



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 75 OF 2013

FREDRICK JACOB OCHIENG OBURA.....1st CLAIMANT

JOSEPH DIDA.....2nd CLAIMANT

ALPHONSE LUKE KITECHI.....3rd CLAIMANT

EDWARD AGOLA.....4th CLAIMANT

JOSHUA O. NYAMWAYA.....5th CLAIMANT

MARTIN OGADA.....6th CLAIMANT

TOM OGALO.....7th CLAIMANT

AGGREY AWUONDA.....8th CLAIMANT

VERSUS

KISUMU MUNICIPAL COUNCIL.....1st RESPONDENT

KISUMU WATER & SEWERAGE CO.....2nd RESPONDENT

RULING

1. The Court delivered judgment in favour of the Claimants on 22 September 2017. The Court found that the retirement of the Claimants were premature and each one of them was awarded maximum compensation. The 2nd Respondent was also directed to pay the costs.
2. On 6 February 2020, the Claimants filed a Motion under a certificate of urgency seeking review of the judgment to include interest at the rate of 30%.
3. According to the Claimants, the failure by the Court to award interest was a *slip* by the judge and did not put into consideration the provisions of sections 26, 27 and 99 of the Civil Procedure Act.
4. The Claimants asserted that they only became aware of the *slip* when they moved to execute the judgment and that in any case, costs and interest followed the event.
5. The Court's attention was drawn to case law.
6. The 2nd Respondent filed Grounds of Opposition to the Motion on 10 March 2020 wherein it raised an objection on the ground of inordinate delay in filing the application.
7. It was also contended that the Court was *functus officio* and the only route available to the Claimants was through an Appeal.
8. Pursuant to Court orders on 10 November 2020, the Claimants filed their submissions on 30 November 2020 (the same should have been filed/served on or before 17 November 2020). The Respondents submissions were not on file by the agreed timeline of 24 November 2020.
9. The Court has considered the Motion, affidavits, Objections and the submissions on record.

10. According to the Claimants, the failure to award interest was an error apparent on the face of the record in light of the statutory provisions on interest and the case law emanating therefrom.

11. It took the Claimants over two and a half years to move the Court. The apparent explanation was that it was only at execution that they became aware of the omission.

12. The Court does not find the explanation, nay, excuse valid. It beats logic why a successful party would sit out execution of judgment for that long where they had the benefit of legal counsel. There is even no evidence on the file that a decree was extracted and issued. The delay was inordinate.

13. The next question is whether a failure to award interest would amount to an error apparent on the face of the record in light of the provisions of sections 26 and 27 of the Civil Procedure Act.

14. This Court does not think so. The proviso gives the Court a discretion. And where a discretion is not exercised or is exercised wrongly, that, in the view of this Court would not amount to an error apparent on the face of the record.

15. What a party dissatisfied with the wrong exercise or failure to exercise a discretion is to prefer an Appeal to challenge the legality of the exercise of the discretion.

16. The Court finds no merit in the Motion and it is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimants	Mwamu & Co. Advocates
For 1 st Respondent	Otieno, Ragot & Co. Advocates
For 2 nd Respondent	Ouma Njoga & Co. Advocates
Court Assistant	Chrispo Aura