IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WAKI & WARSAME JJ.A)

CIVIL APPLICATION NO. 271 OF 2010

BETWEEN

BETH MUTHONI NJAU.....1ST APPLICANT

EDDIE NJAU.....2ND APPLICANT

VERSUS

CITY FINANCE BANK LTD.....RESPONDENT

(Being an application for review of the judgment of this court made on 16th June 2016 failing to award interest to the applicant emanating from an appeal against the judgment of Honourable Lady Justice Khaminwa in Nairobi, Milimani

in

H.C. C.C. No. 107 of 2008)

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RULING OF THE COURT

1. What is before us is a notice of motion dated the 4th July 2017, wherein **BETH MUTHONI NJAU** and **EDDIE NJAU, (applicants),** are seeking to review this court's judgment delivered on the 16th June, 2017. The application was brought under Article 159 (2) (d) of the Constitution, Sections 31 and 35 of the Appellate Jurisdiction Act (we believe the applicants mean rule 31 and 35 of the Court's rules) and all enabling provisions of the law. The application was supported by the affidavit sworn by the 1st applicant. The basis under which the applicants seek to review the judgment is that the learned judges omitted to award them interest on the principal amount.

2. A brief background of this case is important. By a judgment given on the 11th August, 2010, the High Court (Khaminwa J) allowed the applicants claim for Kshs. 66,000,000/= against **CITY FINANCE BANK LTD** (the respondent) and ordered the respondent to pay the applicant the said amount plus costs and interest. Aggrieved by that judgment the respondent filed an appeal against the decision. This Court (differently constituted) upon hearing the appeal set aside and substituted the judgment for Kshs. 66,000,000/= with a judgment for Kshs. 42,000,000/= which also awarded the applicants half costs of the suit and of the appeal. The issue of interest was not mentioned in the said judgment. It is this judgment of the court, which prompted the applicants to file the application for review.

3. The applicants contend that the respondent did not challenge the interest awarded by the Superior Court in their Memorandum of Appeal and as such the application was uncontentious. The applicants argued that the judgment condemned them unheard because they were not given an opportunity to address the issue of interest yet the same was varied. The applicants further argued that the judgment would occasion them great injustice if it is not reviewed because it will deny them a substantial portion of the fruits of the judgment. The applicants also contend that if the learned judges intended to vacate the interest, they would have expressly made a finding on the same and given reasons. The applicants therefore concluded that the omission to award the interest was an error apparent on the face of the record that ought to be addressed.

4. The respondent filed a replying affidavit in opposition to the application sworn by Christine Wahome, the head of Legal Services of the respondent. She deposed that there was no error or accidental slip in the judgment. She further deposed that after delivery of the judgment, the amount deposited in the joint accounts of the parties' advocates was disbursed and therefore the respondent has not provided any funds for any further payment to the applicants.

5. When the matter came up for hearing before us Mr. Kandere appeared for the applicants and Mr. Mwangi appeared for the respondent. In

his submissions Mr. Kandere argued that from the memorandum of appeal the issue of interest was not appealed from and contended that the failure to award the interest was a mistake or an error. On his part Mr. Mwangi stated that there was no error or accidental slip on the judgment. Learned counsel contended that the court was silent on the issue of interest and that any variation of interest would be considerable.

6. We have considered the application, grounds in support and all documents, authorities and submissions filed by the parties herein. We must state that review applications before this Court are not ordinary, every-day proceedings. In fact, for the longest time this court's decisions were clothed with finality and could not be re-opened. See ***Lakhamshi Brothers Ltd vs. Raja & Sons [1966] EA 313***. It is only after the 2010 Constitution that this court has been reviewing its decisions by finding that it has residual jurisdiction to review and reopen its decisions. In ***Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR*** this court stated thus:

> ***"57..Jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).***
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> **……**
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> ***"61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."***

7. From that decision, it is clear the court limited the exercise of its residual jurisdiction to review its own decisions, to matters that will promote public interest and enhance public confidence in the rule of law and the justice system. The applicants contend that the failure by the court to award interest was a result of an error apparent on the face of the judgment which will occasion great injustice if it is not reviewed. We have spent considerable time going through the impugned judgment and in our view the applicants have not demonstrated that the court made any errors in the judgment. From the judgment it is evident that the learned judges considered the appeal before rendering their judgment. The learned judges stated thus:-

> ***"In the result, the judgment of Shs. 66 million in favour of the deceased is set aside and substituted for a judgment of Shs. 66 million less set-off of Shs. 24 million (net Shs. 42 million)…..in summary therefore, judgment is entered for the respondent for a net of Shs. 42 million with half costs of the appeal and half of the costs of the suit."***

From the above we do not find any errors of law that need to be corrected. If at all the learned judges intended to award the applicants interest nothing would have been easier than for them to say as much in the judgment. Having failed to do so, we cannot review the judgment and award the applicants interest which was denied by the learned judges in their own wisdom. There is, therefore, no basis or justification for re-opening the sound and comprehensive decision of this court in order to award interest to the applicants herein. There was no error apparent on the face of the judgment established by the applicants to clearly show that a significant injustice has occurred. It was within the powers of the court to award or not to award interest and in its wisdom did address the issue in the circumstances of the dispute and in the best interest of the parties. The court exercised its discretion properly and judiciously and in the absence of the criteria set for our interference, we cannot unilaterally fault the court in the manner it reached its decision.

8. Rule 35 of the Court of Appeal Rule, dealing with correction of clerical and accidental slips are not applicable in the circumstances of this matter.

9. The upshot of the foregoing is that the applicants' Notice of Motion dated 4th July, 2017 is bereft of merit and we accordingly dismiss it with costs.

Dated and Delivered at Nairobi this 9th day of November, 2018.

W. OUKO (P)

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is the

*True copy of the original***.**

DEPUTY REGISTRAR