



**Mulandi & another v Makau (Suing as the legal representative of Estate of Japheth Mwendwa Makau (Deceased) (Civil Appeal 136 of 2014) [2023] KEHC 23163 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 136 OF 2014  
MW MUIGAI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JAMES MULANDI ..... 1<sup>ST</sup> APPELLANT**

**LOCHAB BROS LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETRONILA NGINA MAKAU (SUING AS THE LEGAL REPRESENTATIVE OF ESTATE OF JAPHETH MWENDWA MAKAU (DECEASED) ..... RESPONDENT**

**RULING**

**Notice of Motion**

1. Vide a Notice of Motion under a Certificate of Urgency dated 12th May,2023 and filed in court on 15th May,2023 brought under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Orders 51 Rule 1, 45 Rules 1 and 2, Order 40 Rule 7 of the Civil Procedure Rules, 2010, wherein, the Applicant sought Orders That:
  1. Spent
  2. Spent
  3. In the alternative, the decree issued by this Honorable Court on 4<sup>th</sup> February,2020 dated 27<sup>th</sup> April,2023 be reviewed to reflect the exact interest accrued on the decree giving into consideration the part payment on the judgment amount (Kshs. 1,025,200) paid to decree holders on 22<sup>nd</sup> February,2016
  4. This Hon Court be pleased to make any further orders as it may deem fit and just to serve the ends of justice.



5. Costs of this Application be in the cause.
2. Grounds upon which the Application is premised are on the face of the Application herein.

**Supporting Affidavit**

3. The said application is supported by an affidavit dated 15th May,2023 sworn by John Katiku, the Advocate on record for the Applicants herein wherein, he deposed that following various correspondence between his firm and the advocates on record for the decree holder, they were unable to reach a consensus on the accrued interest on the decretal amount.
4. He deponed further that interest on court decree is usually calculated at the rate of 12%. However, the decree holder in extracting the decree has applied an interest rate of 14%.
5. Lamenting that failure to factor in the correct interest rate has led to an arithmetic erroneous conclusion on the interest accrued; further that parties have not agreed on the interest due to the Decree holder.
6. It was opined that there is an urgent need for the Hon court to intervene to prevent the respondent from claiming excessive interest which they are not entitled to; and the Respondent will not suffer any prejudice if the orders sought are granted, the Applicants stand to suffer immense economic loss if they are compelled to pay exorbitant interest on the decretal amount which is not justified to the Respondent.
7. Depositing that the correct calculation which they urge this Hon Court to adopt is as follows;

A. General Damages

Court award on general damages ..... Kshs. 1,288,000  
 Less general damages paid to Respondent on 22.02.2016 Kshs. ....  
 (1,004,000)  
 balance on general damages exclusive of interest Kshs..... 284,000  
 Add: interest on general damages from 19.06.14 (date of the lower court judgment) up  
 to 22.02.2016 (when part payment was made) (1 year and 8 moths) = 1.67 years Kshs  
 1,288,000.00 x 12% x 1.67 years.....Kshs 258,115,20  
 Add Interest on balance of general damages (balance on unsettled sum Kshs  
 284,000.00) (from 22.02.16 to 22.04.2022-7 yrs. 2 months) Kshs. 284,000.00 x 12% x  
 7.17years..... Kshs 244,000.00  
 Sub-total Kshs. 786,355.20

B. Special damages

Award of special damages by High court..... Kshs.53.000.00  
 Less 20% thereof..... Kshs. 10,600.00  
 Total award on special damages..... Kshs. 42,400.00  
 Less special damages paid on 22.02.16.... Kshs. 21,200.00  
 Special damages exclusive of interest..... Kshs. 21,200.00  
 Add: interest on special damages 19.06.2012 (when part payment were made) (44  
 months=3years, 8 months) Kshs. 42,400 x 12% x 3.67 years ..... Kshs 18,672.96



Add: interest on special damages (22.02.16 to 22.04.23= 7 yrs., 2 months) Kshs. 21,200.00 x 12% x 7.17 years..... Kshs 18,240.48

Sub-total Kshs. 58,113.44

C. Resultant Decretal Amount

General damages inclusive of interests less amount paid on 22.02.2016..... Kshs 786,355.20

Special damages inclusive of interests less amount paid on 22.02.2016..... Kshs 58,113.44

Add: party and party costs awarded to the Respondent assessed at Kshs. 210,000,00- Fully paid on 22.02.2016 .....

Total award Kshs.... 844,468.64

Less:

Further court filing fees paid by Appellant on the Decree on 06.01.2019..... 65,605.00

Total amount payable to Respondent..... Kshs. 778,863.64

8. He sought an order to set aside the decree as drawn.

**Replying Affidavit**

9. By a Replying Affidavit dated 7<sup>th</sup> June,2023 and file in court on 8<sup>th</sup> June,2023, sworn by Nzilani Muteti, an Advocate for on record for the Respondent herein, wherein he deposed that the issue of calculation of interest was dealt with in their earlier application dated 3<sup>rd</sup> November,2021 and the court record will bear them right.
10. He lamented further that it was ordered vide ruling dated 28<sup>th</sup> day of April 2022 on the interest due be calculated taking into account the time and amount paid by the Applicant.
11. It was deponed that on allowing the Appeal and substituting the award of general damages the Honorable Judge went further to detail the manner in which interest would be calculated in the following manner;
- a. Interest on special damages from the date of filing suit to date Of final payment.
  - b. Interest on general damages from date of judgment to date of final payment.(annexed and marked copy of the Judgement.)
12. It was lamented that the Applicants had filed an application for stay of execution prior to the prosecution of the appeal and it was agreed by consent that half the awarded amount plus costs be paid to the Advocate for the Respondent and the balance be deposited into an interest earning account with a reputable or be deposited in court. Further the Applicant paid half the amount plus costs on the 22<sup>nd</sup> day of February,2016 and opted to deposit the balance in court which deposit does not attract any interest whatsoever.
13. According to the affiant, the Applicants thereafter filed the Appeal whose outcome was delivered on the 4<sup>th</sup> February,2020, since then the Applicants have exposed the Respondent to a cat and mouse game by filing Application after Application to defeat the Respondents efforts to recover the amount rightfully due to her and most particularly the interest accrued.



14. Deposing further that their calculation of interest is contrary and prejudicial to the orders of the Honorable Court as they wish and intent to deprive the Respondent of interest accrued on the special damages from the date of filing the suit and general damages from the date of judgement to date of partial payment; and that their calculation of interest on a balance after partial payment does not factor in interest on the principle amount awarded and the accrued interest from the date of filing suit for special damages and from date of judgement for the general damages.
15. It was deposed that to the best of their knowledge once the Appellant appealed and the High Court substituted the award the rates applicable for calculating interest would be the High Court rate of 14% however they stand corrected on the issue.
16. Lamenting that the Decree issued herein is true reflection of the amount due inclusive of accrued interest and pursuance of the ruling issued on 28<sup>th</sup> April,2022.

### **Affidavit in reply to the Respondent's Replying Affidavit**

17. In his Affidavit in reply to the Respondent's Replying Affidavit sworn by John Katiku, Advocate on Record for the Applicants herein wherein in response to the replying affidavit, he lamented that the judgment in this suit dated 4<sup>th</sup> February,2020 ordered that general damages will attract interest from the date of judgment in the trial suit at court rates till payment in full while interest on special damages will accrue from the date of filling the suit till payment in full at court rates.
18. He deposed that the question that arises is therefore the correct court interest rate applicable in the circumstances; further that the court rate of interest was set way back in 1982 under Section 26 (1) of [Civil Procedure Act](#) whence the Chief Justice of the Republic of Kenya Hon Justice Alfred Simpson gave a practice Note No. 1 to the effect that in the absence of any valid reason for ordering a higher or lower rate of the interest, the rate of interest should be 12%.
19. He deposed further that the Deputy Registrar was wrong in applying the interest rate of 14% and not 12%and that in this suit the court did not specifically order that 14% interest rate should be applied and in the absence of such an order it is not upon the Deputy Registrar to apply 14%.
20. The matter was canvassed by written submissions.

### **Submissions**

#### **Applicants' written submissions**

21. In their submissions dated 25<sup>th</sup> July,2023 and filed in court on 26<sup>th</sup> July,2023, wherein, counsel for the Applicants submitted on the following issues:
  - a. Whether the Applicants' application dated 12<sup>th</sup> May,2023 is res judicata.
  - b. Whether the applicable interest rate should be 12% in the absence of a court order to the contrary.
22. As to Whether the Applicants' application dated 12th May,2023 is res judicata, counsel submitted that the issue of res-judicata does not arise as the issue relating to the interest rate applicable in drawing the decree has never been raised and neither has the court determined it. Averring that the application dated 3<sup>rd</sup> November,2021 was specifically a contention on a ruling that did not consider part payment as a result of which it led to an erroneous calculation on interest accrued.



23. Submitting that the current application dated 12<sup>th</sup> May,2023 is seeking review of the decree dated April,2023 on grounds stated therein mainly the court rate which should be 12% and not 14%.
24. On Whether the applicable interest rate should be 12% in the absence of a court order to the contrary, counsel relied on the case of Meridian Medical Center Limited Vs National Hospital Insurance Fund (Civil Suit 345 of 2013) KEHC 326 (KLR), where Justice Mabeya held that the Chief Justice of the Republic of Kenya Hon. Justice Alfred Simpson gave a practice Note No. 1 of 1982 that fixed the rate interest at 12% under Section 26 (1) (2) of Civil Procedure Act which provides that;
- “26 Where and in so far as a decree is for the payment of money, the court may,
- (1) 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.”
25. Further, reliance was placed on Court of Appeal case of Centre for Mathematics Science Vs Apex Security (2021) eklr, where court affirmed the position that once the judgement of the trial court is silent on interest rate, then the decretal sum will attract an interest rate of 12%.
26. Counsel urged the court to allow the Application as prayed.

### **Respondent's Submissions**

27. The Respondent in her submissions dated 24<sup>th</sup> July,2023 and filed in court on 25<sup>th</sup> July,2023, wherein counsel for the Respondent submitted on the following issues sequentially:
28. On what is the court rate of interest applicable vis vis the Decree issued on 27<sup>th</sup> April,2023, counsel submitted that the provisions on interest in the Civil Procedure Act provide for interest on Principal Sum awarded by the court and interest on costs of the suit, respectively under Section 26 (2) Act as follows:
- “26 Where and in so far as a decree is for the payment of money, the court may,
- (1) 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.”



29. Contending that over time the Chief Justice has by practice notes given guidance to court as to the reasonable rate of interest that the court may award under Section 26 (1) of the Act being “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”
30. Counsel relied on the case of Highway Furniture Mart Ltd Vs P.S Office of the President & AG (2004) eKLR, where Okwengu J in her ruling paragraph 8 stated as follows;
- “ .... There is an error apparent on the face of the record but the error is not on the judgment delivered on 16<sup>th</sup> December,1998, but on the decree extracted from this judgement as the interest on the decree ought to have ought to have 14% from 18<sup>th</sup> February, 1998 to date of payment and 36% from 12<sup>th</sup> October,1990...”
31. Similarly, the Court Appeal No. 52 of 2005, Highway Furniture Mart Limited vs Permanent Secretary Office of the President & Anor (Supra), where the learned Judges were in agreement with Justice Okwengu as stated as follows:
- “ the Chief Justice from time to time fixes the ceiling of the Court rate interest under Section 26 of the *Civil Procedure Act*, the prevailing court rate is 14% p.a.”
32. It was the Respondent’s case that the applicable rate is 14% as per the decree dated 27<sup>th</sup> April,2023.
33. As to Whether the calculation reflect the interest accrued on the decree giving into consideration the part payment on the part payment on the decretal sum, counsel relied on Order 21 Rule 12 of the Civil Procedure Rules which provides as follows:
- “ 12. Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
- (2) After passing of any such decree, the court may on the application of the judgmentdebtor and with the consent of the decree- holder or without the consent of the decreeholder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”
34. It was opined that Justice Odunga on 4<sup>th</sup> February,2020 in allowing the Appeal and substituting the award of general damages went into detail in the manner in which the interest would be calculated as follows:
- a. Interest on special damages from the date of filing suit to date of final payment.
- b. Interest on general damages from date of judgment to date of final payment.
35. Submitting that the Decree herein is a true reflection of the Amount due inclusive of accrued interest and prayed that this application be dismissed with costs and respondent be at liberty to execute, recover and enjoy the fruits of her judgment.



## Determination/analysis

36. I have considered the application, the supporting affidavit, the Replying Affidavit, reply to the Replying Affidavit and the submissions filed as well as the authorities relied upon.
37. The issue that commends itself for determination is whether the Deputy Registrar was wrong in applying the interest rate of 14% and not 12%.
38. The power of the Court to award interest is derived from 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.”

39. In *Kipchumba v BOG Tambach Teachers Training College* (Civil Appeal 100 of 2019) [2023] KECA 802 (KLR) (30 June 2023) (Judgment). Court observed at Paragraph 25,26,27 and 28 that:

- “25. We note that courts have, over time, come up with several principles derived from the general rule in Section 26 of the [Civil Procedure Act](#) which have, over time acquired stable meanings. The following three principles emerge from the Section:
26. First, the trial court has wide discretion to award and the rate of interest provided that the discretion must be used judiciously. As a result of this discretion, an appellate court is enjoined to treat the decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the trial court proceeded upon some erroneous principle or was plainly and obviously wrong.
27. Second, the court has discretion to award and fix the rate of interest to cover: 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.
28. Lastly, Section 26 of the Act is not applicable to the period before a suit is filed.”

40. Practice direction No. 1 of 1982 provides that:

“[Civil Procedure Act](#) (Act 21) section 26 Interest- rate of interest- power of the court to order payment of interest- interest on principal sum of decree- rate to be applied in the absence of a valid reason to order either a higher or lower rate.



March 16, 1982, Simpson AG CJ gave the following practice direction. The [civil procedure act](#) (cap 21 laws of Kenya) section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable.

In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%.”

41. In the instant case, the applicant submitted that based on the fact that the court was silent on the rate of interest, the Deputy Registrar was wrong in applying the interest rate of 14% and not 12%. The Respondent on the other hand averred that the practice notes gave guidance to court as to the reasonable rate of interest that the court may award under Section 26 (1) of the Act being 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. Respondent maintained that the applicable interest is 14% as per the decree dated 27<sup>th</sup> April,2023.
42. The above contention arises from a ruling by Deputy Registrar dated 28<sup>TH</sup> April,2022 which applied the interest rate at 14% which led to the extraction of a decree dated 27<sup>th</sup> April,2023, arising from the judgment dated 4<sup>th</sup> February, 2020. In the said judgement, it was ordered that general damages will attract interest from the date of judgement in the trial suit at court rates till payment in full while interest on special damages will accrue from the date of filing the suit till payment in full at court rate.
43. The grant of an award of interest is an exercise of the court’s discretion, but that discretion must always be exercised within limits. It must not be capricious or based on whim. In the case of Abok James Odera T/A as A.J Odera & Associates vs John Patrick MachiraT/A Machira & Co. Advocates, [2013] eKLR, the Court was confronted with an appeal where the learned judge had awarded 25% claimed by a party in the plaint. The court considered the propriety of that rate of interest and stated that the judge fell into error in awarding that rate when it had neither been provided for in the agreement between the parties, nor in the documents filed before the court. The court expressed itself in the following manner:

“Bearing the above principles in mind, we have no hesitation in finding that the learned trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% from 4<sup>th</sup> March, 1996 when the same had neither been provided for in the said agreement or Justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary Judgment and or oral highlights in court at the time of the respondents request for the said summary Judgment.

We appreciate that section 26 (1) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya tended to give the learned trial Judge a wide discretion with regard to the award of interest. It reads:

- Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principal such adjudged from the date of the suit to the date of decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit....”

The above discretion notwithstanding it is now trite that the exercise of the judicial discretion donated by this section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason. Herein the learned trial Judge gave no reason as to why he awarded interest at the rate of 25% from the pre-claim period.”



44. In the present case, the rate of 14% was applied by the Deputy Registrar which was then applied by the Respondent in her decree dated 27<sup>th</sup> April,2023. Irked by the said interest rate the Applicant made this application seeking the said decree to be set aside on the ground that the interest on court decree is usually calculated at the rate of 12%. The Applicants herein are against the decree holder for applying an interest rate of 14%.
45. I find that the decree as extracted by the Respondent was guided by the ruling of the Deputy Registrar dated 28<sup>th</sup> April,2022 that the interest rate to be applied is 14%. Further, I note that the Applicant did not contest the said ruling by seeking the same to set aside at the earliest time possible. The said ruling was back in 2022 and a decree was extracted on 27<sup>th</sup> April,2023. Why did the Applicants have to wait for the said decree to be extracted and approach court for the same to be set aside if indeed they were genuine on their dissatisfaction on the interest awarded by the Deputy Registrar? When indeed they were aware of the said ruling for all that time. Why do they have to wait for the said decree to be extracted the approach the court for the same to be set aside? In my view I see a mischief on the part of the Applicants.
46. In my considered view the Applicants are deploying a tactic to delay the Respondent from enjoying the fruits of her judgment. I am in agreement with the submission of the Respondent that the Decree herein is a true reflection of the amount due inclusive of the accrued interest
47. The judgment on appeal of 4/2/2020, Hon GV Odunga J awarded costs of proceedings to the Appellant and award on general damages would attract interest from date of judgment after trial to date of payment, while interest on special damages shall be from date of filing suit to payment in full. By Ruling of 15/3/2021, reviewed the costs of the proceedings before trial are awarded to the Respondent.
48. The Respondent sought review on interest which would have been sorted out at the time, what is the Court rate on interest where interest is not contracted and/or agreed upon or rate of interest is silent/ not catered for?
49. It is also on record that the Applicant had paid part of the decretal sum to the Respondent to the tune of Kshs. 1,025,200, which payment was made on 22/02/2016. The Respondent extracted a decree pursuant to a court order issued on 28<sup>th</sup> April 2022. I see no prejudice that Applicants will suffer on the Adoption of the 14% as issued by the Deputy Registrar.
50. From the forgoing, I find that the interest rate applicable in this case is 14% per annum at Court rates.
51. I therefore find that the Taxing Officer exercised discretion of 14% on costs as required and did not exceed 14 % as provided by Section 26 & 27 of CPA.
52. Each party to bear their own costs.
53. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In The Presence Of:

No Appearance - For The Appellants/applicants

Ms Nzilani - For The Respondent Online



Geoffrey/patrick - Court Assistant(s)

