



**Trustees, Nzoia Sugar Co Ltd Staff Retirement Benefits Scheme 2007 v Makhanu t/a Architects N Systems (Civil Appeal E088 of 2023) [2024] KEHC 15032 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E088 OF 2023**

**DK KEMEL, J  
NOVEMBER 29, 2024**

**BETWEEN**

**THE TRUSTEES, NZOIA SUGAR CO LTD STAFF RETIREMENT BENEFITS  
SCHEME 2007 ..... APPELLANT**

**AND**

**CHRISTOPHER NYONGESA MAKHANU T/A ARCHITECTS N  
SYSTEMS ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant has filed an application dated 30<sup>th</sup> July, 2024 pursuant to Section 1A, 1B, 3A and 99 of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010, seeking orders inter alia: that this Court be pleased to correct and/or amend its judgement as delivered on 29<sup>th</sup> July 2024 and make a determination on the Respondent/Applicant's Memorandum of Cross-Appeal dated 21<sup>st</sup> November 2023; that this Court be pleased to make any other order that it deems fit and just in the circumstances and that the costs of the application be provided for.
2. The application is supported by the grounds on its face and verified by the supporting affidavit of Christopher Nyongesa Makhanu, the Respondent/Applicant herein, sworn on even date wherein he averred inter alia; that the Respondent/Applicant dissatisfied by the judgement in Chief Magistrate Court at Bungoma by Hon. Maundu, delivered on 1st August 2023, filed his respective memorandum of cross-appeal dated 21<sup>st</sup> November 2023, challenging the decision of the lower Court in awarding interest from the date of judgement instead of from the date of filing the suit as provided for under Section 26 of the *Civil Procedure Act*; that the judgement as rendered by this Court on 29<sup>th</sup> July 2024, failed to consider his memorandum of cross-appeal and render its determination on the same; that according to him, under Section 99 of the *Civil Procedure Act*, the law bestows this Court with the power to amend and/or correct its judgement, decrees or orders to cater to any clerical or arithmetical or any accidental slips or omissions that may arise therein; that it is in the interest of justice that this



honourable Court be pleased to correct/amend its judgement as delivered on 29<sup>th</sup> July 2024, by making a determination of his memorandum of cross-appeal dated 21<sup>st</sup> November 2023.

3. The Appellant/Respondent opposed the application. Vide a replying affidavit sworn on 14/8/2024 by Emmanuel Sifuna, current Chairman of the Appellant/Respondent wherein it was averred inter alia; that the trial Court in its judgement while allowing the Respondent/Applicant's claim as prayed in his amended Plaint granted him interest without specifying if it was to run from the time of filing the suit or from the time of delivery of judgement; that according to him, it is settled principle of law that whenever a judgement is silent on the period from which interest is to start running then the same should start running from the date of judgement; that Section 26 (1) of the Civil Procedure Act is not couched in mandatory terms and which clothes the trial Court with wide discretionary powers in regard to the period from which interest starts to apply; that it is the duty of this Court not to interfere with the discretion of the trial Court unless its satisfied that the trial Court proceeded on some erroneous principles or was plainly wrong, which is not the case herein.
4. Both parties opted to rely on their respective filed affidavits and indicated that they will not be filing any written submissions.
5. I have considered the application, the supporting grounds and as well as the rival affidavit as filed. The issue for determination is whether the Respondent/Applicant has met the threshold for the grant of the orders sought.
6. Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
7. Order 4 Rule 11 of the Civil Procedure Rules provides that:-

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.”
8. In the case of Kenya Power & Lighting Co Ltd v Peter Langi Mwasi [2018] eKLR it was held that whereas the timelines for filing of cross appeals was not provided for in the Civil Procedure Rules, the same ought to be filed without any delay. In the mind of this Court, the cross appeal ought to be filed at least before directions under Order 42 Rule 11 of the Civil Procedure Rules have been given in the main appeal.
9. Order 42 Rule 32 of the Civil Procedure Rules states as follows:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”



10. Since no directions had been given as envisaged under section 79B of the Act, the Applicant/ Respondent was not required to obtain leave of the Court. On further perusal of the Court record, the Applicant/Respondent avers in his affidavit in support of his application that he filed a memorandum of cross-appeal dated 21<sup>st</sup> November 2023. On perusal of the Court record, it is clear that parties were only contemplating on the Respondent/Appellant's record of appeal dated 30<sup>th</sup> January 2024, and at no point did the Applicant/Respondent raise any objection to directions issued by the Court on 3<sup>rd</sup> April 2024, being given regarding the main appeal at the exclusion of his cross-appeal. I have not come across any memorandum of cross-appeal dated 21<sup>st</sup> November 2023 on the record and that there is no indication that the Applicant/Respondent had filed his cross-appeal before the issuance of Court directions on 3<sup>rd</sup> April 2024. It is on that basis that the main appeal was determined by this court. The issue of the Respondent's cross appeal was not addressed since no directions were taken over the same. I find it is rather late in the day for the Respondent/Applicant to seek to reverse the clock and seek to bring up the issue of the said cross appeal wherein directions had not been taken. I also find that it was immaterial that the Respondent raised the same in his submissions leading to the judgement since no directions had been taken regarding the cross appeal. It is instructive that the Appellant/Respondent in its submissions did not dwell on the said cross appeal due to the fact that no directions thereon had been taken. It is also instructive that this court must guard against temptation by parties out to unwittingly put it in a situation where it sits on its own appeal in a matter that it had determined. It is also instructive that the Respondent/Applicant seems to suggest that this court erred when it failed to consider the cross -appeal. If indeed, that is their view, i find that the appropriate approach would be to lodge an appeal against the judgement of this court. I find that the present application lodged by the Respondent is a guise to try its luck on review when the circumstances favour an appeal to the Court of Appeal. It is obvious that the Respondent impliedly is of the view that this court erred when it failed to consider the issue of the cross -appeal in its judgement and if that is so, the same should be a matter for appeal.
11. Therefore, this Court finds that there was no proper record of cross-appeal filed before it for its contemplation and/or determination as alleged by the Respondent/Applicant herein. This thus leads me to come to the conclusion that the Applicant has not presented sufficient ground to justify review of the judgement.
12. In the result, the application dated 30<sup>th</sup> July 2024 lacks merit. The same is dismissed with costs to the Appellant/Respondent.

**DATED AND DELIVERED AT SIAYA THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Bulia .....for Respondent/Applicant

M/s Wakoli.....for Appellant/Respondent

Kizito/Ogendo.....Court Assistant

