



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NUMBER NO 2772 OF 1997

ALLAN STEPHEN REYNOLDS.....PLAINTIFF

VERSUS

TWIGA CHEMICAL INDUSTRIES LIMITED.....DEFENDANT

RULING

1. The Plaintiff in this suit claimed various sums of money from the Defendant upon termination of his employment with the Defendant. The Defendant denied the claims and also put forth a set-off for a certain sum of money. Before the suit came to trial, the parties negotiated and on 18th February, 2013 they recorded a consent, the Defendant having admitted the Plaintiff’s claim to the extent of KShs 2,226,144/00, and the Plaintiff having admitted the Defendant’s set-off to the extent of KShs 1,919,515/66. The trial then proceeded on the remainder of the Plaintiff’s claim made up of two issues:

1. KShs 260,000/00 for school fees.
2. KShs 4,550,000/00 being the value of the Plaintiff’s goods which were auctioned by a transportation company.

2. In a judgment delivered on 12th November, 2004 the Court (Githinji, J as he then was) entered judgment for the Plaintiff as follows (after some figures were subsequently corrected) :

Admitted claim.....	KShs 2,226,144.00
Admitted school fees.....	KShs 260,000.00
Sub-total.....	KShs 2,486,144.00
Add value of Plaintiff’s goods	
sold by AGS.....	<u>KShs 4,550,000.00</u>
	KShs 7,036,144/00
Less set-off	KShs1,919,515/00
Balance.....	KShs5,116,629/00

3. The Plaintiff was also awarded costs of the suit and interest at the rate of 12% per annum from the date of filing suit. The interest was by consent of the parties.

4. The Defendant then appealed to the ***Court of Appeal*** vide **Nairobi Civil Appeal Number 300 of 2006**. The ***Court of Appeal*** noted that the main issues that arose for determination in the appeal were:

- i. Whether the trial court erred in law in making a finding that among the benefits due to the Plaintiff was the school fees claim of Kshs. 260,000/00.
- ii. Whether the learned Judge erred in law in making a finding that the Defendant was liable for the Plaintiff's loss of goods for the value of Kshs. 4,550,000/00.
- iii. Whether the learned Judge erred in failing to make a finding that the Plaintiff should have mitigated his loss.
- iv. Whether the learned Judge was biased in his judgment.

5. By a judgment delivered on 28th February, 2014 the ***Court of Appeal*** allowed the appeal in part and ordered as follows:

- i. The claim for school fees of Kshs. 260,000/00 fails.
- ii. The claim of Kshs. 4,550,000/00 is upheld.
- iii. Costs of the appeal to the Respondent (Plaintiff).

It is clear that the only award of the High Court that Court of Appeal set aside was KShs 260,000/00.

6. Before the appeal was heard and determined, this Court (Waweru, J) had allowed the Defendant's application for stay of execution pending disposal of the appeal upon the condition that the Defendant deposits in a joint interest-earning account the decretal sum, which the court calculated at Kshs 14,203,040/50 at that time. The condition was met.

7. Upon disposal of appeal before the ***Court of Appeal*** the Plaintiff has a plied by notice of motion dated 8TH April, 2014 for the main order that:

“The funds held at Imperial Bank Limited in the names of Messrs Muthaura Mugambi Ayugi & Njonjo, Advocates and Messrs Gichuki King'ara Advocates pursuant to the conditional stay order issued by this Honourable Court on 2nd October, 2008 (the Hon. Mr. Justice H.P.G. Waweru) be released forthwith to the Plaintiff's Advocates on record, Messrs Muthaura Mugambi Ayugi & Njonjo Advocates”.

The application is supported by an affidavit sworn by his advocate, **Jomo Nyaribo** and is brought under the inherent power of the court.

8. In response to the application the Defendant filed **notice of preliminary objection dated 29th April, 2014** raising the following grounds:

- i. That there is no decree capable of being executed by the Plaintiff by way of release of the amount deposited as the previous decree has been set aside by the Court of Appeal.
- ii. That no formal decree has been extracted in conformity with the ***Court of Appeal*** judgment.
- iii. That costs have not been re-ascertained nor leave sought to execute before taxation under **section 94** of the **Civil Procedure Act**.

9. The Defendant also filed a **replying affidavit** sworn by its advocate, **Caroline Kimeme**. In addition

to elaborating the three grounds in the notice of preliminary objection, the following additional grounds of objection to the application have been raised;

(i) That the *Court of Appeal* did not award interest on the judgment sum that was upheld.

(ii) That the sum of KShs 260,000/00 set aside by the *Court of Appeal* has not been discounted from the amount now due and payable upon the decree.

(iii) That in any case the decree would have to be drawn afresh in light of the variation made by the *Court of Appeal* in judgment of the High Court.

iv. That the Plaintiff's application for release of the sums deposited in the joint account is thus premature and ought to be refused.

10. I have considered the submissions of the learned counsels appearing, including the cases cited. Those cases are on broad principles of law that are not in dispute.

11. As has been seen above I have perused the judgment of this court and that of the *Court of Appeal*. Regarding interest on the judgment sums, the same was awarded by the High Court by consent of the parties. The issue of interest was never raised before the *Court of Appeal* and that Court made no pronouncement on it, obviously because it was not an issue in the appeal. The interest therefore remained in place as awarded by the High Court, by consent of the parties. It cannot be challenged now.

12. As for variation of the decree, indeed the *Court of Appeal* varied the decree of the High Court by setting aside the award of KShs 260,000/00. This however is a very small sum compared to the award of KShs 4,550,000/00 that was upheld by the *Court of Appeal*. If you add interest at 12% per annum from the date of filing suit (15th November, 1997) to date, surely the decretal sum will far exceed KShs 14,203,040/50, which was the decretal sum as at 12th November, 2008 as then calculated by this court. And this will be so even after reducing the judgment sum by the small sum of Kshs 260,000/00 that was set aside by the *Court of Appeal*.

13. Similarly, re-taxation of the Plaintiff's costs in the High Court on account of the reduction of the value of the subject-matter by KShs 260,000/00 is also unlikely to substantially affect those costs.

14. The small adjustments to the decree that will become necessary in order to take into account the reduced judgment sum (by KShs 260,000/00) can easily be dealt with by the Deputy Registrar of the court if the parties cannot agree on that simple matter. I note that a fresh decree was drawn up by the Plaintiff's counsel after the judgment of the *Court of Appeal* was delivered. If it has errors as argued for the Defendant, let the court be appropriately moved in that regard.

15. As for now, having observed that the amount due upon the decree will be far in excess of the amount now held in the joint account even after factoring in the reduction of the judgment sum by KShs 260,000/00, I see absolutely no reason why the Plaintiff should not have access to the amount now held in the joint account. To deny him access thereto would be totally unjust and pointless.

16. In the event, I will allow the notice of motion dated 8th April, 2014 as sought in prayer 2 thereof. The Plaintiff should have costs of the application. Those will be orders of the court.

DATED AND SIGNED AT NAIROBI THIS 8th DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF JULY 2014