



**Ngatia (Suing as Administrator & Beneficiary of the Estate of Charles Maina
Ngatia) v Barclays Bank (K) Ltd & another (Civil Appeal 573 of 2016)
[2023] KEHC 21725 (KLR) (Civ) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 573 OF 2016
AN ONGERI, J
AUGUST 23, 2023**

BETWEEN

**FLORENCE KIBIGO NGATIA (SUING AS ADMINISTRATOR
& BENEFICIARY OF THE ESTATE OF CHARLES MAINA
NGATIA) APPELLANT**

AND

BARCLAYS BANK (K) LTD 1ST RESPONDENT

CATHERINE GAKONDE 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. L. Kabaria (RM)
in Milimani CMCC no. 447 of 2010 delivered on 8/8/2016)*

JUDGMENT

1. The appellant was the plaintiff in CMCC No. 447 of 2010 in which she sued the respondent bank for refund of ksh.150,000 paid to the respondent bank for acquisition of that property title No. Limuru/Bibirioni/T.757 (hereafter referred to as the suit property).
2. A brief history of the case was that the appellant's husband bought the suit property in a public auction and paid the 1st respondent ksh.150,000/=.
3. The 2nd respondent's husband moved to court vide HCC no. 208 of 1989 and sought a declaration that the.



4. The trial court gave judgment in favour of the appellant against the 1st respondent in the sum of ksh.150,000 together with costs from 1/12/2005 but the claim against the 2nd respondent was dismissed.
5. The appellant has filed a partial appeal in respect of the dismissal of the suit against the 2nd respondent and on the issue of costs on the following grounds;
That the Trial Magistrate erred in law and in fact by:
 - a. Failing to consider the evidence adduced on behalf of the Appellant;
 - b. Failing to consider written submissions of the Appellant;
 - c. Dismissing the Appellant's claim against the 2nd Respondent;
 - d. Failing to make a finding as to whether the 2nd Respondent ever paid the 1st Respondent the sums due to it on account of the purchase of Limuru/Bibirion/T.757;
 - e. Finding that Kshs. 150,000 paid to the 1st Respondent by the Appellant's husband was not a loan facility given to her husband by the 1st Respondent;
 - f. Finding that failing to evaluate the evidence by the Appellant correctly and thereby arriving at the conclusion that the rate of interest claimed by the appellant was unfounded;
 - g. Finding that the interest owed to the Appellant to be computed at Court Rates from 1st December 2005 instead of from the time of payment to the 1st Respondent by the Appellant;
 - h. Finding that the claim for compound interest at commercial rates had not been proved by the Appellant; and
 - i. Failing to evaluate the evidence by the Appellant correctly and thereby arriving at the conclusion that there was no basis upon which the amount paid to the 1st Respondent can be claimed from the 2nd Respondent.
6. The parties filed written submissions in the appeal as follows;
7. The Appellant submitted that the 2nd Respondent had admitted during the hearing that she never paid the 1st Respondent the amount of Kshs.150,000 and did not adduce any evidence of having paid the amount therefore benefited from owning the suit property without any consideration and for this reason, the suit against the 2nd Respondent should not be dismissed.
8. The Appellant further submitted that the 1st Respondent had not denied advancing a loan to the Appellant yet the lower court had disregarded this evidence. Further, the Appellant's expert witness had testified that the 1st Respondent had been charging an average interest rate of 16.8% compounded annually, which facts had been verified by independent auditors. This evidence had also not been taken into consideration by the lower court. The Appellant urged the Court to allow the Appeal.
9. The 1st Respondent submitted that the decretal amount which was the refund of the purchase price and interest accrued in CMCC 447 OF 2010 had already been paid to the Appellant.
10. The 1st Respondent also submitted that there was no nexus between the loan that it had advanced to the Appellant husband to the transaction over the suit property- and no evidence linking the two had been adduced.



11. It submitted that awarding Kshs.150,000 plus interest since 1988 was outside the pecuniary jurisdiction of the court as the Appellant witness had testified that the amount would be Kshs. 13,102, 676.55 as at 31st March 2015.
12. It insists that it was unaware of the proceedings in HCCC 208 OF 1989 until it received a demand letter from the Appellant on 20/10/2009, twenty years after the auction was challenged in court.
13. The 1st respondent submitted that it would be unjust for the court to award interest during the period which the Appellant was indolent yet it is a maxim that “no man should benefit from his own wrong.” Further, the auction had only been set aside in the year 2005, before which it was valid. During that time, the Appellant was still the registered owner of the property and she had not sought orders of possession.
14. The 1st respondent also submitted that the award of interest is discretionary on the Court, in any manner that it deems fit and reasonable based on Section 26 of the *Civil Procedure Act*. They submitted that interest prior to the date of the suit is only claimable under an agreement which stipulates the rate, where there is an implied agreement or where there is a statutory right to interest.
15. It further submitted that the trial Court had been right in awarding interest from the year 2005 instead of 2010 at Court rates. It urged the Court to dismiss the Appeal with costs.
16. The 2nd Respondent submitted that the matter in issue in the current suit had already been litigated in the two previous suits where the Appellant had the opportunity to seek the prayers that she is now seeking.
17. The 2nd respondent further submitted that the current suit amounts to harassment as no man should be vexed twice for the same cause. The current suit amounts to vexing the 2nd Respondent thrice. She urged the Court to dismiss the Appeal with costs.
18. This being a first appeal, the duty of this court is to re-evaluate the evidence adduced in the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity of seeing the witnesses.
19. Section 78 of the *Civil Procedure Act* provides as follows;
Powers of appellate court
 - (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
20. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.



21. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated as follows;

“[A]n appeal to this Court from a trial by the High Court is by 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 allowances in this respect”

22. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the same was stated with regard to the duty of the first appellate court as follows;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

23. The issues for determination in this appeal are as follows;

- i. Whether the appellant proved her case against the 2nd respondent to the required standard.
- ii. Whether the Trial court was right in ordering interest at court rates and for the period stipulated.
- iii. Whether the trial court was right in ordering the appellant to pay the 2nd respondent the costs of the suit in CMCC No. 447 OF 2010.
- iv. Whether CMCC No.447 of 2010 had already been litigated in the two previous suits where the current issues ought to have been raised.

24. On the issue as to whether the appellant proved her case against the 2nd respondent, I find that the trial court was right in its finding that it was the 1st respondent bank that was paid kshs.150,000 by the appellants’ husband and further that the Appellant’s husband did not pay the 2nd respondent any money.

25. On that basis, I find that the appellant did not prove that the 2nd respondent owed her any money.

26. On the issue as to whether the court was right in ordering the appellant to pay the 2nd respondent costs of the suit, the governing provision is Section 27 of the [*Civil Procedure Act*](#).

27. Section 27 provides as follows;

“(1)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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge 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 order.”



28. In the case of DGM v EWG [2021] eKLR, the court stated as follows;
- “Section 27 of the [Civil Procedure Act](#) provides that costs should follow the enemy unless the court for some good reason orders otherwise.”
29. However, in the current case, the appellant having lost the property to the 2nd respondent, It was not fair for the Trial court to order the Appellant to pay the 2nd respondent the costs of the suit.
30. In the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 the court stated as follows;
- “It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
31. The 1st respondent ought to have been ordered to pay the 2nd respondent’s costs because it was the 1st respondent bank that had received money from both the 2nd respondent and the Appellant for the same property.
32. On the issue as to whether the Trial court was right in ordering interest at court rates and in the manner stipulated, the Appellant asked for interest at commercial rates from the time the money was paid to the 1st respondent until payment in full.
33. The Trial court gave interest at court rates from 1st December 2005 when the High court declared the auction null and void.
34. The Appellant was seeking interest at commercial rates from the time the money was paid to the 1st respondent.
35. Section 26 of the [Civil Procedure Act](#) Provides:
- (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.
36. I find that the money was paid for purchase of the suit property and the parties had not agreed on the issue of interest.
37. In the circumstances I find that the court had no basis for granting interest at commercial rates.
38. I also find that the interest was to be computed from the date of the judgment in the High court case because that is when the amount was due to be refunded to the Appellant.



- 39. The determination that the sale was null and void was made on 1/12/2005 when the transaction was reversed by the High court.
- 40. I find that the Trial court was right in ordering interest at court rates and for the period stipulated from the date of the High court judgment until payment in full.
- 41. On the issue as to whether CMCC No.447 of 2010 had already been litigated in the two previous suits where the current issues ought to have been raised, I find that the Appellant had a right to seek refund of her money following the declaration that the auction was null and void.
- 42. There is no indication that the other cases redressed the issue of the refund of the purchase price.
- 43. I also find that the said issue which was raised by the 2nd respondent in their submissions was not raised during the hearing of the original suit and the 2nd respondent is estopped from raising it at appeal stage.
- 44. I accordingly set aside the order requiring the appellant to pay the 2nd respondent costs in CMCC No. 447 of 2010 and I substitute it with an order that the costs of the 2nd respondent in the trial court be paid by the 1st respondent bank.
- 45. The appeal having succeeded partially I order that each party pays its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF AUGUST, 2023.

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A.N. ONGERI
JUDGE

In the presence of:
for the Appellant
 for the 1st Respondent
 for the 2nd Respondent