



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 488 OF 1996

KOMBO JUMA MZEE.....PLAINTIFF

VERSUS

KARISA NZAI MUNYIKA.....DEFENDANT

RULING

1. The defendant/Judgment debtor on 26th April, 2017 filed a Notice of Preliminary Objection against the plaintiff/decree holder's application dated 10th February, 2017 on the following grounds:-

(i) That the plaintiff/decree holder/applicant's application seeking review of the Judgment and decree given on 14th November, 2012 is barred by limitation pursuant to Section 4(4) of the Limitation of Actions Act, Cap 21, Laws of Kenya, the same having been filed after the lapse (sic) of twelve (12) years from the date of the Judgment;

(ii) That the plaintiff/decree holder/applicant's application for orders for an award of interest is barred by limitation pursuant to Section 4 (4) of the Limitation of Actions Act, Cap 21, Laws of Kenya, the same having been filed after the lapse (sic) of six years from the date interest would have become due, if at all; and

(iii) That this court cannot entertain defective proceedings (plaintiff's application dated 10th February, 2017 as the right of appeal has lapsed) (sic).

2. In order to understand the context within which the notice of preliminary objection has been raised, it is necessary to capture the contents of the application dated 10th February, 2017. The said application is premised on the provisions of Order 45 rules 1 and 2 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act, Cap 21, Laws of Kenya. It seeks the following orders:-

(i) That the Honourable court be pleased to review its judgment and decree delivered on 14th November, 2002 to consider the plaintiff's claim on interest on the decretal amount; and

(ii) Costs of the application be provided for.

3. The defendant's Counsel filed her written submissions on 26th May, 2017 and the plaintiff's Counsel filed hers on 16th June, 2017. In arguing the preliminary objection, Ms. Oyier, Learned Counsel for the defendant submitted that the award of interest is discretionary and the court which determined the suit was silent on the said issue. In her view, that was deemed to be denial of interest. It was submitted that the plaintiff did not satisfy the court that interest should have been granted, thus it was denied. She stated that the plaintiff should have appealed against the Judgment delivered on 14th November, 2002 within 14 days.

4. Counsel for the defendant submitted that the plaintiff went to sleep after delivery of the Judgment and only extracted the order on 10th February, 2009, yet the application for review was filed on 10th February, 2017 by which time 14 years and 6 months had elapsed. She further stated that from the date of the extraction of the order to the date of the application, 7 years and 7 months had elapsed.

5. It was submitted that after extraction of the order, if the plaintiff had seen the error on the face of the record, he ought to have moved to the Court of Appeal. The defendant prayed for a refund of the excess the defendant paid to the plaintiff in the sum of Kshs. 336,703.35.

6. Ms. Oyier argued that the plaintiff was not specific on which award of interest he was seeking. She cited the provisions of Section 4(4) of the Limitation of Actions Act which provides that an action shall not be brought after 12 years of delivery of a Judgment. She indicated that the application herein was brought after the elapse of 12 years hence it should not be entertained by the court due to effluxion of time.

Counsel relied on the case of **Jane Wanjiru Gitau vs. Kenya Power & Lighting Co. Ltd** [2016] eKLR where the court held that any contested questions during trial, once pronounced upon by the court, became further re-dressable by way of appeal not review.

7. Ms. Wambani, Learned Counsel for the plaintiff was of the position that under the provisions of Order 45 rules 1 and 2 to the Civil Procedure Rules and Section 80 of the Civil Procedure Act, there is no limitation as to applications for review. She contended that Section 4(4) of the Limitation of Actions Act provides timelines within which suits can be instituted. She was of the view that since no interest was awarded in the plaintiff's case, the provisions of Section 4(4) the Limitations of Actions Act did not apply. She submitted that in the Judgment delivered on 14th November, 2002, the court was silent on the issue of interest as there was no express denial. She stated that an appeal would not be the proper procedure to remedy the situation.

8. Counsel further submitted that if there was denial of interest, then they would have appealed. She indicated that in the plaint, the plaintiff had prayed for interest to be awarded.

9. In distinguishing the case of **Jane Wanjiru Gitau vs. Kenya Power and Lighting** (supra) from the present matter, she stated that interest had been awarded in the former case thus the facts were dissimilar to the present matter. She prayed for the preliminary objection to be dismissed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If a prayer for an award of interest that was not granted in a suit should be by way of review or appeal; and
- (ii) If the application dated 10th February, 2017 is time barred.

10. Section 26(1) of the Civil Procedure Act addresses the issue of award of interest in the following terms:-

“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 other earlier date, as the court thinks fit.” (emphasis added).

11. On whether an application for review or an appeal should be filed to seek orders for an award of interest, Section 80 of the Civil Procedure Act provides as follows:-

“Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. With regard to review of court orders, Order 45 rule 1 of the Civil Procedure Rules lays the basis upon which an application for review can be made, this is when –

- (i) There is a discovery of a new and important matter or evidence which, after the exercise of due diligence was not within a party's knowledge or could not be produced by a party at the time when the decree was passed or the order made;
- (ii) On account of some mistake or error apparent on the face of the record; or
- (iii) For any other sufficient reason the applicant desires to obtain a review of the decree or order, he may apply for review to the court which passed the decree or made the order without **unreasonable delay.**” (emphasis added).

13. In **Nyamongo and Nyamongo Advocates vs. Kogo** [2001] E.A 173 the Court of Appeal stated thus:-

“We have carefully considered the submissions made to us by the Advocates of the parties to this appeal. An error apparent on the face of 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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 was to be established by a 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 the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

14. In a matter such as this where the Judge did not award interest and bearing in mind that he had the discretion to either or not, award

interest, it would be erroneous for an aggrieved party to approach this court for review. That would be akin to asking this court to sit on appeal in a Judgment that was rendered by a court of concurrent jurisdiction. The best avenue for such a litigant would be to appeal against the decision of the court that heard the case in the first instance, on the basis that interest had been prayed for in the plaint, but was not awarded. The appeal court would then resolve the issue of whether or not the Judge who heard the case exercised his discretion judiciously.

15. This court in making the decision that an appeal should have been pursued is alive to the provisions of Section 80 of the Civil Procedure Act which give a litigant who is aggrieved the leeway to pursue a review in a case where no appeal has been instituted. The provisions of Section 26(1) of the Civil Procedure Act however leave no room for doubt that the award of interest is discretionary on the court that hears a suit. Therefore in a situation where interest is not awarded, it cannot be interpreted to be as a result of an error on the face of the record which would be the subject of review. The authority cited by Counsel for the defendant of **Jane Wanjiru Gitau vs The Kenya Power & Lighting Company Limited** [2006] eKLR is right on point.

16. On the issue of limitation of actions, Section 4(4) of the Limitation of Actions Act provides that:-

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or subsequent order directs any payment of money or the delivery of the property to be made at a certain date or at recurring periods). The date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.” (emphasis added).

17. Even if this court would have found that the application filed by the plaintiff for review was appropriate, it would have invoked the provisions of Section 4(4) of the Limitation of Actions Act to strike out the application dated 10th February, 2017 as the application by the plaintiff seeking review of the Judgment and decree was filed over 14 years after delivery of the Judgment in this case. The date of delivery of the said Judgment was 14th November, 2002.

18. Counsel for the defendant in her submissions indicated that her clients overpaid the plaintiff with an amount of Kshs. 330,000/= for which she claims a refund. I decline to address the said submission as it is not only misplaced but does not form the subject of the preliminary objection.

19. The court finds that the notice of preliminary objection dated 26th April, 2017 has merit. It is hereby sustained with the result that the plaintiff's application dated 10th February, 2017 is hereby struck out. Costs are awarded to the Judgment debtor/defendant.

DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Oyier for the defendant/Judgment debtor

Mr. Alwenya holding brief for Mr. Khatib for the plaintiff/decree holder

Mr. Oliver Musundi - Court Assistant