



**Stephen Musumba t/a Zapata Agencies v Principal Secretary Ministry
of Agriculture & Irrigation & another (Civil Appeal E018 of 2020)
[2022] KEHC 3359 (KLR) (Civ) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E018 OF 2020

SJ CHITEMBWE, J

MAY 31, 2022

BETWEEN

STEPHEN MUSUMBA T/A ZAPATA AGENCIES APPELLANT

AND

**PRINCIPAL SECRETARY MINISTRY OF AGRICULTURE &
IRRIGATION 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal arising from the judgment/decree by Honourable Chief Magistrate
Mr. P.N. Gesora delivered in Nairobi CMCC No. 5641 of 2018 on the 28th May, 2020)*

JUDGMENT

The Appeal:

1. The instant appeal is with respect to the judgment by Hon. P. N. Gesora CM dated the May 28, 2020 in Milimani Chief Magistrates' Court Case No. 5641 of 2018; Stephen Musumba T/A Zapata Agencies vs The Principal Secretary Ministry of Agriculture & Irrigation and The Hon. Attorney General, where the trial court dismissed the appellant's claim for Kshs. 7,231,880.66 being the accrued interest of the outstanding payment under the contract which remained unpaid for a period of over twenty (20) years.
2. The appellant's claim against the respondents in the subordinate court was anchored on a tender agreement between the appellant and the 1st respondent entered into on or about 1997/98. That pursuant to the agreement and subsequent Local Purchase Orders, the appellant supplied construction materials to the Ministry of Agriculture, Teso District for the WESKAP Project worth Kshs.



1,326,900.00. That due to financial constraints, the 1st respondent paid Kshs. 850,500.00 in the 1998/1999 financial year, leaving an outstanding balance of Kshs. 476,400.00 which was eventually paid on 23rd October, 2017, twenty (20) years later. The appellant's claim as against the respondents is therefore for the accrued interest of Kshs. 7,231,880.66 for the balance of Kshs. 476,400.00 which remained unpaid for over 20 years. The trial court dismissed the appellant's claim.

3. Being dissatisfied with the judgement and decree of the subordinate court the appellant has preferred this appeal by way of a Memorandum of Appeal dated July 26, 2020. The grounds of appeal are:
 - i) That the learned trial magistrate erred in law and in fact by holding that the appellant herein did not lay basis for the payment of the interest claimed yet it was clear from his pleadings that he had supplied goods, was paid a deposit and the balance over 20 years later. The claim for interest is at the prevailing commercial bank rates which is what the law provides.
 - ii) That the learned trial magistrate erred in law and in fact by holding that the appellant did not state the rate of the interest and how he arrived at the figures yet the appellant was very categorical that interest claimed was at the prevailing commercial bank rates and was overdue for over 20 years.
 - iii) That the learned trial magistrate erred in law by holding that the appellant did not lay a basis of the interest claimed yet the appellant based his claim on section 48 of the *Public Procurement and Asset Disposal Act* which states that:- The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement- (a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and (b) the interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.
 - iv) That the learned trial magistrate erred in law and fact by acknowledging that no evidence was led by the defence yet he went ahead and ignored the set out case law that held that failure to adduce any evidence by the defence means that the evidence adduced by the plaintiff against the defence is uncontroverted and therefore remained unchallenged. One such case law is *Trust Bank Limited v Paramount Universal Bank Ltd & 2 others* Nairobi (milimani) HCCs No. 1243 of 2001 where it was held that;- "the learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, the party's pleadings remains mere statements of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."
 - v) That the learned trial magistrate erred in law and in fact by holding that by the 1st respondent paying the balance the matter was brought to an end yet the law provides that where a procuring entity delays paying the contractor, the procuring entity shall pay interest on the overdue amount.
 - vi) That the learned trial magistrate erred in law and in fact by dismissing most of the appellant's claim without considering its merits.
 - vii) That the learned trial magistrate erred in law and in fact in failing to appreciate the appellant's submissions and/or failing to give reasons for disregarding the submissions and the authorities in support thereof.
4. On October 14, 2021 the court directed that the appeal be canvassed by way of written submissions. The appellant has on record submissions dated October 28, 2021 while the respondents' submissions are dated December 15, 2021.



The Appellant's Submissions;

5. The issue for determination as outlined by the appellant is the amount of monies owed to him. The appellant submits that although he performed his obligations under the contract, the 1st respondent failed to pay the full contractual sum. The appellant's further submission is that the materials supplied were worth Kshs. 1,326,900.00. The 1st respondent paid Kshs. 850,500.00 leaving an outstanding amount of Kshs. 476,400.00. The balance, remained unpaid for over twenty (20) years thus accruing interest amounting to Kshs. 7,231,880.66. Further that on October 23, 2017 the 1st respondent paid the outstanding balance of Kshs. 476,400 without the accrued interest.
6. The appellant submits that the 1st respondent contractual obligation will only come to an end after payment of the principal sum together with interest on the overdue amount paid after twenty (20) years from the date of the contract. He further submits that he laid a basis for the payment of the interest claimed on the outstanding balance by adducing evidence before the trial court. It is his submission that the interest claimed was at the prevailing commercial bank rates as stipulated in section 48 of the [Public Procurement and Assets Disposal Act](#) which had come into force at the time the balance of Kshs. 476,400 was paid.
7. The appellant relies on the case of [North end Trading Company Limited \(Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi](#)[2019] eKLR where Makau J. held that;

“24. Under Section 48 of the Public Procurement and Disposal Act, and Section 140 of the current [Public Procurement and Asset Disposal Act](#), No 33 of 2015 both recognize that unless the contract provides otherwise, the procurer is under obligation to pay interest on overdue amount at the prevailing commercial bank rates.”

Reference was also made to the case of *Lata v Mbiyu*[1965] EA 392 where the court held that;

“The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the [Civil Procedure Act](#) but such discretion must, of course, be judicially exercised... It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

8. The appellant relies on the case of *Karuru Munyororo v Joseph Ndumia Murage & another*, Nyeri HCCC No 95 of 1988, where Makhandia J. held that where the plaintiff's has proved a case on a balance of probability, and in the absence of the defendants and or their counsel to cross examine him and the evidence remains unchallenged and uncontroverted, a court of law ought to act upon such evidence. The appellant submit that the trial court erred in failing to rely on his evidence since the respondents did not adduce any evidence in support of their case.

Respondents' Submissions;

9. In opposition, the respondents identified the following issues for determination;
 - i) Whether the appellant has laid any basis for payment of the interest as claimed.
 - ii) Whether failure to avail a witness by the defendant means that the plaintiff proved his case



- iii) Whether the appellant suit was time barred
 - iv) Who should bear costs of this suit.
10. On the first issue, the respondents submit that the plaintiff's claim is not only unjustifiable but has no basis in law. The reasons thereof are that the plaintiff has failed to avail a copy of the contract subject matter of this suit and secondly, the claim for accrued interest of Kshs. 7,231,880.66 for twenty (20) years is inclusive of the principal amount already paid. Counsel's further submissions are that the appellant having consented to have the matter amicably settled with no further claim on the 1st respondent is estopped from laying further claim through the present suit.
 11. On whether the failure to avail a witness implies that the plaintiff proved his case, the respondents submit that the appellant failed to prove his allegations on a balance of probabilities hence the dismissal by the trial court. The respondent referred to the provisions of section 107 (1) of the Evidence Act, cap 80 which provides;

107. (1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 12. Further reliance has been placed on the case of Evans Nyakwana v Cleophas Bwana Ongaro[2015] eKLR where it was held;

“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (chapter 80 of the Laws of Kenya)...16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...17. The Court of Appeal in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR considered the applicability of these provisions as follows;
 13. We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”
 14. On whether the appellant's suit is time barred, the respondents submit that the suit filed on 18th June, 2018 without leave of the court on a cause of action which arose in or about 1998, is time barred. The respondents have made reference to the provision of section 3 (2) of the Public Authorities Limitation Act. Which provides;

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”
 15. The respondents further submit that the provisions of section 48 of the Public Procurement and Asset Disposal Act on which the appellant has anchored his claim is nonexistent thus rendering the argument futile. On costs, the respondents submit that having failed to establish sufficient cause to warrant interference with the trial court's judgment, the appellant ought to bear the costs. Reference has been



made o the case of *Alexander- Tryphon Dembeniotis vs Central Africa Co. Ltd* (1967) EA 310 where the court held:

“The defendant is entitled to put his back against the wall and to fight from every available point of vantage. It would be extremely hard on defendants if as a rule they were told, at the end of the trial: “You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action”... Full costs should be awarded to a plaintiff who has succeeded in the main purpose of his suit and obtained the precise form of relief he wanted...It is not on every issue in a suit that success will bring a right to the costs of that issue. Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and he should not be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue.”

Analysis and Determination;

16. This being a first appeal, the court is required to evaluate the evidence on record before drawing its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* (1968)E.A 123; [Gitobu Imanyara & 2 others v Attorney General](#) [2016] eKLR; [Abok James Odera t/a A. J. Odera & Associates vJohn Patrick Machira T/a Machira & Co. Advocates](#)[2013] eKLR.
17. Having taken into consideration the evidence adduced and written rival submissions of both parties the following are the issues that this court has framed for determination;
 - (i) Whether there was a valid contract between the appellant and 1st respondent;
 - (ii) Whether the suit is time barred;
 - (iii) Whether the appellant is entitled to the accrued interest; and
 - (iv) Cost of the suit.

Whether there exists a contract between the appellant and 1st respondent

18. On whether there exists a contract as between the appellant and the 1st respondent, this court as a starting point is guided by the holding of Atkin, LJ in [Rose And Frank Co v J R Crompton & Bros Ltd](#) (1923) 2 KB 293, where it was held:

‘To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.’

19. In the case of [William Muthee Muthami v Bank of Baroda](#) [2014] eKLR the Court of Appeal observed that: -

‘In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.’



20. I have perused the pleadings and the evidence on record and although both parties have alluded to the existence of an agreement, there was no written contract as between the appellant and the 1st respondent. In his judgment, the Learned Trial Magistrate held that;
- “It is clear contract which is the subject of these proceedings was awarded to the plaintiff by the 1st defendant. The contract sum was Kshs. 1,326,900.”
21. By their conduct, the parties have implied that indeed there was an agreement as between them for the supply of the building materials. The Court of Appeal in the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* [2017] eKLR stated that: -
- “11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded...”
22. In the present case, the appellant testified that on or about 1997/1998 he entered into a tender agreement with the Ministry of Agriculture Teso District for the supply of construction materials, which he did. That upon satisfactory completion, the 1st respondent paid him Kshs. 1,326,900.00 which was the total sum of the supplied materials. In a letter dated February 8, 2010, Mr. Johnstone Imbira, a former Teso District Agricultural Officer confirms that the appellant supplied the office with various goods after which payment vouchers were prepared. The act by parties amounted to a contract, there was a meeting of minds as between the parties hence the respondents’ argument that the failure by the appellant to avail a written contract led to the dismissal of the suit is not supported by the record.

Whether the suit is time barred;

23. Having established the existence of a contract as between the appellant and the 1st respondent, the other issue for determination is whether the appellant’s suit is time barred.
24. Although the issue was raised before the trial court, the court did not address its mind to the same nor give any reasons thereof. The respondents’ submissions are that the suit is time barred having been filed over three (3) years since the cause of action arose. It was their further submission that the cause of action arose on or about 1997-1998 and the suit was filed on 18th June, 2018, twenty (21) years later thus proving indolence on the appellant’s part.
25. The provisions of section 3 (2) of the *Public Authorities Limitations Act* (“PALA”) provides as follows;
- (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
26. In his plaint dated June 14, 2018 and filed on 18th June, 2018 the appellant claim is for Kshs. 7,231,880.66 being the accrued interest at the prevailing commercial bank rates for the balance which remained unpaid for over twenty (20) years. The 1st respondent paid the appellant the balance of Kshs. 476,400.00 on 20th October, 2017, it is my view that the cause of action in the present suit arose once the balance was paid. It therefore, follows that the primary suit was not time barred as the same was filed within one (1) year of receipt of the balance of outstanding amount. Moreover, I have considered the numerous correspondence between the appellant, his advocates and the respondents and I am convinced that the appellant was not indolent, he made follow ups on his payment. The cause of action accrued after the final balance was paid.



Whether the appellant is entitled to the accrued interest;

27. The trial court while dismissing the appellant's claim for accrued interest held that;

“The plaint as framed does not lay any basis for the payment of the interest claimed. The plaintiff does not state the rate of interest that he is relying on and how he arrived at the figure claimed. It is my humble view that by paying the balance claimed this matter was brought to an end. There is clearly no cause of action herein and I proceed to dismiss this suit with costs.”

28. The appellant argue that the lower court erred in failing to take into consideration his claim for accrued interest on the ground that he had failed to state the rate at which the interest accrued. It is the appellant's contention that the accrued interest was to be calculated in accordance with the prevailing commercial bank rates and called upon this court to consider section 48 of the *Public Procurement and Asset Disposal Act*. The appellant maintains that he proved his case on a balance of probabilities and since the respondents did not call any evidence to refute the claim for Kshs. 7,231,880.66, the same ought to be awarded considering the economic loss and prejudice he suffered as result of the delayed payment.

29. The respondents have maintained that the appellant has failed to lay a basis for the award of Kshs. 7,231,880.66 on account of accrued interest and the fact that they did not call a witness or evidence does not in any way shift the burden of proof. The respondents have also argued that section 48 of the *Public Procurement and Asset Disposal Act* on which this claim is pegged is nonexistent hence making the claim untenable under the law. It is the respondents' further submission that by agreeing to have the matter amicably settled through the numerous correspondence, he is estopped from laying any further claim.

30. In the case of *Highway Furniture Mart Ltd v Permanent Secretary Office of The President & another*[2006] eKLR the court held that;

“The justification for an award of interest on the principal sum is to compensate a Plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant.”

31. It is not in dispute that the appellant supplied building materials to the 1st Respondent Busia District Office in 1997/1998 worth Kshs. 1,326,900. That due to liquidity problems at the Teso District Treasury, the payment was carried forward to the next financial year as pending bills. That after receipt of the vouchers, the 1st Respondent paid Kshs. 850,000 leaving a balance of Kshs. 476,400. This was confirmed by Mr. Johnstone Imbira, the then Busia District Agricultural Officer vide an affidavit sworn on February 26, 2010.

32. The 1st respondent paid the balance of Kshs. 476,400 to the appellant on October 23, 2017. The appellant was kept away from his money unfairly for twenty (20) years despite numerous inquiries and follow ups by the appellant. I find the delay of payment by the 1st respondent not only unconscionable but also oppressive and injurious. The failure by the appellant to avail to this court clear terms of payment is not a bar from finding that the delay was unreasonable and unjustifiable. The appellant expected his payment in the financial year 1997/1998. However, the same was forward to the next financial year due to the 1st respondent's liquidity issues.

33. The respondents have argued that the appellant is estopped from making this claim because through a letter by his advocate he had undertaken to have the matter settled with no further claim as against the 1st respondent. I have perused the evidence herein and indeed there is a letter dated June 7, 2010 by



the firm of Khaminwa & Khaminwa Advocates acting on behalf of the appellant herein. The contents of that letter reads in part;

“Upon remittance of the aforesaid sum by your ministry to the above bank particulars, we hereby confirm that our client and ourselves will treat this matter as amicably solved and that our client will not have any other claims whatsoever in future against your Ministry as regards this particular claim.”

34. Interestingly, this letter did not elicit payment of the balance from the respondent, as evidenced by a subsequent Notice of Intention to Sue dated October 12, 2011 by the same firm of advocates. The reliefs sought thereon were special damages, compound interest at prevailing commercial bank rates on paragraph (a) above and costs and interests. Similarly, the firm of H. Kago & Company Advocates wrote to the 1st respondent with regards to the outstanding bills vide a letter dated September 28, 2016 and this also elicited no response whatsoever.
35. The parties had not made any provision of interest on late payment in their engagement. The appellant has however argued that the interest is on the outstanding balance at the prevailing commercial rates. The appellant relies on section 48 of the Public Procurement Act however a perusal of the said Act indicated that the correct provision is section 140 of the Public Procurement and Disposal Act, No. 33 of 2015 which provides;

“The following shall apply with respect to delayed performance and overdue amounts owed by a procuring entity and a contractor under a contract for a procurement —

- (a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts;
- (b) the contractor shall be liable to liquidated damages for delayed performance;
- (c) the interest and liquidated damages to be paid under paragraph (a) and (b) shall be in accordance with prevailing mean commercial lending rate as determined by Central Bank of Kenya; and
- (d) the methods of computing interest liquidated and ascertained damages shall be as prescribed in the regulations.”

36. The above section although erroneously cited, is what informed the appellant’s claim for interest rate at bank rates. However, the same is not applicable to the present suit since it does not have a retrospective effect. The Public Procurement and Disposal Act, No. 33 of 2015 was introduced to ensure that public procurement and disposals of public assets is done within the values and principles of the Constitution. Further section 23(3) of the Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya) provides as follows:

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not

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- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or



- (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
- (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

37. Further, in the case of *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others*, SCK Application No. 2 of 2011 [2012] eKLR, the Supreme Court while considering the question whether the retrospective application of a statutory provision is unconstitutional stated as follows:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury’s Laws of England*, 4th Edition Vol 44 at p 570). A retroactive law is not unconstitutional unless it:(i) is in the nature of a bill of attainder;(ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden”

38. I have evaluated the evidence on record. The appellant did not lead any evidence to prove his claim for Kshs. 7,231,880.66 on account of interest. There is no evidence on record to demonstrate the prevailing commercial rate of interest and the period in question. I am in agreement with the observation of the trial court in its holding that;

“The plaint as framed does not lay a basis for the payment of the interest claimed. The plaintiff does not state the rate of interest that he is relying on and how he arrived at the figure claimed.”

39. I am in agreement with the sentiments of Ogola J. in *H Young & Co. (EA) Limited (supra)* that it is not the duty of the court to write a contract for the parties. However, the court can give efficacy to the intention of the parties to a contract without re-writing the contract. The contractual agreement has not been disputed and it is evident that the full consideration was to be paid within the same year of supply. The appellant was made to wait for the outstanding balance for twenty (20) years. Being commercial transaction, the appellant has been prejudiced by being deprived the use of his money. He ought to be compensated for his trouble. I am guided by the case of *Omega Enterprises Kenya Limited v Eldoret Sirikwa Hotel Limited & others* Civil Appeal No 235 of 2001, where the Court of Appeal thus:

“There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he was so deprived.”



40. Accordingly, I would agree with the decision of Azangalala J (as he then was) in *Nalinkumar M Shab v Mumias Sugar Company Ltd*[2010] eKLR 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.”

41. The appellant kept on threatening the 1st respondent with litigation way back in 2010. No suit was filed. The cause of action accrued from the time the balance was paid. I do find that awarding interest from 1997 would be improper.

42. In the end, this appeal succeeds, the lower court judgment is hereby set aside and I enter judgment in favour of the appellant for accrued interest on the balance of Kshs. 476,400.00 at court rate from the date of filing suit till payment in full. The appellant shall have cost of the case before the trial court and costs of the appeal.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

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J.K. SERGON

JUDGE

