



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 356 OF 2017

(Formerly Machakos HCCC No. 93 of 2014)

SAMMY AKIFUMA.....1ST PLAINTIFF

JOYCE AKIFUMA.....2ND PLAINTIFF

VERSUS

KAPOSHI NJOROGI NAKUMANIA....1ST DEFENDANT

JONATHAN KAPOSHI.....2ND DEFENDANT

NTEENE OLE KAPOSHI.....3RD DEFENDANT

KENNETH OBIMBO ODHIAMBO.....4TH DEFENDANT

RULING

What is before me for determination is the Defendants' Notice of Motion dated the 17th September, 2018 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 7 of the Civil Procedure Rules. The applicants seek the following prayers:

1. That this Honourable Court to review and/or vary the Judgment and Orders made on the 16th April, 2018 by hon. Lady Justice C. Ochieng awarding interest from 1990 at Court rates and costs of the suit to the Plaintiff.
2. That the National Land Commission and/ or Kenya Railways be ordered to release part payment of Kshs. Thirteen Million Eight Hundred and Fourteen Thousand Seven Hundred (13, 814, 700/=) only to the 2nd Defendant applicant pending the hearing of Appeal by the Plaintiff.
3. That the cost be in the cause.

The application is premised on the summarized grounds that the Honourable Court pursuant to Judgment delivered on 16th April, 2018 ordered the Defendants to refund Kshs. 120,000/= with interest from 1990 at Court rates and costs of the suit within ninety (90) days from the date of the Judgment. The 2nd Defendant is the registered proprietor of land parcel number Kajiado / Kaputiei/ 2345 which parcel had a total of 7.85 hectares acquired by the Government of Kenya for construction of Standard Gauge Railway and compensation was stopped by orders of this Court. The National Land Commission awarded Kshs. 13, 814,700/= in respect of the undisputed portion of the parcel and the said commission withheld the money because the title was encumbered. The Defendants herein are not in gainful employment and are willing to compensate the Plaintiffs with proceeds herefrom. The 3rd Defendant is ailing and requires urgent medical attention which is expensive and only possible if the orders sought herein are allowed.

The application is supported by the affidavit of JONATHAN KAPOSHI where he reiterates his claim above and contends that on 23rd April, 2018 he conducted a search and found that there are cautions pending booking since 2014 and the Plaintiff registered a Court Order in Misc. Application No. 320 of 2012 inhibiting any dealings. He explains that he has requested the Plaintiffs to remove the caution as he is desirous in complying with the Court Order within the timeframe given but he has no other source to raise the funds except from the compensation. He claims his parents are ailing and he is in urgent need of funds to take his mother to India for treatment with the current cost of travel including treatment estimated at Kshs. 1.5 million which he cannot raise unless he is compensated. He insists there was no demand and/or notice of intention to sue received by the Defendants herein before this suit was filed and the Defendants were willing to refund the consideration and the matter would have been resolved without necessarily coming to court. He reiterates that the interest on the consideration was awarded against the law as the Plaintiff was only entitled to the amount paid.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by SAMMY AKIFUMA who deposes that Kajiado/ Kaputiei Central / 2345 was a resultant subdivision of Kajiado/ Kaputiei Central/ 839 and that is the reason the 2nd Defendant was enjoined in the suit. He confirms that judgment which was entered in their favour was for refund of the purchase price of 60 acres in the sum of Kshs. 120,000/= with interest from 1990 from the original Kajiado/ Kaputiei Central/ 839. Further, that compensation of Kshs. 13, 814, 700 currently withheld by the National Land Commission was in respect of Kajiado/ Kaputiei Central / 2345. He disputes the release of the said funds and insists the same should be held in an interest earning account. He disputes the annexed medical report for the 3rd Defendant and insists no expert evidence has been adduced to confirm the treatment sought abroad is necessary. He contends that this application lacks merit and insists that the Defendants' averment on challenging the award of interest as against the law cannot be proved.

Both parties filed their submissions

Analysis and Determination

Upon consideration of the Defendants' Notice of Motion dated the 17th September, 2018 including the parties affidavits, annexures and submissions, the following are the issues for determination:

- Whether the Judgment and Orders made on the 16th April, 2018 awarding interest from 1990 at Court rates and costs of the suit to the Plaintiffs should be reviewed.
- Whether the National Land Commission and/ or Kenya Railways should be ordered to release part payment of Kshs. Thirteen Million Eight Hundred and Fourteen Thousand Seven Hundred (13, 814, 700/=) only to the 2nd Defendant pending the hearing of Appeal by the Plaintiff.

As to whether the Judgment and Orders made on the 16th April, 2018 awarding interest from 1990 at Court rates and costs of the suit to the Plaintiffs should be reviewed. The Defendants contend that the interest at Court rates awarded to the Plaintiffs from 1990 until payment in full was against the law. Further that the Plaintiffs' should not have been awarded the Costs of the suit. The Defendants in their submissions have reiterated their claim above and relied on section 7 of Cap 302 to support their arguments. The Plaintiffs' have opposed the review of the judgment and in their submissions relied on the cases of **Jane Wanjiku Wambu V Anthony Kigamba Hato & 3 Others (2018) eKLR**; **Peter Muriuki Nguire V Equity Bank (K) Ltd (2018) eKLR** to buttress their arguments.

Section 80 of the Civil Procedure Act provides as follows:—**"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."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: ' **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 on account of some mistake or error apparent on the face of the record, or 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.'**

Section 26 of the Civil Procedure Act makes provision on interest and stipulates thus: ' **(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.'**

While Section 27 of the Civil Procedure Act provides as follows: ' **(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.'**

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.'

In the case of **Jane Wanjiku Wambu V Anthony Kigamba Hato & 3 Others (2018) eKLR** , the learned Judge while dealing with the issue of interest held that the trial court had a wide discretion to award or fix the rate of interest.

In the case of **MUYODI v INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243**, the Court of Appeal while describing an error apparent on the face of record, held as follows: ' ***In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in***

the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

Based on the facts presented before me and in relying on the legal provisions cited above as well as associating myself with the two decisions, I find that the Applicants have not met the threshold of review since the award of costs and interest which they are seeking the Court to review is discretionary. Further, that there is no error apparent on the face of record nor discovery of new and important materials to warrant the review of this court's judgment. In the circumstance, I will decline to grant that prayer.

As to whether the National Land Commission and/ or Kenya Railways should be ordered to release part payment of Kshs. Thirteen Million Eight Hundred and Fourteen Thousand Seven Hundred (13, 814, 700/=) only to the 2nd Defendant pending the hearing of Appeal by the Plaintiff. Since the Defendants have averred that they intend to use part of the funds to settle the decretal amount. Further, since these funds were for compulsory acquisition of land which is owned by the 1st Defendant, I am unable to find a reason to block the release of the said funds by the National Land Commission. In the circumstance, I will allow the said prayer for the release of the said funds. However in the interest of justice and since there was an order barring the release of these funds pending the outcome of the suit which order was not contested, and further based on the Applicant's admission in the submissions that he seeks for the release of funds to comply with the Order of the Court to refund purchase price to the Plaintiffs, I direct that the 1st Defendant will receive the funds less the assessed decretal amount which should be paid to the Plaintiffs.

The costs of the application is awarded to the plaintiffs.

Dated and Delivered in Kajiado this 11th day of December, 2019

CHRISTINE OCHIENG

JUDGE