



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 24 OF 2017**

**JOHN KIRAGU KIMANI.....PLAINTIFF/APPLICANT**

**VS**

**RURAL ELECTRIFICATION**

**AUTHORITY .....DEFENDANT /RESPONDENT**

**RULING**

1. The ruling is in respect to the Notice of Motion dated the 7/11/19 and amended on the 1/7/2020 in which the Plaintiff/Applicant sought a review of the judgement of this Court delivered on the 15/11/2018 so as to include interest payable on special and general damages and the Court to determine the mode of computation thereof.
2. The Plaintiff *inter alia* sought an alternative prayer that the Court do correct an error in the aforesaid judgement arising from accidental slip or omission of the Court in making an order on interest payable on special and general damages together with the mode of computing the same.
3. The application is supported by the affidavit of the Applicant/Plaintiff and the grounds adduced thereto. The deponent stated that he was awarded special and general damages in the sum of Kshs 981,939/- and Kshs 250,000/-. That however the said judgement was silent on the issue of interests on both components as well as the manner of computing the same despite the Plaintiff having pleaded and prayed for the same in his plaint.
4. In addition, the Plaintiff stated that no Appeal has been filed against the judgement aforesaid and urged the Court to review and or correct the accidental slip or omission on the part of the Court in failing to grant interest on the said amounts.
5. The Plaintiff urged the Court that the application was made without unreasonable delay.
6. In his Supporting Affidavit the Plaintiff deponed that the decree was extracted on the 13/6/19. That in his opinion the interest on special damages should be calculated from the date of the damage valuation report, that is to say the 26/8/13 and or from the date the suit was filed on the 11/10/13 until payment in full. Whilst the interest on the said general damages should be calculated from the date when the judgement was delivered that is to say the 15/11/18 until payment in full.
7. The application was opposed by the Defendant/Respondent who termed it as misconceived incompetent and bad in law. Pauline Sewe, the Chief Legal Officer of the Defendant/Respondent deponed that the notice of appointment of Advocates dated the 7/11/19 was in violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the same having been filed after the delivery of judgment and without leave of the Court nor consent of the previous Advocates on record.
8. With respect to the issue of interest the Defendant contended that interest is discretionary under Section 26 (1) and (2) of the Civil Procedure Act. That under Section 26(2) of the Civil Procedure Act where a decree is silent on interest, there is a deemed interest at the rate of 6% p.a. That interest on the decretal amount was calculated the rate of Kshs 98,555/- and awarded in the warrant of attachment and paid to the Applicant/ Plaintiff hence the Plaintiff has already enjoyed the interest and is keen on a vexing endeavour against the Defendant. Besides the Defendant argued that the application was brought with inordinate delay.
9. Parties filed written submissions which I have read and considered. The Plaintiff relied on his written submissions dated the 13/3/2020 and 1/7/2020.
10. With respect to the issue of compliance with Order 9 Rule 9 of the Civil Procedure Rules the Plaintiffs submitted that there was no change of Advocates on record and that rather the firm of Simon Kiragu & Company Advocates which filed a Notice of Appointment of advocates was added to the panel composed of the previous Advocates Messrs Mwangi Chege & Company Advocates. It was his contention that since the earlier firm was not being replaced it follows that the second firm as an addition and therefore Order 9 Rule 9 did not apply.

11. As to whether the application has been filed without delay the Plaintiff submitted that time starts running from the 13/6/19 when the decree the source of the Plaintiff's dissatisfaction was issued and not the date of the judgement. That the application was filed on the 7/11/19, a period of 5 months which he contends cannot be said to be inordinate. That the Applicant explained that he did not realize that the interest on the decretal amount was not ordered until October 2019, about a year and one month later. That the delay is not intentional and that the Applicant has been a diligent litigant with the exception that the issue of interest was not brought to his attention by his legal advisers at the soonest. He submitted and urged the Court that should the time be calculated from the date of the delivery of judgement that then ought to deem the delay as having been sufficiently explained.

12. Is the Courts failure to award interest a ground for review? The Plaintiff submitted that the Court failed to apply its mind to the issue of interest in the face of clear prayers in the pleadings. That, that in itself amounts to an error on the face of the judgement which necessitates the Court to review its judgement and include interest payable. That this is not a case where the Court declined to award interest but rather that the judgement was silent on the award of costs. That the Courts inadvertent failure to award interest is a self-evident accidental slip or omission which can be corrected by the Court suo moto or on application by any of the parties.

13. Is the Court functus officio? The Plaintiff submitted that the doctrine of functus officio does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. That proceedings are only fully conducted and the Court becomes functus when its judgement or order has been perfected.

14. As to the question whether the Plaintiff was paid interest, the Plaintiff has refuted receiving such interest. He maintains that the Defendant has not shown any proof of payments of interest. Further that if any interest was paid it can only be assumed to be interest payable under Section 26 (2) of the Civil Procedure Act. He submitted that the interest that the Plaintiff is seeking is that provided for under section 26(1) of the Civil Procedure Act. That though interest is awarded at the discretion of the Court he maintains that the Court having failed to award interest in the first instance should revisit its judgement and exercise its discretion judiciously and award the said interest.

15. Further the Plaintiff submits that he was deprived of the value of the damaged trees from the date when the Defendant unlawfully entered into the suit property and cut down the trees in July 2009. Alternatively, he submits that interest may be calculated from the 26/8/13 when the damage was assessed and valued – see the valuation report.

16. Finally, the Plaintiff submitted that interest should be awarded at the Court rates of 14% p.a on special damages from the 26/8/13 to the date of the issuance of the decree in the sum of Kshs 811,000/-. The interest on general damages is assessed from the date of judgement from the 15/11/18 to the date of issuance of the decree that is 13/6/19 totalling Kshs 21,000/-. In addition, the Plaintiff seeks further interest on the aggregate sum of the special and general damages at Court rates from the date of the said decree that is from 13/6/19 to the date of the payment of the decretal sum on 26/7/19 amounting to Kshs 19,000/-, giving a total interest at Kshs 851,000/-.

17. The Plaintiff submits that the Court has unlimited discretion to review its judgement delivered on the 15/11/18 and award interest on special and general damages in the judgement.

18. The Defendant in opposing the application submitted that the Plaintiff's application was filed with inordinate delay which delay is unexplained and inexcusable. That delay prejudices the Defendant because the decree was satisfied on the 26/7/19 while the application was filed 4 months after the said satisfaction and about 1 year after judgement.

19. That the ground being pursued by the Plaintiff is not a ground for review but for Appeal because the alleged failure by the Court to make an order on interest is not an apparent error on the face of the record.

20. That in pursuance to Section 26(2) of the Civil Procedure Act where a Court makes no orders on interest the Court shall be deemed to have ordered interest at 6% p.a . That the Court issued interest of Kshs 98,555/- on the 15/7/19 and in so seeking for further interest the Plaintiff is vexing the Defendant further.

21. Further the Defendant is alleging that the Court applied the law incorrectly which can only be a ground for Appeal and not review.

22. Finally, that the application is incompetent for failure to comply with Order 9 Rule 9 of the Civil Procedure Rules in that the firm of Simon Kiragu came on board after the delivery of judgment and after the payment of the decretal amount. That neither was the leave of the Court or consent of the previous law firm of M/s Mwangi Chege & Company Advocates obtained as required under Order 9 Rule 9 of the Civil Procedure Rules. In addition, that the application does not meet the requirements for review under Order 45 of the Civil Procedure Rules.

23. The issues for determination are; whether the law firm of Simon Kiragu & Co Advocates have complied with Order 9 Rule 9 of the Civil Procedure Rules; whether the orders of review are merited; Whether there are any errors arising from accidental slip or omission in the judgement for the Court to correct through the slip rule and award interest in favour of the Applicant; who meets the cost of the suit.

24. Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.

Order 9 Rule 10 states that;

“An application under Rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first”.

25. From the record this case was filed on the 11/10/2013 by the firm of Mwangi Chege and Company Advocates on behalf of the Plaintiff/Applicant. The judgement in this matter was delivered on the 15/11/18 and the decree extracted on 13/6/2019. All this while the Advocate on record for the Applicant remained Messrs Mwangi Chege & Company Advocates.

26. On the 7/11/19 a Notice of Appointment of Advocates dated the 7/11/19 was filed by the firm of Simon Kiragu & Company Advocates on behalf of the Applicant/Plaintiff. The said firm also filed an application of even date seeking orders of review of the judgement delivered on the 15/11/2018 to include interest payable to the Applicant with respect to the special and general damages awarded in the said judgement.

27. Order 9 Rule 9 provides that for a change of Advocates to take place there are two ways; by leave of the Court to be effected upon notice to all the parties and secondly by consent filed between the incoming Advocate and the outgoing Advocate. The Applicant has argued that the firm of Mwangi Chege and Co Advocates are still on record for him alongside the new firm of Simon Kiragu and Co Advocates. He argues that the new law firm filed a Notice of Appointment of Advocates and not change of Advocates. I have perused the said notice and it is instructive that it does not indicate that the new firm will act for the plaintiff alongside or together or in addition to the previous firm. The notice is also not copied to the firm of Mwangi Chege & Company Advocates.

28. The observations in para 27 may explain why on the 16/6/2020 the Applicant sought leave inter alia for the firm of Simon Kiragu & Co Advocates to come on record in the matter. This application is dated the 4/6/2020. There is no evidence when the firm of Mwangi Chege & Company Advocates ceased from acting for the Plaintiff in this matter. It is therefore clear that the application filed by the current firm on the 7/11/19 was done without compliance with Order 9 Rule 9 of the Civil Procedure Rules.

29. That notwithstanding the record shows that the Court granted leave for the current firm to come on record on the 1/7/2020. In the same orders the Court also granted leave to the Applicant to amend the application dated the 7/11/19 seeking review of the judgement. If the said substantive application was filed contrary to Order 9 Rule 9 can the amendment hold? I do not think so.

30. It is the view of the Court that the substantive application was filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules and therefore the application is for rejection on that ground. This point would have been sufficient to dismiss the motion however, the Court will determine the next issue nonetheless.

31. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides inter alia: -

“Any person who considers himself aggrieved—

a. by a decree or order from which an Appeal is allowed by this Act, but from which no Appeal has been preferred; or

b. by a decree or order from which no Appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

35. Order 45 Rule 1 of the Civil Procedure Rules is couched in the following terms: “(1) Any person considering himself aggrieved—

(a) by a decree or order from which an Appeal is allowed, but from which no Appeal has been preferred; or

(b) by a decree or order from which no Appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or

(c.) on account of some mistake or error apparent on the face of the record,

or

(d) for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

36. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

37. The Applicant has premised his application on the inadvertent failure accidental slip error or omission to include interest on the special and general damages.

38. Section 26 (1) of the Civil Procedure Act guides the Court on the issue of award of interest. It states as follows;

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 per cent per annum.”

39. Section 26(2) of the Civil Procedure Act provides that in the event the judgement is silent the Court will be deemed to have granted interest at the rate of 6%.

40. Evidence was led by the Respondent that the Court assessed interest at the rate of 6% and the same was included in the sum payable to the Applicant vide the decree dated the 15/7/2019 being the amount disclosed as Kshs 98,555/- and paid vide RTGS to the Plaintiff on the 26/7/19.

41. It is clear that the silence with respect to the issue of interest in the judgement was cured by the application of Section 26(2) of Civil Procedure Act by which the Applicant did not raise any objection to the decree issued by the Court. The application for review is being made 4 months after the issuance of the decree and about 12 months after the delivery of judgment. It is to be noted that the Applicant was represented by Counsel in all the instances. Having acquiesced to the state of affairs that is to say the application of Section 26 (2) of the Civil Procedure Act, the filing of the application for review after 4 months is to be taken by the Court as being inordinate and does little to attract the discretion of the Court.

42. In view of the point raised in para 40 and 41 it is the opinion of the Court that there is no error on the face of the judgement on record to warrant the discretion of the Court for review. The reason being that the silence on award of interest was cured by the application of 6% interest calculated and included in the decree.

43. For the forgoing the Applicant has not demonstrated any error on the face of the record. There is no ground for the correction of any slip under Section 100 of the Civil Procedure Act either. None has been demonstrated.

44. I concur with the decision of the Court in the case of **Jersey Evening Post Limited Vs Al Thani (2002) JLR 542 at 550;**

“a Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the Court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once the proceedings are finally concluded the Court cannot review or alter its decisions; any challenge to its ruling on adjudication must be taken to a higher Court if that right is available.”

45. In the end the application has no merit. It is dismissed with costs to the Respondent.

46. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15<sup>TH</sup> DAY OF OCTOBER 2020.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Jesse Kariuki HB for Kiragu for the Applicant

Wahome Gikonyo for the Respondent

Kuiyaki and Njeri, Court Assistants