



Mutegi ((Suing as the Legal Representatives & Administrators of the Estate of the Late Peter Mutegi Muthurwa)) v Macharia (Civil Appeal 18 of 2017) [2023] KEHC 17856 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 18 OF 2017
FN MUCHEMI, J
MAY 25, 2023**

BETWEEN

**JENNIFER KEIYA MUTEGI APPELLANT
(SUING AS THE LEGAL REPRESENTATIVES & ADMINISTRATORS OF THE ESTATE OF THE LATE PETER MUTEGI MUTHURWA)**

AND

JOHN MWANGI MACHARIA RESPONDENT

RULING

Brief facts

1. This application dated 19th May 2022 brought under Section 1A, 1B, 3, 3A, 26 and 34 of the *Civil Procedure Act*, Order 45 and 51 of the *Civil Procedure Rules* and Article 50(1) of the *Constitution* of Kenya seeks for review of the judgement delivered on 26/6/2020 by awarding interest on the award of general damages of Kshs.911,000/= given by this Court of Appeal. The said amount was substituted with the lower court award of Kshs.2,328,600/=. The applicant seeks for further orders that the interest of the sum of Kshs.911,000 do commence from the date of the lower court judgement and that it be computed at court rates.
2. The respondent opposed the application in his Replying Affidavit filed on 27th March 2023.

The Applicant's Case

3. The applicant states that she was awarded a sum of Kenya Shillings Two Million Three Hundred and Twenty Eight Thousand Six Hundred (Kshs. 2,328,600) with costs and interest in the trial court CMCC No. 443 of 2013. The said judgment was appealed against giving rise to this appeal whereas the award was varied from Kshs. 2,328,600/- to Kshs. 911,000/- . The applicant further states that the



court did not address the issue of interest in any way and the same was therefore retained as the learned magistrate had ordered. The applicant deposes that the trial magistrate ordered the principal amount to accrue interest from 12% per annum from 15/12/2015. As such, the applicant argues that interest of the sum of Kshs.911,000/- at court rates should run from the date of judgement of the court.

The Respondent's Case

4. The respondent swore an affidavit through his advocate Naomi Achieng Tom who deposes that the lower court awarded the applicant a sum of Kshs. 2,328,600/- with costs and interest in CMCC No. 443 of 2013 but this Honourable Court varied the orders vide its judgment dated 26/6/2020 and did not award interest to the applicant. The respondent states that the applicant on 2nd July 2020 wrote to the firm representing the respondents requesting for payment of Kshs. 1,265,049/- but did not include interest in the said sum. Furthermore, the respondent states that the application has been filed after inordinate delay considering judgment was delivered on 26/6/2020. As such, the respondent argues that the application is an afterthought, filed in bad faith and explicitly calculated to annoy the respondent. The respondent further argues that they will be severely prejudiced if the application is allowed as the decretal sum awarded by the court has already been settled.
5. The respondent states that litigation must come to an end and the applicant should now be labelled as a vexatious litigant. The respondent further states that the application is grossly incompetent, bad in law and an abuse of the court process and thus should be struck out with costs.
6. Parties agreed to dispose of the application by way of written submissions but the applicant did not file his.

The Respondent's Submissions

7. The respondent argues that the applicant is not entitled to interest at all. The respondent states that the court set aside the judgment of the lower court vide its judgment dated 26th June 2020 and substituted the decree of the lower court and held that the applicant was entitled to Kshs. 911,000/- and not Kshs. 2,328,600/- . The court further held that the parties shall bear their respective costs of the appeal and that the applicant shall have costs in the lower court as ordered by the learned magistrate.
8. The respondent argues that the applicant was well aware that the court did not award interest as she wrote a letter dated 2/7/2020 requesting for payment of Kshs. 1,265,049/- and she did not factor in the alleged interest. As such, the current application is an afterthought, in bad faith and explicitly calculated to annoy him.
9. Furthermore, the respondent argues that the instant application can only be seen as a reconsideration since judgment was delivered nearly three (3) years ago. The provisions of Order 45 Rule 1 of the [*Civil Procedure Rules*](#) explicitly indicate that the application for review of judgment to the court which passed the decree or made the order shall be made promptly and without any reasonable delay. In view of the inordinate delay, the respondent submits that equity aids the vigilant and not he indolent and therefore the application ought to be dismissed.
10. The respondent submits that the applicant is attempting to unjustifiably enrich herself from the award of the court by demanding interest which was not awarded. Moreover, the respondent states that he is likely to suffer prejudice as the decretal sum was settled way back in July 2020.
11. In the event the court deems it reasonable to award interest to the applicant, the respondent submits that pursuant to Section 26 of the [*Civil Procedure Act*](#), interest is payable from the date of the decree which is when this court delivered its judgment on 26th June 2020. To support his contentions, the



respondent relies on the case of Jane *Ovuyanzi Raphael (Suing as the legal representative of the estate of Japheth Amaayi) vs Salina Transporters [2020]* eKLR.

The Law

Whether the application has merit.

12. The appeal herein arose from the judgment of the magistrate's court where an award of Kshs. 2,328,600/- in damages comprising of Kshs. 20,000/- for pain and suffering, Kshs. 100,000/- for loss of expectation of life, Kshs. 2,277,000/- for loss of dependency and Kshs. 15,000/- for special damages was made. The magistrate awarded costs of the suit and interest at court rates to be calculated
13. Being aggrieved with the judgement in respect of quantum, the respondent lodged this appeal. This court in its judgment delivered on 26th June 2020. The court varied the award on loss of dependency and substituted it with Kshs. 900,000/-. The court then tabulated the award as follows:-
 - a. Pain and suffering Kshs. 20,000
 - b. Loss of expectation of life Kshs. 100,000
 - c. Loss of dependency Kshs. 1,000,000
 - d. Total Kshs. 1,120,000
 - e. Less 20% contribution Kshs. 56,000
 - f. Net amount Kshs. 1,064,000
14. I have perused this application and the law on review which is order 45 Rule 1. The judgement in question was delivered by Ngaah J on 26th June 2020. This application was filed on 19th May 2022 about (3) years after the judgement. There was quite some delay in filling the application. However, the parties engaged one another in the matter by recording consent to sort out some issues between them related to the said judgement. Even if this court was to entertain this application, the issue arises as to whether the applicant has satisfied the requirements of Order 45 Rule. 1.
15. The applicant has to satisfy the court in seeking review that since the time the judgement was delivered, he has found new and important evidence. From the material laid before this court, the applicant has not brought in any new and important evidence to justify review under order 45.
16. The judgement was delivered by Ngaah J whose court is the same one that is hearing this application. In my considered view, this court lacks jurisdiction to review the orders of another judge of equal jurisdiction. The appellant ought to have appealed against the judgement of judge Ngaah to the Court of Appeal challenging it on the grounds that he has presented before this court.
17. Having found that I possess no jurisdiction to review the orders of Ngaah J, I proceed to look at the said judgement vis a vis that of the High Court with a view of expressing my view on this application.
18. The judgement by the magistrate delivered on 26/6/2020 was very clear on the issue of interest on general damages. The court ordered that the interest on the award be effective from the date of judgement at the rate of 12%. This is the position adopted by courts in respect of general damages. On appeal, the issue of interest on the general damages was not an issue and as such the honourable judge did not deal with it in his judgement. As such, I am of the considered view that even if this court was



possessed of the requisite jurisdiction to review the judgement, there is nothing in the said decision to be reviewed in regard to interest. The honourable judge stated in part:-

“The parties shall bear their respective costs of appeal. The respondent shall, however have the costs in the lower court as ordered by the magistrate.”

19. In my understanding of the said order the honourable judge did not change the orders of the magistrate on costs of the lower court suit and on the interests payable on the damages. As such the orders of the learned magistrate on costs and interests still stand. If the orders were to change, it required that an order be made in the judgement of the appeal. It is clear that no such order was made in the appeal. The applicant’s prayers in this application were informed by lack of understanding of the orders of the learned judge. The judge needed not to add anything to the clear and unambiguous order of the magistrate. The respondent cannot therefore escape his responsibility of paying interest on the award of general damages.
20. In effect, I find that this court lacks jurisdiction to review the orders of the honorable judge made on 26th June 2020 and that further there are no orders in the said judgement warranting review in the manner the applicant has sought.
21. The application is hereby struck out with no order as to costs due to the nature of the suit.
22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of May 2023.

