



Khetias Garments Limited v Cheronno (Suing as the Legal Admn. of the Estate of the Late Purity Kangogo Jebiwott - Deceased) (Civil Appeal E154 of 2022) [2024] KEHC 10962 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E154 OF 2022
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

BETWEEN

KHETIAS GARMENTS LIMITED APPELLANT

AND

BETABINE JEPCHUMBA CHERONO (SUING AS THE LEGAL ADMN. OF THE ESTATE OF THE LATE PURITY KANGOGO JEBIWOTT - DECEASED) RESPONDENT

RULING

1. Before me is a notice of motion application dated 31st January 2024 wherein the application seeks the following orders:
 - i. Spent
 - ii. That this honorable court be pleased to review and/or vary the terms of the judgment delivered on the 21st November, 2023 only to the extent on the interest earned and payable to the Respondent on the sum deposited in the joint interest earning Account of both counsels on record (M/s Rioba Omboto & Co. Advocates and Nyairo & Co. Advocates) pursuant to the trial court's ruling dated 13th January, 2023 in the primary suit Eldoret CMCC No. E060/2020.
 - iii. That the court do further review the judgment and award costs to the Respondent in this appeal.
 - iv. That costs be in the cause.
2. The application is supported by David Rioba Omboto, Advocate and is premised on grounds that: -



- a. On 23rd September, 2022 the learned trial magistrate delivered judgment in favor of the Respondent herein in the sum of Kshs. 3,645,000/= and a consent on party and party costs were agreed at Kshs. 175,575/=.
 - b. Thereafter the appellant appealed and subsequently applied for stay pending appeal. That on 13th January, 2023 the trial magistrate gave a conditional stay of execution where the appellant was to pay half of the decretal sum and other half to be deposited in a joint interest earning account of both advocates on record.
 - c. On 22nd November, 2023 this honorable court delivered its judgment in favor of the respondent, however there is an inadvertent error on the terms of the judgment especially on the interest earned.
 - d. As at 15th December, 2023 the deposited sum had accrued interest to a tune of Kshs. 92,540/=, however, counsel for the appellant has declined to release the amount due to the Respondent despite of several letter requesting for the same.
 - e. The appellant's counsel contend that this court did not award any interest and costs in its judgment delivered on the 21st November, 2023 hence the Respondent are not entitled to the interest earned from the sum deposited in a joint interest earning account.
 - f. It is apparent that there is an inadvertent error on the terms of the judgment only to the extend on the interest on the deposited sum held in a joint interest earning account which has accrued interest to a tune of Kshs. 92,540/=.
 - g. That the error must have been occasioned by the deliberate incomplete record of appeal prepared and filed by the appellants as they left out crucial documents for determination to wit the ruling delivered by the trial magistrate on the conditional stay and consent on the agreed costs of Kshs. 175,575/=.
3. The Appellant opposed the application through a replying affidavit dated 8th March, 2024. In the said response, the appellant averred that the lower court delivered its ruling on the application for stay pending appeal in which the court ordered the appellant to pay the respondent half the decretal amount and the remaining half to be deposited in a joint interest earning account in the name of both advocates on record.
 4. The appellant averred that upon delivery of the judgment on appeal, the Respondent/applicant's advocates, M/s Rioba Omboto and company advocates wrote to the appellant's advocate demanding release of the amount awarded by this court plus interest accrued.
 5. That the appellant's advocate responded to the letter expressly indicating that there was no interest and the only amount payable to the respondent was Kshs. 1,437,713/=. The appellant's advocate further enclosed a consent for the release of the sum of Kshs. 1,437,713/= held in the joint account to the Respondent.
 6. That the Respondent's advocate being fully aware of the appellant's position, he went on to execute a consent letter for release of the sum of Kshs. 1,437,713/=. The appellant argued that the award of costs and interest is discretionary and the court having properly exercised its mind and made a determination not to award costs and interest, it follows that the issue of costs and interests cannot be reviewed and granting the orders being sought by the Respondent would amount to this court sitting on its own appeal which is outside this court's jurisdiction.



Analysis and determination

7. Having considered the application together with the response filed, I find the only issue for determination to be; Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.
8. The provisions of section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules allow the court to review its decision on account of an error apparent on the face of the record or for any other cogent reason.
9. A mistake or error apparent on the face of the record is one that is self-evident and needs no extensive explanation. It was the position in the case of Paul Mwaniki v NHIF Board of Management [2020] eKLR.
10. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd v Ndungu Njau.

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
11. An analysis of the application reveals that the applicant believes he is entitled to the interests accrued on the monies held in a joint interest earning account.
12. I must point out that money held by a person against the interest of the deprived over a period of time ordinarily, loss occurs in that the owner of the funds had plans on how to invest or spend that money. Such a deprived person requires to be compensated with an order for payment of interest. See Nderi & Kiingati Advocates v Kiruti & Company Advocates [2021] eKLR.
13. In the case of *Naphtali Paul Radier –Vs- David Njogu Gachanja HCC No. 582 of 2003* (O.S) justice H.P.G Waweru held: -

“The defendant has withheld the plaintiff’s money from August 2002. Justice demands that he pays it with interest”
14. It is trite law that so long as monies that was undertaken to be paid remains unpaid, interest on it for the unpaid period should be provided.
15. The question remains though, whether the power of the court to award interest under Section 26 of the *Civil Procedure Act* is affected or limited by the said provisions. It is trite that a judgment creditor who is seeking interest must say so in the suit with particulars and details of the basis of the claim, the rate, the date from which it is claimed, the total amount of interest claimed to the date of settlement of the debt and whether the interest rates accrues daily, monthly or per annum. The court in *Sempra Metals Ltd (formerly Metallgesellschaft ltd) v Inland Revenue Commissioners and another* [2007] 3



WLR 354 articulated the position on determining the basis of computation of interest payable to the judgment creditor in the following extract:

“The reality is that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest.”

16. I would accordingly pursuant to section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules as read with Section 26 award interest at court rates per annum to the decretal sum with effect from 21st November, 2023 till payment in full.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024.

In the Presence of

Mr. Omboto Advocate

R. NYAKUNDI

JUDGE

