



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 868 OF 2009

JAMES GITAU SINGH T/A SINGH GITAU ADVOCATES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. **JAMES GITAU SINGH (T/A Singh Gitau Advocates**, the Plaintiff), was the Advocate representing **NATIONAL BANK OF KENYA LIMITED**, the Defendant, in various matters. The Plaintiff instituted this case on 27th November 2009 seeking Judgment for Kshs. 14,068,148.26 with interest and costs being his legal fees for work done.

2. This Court delivered its Judgment on 8th May 2019 as follows:

“(i) The Plaintiff is granted Judgment for interest at 14% per annum on the principal sum of Kshs. 14,068,142.26 from 4th February, 2009 until payment in full.

(ii) The Plaintiff is awarded costs of this suit.”

3. It is important to state that the Court confirmed, in that Judgment, that the Defendant fully paid the Plaintiff the principal sum of this claim being Kshs. 14,068,148.25 on 11th January 2010. The dispute left for determination by the Court by its Judgment was whether interest was payable on that principal sum.

4. A decree has been drawn in terms of the Judgment of 8th May 2019.

5. The Defendant has presented a Notice of Motion dated 17th July 2019. The Defendant seeks the following prayers:

“That the Judgment and orders of this Court made on 8th May 2019 be reviewed and the following Judgment and orders do issue:

(a) The Plaintiff is granted Judgment for interest at 14% per annum on the principal sum of Kshs. 14,068,148.26 from 4th February 2009 to 11th January 2010;

(b) The Plaintiff costs of this suit.”

6. The Defendant in the affidavit of their legal officer Chrispus Maithya stated that it did not wish to appeal against the Judgment in this matter. On requesting the Plaintiff to inform them the amount being sought from them the Plaintiff responded with calculation of interest from 4th February to 8 May 2019. In the Defendant's view that calculation is in error because the Plaintiff was paid the principal sum on 11th January 2010. It is the Defendant's case that interest could only be from 4th February 2009 up to 11th January 2010. It is on the basis of that submission the Defendant seeks the prayer in its application.

7. The Plaintiff opposed the application. The opposition is on the basis that the application is without merit and that the Court is *functus officio*.

8. Learned Advocate for the Plaintiff submitted that in seeking review the Defendant had not stated, as required under Order 45 of the Civil Procedure Rules, whether there was discovery of new and important matter. In this case Plaintiff said that no new matter had been

discovered.

9. Plaintiff further argued that this Court having delivered Judgment it became *functus officio*, and that the Court cannot again delve in the matter. Relying on the cases **MENGINYA SALIM MURGANI V KENYA REVENUE AUTHORITY (2014) eKLR** and **HIGHWAY FURNITURE MART LIMITED V PERMANENT SECRETARY OFFICE OF THE PRESIDENT & ANOTHER [2006] eKLR**, Plaintiff submitted that so long as the decree conformed to the Judgment there cannot be a review.

10. The Defendant's Learned Advocate stated that the Defendant was seeking clarification on the figures in the Judgment.

ANALYSIS

11. Looking at the Judgment on 8th May 2019 one would not imagine that an application, such as the one before me, would be necessary. This is because, in my view, if only the Learned Advocates in this case had cared to read through that Judgment it would be clear what is due to the Plaintiff. It is because both Counsels failed to read the Judgment in full that I will not award costs to the Notice of Motion dated 17th July 2019.

12. In that Judgment it is acknowledged that the parties admitted that the principal amount was paid to the Plaintiff on 11th January 2010. It was also acknowledged that interest would begin to apply from 4th February 2009. It does not take much imagination to surmise that interest would begin to apply from 4th February 2009 until 11th January 2010 when the principal amount was paid to the Plaintiff. And that is what the Judgment of 8th May 2019 stated.

13. The Plaintiff erred to argue that the Court on delivering its Judgment on 8th May 2019 it became *functus officio*. Far from it. One only needs to look at the provisions of **Section 34 of the Civil Procedure Act**. This sections addresses all questions in a suit where the decree has been passed. That section however does not permit the Court to go through the merits of the case, or issues of the case after Judgment. This section was discussed in the case **SIMON HORNER V MICHAEL JOHN MWAURA & 3 OTHERS [2019] eKLR** as follows:

“The Applicant in approaching this Court does not seek this Court to re-entertain the merits or otherwise of the dispute on Directorship/Shareholding of the 3rd Respondent, which is what was before Court at the trial. Rather the Applicant seeks this Court to determine how the decree it passed can be satisfied. This is permitted under section 34 of the Civil Procedure Act which provides:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree and not by a separate suit.”

*The Court of Appeal in the case **GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY V ERNIE CAMPBELL & CO. LTD & ANOTHER [2018]** had occasion to consider that section and stated:*

“In reply to the appellant's contention that the High Court stood functus officio once it adopted the award and therefore had no jurisdiction to delve into the matter thereafter, the 1st Respondent submitted that it did not seek to re-engage the Court on the merits of the decision of the arbitration or on the merits of the application to enforce the arbitral award. Having established that the appellant was the 2nd Respondent's majority shareholder, its application to have its assets satisfy the decree in its favour became necessary. The application was hinged on section 34 of the Civil Procedure Act which provide that all questions arising between the parties to the suit in which the decree was passed or relating to the decree has to be determined by the Court executing the decree and not by a separate suit.”

To respond to the Respondents this Court is not functus officio in as far as the present application is concerned because the application seeks to enforce execution/satisfaction of the decree herein.”

CONCLUSION

14. In the end calculating the amount due in the decree of this Court of 8th May 2019 parties shall be guided by the following:

That the 14% interest rate awarded to the Plaintiff applies to the Principal sum of Kshs. 14,068,148.26 from 4th February 2009 until 11th January 2010.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR DEFENDANT