REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 100 of 1993

Shanzu Investments Ltd……..……..APPLICANT

Versus

Commissioner of Lands……..RESPONDENT

JUDGMENT

November 19, 1993, Kwach, Muli and Tunoi JJ A delivered the following Judgment.

This is an appeal against the ruling of the High Court of Kenya at Nairobi (Couldrey, J) made on an application by the defendant, now the respondent, in a motion to review the judgment entered for the Plaintiff, the appellant herein, against the respondent on 8th October, 1992. The Superior Court in granting the applicant held inter alia as follows:-

"It will be much quicker for the plaintiff if I allow the motion, review the judgment and set it aside, then the plaintiff can serve the Attorney – General and the matter of interest can be determined on an interlocutory application, presumably, if the Attorney-General enters an appearance or files a defence, on an application to apply for summary judgment.

I am not certain that I have a discretion anyway if the view I hold is correct and service is bad by reason of statute. If the whole suit were set aside on appeal then the plaintiff might be faced with limitation which is not a problem it has for another few months. So I set aside the judgment."

From that ruling the appellant has appealed to this Court.

By Gazette Notice Number 4937 dated 26th September, 1990 the respondent gave notice pursuant to Section 6(2) of the Land Acquisition Act, Cap 295 of the Laws of Kenya, of compulsory acquisition of the appellant's lands Numbers LR 5794/1/MN and LR 5795/1/MN situated in Mombasa measuring 0.4048 hectares and 0.4587 hectares respectively and in pursuance of Sections 10 and 11 of the said Act, the respondent made an award of compensation of Shillings 10,888,200.00 and notified the appellant of it on the 4th November, 1990. The appellant promptly accepted the said award on 7th November, 1990, and it would appear, that the respondent immediately went into occupation of the said lands.

Under Section 13(1) of the said Act the respondent was enjoined;-

"After notice of an award has been served under Section 11 on all the persons determined to be interested

in the land, the Commissioner shall, as soon as practicable pay compensation in accordance with the award to the persons entitled thereunder….."

It is now common knowledge that no payment has been effected even up to the time this appeal came up for hearing. However, on 4th May, 1992 the appellant filed suit for the recovery of the amount of compensation awarded to it with interest thereon at the commercial rate of 24% per annum from 7th November, 1990 until payment in full together with the costs of the suit. The respondent failed to file a defence within the prescribed period and the appellant consequently obtained on ex-parte judgment for the amount claimed at the interest rate of 24%. On learning of this the respondent then applied by Chamber Summons for the judgment to be set aside under Order 9 A rule 10 of the Civil Procedure Rules but the application was not prosecuted. Four months afterwards it brought up another application in the Superior Court by way of the Notice of Motion seeking a review of the said judgment so as to vary the rate of interest. On 12th May, 1993 the learned Judge heard the two applications simultaneously and granted the former one.

Mr Kariuki, for the appellant, has submitted that the learned Judge erred in setting aside the judgment and decree in absence of any grounds to justify such action and that it was wrong for him to introduce on his own volition the issue of irregular service of summons, a matter which had not been raised in any of the applications. He averred that there were sound grounds for the learned Judge on which he could review the judgment by varying the rate of interest applied on the principal sum.

Order 9 A rule 10 provides that:-

"Where judgment has been entered under this Order the Court may set aside or vary such judgment upon such terms as are just."

The Court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied must be done on terms that are just: Patel v EA Cargo Handling Services Ltd, (1974) EA 75, 76B, C (CA-K). The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The test for the exercise of this discretion are these:- First, was there a defence on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?

Now, in this instance, the judgment was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there must be a "triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication (see Patel's case Ibid). Mr Oyalo, for the respondent, had submitted in the Superior Court as well as in this court that the respondent did not deny liability for the principal sum and that the only issue in contention was with regard to the rate of interest applicable.

In our view, no useful purpose could be served by setting aside the judgment as there was no possible defence to the action. We agree with Mr Kariuki that the learned Judge acted in error in setting aside the said judgment.

Before Section 16(1) of the Land Acquisition Act was amended by Act No 6 of 1990 it required the respondent where the amount of any compensation awarded is not paid or paid into court on or before the taking of possession of the land to pay interest at the rate of six per sent per annum from the time of taking possession until the time of payment into court. The resultant effect of the amendment is that interest shall be payable at "such rate as may be prescribed." But no rate has so far been prescribed rendering the amendment of no useful consequence. However, we are of the view that the interest rate 24% charged on the principal sum was contrary to the provisions of Section 26 of the Civil Procedure Act and was manifestly excessive and the learned Judge should have varied it.

The power to review is given to the court by Section 80 of the Civil Procedure Act, Order 44 of the Civil Procedure Rules and the relevant case law.

In Sadar Mohamed –vs- Charan Singh, (1959) EA 1 793, Farrel J held that there was unfettered discretion in court to make such orders as it thinks fit on an application for review and that the omission of any qualifying words was deliberate. However, in a later decision, Yusuf –vs- Nokrach, (1971) EA 104, the late Chanan Singh J held that "any other sufficient reason" as set out in Order 44 Rule 1 means sufficient reason analogous to those in the rule.

In WANGECHI KIMITA & ANOTEHR vs MUTAHI WAKABIRU CA No 80 of 1985 (unreported) it was held that

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfetterd right given to the court by Section 80 for the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason."

In the circumstances, we have come to the conclusion that the just course here is to allow the appeal, set aside the order setting aside the judgment and hold that on the material before the Superior Court there were sound grounds on the basis of which that court could grant the application for review for "any other sufficient reason" and vary the interest awarded in the decree and review the judgment as sought. In pursuance of Section 3 (2) of the Appellate Jurisdiction Act, Cap 9, we would do the same. We would restore the judgment for the appellant against the respondent in the principal sum of Shs 10,888,200.00 with interest at the rate of six per cent per annum from the date of taking possession by the respondent until the date of filing suit and thereafter at court rates until payment in full.

For these reasons we would allow the appeal and award the costs to the appellant.

Kwach, Muli & Tunoi, JJ A

November 19, 1993