



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

SUIT NO. 22 OF 2014

PATRICK MWAURA WAGATIRAPLAINTIFF

VERSUS

EQUITY BANK LIMITED1ST DEFENDANT

GABRIEL NDUNGU2ND DEFENDANT

RULING

1. This is a ruling on the plaintiff's Notice of Motion dated 21/4/2020 brought under **Order 45 of the Civil Procedure Rules, Section 3A, 63 (e) and 81 of the Civil Procedure Act**. In the Motion, the plaintiff sought the review of the judgment of this Court (Ng'etich J) dated 30/1/2020 (21/2/2020).
2. The application was supported by the affidavit of the plaintiff himself sworn on 5/5/2020. It was contended that, judgment was entered in favour of the plaintiff on 21/2/2020 for Kshs. 17,365,100/= together with costs. The said sum was damages for illegal sale of the applicant's LR. No. Ruiru Kiu Block2/4018.
3. The plaintiff contended that in his amended plaint dated 5/12/2017, he had prayed for; Kshs. 40,000,000/=, Costs together with interest on both. That there was an error apparent on the face of the record as the Court failed to award interest on the principal sum and costs as prayed for in the amended plaint. There was no reason given for the failure to award interest after finding that the sale was unlawful.
4. The 1st defendant opposed the application vide an affidavit sworn on 13/10/2020 by **Kariuki King'ori**. It was contended that, if the Court had erred in not awarding interest, it similarly erred in awarding Kshs. 17,365,100/= and not Kshs. 350,000/= which was the value of the property when it was sold in 2005. That awarding interest is a discretionary exercise and the Court exercised that discretion. That there were no circumstances to warrant the prayers sought and the application is bad in law.
5. The 2nd defendant also opposed the application through his affidavit sworn on 10/08/2020. He averred that there was no new discovery of evidence, neither was there arithmetic or such errors or mistakes apparent on the face of the decree to warrant variation or review of judgment. That the plaintiff's recourse was to appeal to the Court of Appeal. Finally, that awarding interest is a discretionary exercise and the Court had exercised that discretion.
6. The parties filed their respective submissions which are on record and which the Court has carefully considered.
7. This is an application for review. Review proceedings are not in any way an appeal and have to be strictly confined to the scope and ambit of **Order 45 Rule 1 of the Civil Procedure Rules**. This is on discovery of new and important matter or evidence which was not within the knowledge of an applicant or could not be produced at the time when the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The application has to be made without unreasonable delay.
8. In the present case, the plaintiff based his application on the ground that there was an error apparent on the face of the record. That the Court failed to award interest on the principal sum and costs as prayed without giving any reason therefor.
9. I have perused the plaintiff's submissions dated 1/3/2019. He submitted on the issue of costs and urged that interest be awarded on the principal sum at paragraphs 1.122, and at 1.124. In the judgment of 21/2/2020, the Court was silent on the issue of interest though it awarded damages and costs of the suit. The question therefore is, was failure to award interest, though specifically prayed for, an error apparent on the face of the record or not?
10. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal observed of

‘an error apparent on the face of the record’ as follows:

“In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174, this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us”.

11. In National Bank of Kenya Ltd vs Ndungu Njau [1997] Eklr, the Court of Appeal observed: -

“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.”

12. In this case, the record is clear that interest on damages and costs was prayed for in the amended plaint and was submitted on. It was therefore one of the issues the Court had been called upon to make a determination on. It never addressed the issue at all.

13. The defendants contended that interest was in the Court’s discretion and in failing to award the same, the Court had merely exercised that discretion. It is correct that the award of interest is in the discretion of the Court. However, it cannot be in the discretion of the Court not to address a matter or issue that is expressly submitted to it for determination without giving a reason therefor.

14. The granting of interest is governed by *section 26 of the Civil Procedure Act*. In Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] Eklr, the court observed: -

“I have come to the conclusion that the Learned Trial Magistrate erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts’ repeated application of Section 26 of the Civil Procedure Act. The cases cited above reached the conclusion that where a claim is for liquidated damages, unless there is good cause, the interest should be calculated from the date of filing the suit”.

15. In Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469, it was held: -

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment”.

16. The complaint in the present case is that there was an error on the face of the record as the Court failed to address the issue of interest even after having awarded the damages. The Court holds that, that failure is an error on the face of the record as the Court should have addressed that issue which had been submitted to it for determination.

17. The plaintiff’s claim was for a liquidated amount of Kshs. 40,000,000/=. The Court awarded Kshs. 17,365,100/=. *Section 26 of the Civil Procedure Rules* provides: -

“1) Where and 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 to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the 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 payment or to such earlier date as the court thinks fit.

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

18. In this regard, I allow the application and order that the damages awarded in the sum of Kshs. 17,365,100/= will attract interest at Court rate from the date of filing suit until payment in full. Costs will also attract interest from the date of judgment. The plaintiff will have the costs of the application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this **10th** day of **June, 2021**.

A. MABEYA, FCIArb

JUDGE