



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 119 OF 2010**

**JOHN FRANCIS WAMBUGU.....APPELLANT**

VERSUS

**BHOGALS GARAGE LTD.....RESPONDENT**

*(An appeal from the Judgment/Decree of Honourable C.A. Otieno Resident Magistrate, Nakuru delivered on 19<sup>th</sup> April 2010 in Nakuru CMCC No.1586 of 2006)*

**RULING**

1. The appellant by his application dated 3<sup>rd</sup> December 2016 seeks an Order of Review and variation of the judgment of the court in the appeal dated 14<sup>th</sup> July 2016 by ordering the Respondent to pay costs of the lower court case that he had lost but allowed on appeal. It is his contention that as he succeeded in the Appeal, the respondent ought to pay costs in the primary suit.

He brings the application under the provisions of **Order 45 Rule 1 Civil Procedure Rules and Sections 3A and 27 of the Civil Procedure Act.**

The application is opposed by grounds of opposition filed on the 25<sup>th</sup> January 2017. I have considered both the grounds in support and in opposition of the application and submissions.

2. The trial court judgment was set aside in its entirety including the award of costs, and substituted with a judgment in favour of the appellant together with costs in this appeal.

The provisions of **Order 45 Rule I of the Civil Procedure Rules** presupposes that there is discovery of new and important matter or evidence, or the existence of a clerical or arithmetical mistake or error apparent on the face of the record or decree.

3. The applicant has not in any way demonstrated any new or important matter or an error on the face of the decree. See **HCCA No. 126 of 2009 Michael Kungu Kigioa -vs- KNUT (2013) e KLR.**

**Section 27 of the Civil Procedure Act** grants the court wide discretion to award costs as it deems fit. The primary suit was dismissed with costs. The appellant who was the plaintiff was awarded costs of the appeal. To award costs of the primary suit to the appellant, in my view would amount to double compensation. I find no basis to award either costs nor interest to the appellant on the primary suit.

4. In the appeal judgment dated the 14<sup>th</sup> July 2016, costs were awarded to the appellant upon the awards granted on both special and general damages by the trial court. The court did not however determine the matter of interest rates and the commencement date of the application of interest.

**Section 99 and 100 of the Civil Procedure Act** empowers the court to correct any clerical or arithmetical mistakes in decrees or orders at any time on such terms as it thinks fit. **Section 26** thereof further empowers the court to order interest at such reasonable rates upon the principal sum from some date as it may determine See **Civil Appeal No. 161 of 1999 – Abok James Odera & Associates -vs- John Patrick Machira t/a Machira & Co. Advocates (2013) e KLR.**

Having noted that the judgment is silent on the matter of interest, I am persuaded, both on my own motion

and by the applicant to award interest on both the special and general damages from the date of the primary suit judgment that is on the 19<sup>th</sup> April 2010 at court rates.

5. To that extent the appellant's application dated 3<sup>rd</sup> December 2016 Succeeds in terms of **Prayer No. 3** only.

No award of costs on the application is granted.

**Dated, Signed and Delivered this 20<sup>th</sup> Day of July 2017.**

**J.N. MULWA**

**JUDGE**