



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO.736 OF 2015 (Thika ELC Suit NO.249 OF 2018)

JAVID IQBAL KARIM.....1st PLAINTIFF

(as the administrator of the

Estate of the late Gulam Fatima)

ABDUL KADHEER MUGHAL.....2nd PLAINTIFF

(in his capacity as the attorney of

Hajira Bibi w/o Allah Rahim Wazir Mohammed Mughal

d/o Fateh Mohammed Executrix of the Estate of the late

Allah rahim Wazir Mohamed Mughal)

-VERSUS-

ZE YUN YANG.....DEFENDANT

RULING

The Plaintiffs/Applicants brought this *Notice of Motion* application dated 5th October 2018, under Section 3A and 99 of the Civil Procedure Act and all other enabling provisions of law and sought for orders that:-

- 1) *That the Honourable Court be pleased to correct its Judgment dated 23rd February 2018.*
- 2) *That the Honourable Court be pleased to issue a Decree from the Judgment.*
- 3) *That the Honourable Court be pleased to issue any other orders it deems suitable in the circumstances.*

The application is based on the grounds that the *Judgment* of the court contains a *Clerical error* that can be corrected and that the correction of the error will not occasion the Respondent any prejudice.

The application is also supported by the *Affidavit* of *Mohamed Tariq Khan Advocate*, who averred that the Judgment in regard to this matter was delivered at Thika on 23rd February 2018, by myself. He further averred that on the said date, the Plaintiffs were represented in court by one *Mr. Mwiti* who was *holding brief for Mr. Khan* and *Mr. Njoroge holding brief for Mr. Ngatho* for the Defendant. He further averred that Mr. Mwiti's notes were clear that Judgment was pronounced on the following terms.

- a) *That Plaintiffs were awarded Kshs.4,702,313/= plus interest.*
- b) *Costs of the suit.*

However, on 14th May 2018 when they sought for typed *Judgment* and drew up a *Decree*, the same had an omission of

'plus interest'. He also averred that upon perusal of the court file they found the said typed Judgment and no handwritten notes on the orders of the court. It was his contention that the Applicants have been faced with a dilemma on the issue of interest since at one hand the Judgment was pronounced in open court indicating an award of interest while on the other hand, the award of interest was omitted in the typed Judgment. He further contended that the omission of the award of interest in the typed Judgment is an accidental slip and/or omission in the Judgment.

He contended that the Court has power to correct, rectify and/or amend the said accidental slip and omission in the Judgment as set under **Section 99** of the **Civil Procedure Act**. Further, that it is to the interest of justice that the court do rectify and/or amend the Judgment to include the award of interest since the Respondent will not suffer any prejudice.

The application is opposed by the Respondent who filed **Grounds of Opposition** and averred that:-

- 1) **The said application is embarrassing, frivolous and vexatious.**
- 2) **The award of interest is a discretionary power of the court. It is not a clerical error that can be corrected as sought by the Plaintiffs.**
- 3) **A challenge to the exercise of discretionary powers of the court can only be mounted via an appeal and not vide the orders sought by the Plaintiffs.**
- 4) **There has been inordinate delay by the Plaintiffs in bringing this application which means that the Plaintiff's actions are an afterthought after running out of time to file an Appeal.**

The application was canvassed by way of written submission and authorities were cited which this Court has carefully read and considered.

The application is premised under **Section 3A** which gives the court inherent power to make such orders that are necessary in ensuring that end of justice is met and also to prevent abuse of the court process.

The application is also premised under **Section 99** of the **Civil Procedure Act**, which states:-

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

The Court has perused the court record and it is indeed correct that this Court read its **Judgment on 23rd February 2018**, in the presence of **Mr. Mwiti** holding brief for **Tariq Khan** for Plaintiffs and **Mr. Njoroge** holding brief for **Mr. Ngatho** for the Defendant. This Court read a typed Judgment and not a draft handwritten Judgment. It is also very clear that on the issue of costs, the Court stated that the same is awarded at the discretion of the court as provided under **Section 27** of the **Civil Procedure Act**. Since Plaintiffs were partial successful litigants, the Court awarded them costs of the suit to the extent of their success. In the final analysis, the Court entered Judgment for the Plaintiffs against the Defendant for payment of **Kshs.4,702,313/=** as balance of the purchase price plus costs of the suit. This Court did not award any interest at all. If **Mr. Mwiti** holding brief for **Mr. Khan** wrote his notes '**award of Kshs.4,702,313/= plus interest**', then that was an error on his part but there is no clerical or arithmetical error on the part of the court record. The Court had no intention of awarding interest as stated by the Applicants.

As averred by the Defendant/Respondent, if the Plaintiffs were not satisfied with the fact that interest was not awarded on the amount of money to be repaid, that is **Kshs.4,702,313/=**, then the best avenue would have been by way of lodging an Appeal but not asking the court to rectify and/or amend its Judgment and award 'Interest' whereas it had not awarded the same on **23rd February 2018**. The assumption that there was a handwritten notes by the Court on the orders granted on **23rd February 2018** is erroneous and this Court finds that the correct orders given by the Court on **23rd February 2018** are as follows:-

"Consequently, the Court enters Judgment for the Plaintiffs against the Defendant for payment of Kshs.4,702,313/= as balance of the purchase price plus costs of the suit herein."

Nothing more was awarded and therefore the accidental slip rule as provided by **Section 99** of the **Civil Procedure Act** cannot apply herein as there was no clerical error at all.

The application herein is **misplaced**, and **vexatious**. Consequently, the Court finds that the necessary order as provided by **Section 3A** of the **Civil Procedure Act** is to have this application dismissed as it lacks merit and is frivolous.

The upshot of the foregoing is that the **Notice of Motion** application dated **5th October 2018**, is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of April 2019.

L. GACHERU

JUDGE

5/4/2019

In the presence of

Mr. Kiptoo holding brief for Mr. Tariq Khan for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the stated advocates.

L. GACHERU

JUDGE

5/4/2019