



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 65 OF 2006

INSURANCE EXPERTS (K) LIMITED.....APPELLANT

- V E R S U S -

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1) Insurance Experts (K) Ltd, the appellant herein, filed an action against National Bank of Kenya Ltd, the respondent herein, before the Chief Magistrate's Court, Milimani seeking to be paid ksh.530,000. The trial Principal Magistrate considered the evidence tendered by both sides and in the end dismissed the suit. Being aggrieved, the appellant preferred this appeal. On appeal, the order dismissing the suit was set aside and was substituted with an order entering judgment in favour of the plaintiff (appellant) and against the defendant (respondent) in the sum of ksh.530,000/= plus interest at court rates from the date of judgment until full payment.

2) The appellant/applicant has now taken out the motion dated 12th July 2016, the subject matter of this ruling in which he sought for the following orders:

1. That the court be pleased to review and vary the rate of interest to be paid on the sum of kshs.530,000/= decreed to be due and owing by the respondent to the appellant to be from 3rd December 1999 when the claim was filed in court instead of 27th May 2016.

2. The costs of this application be provided for.

3) The motion is supported by the affidavit of Philip Jasper Wishaminy. The respondent filed his grounds of objection to oppose the motion.

4) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the motion and the grounds of opposition against the motion. The applicant has basically sought for the following orders *inter alia*: First, is an order to review and vary the date from when interest should be paid on the decretal sum of kshs.530,000/=. Second is an order as to costs of this application.

5) The applicant has stated that what was claimed in the plaint is a debt due and owing from the respondent to the appellant as at October 1997 when the applicant filed its plaint in the High Court as HCCC No. 1806 of 1999 on 3rd December 1999, it claimed interest on the sum at court rates from the time the suit was filed until payment in full. The award on the appeal judgment of ksh.530,000/= is an error made by awarding interest as from the day judgment was given on 27th May 2016 and not 3rd

December 1999 when the case was filed. The applicant goes ahead to say that no reasons have been given and interest from 03.12.1999 to 27.05.2016 has been denied to the applicant, therefore there is sufficient reason to review the part of the judgement as relates to the interest.

6) The respondent on the other hand is saying that the court is now *functus officio*, having exercised its discretion and pronounced itself conclusively on the decretal sum and interest allowed thereon by awarding interest at court rates from the date of judgment until payment in full. There is no error on the face of the record, the judge having exercised his judicial discretion. The appellant remedy lies in an appeal if aggrieved with the decision. Lastly, that the appellant's application is *res judicata*, statute barred and constitutes gross abuse of the process of the honourable court and ought to be out rightly dismissed with costs to the respondent.

7) The issue for determination before this court is whether this court ought to review its earlier decision as sought by the appellant. In order to justify the grant of an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the Civil Procedure Rules, certain requirements must be met. The said provision provides as follows:

1. 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 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 produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate court the case on which he applies for the review.

Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya upon which the said rule is based provides as follows;

“Any person who considers himself aggrieved-

a. 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.”

8) The law is that interests on general damages accrue from the date of judgment as opposed to special damages which accrue interest from the date of filing of the suit. This was held by the Eastern Court of Appeal in **Dipak Emporium – vs- Bond’s Clothing in Civil Appeal No. 64 of 1972(1973)EA 553**. The rationale for awarding interest was explained in **Later –vs- Mbiyu (1965) EA 392** where it was held:

“The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the courts discretion. But such discretion must be judicially exercised, and where no explanation is given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown. It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

Similarly in **Highway Furniture Mart Ltd –vs- Permanent Secretary office of the President and another (2006) eKLR** it was held:

“The justification for an award of interest on principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods though the wrongful act of a defendant.”

9) It is therefore clear that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has basically wrongfully deprived him of the use of goods or money.

10) Having considered the rival submissions and the material placed before this court I am not persuaded that I should review my decision. It is apparent from both the plaint and the application for summary judgment that the appellant had simply sought for an award of interest at the prescribed court rates until payment in full. There was no prayer for payment of interest from the date of filing the suit. With respect, I agree with the submissions of the respondent that the motion dated 12-7-2016 does not meet the threshold of an application for review. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 20th day of July, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent