



**Co-operative Bank of Kenya Limited v Ondieki & another (Civil Appeal
128 of 2019) [2022] KEHC 11087 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 128 OF 2019
JN KAMAU, J
JULY 27, 2022**

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

HENRY NYABUTO ONDIEKI 1ST RESPONDENT

CHEMILIL SUGAR COMPANY 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon P. Olengo (SPM) delivered at
Nyando in Senior Principal Magistrate's Court c on 31st October 2019)*

RULING

Introduction

1. In its ruling dated September 24, 2021, this court partly allowed the 1st respondent's Notice of Motion application dated December 18, 2020 and filed on December 22, 2020 and ordered the appellant pays him the sum Kshs 2, 031,351.70 which was not in dispute. As the parties were not able to agree on the issue of interests and costs, this court directed them to file their respective written submissions on the same.
2. Pursuant to the aforesaid orders, the Appellant filed undated written submissions on October 27, 2021. The 1st respondent filed two (2) sets of submissions on October 4, 2021 and on November 9, 2021. The 2nd respondent did not file any written submissions. On October 12, 2021, the appellant had indicated to court that the 2nd respondent would not be participating in these proceedings.
3. This ruling is therefore based on the appellant's and 1st respondent's written submissions which the parties relied upon in their entirety.



Legal Analysis

4. The Appellant submitted that it had contacted the 1st Respondent on two (2) occasions to enter consent with regard to settling this appeal and withdrawal of Kisumu HC No 21 of 2020 (OS) in which they were both parties but that the 1st Respondent did not respond which was an indication that he was not willing to have the matter concluded.
5. It placed reliance on the equitable maxim of he who comes to equity must come with clean hands. It blamed the 1st Respondent for having prolonged the litigation leading to accrual of costs and interests which could have been avoided. It invited the court to look at the 1st Respondent's intention and urged it to bear with the efforts it had put in so to settle the matter.
6. It relied on section 27 of the *Civil Procedure Rules* and the case of *Republic vs Rosemary Wairimu Munene, Ex parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* (eKLR citation not given) where the court held that the issue of costs was at the discretion of the court and that the principle, costs follow the event, was not to be used to penalise the losing party but rather it was for compensating the successful party for the trouble taken in prosecuting or defending a case.
7. It added that that discretion must be exercised judicially and in this regard, it placed reliance on the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another* [2016]eKLR where the court held that in determining the issue of costs, the court was entitled to look at the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to article 159 (2)(c) of *the Constitution*. (sic).
8. It urged the court to dismiss the 1st Respondent's application with costs and direct that each party to bear its own costs.
9. On its part, the 1st Respondent placed reliance on section 26(2) and 27(2) of the *Civil Procedure Act* that provide for interest on the principal sum awarded by court and interest on costs of the suit respectively. He submitted that the Chief Justice had by Practice Notes given guidance to courts as to the reasonable rate of interest that the court may award under section 26(1) of the aforesaid 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.
10. He pointed out that in the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be the current commercial rate of interest. He added that the justification for an award of interest on the principal sum was to compensate a plaintiff for the deprivation of any money or specific goods through the wrong act of a defendant. He referred this court to the case of *Later vs Mbiyu* [1965] EA 592 where it was held that the party who had been deprived of the use of goods or money to which he was entitled to should be compensated for such deprivation by the award of interest.
11. He also relied on the Halsbury's Laws of England, the Writing on the subject of costs by Mr. Justice (Rtd) Kuloba and several cases amongst them, the cases of *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others, Orix (K) Limited vs Paul Kabuu & 2 Others* and *Supermarine Handling Services Ltd vs Kenya Revenue Authority* Civil Appeal No 85 of 2006 (eKLR citations not given) where the common thread was that the award of costs was at the discretion of court and that costs follow event.



12. He urged this court to order that the appellant to pay interest and costs at the rates allowed by law and as they prevail in the market and dismiss its assertion of denying him costs and interests.
13. Section 27(1) of the *Civil Procedure Act* Cap 27 (Laws of Kenya) provides that: -
- “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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.”
14. Notably, the successful party ought to be compensated for having taken various lawful and legitimate steps in pursuit of a remedy. Considering the entire chain of events from filing this appeal up to the time the parties left the issues to the court to determine and the numerous court attendances in Nyando SPMCC No 69 of 2016, this court found no reason to deny the 1st Respondent costs.
15. Turning to the issue of interest, section 26 of the *Civil Procedure Act* provides as follows:
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.”
16. A court has wide discretion to award and fix the rate of interests, period and rests. However, that discretion must be exercised judiciously. Under section 26(1) of the *Civil Procedure Act*, the court has discretion to award and fix the rate of interests to cover two (2) stages namely; 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.
17. It was the considered view of this court that it would be proper and fitting for it to exercise its discretion to award and fix interest rates under section 26 of the *Civil Procedure Act* as the 1st respondent had been kept out of monies which the appellant eventually conceded was undisputed.

Disposition

18. For the foregoing reasons, the upshot of this court’s decision was that the 1st respondent be and is hereby awarded costs of the suit and interests at court rates in the undisputed amounts of Kshs 2, 031, 351.70 from the time of filing suit, Nyando SPMCC No 69 of 2016, at the Trial Court.
19. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2022.



J. KAMAU
JUDGE

