



**Real People Kenya Limited & another v Nyandega t/a Akmal Enterprises & another  
(Civil Appeal 33 of 2020) [2023] KEHC 2853 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 33 OF 2020  
JN KAMAU, J  
MARCH 27, 2023**

**BETWEEN**

**REAL PEOPLE KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JAIRO OUNZE MUKOYA T/A YAMUKO AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN NYANDEGA T/A AKMAL ENTERPRISES ..... 1<sup>ST</sup> RESPONDENT**

**EUNICE ODODA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. R.K Ondieki (SPM) delivered  
at Kisumu in Chief Magistrate's Court Case No 219 of 2019 on 3rd June 2020)*

**JUDGMENT**

**Introduction**

1. In their notice of motion dated and filed on May 18, 2022, the appellants herein sought orders that all monies being held in the joint account in Co-operative Bank of Kenya Limited Bank Account Number 110995xxxxx Eldoret Branch in the names of M/S Nyambegera & Co Advocates and M/S Maurice Oduor & Co Advocates be released to the firm of M/S Nyambegera & Company Advocates forthwith.
2. On May 18, 2022, Francis Ambutsi, the 1<sup>st</sup> appellant's Branch Manager swore an affidavit in support of the said application. The 1<sup>st</sup> appellant averred that in a Judgment that was delivered on February 23, 2022, it was awarded Kshs 283, 414.27 together with interest thereon from 3<sup>rd</sup> September 2017 until payment in full while the respondents were awarded Kshs 500,000/= being general damages for unlawful sale of their subject motor vehicle.
3. It asserted that as at May 17, 2022, it was entitled to annual interest at court rates amounting to Kshs 442,126/=. It pointed out that on February 21, 2018, the respondents filed HCCC No 6 of 2018



- against it which suit was later transferred to the Kisumu Chief Magistrate's Court and registered as CMCC No 113 of 2018 but its suit was struck out with costs that were assessed at Kshs 75, 680/=, which costs the respondents had not paid to date.
4. It was its contention that the respondents owed it a sum of Kshs 517,806.00 which was inclusive of the aforesaid costs and consequently, if that sum was to be offset from the sum of Kshs 500,000/= that it owed the Respondent, then the respondents would pay it a sum of Kshs 17,806/= so that this case could be marked as settled.
  5. It was its averment that on November 27, 2011, it deposited a sum of Kshs 2, 404, 760/= at Co-operative Bank of Kenya Limited Account Number 1109xxxxxxx in the joint names of its advocates and those of the respondents but that the respondents' advocates had blatantly refused, ignored and/or neglected to co-operate and give consent to have the said sum of Kshs 2,404, 706.00 plus interest accrued thereon released to its advocate.
  6. It further contended that even if both parties were to assess their respective costs at the Trial Court the margin would be so minimal so as not to warrant the respondents' counsel to unnecessarily withhold such a huge sum of money that belonged to it despite it being engaged in financial business. It pointed out that it would be ready to pay the respondents' assessed costs if the same exceeded its costs, which it averred was not likely to be the case.
  7. It was emphatic that the respondents' counsel conduct highly prejudiced it and that the same was not warranted in all fairness. It thus urged this court to intervene and order that the said sum of monies be released to its Advocates.
  8. In opposition to the said application, Maurice Oduor, the respondents' Advocate, swore a replying affidavit on June 27, 2022. The same was filed on June 28, 2022. The respondents admitted that indeed a Judgment was delivered herein on February 23, 2022. However, they challenged the computation that was done by the appellants which they termed as erroneous and stated they wrote to the appellants to that effect in a letter dated March 17, 2022.
  9. They pointed out that in the case Kisumu CMCC No 219 of 2019 the costs were taxed at Kshs 218,716/= in the 1<sup>st</sup> Respondent's favour against the appellants jointly and severally and that this court not having pronounced itself on costs in the Trial Court which were discretionary, it was not open to the appellants to adopt their own tabulation without reference to this court.
  10. They added that the issue of costs due to the appellants in HCCC No 6 of 2018 was not litigated in this case and it was open for the Appellant to seek recourse in that matter.
  11. They denied ever having received any communication from the appellants requesting for release of the said sums as alleged or closing of the joint account or refusing to execute any draft consent. They were emphatic that the only communication they received from the appellants' advocates was in respect of computation of the sums that were due.
  12. It was their assertion that the appellants' advocates only proposed a set off which intention they advised ought to be clarified by the court. They were emphatic that the appellants were seeking a release of the sums deposited before the issue of the decretal sums due to each party had been determined. They thus urged this court to dismiss the present application as it could conclusively deal with the issue of the trial court's costs in finality.
  13. The 1<sup>st</sup> Appellant's Written Submissions were dated and filed on July 8, 2022 while those of the respondents were dated July 22, 2022 and filed on July 28, 2022. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

14. The 1<sup>st</sup> Appellant submitted its claim for Kshs 283,414.27 accrued interest at rate of twelve (12%) per cent from 3<sup>rd</sup> September 2017 and as at 17<sup>th</sup> May 2022, it was entitled to Kshs 442, 126/=. In this regard, it placed reliance on the case of *Wanjiku Wambu vs Anthony Kigamba Hato & 3 others* [2018] eKLR where it was held that save for special or exceptional circumstances, the court rate for interest was twelve (12%) per cent per annum from the date of filing suit until payment in full.
15. It reiterated that it was entitled to the sum of Kshs 517,806/= made up of Kshs 75, 680/= that was awarded in Kisumu CMCC No 113 of 2018 (formerly HCCC No 6 of 2018) and the sums it was awarded in the Appeal herein. It argued that the respondents ought not to be reluctant releasing the monies it deposited as it was actually the respondents who were indebted to it.
16. It relied on the case of *Esther Cherop Busienei vs Peter Momoen Langat* [2020] eKLR where it was held that an applicant could not run away from the obligation to pay costs. It added that as a matter of principle, a party ought to settle pending costs before being granted audience by a court of law.
17. It cited the provisions of section 27(1) of the *Civil Procedure Act*. It was categorical that this court set aside the order on costs and directed that each party bear its own costs. It argued that this court being a superior court, its decision was binding on the trial court and relied on article 165(6) of *the Constitution* of Kenya, 2010 in this regard. It was their submission that litigation must come to an end but that the respondents had been deploying tactics to delay the conclusion of this matter.
18. On their part, the respondents submitted that the Judgment that was delivered on February 23, 2022 did not express itself on the issue of costs at the Trial Court and that the appellants' allegations were an assumption that because the court directed that each party should bear its own costs of appeal, then the same rule applied with regard to the costs of the Trial Court costs. They also invoked section 27 of the *Civil Procedure Act* and argued that costs were at the discretion of the court.
19. They were categorical that it must have been that discretion was not exercised in favour of the appellants because if it were so, nothing would have been easier than for the court to have stated as such. To buttress their point, they relied on *Halsbury's Law of England* 4<sup>th</sup> Edition (2010) Vol, 10 Paragraph 16 where it reads that:-

“...where the costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them.”
20. They also cited the case of *Impressa Ing Fortunato Federice vs Nabwire* [2001] 2 EA 383 where it was held that the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case.
21. They urged the court to consider the conduct of the parties in the actual litigation, matters that triggered the litigation and the contribution of the party in whose favour the order of costs was withheld, to the causation of those factors. They pointed out that the litigation was triggered when the appellants wrongfully sold their subject motor vehicle.
22. In that regard, they relied on the cases of *Farah Awad Gullet vs CMC Motors Group Limited* [2018] eKLR, *George Gikubu Mbutia vs Small Enterprises Finance Ltd & 2 Others* [2015] eKLR and *Devram Manji Daltani vs Danda* [1949] 16 EACA 35 where the common thread was that a successful litigant could be deprived of costs if it was shown that his conduct either prior to or during the course of the suit had led to litigation.



23. They were emphatic that it was erroneous for the appellants to raise issues that were not before this court. To buttress their point, they relied on the case of *Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others* [2016] eKLR where the court cited an excerpt from an article by Sir Jack Jacob entitled, “The Present Importance of Pleadings” published in *Current Legal Problems* (in 1960), at page 174 where it was stated that parties were bound by their pleadings and that they could not be allowed to raise different or fresh issues in a case without amending their pleadings.
24. Although this court did not see the proceedings in respect of the application in which the Appellant sought a stay of execution pending appeal, it was apparent from the documentation before it that the deposit of the decretal sum was not in dispute. Notably, the appellants were granted an order for stay of execution pending appeal on condition that the 1<sup>st</sup> Appellant deposited a sum of Kshs 2, 404, 760/= . This court heard the Appeal herein and delivered its Judgment on February 23, 2022.
25. It therefore followed that the deposit of Kshs 2, 404, 760/= could not continue being kept from the depositor as the purpose for which the monies were being held was now spent. Be that as it may, it was security as may have been binding for the due performance of the decree in favour of the respondents herein as had stipulated in order 42 rule 6(2)(b) of the *Civil Procedure Rules* that provides as follows:-
- “No order for stay of execution shall be made under subrule (1) unless such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” (emphasis court).
26. This court awarded the respondents a sum of Kshs 500,000/= that was to be secured by the decretal sum that was deposited pending the hearing and determination of the Appeal. Any release of the monies to the 1<sup>st</sup> Appellant would therefore have to be less the said sum of Kshs 500,000/=.
27. It was clear that parties were not agreed on the monies that were due to each other. The 1<sup>st</sup> Appellant took the view that the monies it owed the respondents ought to be offset from the monies they owed it. That was not an unreasonable proposal. However, the issue of costs was not settled. It was the considered view of this court that the issue of assessment of costs was not within its jurisdiction but it was a power that was to be exercised by the Trial court.
28. Section 27(1) of the *Civil Procedure Act* cap 2 (Laws of Kenya) provides that:-
- “Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
- provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”
29. The general principle is that costs are at the discretion of the court and that the same follow the events. In essence, the successful party ought to be compensated for having taken various lawful and legitimate steps in pursuit of a remedy that it was entitled to from the opposing party.



30. In the instant case, both parties were partially successful in the Appeal. In its decision that it delivered on February 23, 2023, this court exercised its discretion and found it prudent to order that each party do bear its own costs of the Appeal. In Paragraph 76 of the said decision, it rendered itself as follows:-

“As the respondents were also partly successful in having general damages awarded to them, this court will deviate from the general principle that costs follow the event and the appellants and the respondents bears their own costs of this appeal.” (emphasis court)

31. It was clear that this court did not pronounce itself on the issue of costs in the lower court. It merely stated as follows:-

“For the foregoing reasons the upshot of this court’s decision was that the Appellant’s appeal lodged on 2<sup>nd</sup> July 2020 was partially merited. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and substituted in the following terms:-

- a. Judgement be and is hereby entered in favour of the 1<sup>st</sup> appellants against the respondents jointly and severally for the sum of Kshs 283,414.27 together with interest thereon from 3<sup>rd</sup> September 2017 until payment in full.
- b. Judgement be and is hereby entered in favour of the respondents against the 1<sup>st</sup> Appellant herein for the sum of Kshs 500,000/= being general damages for unlawful sale of the respondents’ subject Motor Vehicle.

32. This court agreed with the respondents’ submissions that the court did not disturb the finding of costs by the lower court. It only stated that each party would bear its own costs of the Appeal as they were both successful. Having said so, following the court’s finding, it was expected that the assessed costs would not remain undisturbed at the time of issuance of the decree as costs are always dependent on the amount of the decretal sum as provided in the Advocates (Remuneration) Order.

33. Paragraph 50 of the Advocates (Remuneration) Order provides as follows:-

“Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi’s Courts) is that set out in Schedule 7.”

34. While setting out the costs payable for different ranges of decretal sums, schedule 7 of the Advocates (Remuneration) Order is clear that:-

The "Lower Scale" shall be applied in all cases where no defence or other denial of liability has been filed and the "Higher Scale" shall be applied in all other cases.

35. It therefore followed that once this court sat as original court in place of the Trial Court and determined how much monies were due to each other, each party would be entitled to costs as per Schedule 7 of the Advocates (Remuneration) Order to the extent of their success in the matter in the lower court. This court could not determine how the costs of the lower court were to be assessed as that was within the discretion of the Trial Court. There may have been costs awarded for interlocutory applications or for causing adjournments for example, all of which would have to be assessed by the Trial Court.

36. How the amounts were set off were a different matter altogether. While any set off would merely be a mathematical calculation between the parties themselves without intervention of the court unless such intervention had been sought, this court took the position that it could not pronounce itself on set off of costs emanating from a suit that was not related to this Appeal. Notably, the 1<sup>st</sup> Appellant



had sought to have the costs in the sum of Kshs 75, 680/= that it was awarded in Kisumu CMCC No 113 of 2018 (formerly HCCC No 6 of 2018) be set off from the deposited sum which was outside the mandate of this court.

37. As this court exercised its discretion relating to the costs of the Appeal herein, it could not fetter the discretion of the Trial Court to assess the costs that were due to the 1<sup>st</sup> Appellant and the respondents herein.
38. Turning to the issue of interest, section 26 of the *Civil Procedure Act* provides as follows:
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.
39. A court has wide discretion to award and fix the rate of interests, period and rests. However, that discretion must be exercised judiciously. Under section 26(1) of the *Civil Procedure Act*, the court has discretion to award and fix the rate of interests to cover two (2) stages namely, the period from the date the suit is filed to the date when the court gives its judgment and 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.
40. This court re-looked its decision and noted that it did not expressly state if the interest that would accrue on the sum that was awarded to the 1<sup>st</sup> Appellant would be the court rate. It also realised that it did not award the respondents interest. This was an accidental slip and/or omission that required to and could be corrected.
41. This court thus took the liberty of correcting the accidental slips or omissions in its said decision on its own motion to remove any uncertainties and ambiguities as stipulated in section 99 of the *Civil Procedure Act* cap 21 (Laws of Kenya) which provides that:-
- “ Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
42. In view of the fact that both the 1<sup>st</sup> Appellant and the respondents were entitled to interest, this court could not with certainty state how much each party was entitled to with a view to apportioning the amounts each party was entitled to from the monies the 1<sup>st</sup> Appellant deposited herein and order the release of the balance to the 1<sup>st</sup> Appellant, if at all, at this juncture. This was a figure that could only be ascertained from the decree once extracted and once the Certificate of Costs and Decree was issued.

### **Disposition**

43. For the foregoing reasons, the upshot of this court’s decision was that the 1<sup>st</sup> appellant’s notice of motion dated and filed on May 18, 2022 be and is hereby disallowed as the exact amounts that each party was entitled to had yet to be determined.



44. It is hereby directed that costs of the lower court be assessed on the basis of the parties' entitlement as was set out in the Judgment of this court that was delivered on February 23, 2023. Either of the parties is at liberty to file a fresh application with exact figures to enable the court determine the exact sum to be released to the 1<sup>st</sup> Appellant, if at all.
45. The parties be and are hereby notified that the court amended its Judgment of February 23, 2022 specifically setting out the rate of interest that will apply on the monies awarded therein and from when interest on the sum of Kshs 500,000/= that was awarded to the respondents would be payable, which pronouncements were not included in the said Judgment due to an accidental slip and/or omissions on the part of the court.
46. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF MARCH 2023**

**J. KAMAU**

**JUDGE**

