



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 41 OF 2008

MACHAKOS RANCHING LIMITED APPELLANT

VERSUS

JOSEPH WAMBUARESPONDENT

RULING

Introduction

1. This ruling presents a dilemma on the spectre of lost files in the Kenya Judiciary. By Judgment delivered on 6th February 2008, Senior Resident Magistrate’s Court (Hon S.A. Okato) in Machakos CMCCC No. 449 of 2007 awarded the sum of Ksh.470,000 as general damages for pain and suffering and loss of amenities in a personal injury case. The Appellant who was the defendant in the suit considered the award to be excessive in the circumstances as to amount to an erroneous estimate of the damages suffered by the respondent plaintiff in the suit and consequently filed an appeal by Memorandum of Appeal dated 26th January 2008 and filed on 27th January 2008.
2. On 28th January 2008 the Deputy Registrar called from the trial court for ‘the original record of your above civil case together with three certified copies of the proceedings and the ruling/judgment’ for purposes of the appeal. The Court file from the trial court was never traced despite numerous reminders and it was finally determined to have been lost. An application by the respondent dated 19th May 2010 for the dismissal of the appeal for want of prosecution was rejected by the High Court (Waweru, J.) on the ground that the appellant had been prevented from preparing the appeal for hearing as the lower court file had not been provided:

“The appellant says that its hands are tied because it has not been supplied with copies of proceedings and judgment despite paying a deposit for them. It may or may not have been diligent enough in trying to get copies of the proceedings and judgment. But I consider that it would be unjust to dismiss its appeal for want of prosecution at this stage when even this court is apparently unable to secure the original record of the lower court.”

3. This position with regard to the trial court file was confirmed by the Executive Officer of Machakos Law Courts in letter dated 25th July 2014 as follows:

“25th July, 2014

The Deputy Registrar,

High Court of Kenya,

P.O. Box 145,

MACHAKOS

RE: HCCA.NO. 41 OF 2008

CMCC NO. 449 OF 2007

MACHAKOS RANCHING LTD VS. JOSEPH WAMBUA

Reference is made to the above subject matter.

The above CMCC Case No. 449 of 2007 was heard and decided on 6th February, 2008. The counsel for the defendant filed a Memorandum of appeal in the High Court on 27th February, 2008.

He applied to the court to be supplied with the proceedings and judgment for purposes of preparing records of appeal. The registry was unable to supply the same to the counsel because the original records went missing after the judgment was delivered. Efforts to trace the original records have since borne no fruits/or have proved futile.

(Attached herewith is a certificate confirming loss of file).

STEPHEN MUTISYA

AG. EXECUTIVE OFFICER

MACHAKOS”

4. Upon an application for stay pending appeal the trial court had by order made on 8th May 2008 allowed a stay upon conditions that the sum of Ksh.150,000/- be paid to the plaintiff within 7 days of the Order and the balance of ksh.405,290 be deposited in court on or before the 25th May 2009. It is not in dispute that the cheque for the deposit of the balance was forwarded to court by cover of letter dated 14th May 2008. The costs in the trial court are agreed at Ksh.53165/- The total outstanding amount of the decretal sum together with costs in the lower court is Ksh.458,455/-
5. The dispute in matter remains the issue of interest accruing on the decretal sum and costs. It is not clear from the available documents whether interest was ordered on the decretal sum but appellant has not contested that it was not granted by the trial court. In any event section 26 of the Civil Procedure Act imposes interest at 14% in the event that no specific order is made by the trial court, as follows:

“26. Interests

(1) 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 to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 [currently 14%] per cent per annum.”

Proposal for Settlement of the Appeal

6. Upon confirmation that the original court file is lost, the parties have proposed to settle the matter by an order of withdrawal of appeal upon terms, but disagree on the specific terms thereof. The appellant has proposed that it pays the decretal sum together with costs in the trial court and that the appeal be marked withdrawn with no order as to costs. The respondent in accepting that the appeal be marked withdrawn in view of the lost trial court file proposes that the parties share the spoils with regard to the interest accumulated over the 8 years since the judgment of the trial court, so that the appellant pays the decretal sum together with the costs in the trial court together with half the accrued interest.
7. In the absence of an agreement between the parties, the court has been asked to adjudicate the matter.

The legal dilemma

8. The appellant's submission hinged on whether this court whose registry has misplaced the court file and therefore making it impossible for the appellant to file the record of appeal and prosecute the appeal could impose on the appellant the payment of interest for the time the appeal has been pending. On the other hand, should the respondent who is entitled to the fruits of his judgment on quantum, costs and interest be punished by loss of his right to interest by the loss the court file necessary for the prosecution of the appeal against his judgment?
9. The statutory provisions of section 26 of the Civil Procedure Act, which imposes interest at 14% in the event no specific order is made by trial court in a decree for payment of money creates an entitlement to the respondent, which could only be defeated by an order upon appeal.
10. The High Court is superior court of record. The Magistrate's Court is not a court of record but when appeal is preferred from its decisions the court must avail the court file to the higher court. Indeed its record may only be destroyed upon compliance with elaborate procedure for disposal of records under the Records Disposal Act cap. 14.

Inherent power of the court to do justice

11. The court has under section 3A of the Civil Procedure Act, the power to make orders for the interests of justice as follows:

“3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

12. The justice of the case appears to be an order for the payment of the decretal sum already deposited in court together with interest as decreed by section 26 of the Civil Procedure Act, but the appellant may sue for the recovery of the interest paid from the Judiciary which has failed to maintain the records of the Court necessary for purposes of lodging an appeal against the judgment of the trial court.
13. The appellant who has in compliance with Statute compelled to meet the element of interest on the decretal sum by reason of the loss of the court file may, if so advised, sue the Judiciary through its Chief Registrar of the Judiciary, who is the chief administrator and accounting officer of the Judiciary under Article 161 (1) (c) and therefore responsible for the maintenance of court records and the Judicial Service Commission (JSC) which under Article 172 (1) is charged with the duty to 'promote and facilitate the independence and accountability of the judiciary and the efficient,

effective and transparent administration of justice' to recover, as a special damage, the interest on the decretal sum.

Orders

14. Accordingly, for the reasons set out above, the makes the following orders:

- a. The Appellant's appeal herein is marked as withdrawn with no orders as to costs.
- b. The monies deposited in Court as part of the decretal sum will be released to the respondent.
- c. The appellant will pay the costs of the suit in the Magistrate's Court.
- d. The appellant is liable to pay interest in accordance with section 26 of the Civil Procedure Act. However, as the respondent has offered to accept half the interest due, the appellant will only pay interest to the extent of 50% of amount of interest due as at the date of payment in full.
- e. In view of the old age of the appeal, this matter will be mentioned for compliance on the 17th December 2015.

15. The Court hopes that the Judiciary will be encouraged, nay persuaded, by this ruling to expedite the complete digitization of court records to avert this kind of danger of civil claims in the future.

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Musila for Mr. A.K. Mutua for Respondents

Ms. Omulupi for the Appellant

Ms. Doreen- Court Assistant.