



**REPUBLIC OF KENYA**

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

**LAND ACQUISITION ACT APPEAL NO. 42 OF 1989**

**MWANGI MWERU. .... 1<sup>ST</sup> APPELLANT**

**SAMUEL E. N MWERU. .... 2<sup>ND</sup> APPELLANT**

**JAMES KARANJA. .... 3<sup>RD</sup> APPELLANT**

**PETER KARIUKI. .... 4<sup>TH</sup> APPELLANT**

**DANIEL NGANGA. .... 5<sup>TH</sup> APPELLANT**

**SIMEON GIUKU. .... 6<sup>TH</sup> APPELLANT**

**VERSUS**

**THE COMMISSIONER OF LANDS. .... RESPONDENT**

**R U L I N G**

The Applicants/Appellants, whose land Loc. 2/Kanderendu/5 had been compulsorily acquired by the Commissioner of Lands under the Land Acquisition Act, and had been awarded compensation, filed an appeal to this court by a Memorandum of Appeal dated the 17<sup>th</sup> July, 1989, seeking interest. In the grounds of the said appeal, they sought, inter alia, that a fresh inquiry and valuation of the land be done, to compensate them at a sum more than Kshs.1,898,200/- awarded by the Commissioner of Lands. The Appellants also sought that in the alternative, the High Court itself, determines the full compensation of the land.

The record indicates that thereafter the Appellants' advocates entered into negotiations with the Commissioner of Lands who was represented by the Attorney General and that the negotiations led into a consent settlement which was filed in court on 18<sup>th</sup> July, 1990 but was dated 11<sup>th</sup> June, 1990. The consent improved the value of compensation payable to the Appellants from the sum of Ksh.1,898,200/- to about Ksh.3,448,200/-. Apart from the actual land the compensation funds entered as a judgment in favour of the Appellants, each party was to be responsible of own costs. Nothing was said about interests that might have arisen or would arise.

There is evidence on the record that the original court file disappeared and later was declared lost but orders for reconstruction were however, obtained. The matter before the court is now being pursued in a reconstructed file.

There is no clear information on this record what exactly happened when the judgment by consent

was entered. There is no demonstration, say by correspondence, that the Appellants sought a settlement of the consent Judgment and whether the Respondent showed unwillingness to settle the decree all these years. However, the Appellants recently started a process to recover the decretal sum. It would therefore, appear, that the delay to have the Judgment settled, lay with the Appellants who did not demand for it.

On the other hand, the Respondent avers that it was always ready to settle the Judgment if the Appellants served it with a courts certificate of the Order against the Government, upon which alone, the Government honours decrees passed against it. The Respondent accordingly argued that any possible interest which could have accrued all the 22 years since Judgment was entered, was caused, not by the Respondent, but by the Appellants themselves. The Respondents accordingly argued that the Appellants in those circumstances, cannot be entitled to the interest which they themselves caused to accrue.

The Respondent/Judgment debtors raised another argument against the said interest. It argued that the Judgment in question was a negotiated judgment entered by consent. That its nature and construction was not accidental or mistaken but deliberate. That it included what was supposed to be included and left out what was supposed to be left out, including interest. That accordingly, the entered judgment cannot be varied by the court since that would mean the court making a contract for the parties. That in not making an order for interest when the consent judgment was entered, the court did not then exercise its discretion thereto under Section 24(1) of the Civil Procedure Act and cannot later purport to exercise it under subsection (2) thereof.

In reply, the Appellants raised the point that at no time during the negotiations and at the entry of the consent judgment, did either party think of the interest issue nor did either think that a settlement would be delayed as it has in this case.

I have carefully considered the issues in the matter before me. There is no doubt that this was a case where the judgment was in a liquidated sum arising from an act of the judgment Debtor, which although lawful because it was authorized by a statute, was nevertheless a deprivation of Appellants rights and therefore an act to the detriment of the Appellants. Hence the basis of compensation in kind or alternatively in liquid cash. Such a case as is stated by the Court of Appeal in **prem Lata case [1965] E.A. 592 at 593**, would be a suitable case where it is clearly proper to the court to order interest at court rates in favour of the Judgment Creditor.

The reading of the consent judgment in this case, indicates, in my view, that neither the parties nor the court, thought of or held in mind the issue of interest. If they did, the parties would specifically mention the incidence thereof and as to whether or not the Defendant should bear it. For example they specifically mentioned the incidence of costs and laid it on each party. They could have easily done so with interest.

It is possible to say that neither party expected delay in settlement of the judgment entered by the court. In my view, however, such delay should be expected and a cautious party should request the court to provide for such eventuality by making a specific order on such interest.

Furthermore, the Judgment in question was a negotiated consented judgment expected to be complete in all aspects. It is not easy to think that the counsel participating in the negotiation for a liquidated sum, could not think that it did not require to carry interest until settled. Every judgment, whether negotiated, adjudicated by court or sought ex parte, always has the element of interest. In my view not including it in a negotiated judgment such as the one before the court, invites the conclusion that such was the understanding of both parties.

Having said the above, the question that arises and which is the really issue before this court is this: -

Where the court had power and proper reason to order that the sum awarded should attract court or other interest but did not exercise such discretion, can the same court or a court of similar jurisdiction later order for such interest? The applicant answered the question in the positive. He however, failed to point out the source of such power or discretion of the court. In my view Section 26(1) of the Act

aforecited gives the court jurisdiction to exercise discretion to grant interest as at the time of entering judgment in a liquidated form. Section 26(2) thereof donates power of the same court to later grant additional interest to that awarded under subsection (1) if the first order had remained silent on such additional interest. That is all there is to it. The provision is, therefore in my view, not a later source of jurisdiction by the court to award interest that was not awarded at the effective time under Section 26(1). Furthermore the applicant failed to point out any legal authority to support his proposition. I did not myself find any.

In the above circumstances, I hold that this application has no merit. It is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 10th day of February 2014.

.....

**D A ONYANCHA**

**JUDGE**