



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 148 OF 2009

LESIT, J.

NAHASON MAINGI MUGUNA.....PLAINTIFF

-VS-

JOSPHAT NJIRU M'ARUCHA.....DEFENDANT

RULING.

1. By a Plaint dated 13th November 2009, the plaintiff instituted the instant suit against the defendant claiming inter alia payment/refund of Kshs. 2,150, 000 together with compound interest at bank rates from 11th September 2009 till payment in full.

2. Before the matter could be heard, the plaintiff filed a Notice of Motion application dated 18th May 2012, seeking the following orders:

1. **That the court do enter summary judgment against the defendant.**
2. **That the court do strike out the defendant's statement of defence.**
3. **Costs be in cause.**

3. The defendant raised a Notice of Preliminary Objection in respect of the said Application on the following grounds:

1. **That the entire application is bad in law as it does not satisfy the core ingredient of Order 36 Rule 1 (1) of the Civil Procedure Rules 2010.**
2. **That the application is unsustainable and fatally defective as a statement of defence to the plaintiff's claim has been filled and is properly on record.**
3. **That the application is irregular and an abuse of the court process.**

4. In a ruling delivered on 20th March 2012, this court inter alia upheld the preliminary objection raised by the defendant and struck out the plaintiff's application dated 18th May 2012. The court further directed the parties to take out hearing dates for hearing and determination on the issue of compound interest, costs and interests of the plaintiff's suit. In compliance to those directions, the parties filed submissions

which they highlighted before me on the issue of compound interest, costs and interest of the plaintiff's suit.

5. There is no dispute that the defendant satisfied part of the plaintiff's claim when he paid the sum of Kshs 2,150,000/- to the plaintiff. The circumstances leading to that payment is important as it forms an important focus to the issue for determination in the submissions by both parties.

6. The brief facts in this case are as follows: The plaintiff's claim arose from a land sale agreement dated 11th September 2009 whereby the plaintiff paid to the defendant Kshs 2,159,000 as consideration. Subsequently the plaintiff discovered that the defendant had defrauded him by selling to him land that had been the subject of compulsory acquisition by the government and for which the defendant had been compensated.

7. The plaintiff then lodged a complaint with the police whereby the defendant was charged in criminal case number 216 of 2010, before the Chief Magistrate's Court in Meru with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The criminal case was heard fully and the defendant convicted for the charge of obtaining by false pretenses. The court then gave the defendant an option to refund the entire amount or face a custodial sentence. Pursuant to that the defendant paid the entire Kshs 2,150,000/ to the plaintiff.

8. At the same time, the plaintiff instituted this suit against the defendant seeking a refund of Kshs 2,150,000/ together with compound interest at bank rates from 11th September 2009 till payment in full, costs and interest. Judgment was entered for the plaintiff against the defendant in the sum of Kshs 2,150,000/on the defendant's own application dated 30th July, 2012. It is that same ruling which dismissed the plaintiff's application dated 18th May, 2012. In the same ruling, the court ordered the parties to get hearing dates for purposes of the parties arguing the issue of compound interest, costs and interest to the plaintiff's suit. That is what is under consideration here.

9. Mr. Muriuki represented the plaintiff in this case while Mr. Mwanzia represented the defendant. Each counsel made submissions in support of their client's position. I will consider each of their submissions.

10. Defendant's argument on the issue of costs was that costs normally followed the events, and cited section 27 of the Civil Procedure Act in support of that proposition. Mr. Mwanzia urged that costs do not apply because there has been no litigation in this case. Counsel urged that in light of the criminal case number 216 of 2010 through which the plaintiff was paid, the civil case (instant case) does not stand as a party cannot litigate twice.

11. Plaintiff's argument on the issue of costs. Mr. Muriuki submitted that under section 27 of the CPA, costs followed the events, and secondly costs were in the courts discretion. Counsel urged that since he defendant conned the plaintiff, and then failed to honour Notice to pay necessitating the civil suit; further for reason the defendant filed a defence and defended the suit, he should pay the costs of the plaintiff's suit. For that proposition, Mr. Muriuki relied on **NORMAN MAIN V ADAM FERGUSION (1942-43), 20(1)KLR** and **EAST AFRICAN STANDARD LIMITED -VS- GUARDIAN LIMITED (1934) 16 (1) KLR 23**. Counsel for the plaintiff also urged that the defendant was the proximate cause of the filing of this suit, that filing fees and other costs had been incurred and so should be met by the defendant.

12. I have carefully considered the submissions by counsel and authorities cited.

13. Section 27 of the Civil Procedure Act CAP 21 of the laws of Kenya provides as follows:

27 (1) subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (Emphasis mine).

14. In the case of **EAST AFRICAN STANDARD LIMITED -VS- GUARDIAN LIMITED (1934) 16 (1) KLR 23** which has been relied by the plaintiff, the Court of Appeal held:

“The court must exercise the discretion judicially and should not deprive a plaintiff of his costs unless it can be shown that he acted unreasonably. The principle to be applied is whether the action is one which ought to have been brought.”

15. It is not in dispute that the defendant knowingly, willfully and deliberately defrauded the plaintiff of the sum herein, which sum is not in dispute. Selling nonexistent land was both a criminal case, in view of the fraud involved. It was also an actionable case through civil process for the purpose of the plaintiff recovering his money. The defendant took the plaintiff's money and he denied it in the criminal case, necessitating a full hearing in the criminal case. In the civil suit the plaintiff filed to recover back his money, the defendant filed a defence in which he denied the claim and proceeded to defend the suit. Before filing the suit, the plaintiff served a demand letter on the defendant to pay back the money, which the defendant declined.

16. Faced with the circumstances and the facts of this case, I find that the plaintiff acted reasonably and did what a reasonable and prudent man would have done. I find that filing this suit was inevitable. The defendant's argument that by filing this suit and reporting the case to the police was double litigation is untenable. As I explained earlier, the subject matter in this case gave rise to both an actionable civil case and an act which was criminal in nature. One case was within the control of the plaintiff but the criminal matter was solely in the control of the police or State. Both actions were the direct result of the defendant's conduct.

17. In the book by Richard Kuloba “**JUDICIAL HINTS ON CIVIL PROCEDURE** “2nd Edition, Law Africa, page 94 it is stated as follows:

“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. In the case of a criminal prosecution costs are not merely to increase the punishment of an offence. The natural limit which exists as to ordering costs of proceedings is an amount up to the sum actually incurred. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting in an action.”

18. The plaintiff incurred expenses when he filed the instant suit. It is only judicious, fair and just that he should be reimbursed the amounts expended towards this cause. Consequently I do agree with submissions by the plaintiff that the defendant was the proximate cause of the filing of the instant suit and it would only be fair and just that he shoulders the burden of the costs of this suit.

19. Regarding the issue of interest. Mr. Mwanzia for the defendant urged that the plaintiff chose to pursue a criminal case as well as file a civil suit against the defendant on the same subject matter. He urged that since the plaintiff got a refund of the money in the criminal case the entire civil suit became superfluous. Mr. Mwanzia urged that there is no decree in this suit and so no interest is payable. For that proposition, learned Counsel cited the case of **PREM LATA V PETER MUSA MBIYU 1965 EA 592**.

20. In regard to the claim for compound interest, Mr. Mwanzia urged that the same is unfair enrichment and secondly, that it was unconscionable.

21. Mr. Muriuki, learned counsel for the plaintiff urged that under section 26 of the Civil Procedure Act, the court had discretion in the decree to order for interest. Counsel urged that the defendant received Kshs 2, 150, 000/ on 11th September, 2009 and repaid it on 23rd November, 2011 and that the plaintiff is entitled to interest on the same. Counsel urged that the defendant should therefore pay interest on same.

22. Mr. Muriuki also cited the case of **PREM LATA V PETER MUSA MBIYU 1965 EA 592** for the proposition that since the plaintiff was successful in his litigation, and having shown that he was deprived of his money wrongfully, he should not be denied interest.

23. I have carefully considered the rival arguments by both counsels in this matter. Section 26 of the Civil Procedure Act CAP 21 of the Laws of Kenya deals with the issue of interest in suits and provides as follows:

“ 26 (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 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 per cent per annum.”

24. The defendant has urged that there is no decree in this case as the defendant paid the sums in issue in the criminal case. Mr. Mwanzia urged that the moment the defendant refunded the money, the civil case became superfluous. That argument is not tenable. As discussed earlier, the defendant defended the civil suit and also entered a plea of not guilty in the criminal case. Generally, the issue of both interest and cost arises once a suit is filed, and confirmed once the suit is defended. It then becomes payable, if court in its discretion orders it, by the party who loses the suit. Once the defendant defended the suit, he placed himself at the court's discretion on the issue of interest. The reason we have no decree in the instant suit is because the defendant was given an option to refund the money in the criminal case, an option he chose to take. That cannot be used to deny the plaintiff what he has rightfully earned.

25. Both counsels to the parties in this case cited the case of **PREM LATA V PETER MUSA MBIYU 1965 EA 592**. The Court of Appeal in that case held:

“Where the successful party was deprived of the use of goods or money by reason of a wrongful act on 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.”

25. The issue for determination is whether the plaintiff was deprived of his money by reason of the defendant's wrongful act. If so, what interest should be ordered?

26. the plaintiff was deprived of Kshs 2,150, 000/ by fraud in that the defendant sold to the plaintiff, and the defendant received the said sum as consideration for a piece of land the government had fully acquired from the defendant. The defendant was therefore selling to the plaintiff what the defendant no longer owned. I am satisfied that the plaintiff was deprived of his money by the defendant's wrongful act.

27. As for the interest payable, the plaintiff paid the sum in question to the defendant on the 11th September, 2009. The defendant repaid the said sum to the plaintiff on 23rd November, 2011. The plaintiff was therefore deprived of the sum of money in question, and he could not use it or benefit from it over a period of 2 years and two months.

28. The plaintiff claimed compound interest at bank rates from date of 11th September, 2009 until payment in full. In order to earn compound interest the plaintiff needed to support that claim. For instance by showing he took a loan in order to pay the defendant and that he was paying interest on it. The plaintiff had an opportunity to call evidence as the courts order of 220th March, 2012 was very clear the parties were to take dates for hearing on the issue of interest and costs. I find that the plaintiff is undeserving of the order of payment of compound interest, and to make that order would result in unjust enrichment and

is unconscionable in the circumstances.

29. Having come to the conclusions I have of this case, the order which should be made is as follows:

1. **The plaintiff will get the Filing Fees for this suit, Instruction Fees and Getting Up fees but this shall not include any ADDITIONAL SUM on the Instruction Fees. The plaintiff may get other incidental costs and these incidentals shall be subject to proof before the Taxing Master.**
2. **The plaintiff be and is hereby awarded interest at court rates on the principal sum namely Kshs 2,150, 000 from 11th September, 2009 to 23rd November, 2011.**

DATED AND DELIVERED AT MERU THIS 17TH JULY, 2014.

LESIIT, J,

JUDGE