercial Bank saved first defendant the payment of Bank interest on the loan since 2.6.94 when payment was made whereas plaintiff was deprived of the use of the money.

Mr. Kimondo learned counsel for the plaintiff defended the rate of interest at 28% p.a. According to him the burden was on the applicant to show what rate of interest was applicable which burden he failed to discharge.

According to the applicants counsel, the applicant is asking the court to review the specified decree and orders on the ground that he has shown “sufficient reasons” for review of the orders.

The law relating to the status of the consent Judgments and the principles on which consent judgments can be set aside has been stated by the Court of Appeal in several authorities, namely Hirani versus Kassam (1953) EA CA 121; Brook Bond Liebig(T) ltd versus Mally (1975) EA 266; Flora Wasike versus Destimo Wamboko (1982-88) 1KAR 525 and Kenya Commercial Bank Ltd versus Benjoh Amalgamated Ltd & Anor – C.A No. 276 of 1997 (unreported) A consent judgment or order has a contractual effect and cannot be varied or discharged except on the grounds which would justify the setting aside of the contract such as fraud, mistake or misrepresentation.

But as Lord Macnaghten stated in Neale versus Gordon Lenox (1902) A.C 465 at page 477”

“I do not think that the court is entirely in the hands of a counsel and bound to give a seal of its authority to any arrangement that Counsel may make when the arrangement itself is not in its opinion a proper one”

It is clear from the applicants affidavit and his counsels submissions that applicant is mainly aggrieved by that part of the consent judgment which required applicant to pay interest on the decretal sum at the rate of 28% p.a calculated on monthly balances which has increased the judgment sum from 201,570 to over shs 1 million as at 30.3.2000.

By S. 26(1) of the Civil Procedure Act, the rate of interest payable on a money decree for the period from date of filing the suit to the date of the decree and for any period prior to the institution of the suit is at the sole discretion of the court. That discretion of the court is not displaced by an agreement to pay certain rate of interest. When the rate of interest is prima facie excessive, the burden of proving that the interest charged is not excessive lies on the claimant (see Mohamed versus Athmani Shanite (1960) EA 1062 at page 1065 D and 1.

The Agreement for sale dated 27.5.94 did not provide for payment of interest on purchase money but as

the sale was subject to Law Society Conditions of sale, then, interest payable on the purchase money in the circumstances stipulated in clause 8 of the Law Society Conditions of sale. But that clause does not apply in this dispute because it deals with payment of interest of purchase money where completion of the Agreement for sale is delayed. In the present case there was no completion at all.

The respondent has not explained the basis of claiming compound interest at the rate of 28% p.a He does not say that the rate was the prevailing bank rate at the time the money was paid to the bank. He has claimed compound interest as the interest at 28% p.a was to be calculated on monthly balances.

The reasonable interest rate that court can award under S. 26 of civil procedure Act should be compensatory and not punitive. The true measure of the loss of interest income which respondent incurred should not be measured by the rate of interest that applicant would have paid to the bank had the respondent not paid the money to the bank. Rather, the respondents loss should be measured by the rate of interest that respondent would have earned had he invested the money in the money market. I take judicial notice of the fact that the bank interest rates on deposits including fixed deposits is below 12% p.a. The highest yield of about 12% p.a can only be earned through investment in Treasury Bills.

The schedule of calculation of interest at 28% p.a calculated on monthly basis was filed in court together with the application for the execution of the decree. It shows that monthly interest has progressively risen from shs 4,484 in June 1994 to shs 14,025 in June 1998.

By June 1998, the total interest accrued was shs 422,824 which is more than double the judgment sum and which is also more than the purchase price of shs 400,000.

By 16.3.2000 the decretal sum inclusive of interest had reached shs 1,076,429/05 and more is due from 1.4.2000 at the same interest rate.

In the above circumstances, the interest rate has no legal foundation. It is punitive, harsh unconscionable and court cannot countenance it. Court has inherent equitable jurisdiction to re-open unconscionable bargains. Applicant has shown a sufficient reason why that part of the consent judgment providing for interest at 28% p.a calculated on monthly balances should be set aside.

There is no sufficient reason for setting aside the entire consent judgment. The first defendant admitted in the Amended Defence filed on 20.1.98 that plaintiff was entitled to a refund of shs 160,000. His advocates had ostensible authority to compromise the claim. Consent order No. 3 of the consent orders recorded on 22.1.99 allowing execution before taxation is legal. But as the consent orders of 22.1.99 determined the whole suit a final decree should have been issued.

For the foregoing reasons I allow the plaintiffs application in prayer 3, only to the extent that I set aside that part of consent

judgment No. 1 recorded on 2.7.98 awarding interest at 28% p.a calculated on monthly balances and substitute an order that the judgment sum of shs 201,570 shall be paid with interest at court rates from 2.6.94 until payment in full. I give the costs of the application to the applicant.

It follows that the decretal sum will have to be recalculated.

E. M. Githinji

Judge

27.11.2001

Mr. Wena present

Mr. Mbogua holding brief for Mr. Kimondo present