



REPUBLIC OF KENYA



KENYA LAW
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**Abdi v Board of Trustees of the Anglican Church of Kenya Marsabit Diocese
(Civil Appeal 4 of 2018) [2023] KEHC 18040 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL 4 OF 2018**

**JN NJAGI, J
MAY 25, 2023**

BETWEEN

NASIBO IBRAHIM ABDI APPLICANT

AND

**THEY BOARD OF TRUSTEES OF THE ANGLICAN CHURCH OF KENYA
MARSABIT DIOCESE RESPONDENT**

RULING

1. The Applicant has filed an application dated 28th November 2022 seeking that the court determines the interest chargeable on the judgments delivered by this court (Chitembwe J.) on 15th October 2018. The application is premised on grounds cited on the face of the application and supported by the affidavit of the counsel for the Applicant, Ms Amule Yeka.
2. Counsel for the Applicant avers that the Respondent filed an appeal in this matter and the High Court delivered its judgment on the 15th October 2018 and awarded a sum of Ksh.2,500,000/= in general damages less 20% contribution. The court in its judgment did not state whether or not interest was chargeable on the adjudged sum. The Respondent subsequently paid the decretal sum as awarded by the High Court but declined to pay interest.
3. Counsel avers that the lower court had in its judgment awarded the Applicant interest from the date of judgment until payment in full. Therefore, that it is necessary for the court to determine whether the Applicant is entitled to interest on the sums payable.
4. The application was opposed by the Respondent vide grounds of opposition dated 17th January 2023 in which it was argued that the award of interest is a matter of judicial discretion under section 26(1) of the *Civil Procedure Act*. Further that the exercise of judicial discretion does not amount to an omission or an error. That the application is an attempt to review the judgment dated 15/10/2018 through the back door. The Respondent urged the court to dismiss the application with costs.



5. The application was canvassed by way of written submissions of the respective advocates for the parties. Counsel for the applicant submitted that the issue of interest was never the subject of the appeal and therefore the award of interest by the subordinate court was not disturbed. Counsel submitted that by the time the Respondent effected payment of the decretal sum, interest had already accrued pursuant to the judgment of the lower court. Counsel submitted that the law allows payment of interest from the date of decree to the date of full settlement. Counsel urged the court to direct the Respondent to pay the Applicant the interest that had accrued on the judgment.
6. The Applicant relied on the case of *Magic Chemical INC. v Prapid Enterprises (EA) Ltd*, Civil Case No.177 of 2015 where Sewe J. while adopting the judgment of Anzagala J. (as he then was) in *Nalinkumar M. Shah v Mumias Sugar Co. Ltd* [2010] eKLR held that:

“...Kenyan courts have power at common law to award interest for late payment of debt or damages irrespective of whether or not there is an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the ends of justice. After all a commercial transaction deserves the same treatment whether and wherever it takes place.”
7. The Applicant further cited the cases of *Lei Masaka v Kalpama Builders Ltd* [2014] eKLR, *Oluoch Eric Goga v Universal Corporation Ltd* [2015] eKLR and *Joseph Kiarie Njoroge vs Njue Kiarie* [2007] eKLR where the High Court found that interest on general damages ought to run from the date of judgment while interest on special damages ought to run from the date of filing suit.
8. The Applicant submitted that the issue of payment of interest on general damages from the date of judgment has been settled by the Court of Appeal in the cases of *Shariff Salim & another v Malundu Kikava* [1989] eKLR and *Royal Media Services Ltd & another v Jakoyo Midiwo* [2018] eKLR. In the former case the court stated that:

General damages should be paid from the date of assessment which of course is the date of judgment. That is the earliest date when the defendant’s liability to pay does arise.
9. Based on the above submissions the Applicant urged the court to order that interest be paid from the date of delivery of the judgment which at the time when the decretal sum was paid in full was Ksh.198,296/=.
10. The Respondent on the other hand submitted that judgment in the case was delivered by Justice Chitembwe who allowed the appeals, ordered parties to meet their own costs and did not award interest on the adjudged decretal sums. That no appeal or application for review has ever been preferred against the judgment. That the orders sought have the effect of asking the court to sit on appeal against its own judgment or to review the judgment yet no appeal or application for review has ever been preferred.
11. The Respondent submitted that a reading of section 26(1) of the *Civil Procedure Act* shows that award of interest falls within the exercise of the court’s discretion and therefore the court was within its powers by not awarding interest. The Respondent in that respect relied on the case of *Fred’s Academy Limited v Emma Kinya Mugambi & 2 others* [2012] eKLR where the court cited the principles applicable on the exercise of discretion in awarding interest.
12. It was further submitted that there is no error or omission in the judgment of the court that can be corrected in the manner sought by the applicant. That section 99 of the *Civil Procedure Act* provides for amendment of judgments, decrees and orders where there are clerical or arithmetical mistakes. That this is not the case in this matter as the exercise of judicial discretion not to award interest cannot be equated to a clerical or arithmetical mistake.



13. I have considered the grounds in support of the application and the grounds in opposition thereto. It is not in dispute that the lower court awarded interest on the decretal sum. The Judge who delivered the judgment in the appeal did not state whether interest was chargeable on the adjudged decretal sum or not. The Respondent construes this to mean that the Judge declined to award interest. The Applicant on the other hand argues that the matter of interest was not part of the appeal which means that the issue would remain as determined by the lower court.
14. I have perused the judgment of the lower court. The learned magistrate who delivered the judgment awarded interest on the adjudged special damages and general damages. I have also perused the grounds of appeal dated 13/12/2017. I have noted that the matter of interest as awarded by the lower court was not raised in the appeal. In the appeal the High Court reduced the quantum from Ksh.4,000,000/= to Ksh.2,500,000/= and made no comment on interest. In my considered view, the fact that the Judge did not state whether or not interest was chargeable on the adjudged sum cannot be construed to mean that he declined to award interest. I am in agreement with the submission by the Applicant that the matter of interest was not raised in the appeal. Since the Judge did not make any orders on the issue of interest it means that interest was payable as ordered by the lower court.
15. The Respondent has argued that the Applicant should either have filed an appeal or review against the judgment of the High Court. In my view the argument is not tenable as there was no order by the High Court on the issue of interest so as to warrant an appeal or an application for review. The fact that the High Court did not comment on the issue of interest cannot be construed to be an error to warrant a review as the issue was not raised in the appeal.
16. As I see it the Applicant is only seeking for directions on whether interest as determined by the lower court is payable on the adjudged sum in view of the fact that the decision on interest by the lower court was not appealed against.
17. It is trite law that where an order of the court is not appealed against, that order stands until it is vacated by a court of higher jurisdiction. In this case the order of the lower court on payment of interest was not appealed against and has not been vacated. It therefore still stands. The Applicant is therefore entitled to payment of interest as ordered by the lower court. In so stating, the court is not sitting on the judgment of Justice Chitembwe as there was no order made by the learned Judge on interest that this court would be accused of interfering with.
18. The authorities cited by the Applicant from the Court of Appeal show that interest on special damages is payable from the date of filing suit while interest on general damages is payable from the date of judgment. That is the position of the law. The Respondent should therefore pay interest on general damages at court rates as from the date of delivery of the judgment of the lower court to the date of payment. It is so ordered.
19. The orders in this ruling to apply in High Court Appeal No.2 of 2019. The Board of Trustees, Anglican Church of Kenya, Diocese of Marsabit v Naomi Galma Galgalo.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 25TH MAY 2023.

J. N. NJAGI

JUDGE

Appearance:

No appearance for Applicant

No appearance for Respondent



30 days R/A.

