



REPUBLIC OF KENYA



**Rhino Agrimac & Equipment Limited v Busienei (Civil Appeal
135 of 2020) [2023] KEHC 19968 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 19968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 135 OF 2020

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

RHINO AGRIMAC & EQUIPMENT LIMITED APPELLANT

AND

RICHARD BUSIENEI RESPONDENT

*(Being an Appeal from the Part Judgment of the Honourable Ms.
A. N. Makau (PM) delivered on the 14th day of February, 2020)*

RULING

1. Before this court for determination is an Appeal vide a Memorandum of Appeal dated March 10, 2020 against the Judgment of Hon Ms A N Makau (PM) in part delivered on February 14, 2020.
2. Vide a Complaint dated October 8, 2018, the Appellant sued the Respondent for breach of contract for the delivery of a Sprayer Machine which the Plaintiff delivered for a consideration of Kshs 1,100,000.00 but the Respondent paid only Kshs 600,000.00 and has defaulted on payment of the remaining balance of Kshs 500,000.00. By a Consent adopted by court on October 1, 2019, the parties agreed to settle the payment of Kshs.500,000.00 being the defaulted buying price save for prayer No (b) of the Complaint seeking for interest at 4% on Kshs 500,000.00.
3. The parties herein were directed to file written submissions on prayer No (b) and after considering the same, the trial Court delivered part Judgment on February 14, 2020 and dismissed the Appellant's prayer for interest on grounds that firstly the court was not sure who was speaking the truth since the parties chosen to settle the issues out of court. And secondly, that the contract in question was oral with no evidence of a written one.



4. The Appellant was dissatisfied and aggrieved with this finding hence this appeal on the grounds that the Learned Magistrate erred in law and in fact:-
- a. In refusing to award 4% interest per month on the decretal amount from November 24, 2014 to full payment as prayed in the Plaint;
 - b. By failing to appreciate that the interest was a clear condition of the contract between the Appellant and the Respondent;
 - c. By declining to award the interest yet there was no defence on record;
 - d. Misapprehended the whole suit and failed to consider all the material on record as filed by the Appellant;
 - e. By disregarding the submissions and pleadings filed by the Appellant in advancing its case;
 - f. When she failed to give any justifiable reasons for failure to award interests to the Appellant.
- The Appellant prays for orders that;
- a. The Appeal be allowed;
 - b. The Judgment of the Hon Ms A N Makau (PM) delivered on February 14, 2020 be partly set aside by granting the Appellant 4% interest per month on the sum of Kshs 500,000.00 commencing on November 27, 2014 until payment in full;
 - c. Any other and further orders that this court may deem fit;
 - d. The Appellant be awarded costs of this Appeal.
5. On February 18, 2022, this Court directed parties to dispose of the Appeal by way of written submissions. Only the Appellant filed its submissions which I have read and considered. There is no record of the Respondent's submissions. It is worth-noting that the Respondent has never appeared in court despite service and proof of the same. On June 20, 2022, the Appellant indicated in court that it had received written submissions by the Respondent and the court directed that the Respondent should ensure the same were placed on the court record. This directions was never complied with.

Analysis and Determination

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come up with its own independent findings and conclusions, while bearing in mind that it did not hear or see the witnesses as they testified. This was settled in the case of *Selle vs Associated Motor Boat Co & Others* [1968] E A 123, where it was stated as follows:

“An appeal to this Court from a trial by the High Court is y 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 demeanor 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)”.



7. In determining the appeal as per the grounds raised by the Appellant in its Grounds of Appeal, I have read through the submissions filed by the Appellant, and considered the statute and case law. This Court finds the issue for determination being;
- a. Whether the Appellant is entitled to prayer No (b) in the Plaint dated October 8, 2018.
8. Prayer No (b) in the Plaint is essentially seeking for interest on the amount agreed on at 4% to wit:-
- b interest on (a) above at the rate of 4% per month from November 27, 2014 to the date of full and final settlement of the same.
9. In his Plaint at Paragraph 3, the Appellant avers that on or about November 26, 2014, it entered into a contract with the Respondent for the supply of a machine SPRAYER OPTIZ800 RPL12T and which contract was partly oral and partly written. In its submissions, the Appellant alleges that a term/condition in the contract and invoices did set 4% monthly interest on default. However, there is no evidence that was put forth in support of this allegation. Hence, the trial Court correctly observed that the contract herein was an oral one and the court could not tell who was lying between the Appellant and the Respondent on what was agreed on as interest chargeable.
10. However, the trial Court is faulted for awarding no interest at all for breach of contract after the parties confirming that there was indeed breach and even after the Respondent had proposed a rate of 12% per annum in his submissions. Infact, breach is not disputed and as such, there exist proof that the Appellant suffered and should have been adequately compensated. In this Court's view, much as on award of interest is discretionary, failing to invoke this discretion amounts to not acting judiciously. The Court of Appeal in the case of *Supermarine Handling Services Ltd -vs- Kenya Revenue Authority* [2010] eKLR, observed that:-
- “The Plaintiff was deprived of the use of its money since 4/11/1999 and it was only fair that it should be compensated for such deprivation by the award of interest. However, as the liability of the Defendant to pay for the Plaintiff's loss was not determined until the date of Judgment, interest shall be payable from 30th September 2005. We are, satisfied, therefore, that the learned Judge's order in denying the Plaintiff interest was erroneous and was not in consonance with the normal practice and was plainly and obviously a wrong exercise of discretion”(emphasis added)
11. Similarly, the court in the case of *Jane Wanjiku Wambu -vs- Anthony Kigamba Hato & 3 Others* [2017]eKLR, held:-
- “I have come to the conclusion that the Learned Trial erred by not advertng her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the *Civil Procedure Act*. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.”



12. In determining interest payable, the Courts are guided by the provisions of Section 26 of the Civil Procedure Act which provides that:-

- 1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- 2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

13. Further, in the case of Jane Wanjiku Wambu –vs- Anthony Kigamba Hato & 3 Others (*Supra*), the court set out three principles to guide in making a determination as to interest payable in the following terms:-

“First, at all times a Trial Court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial Court with utmost respect and should refrain from interference with it unless it is satisfied that the Lower Court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:-

- a. The period from the date the suit is filed to the date when the Court gives its Judgment; and
- b. The period from the date of the Judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.

Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See *Gulamhussein –vs- French Somaliland Shipping Company Limited* [1959] EA 25; *Highway Furniture Mart Limited – vs - The Permanent Secretary & Another* EALR (2006) 2 EA 94; Mulla – *The Code of Civil Procedure* (16th Ed.) Vol. 1 at p. 505 .”

14. Guided by the above decisions and legal principles. I am satisfied that the Appellant’s case for interests for breach of contract has been made.

15. I therefore award interest at 12% per annum on the consented amount of Kshs 500,000.00 from the time of filing suit to payment in full.



16 It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF FEBRUARY, 2023.

D O CHEPKWONY

JUDGE

In the presence of:

No appearance by and for either party

Court Assistant - Simon

