IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & G.B.M. KARIUKI, JJ.A.)

CIVIL APPEAL NO. 50 OF 2010

BETWEEN

LEE G. MUTHOGA ....APPELLANT

AND

HABIB ZURICH FINANCE (K) LIMITED................... 1ST RESPONDENT

JOSEPH M. GITHONGO ....2ND RESPONDENT

(Being an appeal against the entire Ruling and Orders of the High Court of Kenya, Nairobi (Ransley, J) delivered on 10th day of February 2004

in

H.C.C.C. NO.3008 OF 1984)

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RULING OF THE COURT

1. This is an appeal from the decision of the High Court (Ransley J) made in Civil Suit No.3008 of 1984 on 26th January 2005, in which the **appellant**, Lee G. Muthoga, was ordered to repay to Habib Zutich Finance (K) Ltd, the **1st respondent**, money previously paid to the appellant following a Court order which was subsequently set aside. The dispute regarding the money started over thirty years ago.

2. The background to this matter shows that one Mr. Bernard C. Murage who is not privy to these proceeding and the **2nd respondent**, Joseph Githongo, borrowed money from the 1st respondent on 18th June 1983 and offered as security their property which was charged to the 1st respondent. The Indian Transfer of Property Act, 1882, (ITPA) (now repealed) applied to the charge. They failed or were unable to honour the repayment terms of the loan. The 1st respondent, Habib Zurich Finance (K) Ltd, in exercise of its statutory power of sale under the charge put the property up for sale by public auction with a view to sell and recover the money. On 15th December 1983, the appellant, Mr. Lee Muthoga, was declared the highest bidder at the auction at a price of Ksh.Ksh.275,000/=. He paid 25% of the bid price which amounted to Ksh.68,750/=, leaving a balance of Ksh.206,250/= to be paid within 28 days which he paid. The sale was, however, never completed. It transpired that the 2nd respondent redeemed the charge and obtained an injunction restraining the transfer of the property.

3. Dissatisfied with this turn of events, the appellant filed in the High Court Civil Suit No.3008 of 1984 claiming general damages. He also claimed special damages amounting to Ksh.218,700/= particulars of which he set out in his plaint.

The Court (Akiwumi J) found that there was a breach of contract by the 1st respondent, and awarded the appellant damages for loss of bargain amounting to Kshs.1,225,000/= and special damages in the sum of Ksh.42,100/= together with costs and interest. The 1st respondent applied for stay pending appeal against the decision of Akiwumi J. Stay was denied. As a result, payment was made to the appellant as decreed in the suit. After payment of the decretal sum (Ksh.2,130,832.55/=) by the 1st respondent to the appellant, the 1st respondent lodged in this court Civil Appeal No.144 of 1991 which was heard by this Court (Omolo, Tunoi & Bosire JJ.A) and determined in the judgment delivered on 22nd November 2002, in which this Court found that the High Court was in error in finding that there was a breach of contract and therefore allowed the appeal, set aside the orders and dismissed the appellant's suit in the High Court with an order that the appellant and the 1st respondent would each bear their own costs, but since the 1st respondent brought the 2nd respondent into the litigation, the 1st respondent was to pay the 2nd respondent's costs of the action in the High Court as well as of the appeal.

4.Following that judgment, the 1st respondent filed a notice of motion in HCCC 3008 of 1984 dated 6th June 2003, seeking orders that the appellant do refund all the monies paid to him, that is to say Ksh.2,130,832.55/= with interest at court rates of 12% p.a. Because of interest, the sum claimed escalated to Ksh.4,034,831/=. The 1st respondent also sought a further sum of Ksh.215,000/=as costs awarded by the High Court in the suit which had been paid before the judgment was set aside in Civil Appeal No.144 of 1991 by this Court.

5. Ransley J heard and determined the 1st respondent's notice of motion and delivered a ruling on 26th January 2005 which gave rise to this appeal. The learned Judge, guided by S.91 of the Civil Procedure Act, and a passage in **Mulla Code of Civil Procedure** 12th Edn. and the **authority Guram Ditta v T. R.** [1935] ALL L. J 251, determined that the Court had jurisdiction to order the refund of the decretal amount paid to the appellant plus costs as well as interest at court rates of 12% until payment in full. The learned Judge allowed the application and made orders as follows:

> ***"That the plaintiff/respondent do refund to the defendant/applicant the sum of Ksh.6,380,663.55/= as more particularly set forth hereunder together with interest at 12% p.a. from 26th January, 2005 until payment in full."***

(a) Amount paid as damages ....Ksh.2,130,832.55/=

(b) Further amount paid as costs ....Ksh. 215,000.00/=

Interest at 12% p.a. from 1/11/1999 to 26/1/2005 Ksh.4,034,831.00/=

Total Kshs.6,380,663.55/=

6. Aggrieved by this decision the appellant now brings this appeal. In his memorandum of appeal, the appellant proffered three grounds of appeal in which he contended that the learned Judge of the High Court abused his discretion in exercising his powers under Section 91 of the Civil Procedure Act in that he failed to consider the affidavits before him containing reasons militating against the exercise of the Judge's discretion under the said Section. The appellant also contended that it was unjust for the Court to order interest for the period relating to the time of delay in the determination of the suit which spanned 12 years when such delay was not attributable to the appellant. Further, the appellant contended that the order by the Court on interest, being an equitable one, ought not to have been made.

7. When the appeal came up for hearing on 21st October 2015, all the parties were represented by counsel: **Mr. Chege Kirundi** and **Ms. C. W. Matu** represented the appellant and **Mr. M. A. Khan** and **Mr. N. M.**

Mwangi represented the respondents.

8. Mr. Chege Kirundi submitted that the learned Judge of the High Court abused his discretionary power under S.91 of the Civil Procedure Act when he ordered interest to be paid on the restitutional sum; that the learned judge failed to take into consideration, inter alia, that the circumstances which rendered the money refundable were not caused by the appellant but by an error made by the Court for which the appellant should not be punished; and that the appellant prays for the appeal to be allowed with costs and for the Ruling of the learned Judge to be set aside and costs of the appeal to be borne by the 1st respondent.

9. Mr. Kirundi, further submitted that the appellant had refunded the principal sum of Kshs.2,130,832.55/= but contested the learned Judge's orders awarding interest to the 1st respondent. Further, he contended that the learned Judge erred in awarding costs to the 1st respondent since the Court of Appeal had already dealt with the issue of costs and the learned Judge therefore lacked jurisdiction to sit on appeal on the Appellate Court's decision. Counsel argued that the matter had been in court for many years and that since the appellant was not to blame for the speed at which the proceedings were conducted, it was unfair and inequitable for the Court to determine that he should pay interest in addition to the original principal amount after January 2005 when he refunded the principal sum of Shs.2.1 million. Counsel urged this court to allow the appeal.

10. In opposing the appeal, Mr. Mwangi, learned counsel for the respondents, submitted that the learned Judge had power to order interest upon the restitutional amount; further, that the learned Judge's orders did not offend the provisions of S.91 of the Civil Procedure Act and did not violate the Court of Appeal decision. Counsel submitted that the appellant kept the money for 15 years, and therefore the claim for unjust enrichment does not arise. Counsel urged the Court to uphold the decision of Ransley J.

11. In reply, Mr. Kirundi argued that in awarding the total sum of Kshs.6,380,663.55/=from the initial Ksh.2,130,832.55/= the learned High Court Judge failed to consider that there was no unfair enrichment on the part of the appellant. Counsel reiterated that the Court of Appeal in its ruling had already dealt with the issue of costs.

12. The main issue for determination is with regard to interest. Is the 1st respondent entitled to interest on the principal amount refunded? If so, for what period is the interest chargeable and at what rate?

13. This being the first appeal, this Court is enjoined to consider and re-evaluate the evidence and draw its own conclusions and make its own findings.

The duty of this court on a first appeal was stated in the case of **Selle and Another v Associated Motor Boat Company Ltd and Others** [1968] 1 EA 123 (CAZ) as follows in the judgment of Sir Clement De Lestang, V-P.,

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

14. The application before the High Court whose determination by Ransley J, precipitated this appeal was brought under S.91 of the Civil Procedure Act. Section 91(1) of the said Act provides as follows:

> ***"where and in so far as a decree is varied or reversed, the Court of the first instance shall, on***

application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed.

15. It is clear from the reading of S.91(1) that the learned Judge had discretionary power to grant payment of interest. In the authority provided by the respondents, namely, **Westmont Power (Kenya) Limited v Kenya Oil Company Limited Civil,** (Application No. Nai 254 of 2013 [2014] eKLR,) this Court ordered interest on the restituted sum at Court rates.

16. In considering the use of discretionary power, this court in **Mbogo V. Shah** [1968] EA 93 set out the circumstances where an appellate court may interfere with the decision of the High Court in exercise of its discretionary power. It determined that –

> ***"...A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."***

17. Mulla Code of Civil Procedure, 18th Ed at page 1308, in interpreting S.144 of the Indian Code of Civil Procedure which is similar to our S.91 of the **Civil Procedure Act**, gives an illustration on restitution and interests as follows: –

> ***"(ii) A obtains a decree against B for Rs 5,000 and recovers the amount in execution. The decree is subsequently reversed on appeal. B is entitled on an application under this Section to a refund of the money together with interest, up to the date of repayment, though the appellate decree may be silent as to interest. In Rodger V. Comptoir d'Escompte de Pois [1871] LR 3 PC 465, which is the leading case on the subject, Lord Cairns, in delivering the judgment of the Privy Council, observed as follows –***
>
> ***It is contended on the part of the respondents here (that is A in the present illustration), that the principal sum being restored to the present petitioners (that is B in the present illustration), they have no right to recover from them any, interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the Petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restore to them, with interest, during the time that the money has been withheld."***

18. We are satisfied that, Ransley J was correct in awarding interest to the 1st respondent on the restituted sum but he failed to consider the abnormally long period of the delay caused by the court in determining the matter.

19. The next issue relates to rate of interest. Ransley J awarded interest at court rates of 12% p.a. from the time of payment in 1990 until repayment in January 2005. However, the total interest amounts to Ksh.4,034,831.00/= which is almost double the principal sum of Kshs.2,130,832.55/=.

20. Looking at the persuasive authority in **Pelican Investment Ltd V National Bank of Kenya Ltd** [2000] 2 EA 488 (CAK), Onyango-Otieno J refused to apply the *in duplum* rule as applied in South Africa holding that the law is of ancient Roman and Dutch law and not applicable to this country. The *in*

duplum rule was later introduced to Kenya by the Banking (Amendment Act) Act No.9 of 2006 which amended the Banking Act Cap 486 and introduced S.44A of the same Act which provides -

> ***"44A. (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).***
>
> ***(2) The maximum amount referred to in subsection (1) is the sum of the following***
>
> ***(a) the principal owing when the loan becomes non-performing;***
>
> ***(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and***
>
> ***(c) expenses incurred in the recovery of any amounts owed by the debtor.***
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> ***(3)if a loan becomes non-performing and then the debtor resumes payment on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.***
>
> ***(4) This section shall not apply to limit any interest under a court order accruing after the order is made.***
>
> ***(5) in this section –***
>
> ***(a) "debtor" includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;***
>
> ***(b) "loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and***
>
> ***(c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.***

These provisions were applicable in the instant case by dint of S.44(6) of the Banking Act which provides -

> ***"S.44 (6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation -Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following –***

a. ***The principal and interest owing on the day this section comes into operation; and***

b. ***Interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and***

c. ***Expenses incurred in the recovery of any amounts owed by the debtor."***

21. The application of the *in duplum* principle in Kenya has been specifically designed to apply to formal loans given by financial institutions. Under S.44A(4) of the Banking Act, the rule does not apply to limit any interest under a court order accruing after the order is made. In our view, the learned Judge had discretion to award interest on the sum to be refunded, the justification for this being in line with the observation by Lord Cairns in **Rodger V. Comptoir** referred to in **Mulla Code of Civil Procedure** (supra).

22. When the appellant first received judgment in his favour, the decretal sum totalled Ksh.2,130,832.55/= as opposed to the initial bid at the auction of Kshs.275,000/=. The final decretal sum was based on the value of the property as of January 1990 at Kshs.1,225,000/=. It is contended that it would only be equitable and just to allow the 1st respondent to earn back the sum it had been deprived of plus interest at reasonable court rates. But the bulk of the interest has accrued due during the pendency of the suit. Neither party is to blame for the delay attendant to the disposal of the suit. Interest is normally granted at the discretion of the court and in exercising that discretion the court has to act judiciously and ensure fairness to the parties. It would not be fair, in our view, for the appellant to bear the burden resulting from the long delay which has given rise to the interest that has accrued. The delay of 15 years in the disposal of the suit is attributable to the court. An act of the court should prejudice no one (*actus curiae reminem gravabit*). The learned Judge did not address this issue. In exercising our discretion on the issue of interest, we have to consider what is fair under the circumstances in this case. While the respondent ought to have its money restored to it with interest during the time that the money has been withheld, it is not lost on us that the appellant placed the matter in the hands of the court for determination and if the wheel of justice had turned normally, the attendant delay would have been avoided and the accruing interest would have been far less. It is our considered view that the appellant should bear interest for at least the three year period it should have taken to dispose of the suit. But the issue of payment of interest for the remaining period of delay (of 12 years) for which the wheel of justice turned tortuously slowly must be determined on the basis of two competing interests, first, the need to excuse the appellant from payment of interest accruing due after what should be a reasonable period for determination of the suit, and the need to ensure that the respondent does not suffer loss of interest on the money which should have been in his hands.

23. In our circumstances, as the normal period in the disposal of the suit should not have been so lengthy, we are of the considered view that the parties should be *in pari causa* in relation to the period of delay caused by the court, that is to say, in equal case. Accordingly, neither shall suffer more than the other for the delay. On this basis, we decline to award interest for half the period of the delay (of 12 years) and we order that the appellant should pay interest for the other half of six years, thus making 9 years the period in respect of which the appellant shall pay interest.

24. In the result, we hold that interest shall be and is hereby reduced from 4,034,831/= to Shs.2,420,098/=. We so order. The appeal succeeds in this regard.

25. On the issue of costs, Ransley J allowed the application of Kshs.215,000/= which (sum) was for costs paid to the appellant in satisfaction of orders which were set aside in Civil Appeal No.144 of 1991. This Court differently constituted determined -

> ***"In the circumstances, we do not think that the appellant (here the 1st respondent) is entitled to any costs from the first respondent (here the appellant) either in this Court or in the Court below. Accordingly, our orders on this aspect of the matter shall be that while this appeal is allowed and the first respondent's suit in the High Court is dismissed, the appellant and the first respondent shall each bear their own costs. But the appellant brought the 2nd respondent into the litigation and the appellant shall pay to the 2nd respondent the costs of the action in the High Court and in this appeal."***

26. It is clear that this court had made a determination on the issue of costs and the learned Judge was bound by the decision of this court and should not have awarded the costs. The only costs, perhaps, that ought to have been awarded was for the application for restitution before the High Court. Therefore, we allow the appeal in as far as the issue of costs is concerned with the result that the appellant and the 1st respondent each shall bear their own costs and the 1st respondent shall bear the costs of the 2nd respondent.

27. In the result, as the appeal succeeds partially each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this *6th day of May 2016.*

E. M. GITHINJI

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

G. B. M. KARIUKI SC

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR