



**Nderitu (Suing as legal representative of the Estate of Peter Kangethe Kanyoro) v Ohon & another (Civil Appeal 111 of 2017) [2023] KEHC 2440 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 111 OF 2017  
RB NGETICH, J  
MARCH 16, 2023**

**BETWEEN**

**PHILIPH KANYORO NDERITU (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PETER KANGETHE KANYORO) ..... APPELLANT**

**AND**

**DONALD ELIAKIM OHON ..... 1<sup>ST</sup> RESPONDENT**

**GILBERT BUSOLO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court for determination is notice of motion application dated August 18, 2022 seeking the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That this honourable court be pleased to correct accidental slip or error of omission apparent on the judgment of the Honourable court made on October 3, 2019 in the learned trial judge inadvertently made on accidental omission to provide for interest on liquidated awarded sum to the Applicant/Respondent in the said judgment.
  - iv. That this honorable court be pleased to exercise its judicial discretion under Section 26(1) of *Civil Procedure Act* and award interest to the Applicant/Respondent on the decretal sum at 14% p.a as prayed in the plaint from the date of filing suit in respect of claim for special damages and as concerns claim for general damages from the date of assessment thereof
  - v. Costs of this application be awarded to the Applicant/Respondent



2. Grounds on the face of the application are that on October 3, 2019, this Honorable court entered a judgment in favor of the Applicant/Respondent in the aggregate sum of Kshs 1,314,900 together with costs but the court inadvertently omitted to award interest on the decretal sum as is normally the case; and if the omission was premeditated, the trial judge would have offered reasons for refusal to award interest on decretal amount.
3. That this court has jurisdiction under Section 99 of the *Civil Procedure Act* to correct the accidental omission and equally has power to exercise its discretion to award interest as it may deem necessary under Section 26(1) of the *Civil Procedure Act* and the Respondent shall suffer no prejudice as a result of the said correction.
4. Additional ground is that the Respondent is now aged, frail and sickly and need quick financial assistance to enable him travel to India for medical treatment and interest payable on decretal amount would be adequate to meet his expenses
5. In response, the respondent filed replying affidavit dated November 4, 2022. He averred that there is no typographical error in the said judgment on the issue of interest on decretal amount to warrant this court exercise discretion to issue orders sought in the application.
6. Counsel for the respondent stated that the court went through all pleadings, statements, exhibits, proceedings, trial court's judgment and the appeal itself to come up with the said judgment and the issue of interest never arose during pronouncement of the same.
7. Further that the application is attempting to introduce the issue of interest after three (3) years from the pronouncement of the judgment and no logical explanation has been offered for the delay and granting orders sought would amount to this court appealing on its judgment which is legally wanting hence the legal threshold of granting the orders sought have not been met by the applicant.
8. Counsel further deponed that the attached copies of judgment and cross appeal marked PKN3,4 &5 do not automatically grant the orders sought as the court did not make any error by being silent for the same is discretionary and the court knew its mandate.
9. Counsel further stated that the applicant has not shown that due to court's fallibility, the issue of interest was not exercised in favor of the applicant which this honorable court ought to correct through grant of the orders sought; that the applicant has not shown any mistake or an apparent error on the judgment delivered on October 3, 2019 to warrant grant of orders sought.
10. Counsel deponed that the respondent has fully settled the decretal amount as per averments in the supporting affidavit and annexures PKN6&7 and granting orders sought will be akin to appealing a concluded matter. He concluded that the applicant has been indolent from the date of judgment and the issue of ill health and treatment in India is wanting for this court to exercise discretion and urged this court to dismiss the application with costs.

### **Applicant's Submissions**

11. The applicant started by giving the background of this matter being the matter was filed in the lower court by the applicant on May 18, 2010 in Kiambu CMCC No 575 of 2010 seeking general and special damages following fatal injury to Peter Kangethe Kanyoro(deceased) on March 19, 2008. The applicant was awarded general and special damages.The respondent filed current appeal against award of damages which was dismissed and cross appeal by Applicant herein was partly allowed. The lower court judgment was set aside and granted damages less 10% contribution being a net of Kshs 1,314,900 awarded. Respondent was granted half costs but the judgment was silent on interest.



12. The applicant contends that the omission to award interest is a mere inadvertence not premeditated or intended by the trial judge.
13. Counsel further submitted that the respondent has been paying the applicant in small bits and the general rule is that interest should be awarded to a successful party, a rule that should not be departed from without good grounds.
14. Counsel cited Section 99 of the [Civil Procedure Act](#) which provide for correction of clerical and arithmetic mistakes in judgments, decrees or orders or errors arising from accidental slip or omission.
15. Counsel further quoted the case of [Dominic Alois George Omenye T/a Omenye & Associates v Prime Bank Limited \[2017\]eKLR](#) cited with approval in [Jackson R.K Chepkwony v Michael Kipkorir Langat\[2018\]eKLR](#) where the court held that the power to correct errors will only be made where the court is fully satisfied that it is giving effect to intention of the court at the time when judgment was given or in the case where a matter was overlooked, where it is satisfied beyond doubt that as to the order which it would have made had the matter been brought to its attention.
16. Counsel further cited the case of [Lakhamshi BrothersLtd v R Raja & Sons \[1966\] EA](#) and [Davda v Ahmed & others\[19478\] KLR665](#) where the court stated that the error or omission under section 99 must be an error in expressing the manifest intention of the court; and in the case of [Plaza Trust Limited v Hardrock Café Limited & 2 others \[2017\]eKLR](#) where the court stated that accidental slip is like an error so apparent on the face of the record that would not require additional evidence.
17. Counsel submitted that though the plaintiff prayed for interest in the plaint, the trial Magistrate did not consider the applicant's prayer for interest with the result that the prayer was left undetermined.
18. Counsel admitted that it is the discretion of court to award interest but it cannot be in the discretion of the court not to address a matter that is expressly submitted for determination without giving reasons

### **Submissions By The Respondent**

19. In submissions dated December 21, 2021, counsel for the respondent submitted that the applicant has failed to meet the threshold of the provision he has sought to rely on hence the application ought to be dismissed with costs as the orders sought are akin to this honorable court sitting in appeal of its decision.
20. Counsel submitted that there is no apparent error and or mistake in the judgment which the applicant is seeking to have reviewed; that the copy of judgment attached clearly indicated there is no typographical errors or mistakes to warrant this court to review it.
21. Counsel further submitted that the provisions relied on by the applicant do not in any way authorize the applicant to seek the orders sought in the application; that the application, grounds and supporting affidavit have not indicated why judgment delivered on October 3, 2019 ought to be reviewed. That the issue of award of interest on decretal sum is discretionary and silence depicted by this court during pronouncement of the said judgment cannot be an apparent error, omission or an accidental slip which need to be corrected
22. Counsel for the respondent cited the case of [Fredrick Otieno Outa Versus Jared Odoyo Okello & 3 others \[2017\]eKLR](#) where the Supreme Court held that the legal position as regard court's power to review its own decision was settled in the Outa case where the court set out circumstances under which the court can review its judgment as follows: -
  - i. The Judgment, Ruling or order is obtained by fraud or deceit.



- ii. The Judgment, Ruling or order is a nullity, such as when the court itself was not competent.
  - iii. The court was misled into giving Judgment, Ruling or Order under mistaken belief that the parties had consented thereto.
  - iv. The Judgment or Ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.
23. Counsel submitted that there is nothing in the application and annexures which shows the discretion inherent in this court in regard to award of interest was not exercised judiciously hence the application ought to fail.
  24. Counsel further submitted that if the applicant was aggrieved by the judgment of this court, he ought to have filed appeal in the Court of Appeal as this being appellate and trial court cannot sit on appeal of its decision.
  25. In conclusion, counsel submitted that there has been inordinate delay of two and half years (2 ½) in filing this application and the respondent has already settled the claim as per averments by both parties in their respective affidavits and annexures

### **Analysis And Determination**

26. I have considered the averments herein and submissions by the parties. What is in issue is whether there is an error or omission apparent on the face of judgment delivered on October 3, 2019 which require this court to invoke Section 99 of the [Civil Procedure Act](#) to correct the error or omission.
27. The applicant submitted that the court was silent on interest. Further in the submissions, the applicant's advocate submitted that despite plaintiff praying for interest in the plaint, the trial court did not award interest.
28. Counsel admitted that award of interest is discretionary but it is not correct for court to be silent on interested yet it was expressly submitted on.
29. I have perused the applicant's cross appeal dated August 2, 2017 and note that his ground of appeal was that damages awarded was too low and urged the court to interfere. There is no ground on failure to award interest on damages by the trial Magistrate.
30. I also note that the applicant in submitting on appeal and cross appeal submitted on assessment of damages by the trial Magistrate in particular under loss of dependency and loss of expectation of life. He prayed for enhancement of award under those headings. There is no mention of interest in the submissions. It will not therefore be correct for the applicant to say that they expressly submitted on interest but the court failed to consider. Record show that the issue of interest is being introduced by the applicant after determination of the appeal. The issue was not before the appellate court for determination.
31. Further, I note that judgment was delivered on October 3, 2019 and the application herein was filed August 31, 2022 a period of 2 years 10 months. It is not also disputed that the applicant has been receiving payments by instalments from the respondent.
32. The Respondent averred that they have settled the decretal amount. The question that arise is, why the applicant would wait for 2 years 10 months to approach the court with allegation of error or omission in the judgment. In my view this is an afterthought. If indeed the applicant is sincere on the allegation of error in the judgment, he should have approached the court immediately after delivery of the judgment for correction or file appeal in the Court of Appeal. This in my view is amount to abuse of court process.



33. From the foregoing, I see no omission or accidental slip in the judgment delivered on October 3, 2019. The application herein is not merited, I decline to award interest as prayed.

**Final Orders: -**

1. Application dated August 18, 2022 is hereby dismissed.
2. Costs to the respondent.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Martin – Court Assistant**

Mr. Mwangi holding brief for Ms. Muchemi for Respondent

No appearance for the Applicants

