



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1223 OF 2001

DR. JOSIAH M. KINAMA.....1ST PLAINTIFF/RESPONDENT

DR. LAWRENCE N. MASAU.....2ND PLAINTIFF/RESPONDENT

VERSUS

MILKA WANZA KITUNDU, JOHN.....1ST DEFENDANT/APPLICANT

MUTHUI KITUNDU & SOLOMON NDUNDA KITUNDU....2ND DEFENDANT/APPLICANT

(Being the Personal Representatives/Administrators of the Estate of Solomon Kitundu munywoki)

RULING

The application before me for determination is the Notice of Motion date the 28th day of September, 2015 brought under Order 8 Rule 5, Order 45 (1) (b) and Order 21 rule 21 (2) of the Civil Procedure Rules.

The defendants/applicants have sought the following orders;

- a. That the Honourable Court be pleased to review the judgment passed in this suit on the 31st October, 2015 on the issue of the interest payable to the plaintiffs.
- b. That the judgment debt payable pursuant to the decree passed in this suit be paid by an installment of 400,000/- per month.
- c. That the costs of this application be in the cause.

It is premised on the grounds that; the decision by the trial Judge to the effect that interest be awarded to the plaintiffs at court rates from the date of filing the suit (24th July,2001) to 4th April, 2012 when the principal sum was released to the plaintiffs instead of the 10th May,2011 when the sum of Kshs.650,000/- was deposited in court pursuant to the provisions of order 27 Rule 1(3) of the Civil Procedure Rules is an error apparent on the face of the record and also sufficient cause to justify a review of the judgment. That the debtor in this suit is the estate of the late Solomon Kitundu Munywoki whose estate is in the process of being administered and rather than wait for the completion of the process of administration, the deceased's children have decided to pool resources and pay the decretal amount so as to settle the debt so as to do so they have to reorganize their finances hence the request for payment by installments.

The application is supported by the affidavit of Solomon Ndunda Kitundu sworn on the 28th Septemebr,2015. The deponent who is a son to the late Solomon Kitundu Munywoki avers that, his late

father passed away on the 26th August, 2005 and he was the original defendant in the case. That the family became aware of the existence of this suit in June 2009 when their land parcels L.R. No. Kalawa/Kathulumbi/422 and L.R. No. Kabauni/Kalawa/90 and L.R. Kalawa/Kathulumbi/458 all registered in the name of his late father were advertised for sale by public auction pursuant to a decree issued in this matter against his late father.

That they successful moved the court for an order of stay of execution and setting aside of exparte judgment with the result that the suit was then re-head and in the course of time, a consent judgment was recorded for Ksh.650,000/- in favour of the plaintiff. That a sum of Kshs.650,000/- which had been paid to court was released to the plaintiff on the 10th May, 2011.

It is averred that to address the issue of interest on the principal sum, damages for breach of contract and costs, the suit was heard and the court in its judgment ordered that interest be applied from the date the suit was filed to when the principal sum was released to the plaintiff on 4th April, 2012.

That they now seek a review of the judgment to that extent, and an order to liquidate the balance of the decretal sum as follows;

- a. On or before 31st August, 2015 Kshs.400,000/-
- b. Thereafter Kshs.100,000/= per month effective 30th September, 2015 and on last day of each succeeding month.

The application is opposed by the plaintiff/respondent vide a replying affidavit sworn by Dr. Josiah M. Kinama on the 11th November, 2015. He avers that the prayer seeking review of judgment is made in bad faith and is an abuse of court process as the applicants have not only lodged a notice of appeal in the court of Appeal but had also vide an application of June 15th, 2015 sought to pay the decretal sum by installments which application was withdrawn to pave way for filing of the instant application.

That the prayer seeking payment in installment, is also made in bad faith and intended to delay the plaintiffs from the enjoyment of the fruits of their judgment especially after judgment was delivered over 1 year ago. That the application has been made to frustrate their efforts of expeditious recovery of the decretal sum which by then stood at Kshs.1,687,400/- excluding costs. That their claim having been determined by the court should be given priority by the estate as an accruing liability to the estate before any distribution of the net estate is effected.

The application was disposed of by way of written submissions.

The court has duly considered the application, the affidavits and the submissions by the respective parties. The remedy of review is provided for under order 45 Rule 1 of the Civil Procedure Rules which provides;

1. "if any person considering himself aggrieved.
 - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be provided by him at the time when the decree was passed or the order made, or on account of some mistake, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The foregoing provisions are based on section 80 of Civil Procedure Act which 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 decree or made the order, and the court may make such order therein as it thinks fit”

An applicant seeking an order for review needs to satisfy the court the following;

- a. There is a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made.
- b. There is some mistake or error apparent on the face of the record.
- c. Or for any other sufficient reason.

The applicant herein has sought to review the judgment of Hon. Justice Waweru on the ground that there is an error apparent on the face of the record in that the Judge ordered payment of interest on the decretal sum from the date of filing of the suit to the date the principal amount was released to the plaintiff. In their view, the Judge ought to have ordered payment of interest at court rates at 12%p.a from 24th July, 2001 to the date the payment was made to court on the 10th may, 2011.

The jurisdiction of the court to award interest is provided for under section 26 (1) of the Civil Procedure Act which is in the following terms;

“Whereas and in so far as a decree is for the payment of money, the court may, 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.....”

The defendants have challenged the court’s exercise of its discretion in awarding the interest and they averred that the award of interest was based on arbitrary considerations as to amount to an error on the face of the record. The instances of arbitrariness were offered as follows;

1. While the suit was filed on the 24th July, 2001 the plaintiffs applied to extend time to serve summons to enter appearance and they applied and obtained default judgment upon alleging that the deceased was served with summons to enter appearance.
2. The default judgment was challenged on the footing that the deceased was never served and it was subsequently set aside.

They have contended that interest ought to run from the date the summons to enter appearance were served following setting aside of the default judgment.

The plaintiffs on their part have argued that the application is an abuse of the court process and it has been made to frustrate them. That based on the evidence on record, the defendants application does not warrant any review as provided for under order 45 of the Civil Procedure Rules.

On whether there was an error on the face of the record, I wish to refer to the case of **Antony Gachura Ayub Vs. Francis Mahinda Thunwa (2014)eKLR** quoted with approval in the decision of **Draft and Develop Engineers Ltd Vs. National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011** where it was held;

“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 the facts of each case. There is a real distinction between mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares on in the face, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points here 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for appeal”.

I wholly concur with the above finding and in my considered opinion, the remedy available to the defendants was appeal and not review.

On prayer 2 of the application, it is noted that the estate is still under the process of administration and it may not be possible to pay the decretal sum at once. This court has also taken into account the fact that part of the decretal sum has already been paid to the plaintiffs. In the premises and in the interest of justice, the defendants are ordered to pay half of the remaining decretal sum within 30 days from today and the balance to be paid in monthly installments of Kshs.150,000/- until payment is full.

Prayer (a) of the application is disallowed. The plaintiffs will get the costs of the application.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... **For the 1st Plaintiff/Respondent**

..... **For the 2nd Plaintiff/Respondent**

..... **For the 1st Defendant/Applicant**

.....**For the 2nd Defendant/Applicant**