



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1570 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL OKOTH..... 1ST CLAIMANT
JOHN KARIANJAHIL..... 2ND CLAIMANT
AGNES IRUNGU 3RD CLAIMANT
WILSON MAGURU.....4TH CLAIMANT
ELIAS WAMBUGU..... 5TH CLAIMANT
JOHN KINYANJUL.....6TH CLAIMANT
EUNICE NJOROGE..... 7TH CLAIMANT
PAUL MWANGI MUIRURI..... 8TH CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED..... RESPONDENT

RULING

Vide an application dated 13th December 2018 filed under certificate of urgency on the same date, the Applicants/Claimants seek the following orders:-

1. *Spent*
2. *That this Court do review, vary and/or correct the Judgment of this Court (Nduma J.) delivered on 11th May, 2018 by the Onyango J. to provide for interest on the judgment sum at Court rate from the date of filing suit to date of full payment of the Decretal sum.*
3. *That costs of this application be provided for.*

The grounds upon which they seek the orders are:-

1. That in a Judgment of this Court (Nduma J.) delivered on 11th May 2018 by the Onyango J., the Defendant was ordered, *inter alia* to, pay interest on the Principal sums at the rate of 24% per annum from 23rd December, 2000 to 23rd February 2010.
2. That the Court inadvertently omitted to award interest to the Claimants/Applicants from 24th February, 2010 and/or the date of filing suit 1st March, 2010) to the date of full payment despite the same being prayed for in the plaint.

3. That cause of action herein arose when the Claimants/Applicants were wrongfully terminated from employment on 22nd December, 2000 and it is only fair and just that were entitled to severance pay.
4. That great prejudice would be occasioned on the Claimants/Applicants if the orders sought are not granted whereas no prejudice would follow the Respondent if the orders sought are granted.
5. That in view of the foregoing, there is good and sufficient cause for Review of the said Judgment.
6. That this Application has been made diligently and the delay in applying for review was on account of the parties trying to resolve the issue of interest amicably.
7. That unless the said Order is reviewed as prayed the Applicants stands to suffer great prejudice and loss resulting from the wrongful withholding of the money for over eighteen (18) years which includes the date of filing the suit.
8. That this Court has the jurisdiction to review, vary and/or correct the said Judgment.
9. That accordingly, in the interests of justice and fairness, the said Orders sought in this application ought to be granted as prayed.

In the supporting affidavit of SAM OKOTH the 1st Claimant, the Applicants reiterate the grounds on the face of the application.

The Respondent opposes the application and filed a replying affidavit of R. Wanjiru Nderitu, Counsel in the firm of Muteitha Kibira Advocates, who has the conduct of this suit on behalf of the Respondents. In the affidavit she deposes that upon delivery of judgment in this suit the Respondent who was dissatisfied with the same filed an appeal against the decision. However, parties and their advocates negotiated terms of settlement of the decretal sum as well as party and party costs and after various meetings and negotiations a settlement was reached. That subsequently parties recorded various consents, one being in this suit and another one in the Court of Appeal in Nairobi. Following the recording of the settlements the Respondent settled to decretal sum.

Counsel further deposes that the reason the instant application has been filed is because the applicants were unhappy with deduction of statutory payments from the settlement sum, thus the application is an afterthought and is made in bad faith. That the consent recorded by the parties was without fraud, misrepresentation, coercion, undue influence, mistake or misrepresentation. That the application does not meet the conditions or grounds for review under the Employment and Labour Relations Court (Procedure) Rules, 2016 and that the Respondent will be prejudiced by the application. She prays that the application be dismissed with costs.

The application was disposed of by way of written submissions. In their submissions the Applicants submit that the prayers sought are within the discretion of the Court as was stated in **Shah v Mbogo & Another (1967) EA 116** wherein Harris J. stated:-

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

The Claimants submit that in the instant case there is sufficient reasons to review the judgment wherein the Court inadvertently omitted to pronounce itself on the prayer for interest. That section 26 of the Civil Procedure Act gives the Court discretion to award interest post filing of suit and post judgment.

The Applicants further rely on the decision in **Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited (2015) eKLR** where Odunga J., after analysing various decisions, pronounced himself thus;

“It is therefore clear that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has wrongfully deprived him of the use of goods or money.

That the Plaintiff was deprived of the use of his money by the actions of the Defendant is not in doubt. However, the sum which this Court has found to be due to the Plaintiff was spread over a period of time rather than from a specific date. Apart from that there were various rates of interests imposed rather than one particular rate of interest. To compound the problem the Plaintiff did not plead any particular rate of interest. The Court however recognises that the Plaintiff was deprived of the use of his money by a wrongful act on the part of the Defendant. That money had it been invested would have accrued interest. It is also not lost to the Court that the Defendant is a financial institution which is in the business of lending out money on interest and all things being equal the plaintiff's money must have been put to the same use (Emphasis supplied)

Among the decisions cited by Odunga J. is the case of **Prem Lata v Peter Musa Mbiyu (1965) EA 592** where the Court of Appeal held that:-

“...the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

In the case of **Mukisa Bisquit Manufacturing Company Limited v West End Distributors Limited (No. 2) [1970] EA**, the court held

that:-

“The principal that emerges is that where a person is entitled

to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until assessed, and therefore interest is only given from the date of judgment.”

Similarly, the court of Appeal held in the case of **Samuel Philip Kidoti v Kenya Cargo Handling Services Limited CA No. 76 of 1992** (Cited in the **Icatha v Housing Finance** case (supra) that;

“General damages bear interest from the date of judgment while special damages bear interest from the date of filing suit.”

The Claimants submit that the Respondent held their money for 18 years and they should therefore be awarded interest from date of filing suit till date of payment.

For the Respondents it is submitted that after delivery of Judgment herein parties entered into negotiations following which both the suit in this Court and in the Court of Appeal were by consent of parties marked as settled and the Claimants duly paid as per agreement.

It is submitted that Order 25 rule 5 of the Civil Procedure Rules provides for compromise of suits. That the consent orders are binding on the parties, and effectively took precedence over the judgment. Counsel relied on the Court of Appeal ruling in **Hiram v Kassam** where the Court cited with approval from **Seton H. W. on Forms of Judgment and Orders in the High Court of Justice and Court of Appeal, 7th Edition Vol. 1 page 124.**

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings for action, and on those claiming under them.... and cannot be varied or discharged unless obtained by fraud or collusion, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a Court to set aside an agreement.”

She further relied on the decision in **Flora N. Wasike v Destimo Wamboko (1988)** where the Court of Appeal stated:-

“It is now settled law that a consent judgment or Order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

It is submitted that statutory deductions are due from lump sum court awards as is provided under Section 49(2) of the Employment Act and as affirmed by the Court of Appeal in **Kioko Joseph (suing as the legal representative of the Estate of Joseph Kilinda) v Bamburi Cement Limited (2017) eKLR** where the Court held-

“It follows therefore from the foregoing that contrary to the appellant’s position, the entire global award was subject to taxation. Consequently, the learned Judge did not err in holding as much...”

The Respondent further submitted that this is confirmed by the **Kenya Revenue Authority Employers Guide on Pay As You Earn (PAYE)**. The Respondent prays that the application be dismissed.

Determination

Judgment herein was delivered by myself on behalf of my Brother Nduma J. on 30th May, 2018. As reflected in correspondence attached to the replying affidavit, and to which there is no contest by the Applicants, there were negotiations which ultimately resulted in consents being recorded in both this Court and in the Court of Appeal. Thereafter there was disagreement over statutory deductions made by the Respondent when making the remittances on 3rd December 2018.

In the Judgment dated 11th May 2018 and delivered on 30th May 2018, the court awarded interest at 24% as prayed in the claim. No interest was awarded from the date of filing suit to date of payment in full.

The Employment and Labour Relations (Procedure) Court provides at Rule 28(1) that the Court may, among other orders, make an order for payment of interest on any principal sum awarded by the Court and any other orders to meet the interest of justice.

Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules provide for review of judgments and rulings as follows:-

33. Review

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

In the instant application the Claimants pray for “*review, vary and/or correct the judgment.... to provide for interest..... from date of filing suit to date of full payment of the decretal sum.*” The grounds upon which the applicant seeks review and or variation or correction of the judgment is that the Court inadvertently omitted to award interest on decretal sum from date of filing suit.

As submitted by the Respondent, parties consciously engaging negotiations. In the grounds and affidavit in support of the application there is no mention of the negotiations and subsequent settlement. There is however communication attached to the applicant’s exhibits that show that there were negotiations after the judgment was delivered. During the negotiations parties discussed the issue of interest and when settlement was agreed upon the Respondent paid as per terms of settlement.

The foregoing being the case, it is clear that the amount paid to the claimants was based on the terms of settlement after negotiations and parties are bound by the same as the Respondent withdrew its appeal and made payment on the strength of the settlement. The correspondence between the parties refer to both parties having obtained consent of their clients before settling.

The correct orders that the claimants should have sought if they wanted intervention of this court is therefore the setting aside of the settlements by the parties and not review of a judgment that had been compromised by settlement.

I find that there is no error or mistake apparent on the face of the record that would warrant correction. I further find that having made settlement which the Respondent acted upon to its detriment the claimants are estopped from denying the existence thereof. The Claimants have further not met the requirements for either review of judgment or setting aside of consent orders.

This suit having been marked settled by consent of the parties, it is no longer available for review.

I thus find no merit in the application and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE