IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller JA)

CIVIL APPEAL 16 OF 1979

BETWEEN

NYAKINYUA AND KANGE'EI FARMERS COMPANY LIMITED …..... APPELLANT

AND

KARIUKI AND GATECHA RESOURCES LIMITED.....RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Todd, J) dated January 16th 1979 in

Civil Suit 1020 of 1976

RULING

The draft order in this appeal has been referred to me by the respondent for which Mr Lakha appeared. The date for the hearing of this reference was fixed by consent by a representative of each party in this court's registry and it was agreed all round that no hearing notice need be sent out to either of them. No-one appeared for the appellant.

Mr Lakha submitted that the draft should be amended, first, to include an order that:-

"The plaintiff be evicted from the suit property forthwith…"

which was asked for by the respondent in its notice of cross-appeal on September 10, 1979 and was allowed with costs in the orders of this court on October 27, 1982. His instructions are that the appellant has already left, so the amendment is a formal matter but necessary for an accurate reflection of what this court ordered. At the hearing of the appeal the appellant's advocate submitted the High Court could not have made an order for its eviction but he did not elaborate. This amendment ought to be allowed.

Secondly, Mr Lakha continued, the draft order's fourth paragraph which is this:-

"4. The defendant do pay the plaintiff Kshs 505,000 with costs to the plaintiff of that issue and with interest at court rates on the sum hereby awarded from the date of judgment until payment;"

should be amended to make it clear that the interest at court rates on Kshs 505,000 should be from the date of the judgment of this court, which was October 27, 1982, and not of the High Court (Todd, J) dated January 16, 1979.

The history of the claim for interest is this. The plaint of April 29 of 1976 asked for specific performance of an agreement for sale of October 31, 1974 of agricultural land or, in the alternative, damages for breach of contract with interest on them at court rates. The amended plaint of November 2, 1976 added an alternative prayer for an immediate refund of Kshs 505,000 together with interest thereon at commercial rates. Todd, J dismissed the claim for specific performance, damages, accounts and injuries with costs. He made an order that the respondent should pay the appellant the sum of Kshs 505,000. Interest on it was not mentioned. The appellant in its memorandum of August 9, 1979 asked this court to reverse the dismissal of the prayer for specific performance and its allied claims, and remit the suit to the High Court to assess the damages and so forth.

The last two and half lines of its memorandum were these:-

"The appellant also prays that in the event of this appeal not being allowed the remaining judgment of the High Court be left as it is"

which would be the High Court order that the respondent should pay the appellant only Kshs 505,000. This is what the respondent and his learned advocate were prepared for when the appeal began.

Mr Satish Gautama appeared for the appellant before this court and was allowed, despite Mr Lakha's objection, to add a fifth ground to the memorandum which was-:

"The learned judge erred in not awarding interest on the sum of Kshs 505,000 at the court rates from time to time obtaining"

which was then argued. It is clear that the appellant and Mr Gautama were asking for interest at court rates (not commercial rates) from the date of the High Court judgment.

Law JA dealt with this ground by setting it out and then referring to the amended plaint with its alternative claim for

"….the refund of the sum of Kshs 505,000 'together with interest thereon', this sum representing money paid by the appellant as consideration on account of the purchase price under the void transaction. By section 7 of the Act, any money or other valuable consideration paid in the course of a controlled transaction that has become void, shall be recoverable as a debt by the person who paid it. When the learned judge entered judgment for the appellant for the return of the Kshs 505,000 he said nothing about the claim for interest. This was probably an oversight, because if he had intended to refuse the prayer for interest he would have given reasons for his refusal. However, I do not think that the Kshs 505,000 became repayable as a debt in this case until the court decided that specific performance could not be decreed. That being so, interest on that sum should not in my view be ordered except from the date of judgment until payment, and I would amend the decree accordingly."

Potter JA added –

"….The matters of the plaintiff/appellant's claim for interest on the partial consideration of Kshs 505,000, and of the respondent's cross-appeal against the order that the defendant should pay to the plaintiff the costs of the suit, are dealt with in the judgment of Law JA, which I have had the benefit of reading in draft. I agree that this appeal should be dismissed and I concur in the orders proposed in the judgment of Law JA"

and I agreed –

"…..with the other orders proposed in the judgment of Law JA".

Mr Lakha urges me to correct this under 'the slip rule' because it is not clear what the order of this court was, so far as the date from which the interest should run is concerned, and if it is, and it is from the date of the High Court judgment, then it was wrong and should be corrected because 'interest' is the same as or a form of damages and no damages are allowed for a controlled transaction which is avoided by the provisions of the Land Control Act (cap 302); sections 6 and 22 (*ibid*).

Now Mr Lakha put the same argument and others during the hearing of the appeal. Here are Law JA's notes of them –

"Lakha = Gd 5. No interest can be awarded because of section 7 of cap 302. Damages cannot be awarded, *a fortiori* nor can interest. We cannot claim mesne profits nor damages, nor should interest be allowed. Also agreed issues exclude any claim for interest. We have been kept out of possession for 10 years, as to which we have no remedy; it would be unfair to make us pay interest.

Gautama= Our possession has been purely notional, not physical. Lakha = see p 41 – "physical possession" admitted. No interest justified."

And Gautama replied in this fashion, according to the same notes :

"Interest = conduct of managing director not spotless."

He is referring to the respondent's managing director there. He went on :

"We had to sue him before he agreed to sign conveyance. Refused to co-operate. Immediately after rejection docts; he reactivates defence. We had to pursue our remedy for Kshs 505,000 except by suit. Dft has paid or offered nothing. It would be inequitable to deprive us of interest."

On all this, my view is that this court's order was that interest at court rates on Kshs 505,000 was to run from the date of the High Court judgment (January 16, 1979) and not the date of the appeal judgment (October 27, 1982). Whether it was right or wrong must be left to another court to consider because as the third member of that court (and an acting member of it) I cannot amend it under the slip rule or any other rule.

Rule 35 of the Court of Appeal Rules deals with the correction of errors and I now set it out in full :

"35(1) A clerical or arithmetical mistake in any judgment of the court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or the application of any interested person so as to give effect to what was the intention of the court when judgment was given.

(2) An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under subrule (1), with the judgment as so corrected."

If this order about interest was a mistake it was not a clerical or arithmetical one and to make the interest run from the date of the appeal judgment would not be correcting its order to make it accord with its judgment.

The matter was not overlooked, it was brought to the attention of this court and the judgment gave effect to the intention of this court when judgment was given so, again, the slip rule is inapplicable. *Vallabdas Karsandas Raniga v Mansukhlal Jivraj,* Civil Appeal No 89 of 1962 (unreported).

It cannot be applied where a judgment has been given *per incuriam* even if, for example, the attention of this court has not been drawn to, and the court is ignorant of, a statutory amendment of the law. *Somani v Shirinkhanu* (No 2) [1971] EA 79.

Mr Lakha had one more submission about this. When Law JA said he did not think that the Kshs 505,000 became payable as a debt until the court decided that specific performance could not be decreed that meant the date of the appeal judgment because up till then it was doubtful if specific performance could or could not be decreed. I am afraid I cannot accept this. Law JA would have said 'this court' (of his own volition or the promptings of Potter JA or myself) if he and or we meant this court and 'the court' clearly means the High Court. Furthermore, interest on other sums awarded by a High Court or on a judgment debt run from the date of the award in that court and not this one though the award or order for payment of the debt may be reversed on appeal. The fact is, the High Court decided with certainty that specific performance could not be decreed but Kshs 505,000 should be refunded and that certainty was not dispelled by the appeal. The respondent had the Kshs 505,000 from about October 31, 1974 and he is to refund it now, if he has not done so, with interest at court rates from January 16, 1979.

The upshot is that the draft should be amended to include an order that :

'The plaintiff be evicted from the suit property forthwith'

and the interest at court rates on the Kshs 505,000 with costs should be from the date of the judgment 'of the High Court on January 16, 1979' until payment.

If either party is dissatisfied with this decision and wishes to have it varied, discharged or reversed by the court it may apply for this informally now or by writing to the Registrar within seven days (from hearing it delivered today or reading a copy of it).

Dated and Delivered at Nairobi this 14th day of October 1983.

A.A.KNELLER

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JUDGE OF APPEAL