



**Kenindia Assurance Company Limited v Kariuki (Civil Appeal
18B of 2020) [2022] KEHC 18074 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 18074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 18B OF 2020
AC MRIMA, J
OCTOBER 27, 2022**

BETWEEN

KENINDIA ASSURANCE COMPANY LIMITED APPELLANT

AND

PETER MACHARIA KARIUKI RESPONDENT

*(Being an Appeal arising out of the ruling and order of Hon. V. Karanja (Principal Magistrate)
in Kitale Chief Magistrate's Court Civil Case No. 670 of 2002 delivered on 26th August 2020)*

JUDGMENT

Introduction

1. This appeal raises only one fundamental issue. It is on the rate of interest chargeable on adjudged principal sums.
2. The parties hold divergent positions, hence this judgment.

Background

3. The Respondent, a male adult of sound mind, successfully sought judgment against the Appellant in Kitale Chief Magistrate's Court Civil Case No. 670 of 2002 Peter Macharia Kariuki vs. Kenindia Assurance Company Limited (hereinafter referred to as 'the suit').
4. In its judgment delivered on 13th December, 2018, the fact finder declared that the Appellant herein, then the Defendant, was legally bound to indemnify the Respondent herein, then the Plaintiff, from all claims arising out of an accident that occurred on 9th July, 1995 involving the Respondent's motor vehicle registration number KXG 753 which vehicle was, at the time of the accident, duly insured by the Appellant.
5. The sum of Kshs. 1,618,320/= together with costs and interest until payment in full was decreed.



6. Dissatisfied with the judgment in the suit, the Appellant herein vide a Motion by Notice applied for review of the Court's decree, stay execution and the re-opening of the case on account of missing proceedings. The trial Court, in dismissing that application found that the issues raised in support of the application were an afterthought.
7. The Respondent's costs were sequentially assessed on 4th November, 2019 at Kshs. 166,676/=. Thereafter, no further proceedings took place save for the execution process.
8. It is these execution proceedings that instigated the Appellant's application by way of a Notice of Motion dated 24th January, 2020. The application sought the following reliefs: -
 1. This matter be certified as urgent and service be dispensed with in the first instance.
 2. There be a stay of execution and or further execution against the judgment/decree herein issued on 13/12/2018 and all consequential orders and /or proceedings arising therefrom pending the hearing and determination of this application inter-parties.
 3. This Honourable court do order that there be stay of attachment and sale of the defendant's movable properties namely; 15 seats, 11 office desks, one photocopier, 2 computers, one office visitors bench 3 in one, 7 office cabinets, one office cash safe box, one executive desk and any other attachable assets including office partitions that have been proclaimed by the plaintiff/ Respondent pending the hearing and determination of this application inter-parties.
 4. The Court be pleased to issue an order lifting warrants of attachment, proclamation of attachment and warrants of sale issued on 30.12.2019 and 09.01.2020 unconditionally;
 5. The Court be pleased to issue an order setting aside and/or reviewing the amount of Kshs. 6,659, 861.00 indicated as principal amount, costs and interest on costs, interest on decretal amount, further costs and collection fee as indicated in the decree and certificate of costs as well in the warrants of attachment since they are based on the wrong interest rates and the court do replace it with the correct figures;
 6. That the court be pleased to calculate interest on decretal sum using the correct interest rate of 6% per annum;
 7. The Plaintiff to bear the Auctioneer's costs and costs of this Application.
9. The above application was strenuously opposed.
10. In a ruling rendered on 26th August, 2020, the application was dismissed. It is that ruling and order that prompted the instant appeal.

The Appeal

11. The Memorandum of Appeal was dated 11th September, 2020 and was filed on 14th September, 2022. It raised seven grounds of appeal.



12. In sum, the Appellant took issue with the trial Court that it erroneously applied settled principles of the law, failed to consider its affidavit evidence and the submissions filed and that it overly applied the Respondent's submissions.
13. The issue of limitation in Section 4(4) of the *Limitation of Actions Act* was also raised as one of the grounds of appeal. It was averred that the law outlawed the recovery of interest arrears in respect of a judgment after the expiration of six (6) years from the date the interest became due.
14. Additionally, the Appellant found error with the trial Court's decision for holding that the applicable interest was 12%. This, it maintained, was in total disregard of Section 26 (2) of the *Civil Procedure Act*.
15. The Appellant urged this Court to allow the appeal, set aside the ruling delivered on 26th August, 2020 and substitute that finding with a proper finding and to also award costs of the appeal.

Submissions

16. The parties proposed and this Court directed that the appeal be disposed of by way of written submissions. Parties duly complied. The Appellant filed its submissions on 12th September, 2022 whereas the Respondent filed his submissions on 23rd September, 2022.
17. According to the Appellant, Section 4(4) of the *Limitation of Actions Act* was breached as the interest calculated as per the attached decree spanned over 17 years. This superseded the 6-year period from the date the interests became due on 13th December, 2018.
18. It was submitted that the trial Court ought to have ascertained when interest was due and it was to find that the Respondent was only entitled to interest from the date of judgment. The Appellant furthered that the interest rate applicable was 6% and not 12% as applied by the trial Court. The Appellant relied on the provisions of Sections 26 (2) and 27 (2) of the *Civil Procedure Act* for the submission.
19. The Appellant propositioned that the ruling be returned and the trial Court be ordered to reassess the interest in line with the dictates of the law.
20. On his part, the Respondent countermanded that Section 4 (4) of the *Limitation of Actions Act* remained inoperative to the fact and circumstances of this matter. This is because the six (6) year period complained had not expired.
21. On whether the trial Court ought to have applied a 6% rate on the interest, the Respondent submitted that Section 26 (2) of the *Civil Procedure Act* was extraneous as the judgment of the Court was not silent on payment of interest. He added that the Court interest rate prevailing at that time stood at 12% annually. It was thus lawful.
22. The Respondent urged this Court to dismiss the appeal with costs.

Analysis

23. This Court has duly considered the material in this matter. It has, as well, considered the various provisions of the law relevant to the issues in dispute.
24. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
25. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on



- a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another* (1988) KLR 348).
26. Central to this appeal is the manner in which the trial Court handled the application dated 24th January, 2020.
 27. Before delving into the merits or otherwise of the appeal, this Court has observed that there was an issue raised on appeal, but which issue was not subject of the application which resulted to the impugned ruling appealed against. The issue is the limitation period under Section 4(4) of the *Limitation of Actions Act*.
 28. The aspect as to whether new matters may be introduced on appeal or at submissions stage has received considerable judicial consideration. Leading the queue is the Supreme Court in a ruling in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR. The Apex Court was categorical that parties are firmly bound by their pleadings and the issues that should form the basis of consideration by a Court ought to be only those raised in the pleadings.
 29. The Court of Appeal has also affirmed the position. In *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Sylvester Umaru Onu, JSC stated that: -

"... It is settled law that it is not for the Courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it.....

It is settled law that parties are bound by their pleadings.....the Court below was in error when it raised the issue contrary to the pleadings of the parties."
 30. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

"..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
 31. As matters stand, the earlier position by the Court of Appeal that it is in the discretion of a Court to allow a party to raise a new point on appeal and depending on the circumstances of the case as was held in *Republic –vs- Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR is now overtaken by the holding of the Supreme Court.
 32. On the basis of the principle of stare decisis, this Court finds that the ground of limitation raised by the Appellant on appeal is unsustainable and is for rejection. The ground is hereby struck out from the record.
 33. The next issue in this appeal is applicable interest rate.
 34. This Court has carefully considered the Appellant's argument. It has also perused the decisions referred to especially *BoG Tambach Teachers Training College vs. Mary Kipchumba* (2018) eKLR where the



High Court found that the Practice Notes issued by the Hon. Chief Justice could not overrun the provisions of Section 26 of the *Civil Procedure Act*.

35. Section 26 of the *Civil Procedure Act* is on interest on sums decreed by a Court. The provision states 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 principle sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principle 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 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 percent per annum.
36. Under Section 26(1) of the Civil Procedure Court, a Court in passing a money decree may order payment of interest in the following manner: -
- i. Interest from the date of institution of the suit to the date of the decree;
 - ii. Interest from a period before the institution of the suit to the date of the decree;
 - iii. Further interest from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.
37. In the above three instances, a Court has judicial discretion in awarding the rate of interest.
38. Section 26(2) of the *Civil Procedure Act* deals with instances where a Court does not state the applicable rate of interest in any of the instances in Section 26(1). In such cases, the applicable rate is provided in law.
39. The foregoing, therefore, brings this Court to the aspect of the current applicable rate of interest. Whereas the Appellant held that the rate is 6%, the Respondent posited that it was instead 12%. The Respondent's position was based on the Practice Notes issued by the Hon. Chief Justice which fixed the rate at 12% where the decree is silent on the applicable rate.
40. The Appellant is diametrically opposed to the Respondent's position. It submitted, on the basis of *BoG Tambach Teachers Training College vs. Mary Kipchumba case (supra)*, that Practice Notes by the Hon. Chief Justice would not overrun an Act of Parliament.
41. At this point, this Court will consider the basis of the Practice Note in issue. The instant Note was Practice Note No. 1 of 1982 which was issued by the then Acting Chief Justice Simpson on 16th March, 1982. The Note was on the rate of interest to be applied in the absence of a valid reason to order either a higher or lower rate. In such instances, the Note fixed the rate of interest at 12% up from the 6% provided for in Section 26(2) of the *Civil Procedure Act*.



42. The power of the Chief Justice to issue Practice Notes is provided for in law. Section 81(3) of the [Civil Procedure Act](#) as follows: -

The Chief Justice may, in consultation with the Rules Committee, issue practice notes or directions to resolve procedural difficulties arising under this Act, in order to facilitate the attainment of the overriding objective of this Act as specified in Section 1A.

43. In Section 81(1E) of the [Civil Procedure Act](#), the functions of the Rules Committee are provided as under: -

(1E) The function of the Committee shall be to-

- (a) propose rules not inconsistent with this Act or any other written law to provide for any matters relating to the procedure before courts and tribunals; and
- (b) advise the Chief Justice on such rules as may be necessary under this section.

44. There is no doubt that the rules to be promulgated by the Rules Committee and the Practice Notes by the Hon. Chief Justice are delegated legislation or subsidiary legislation. (See Nairobi High Court Petitions No. E540 & E546 of 2021 [Katiba Institute & 3 Others vs. Independent Electoral Boundaries Commission & Others](#) (2022) eKLR).

45. As a settled judicial principle, the provisions of subsidiary or delegated legislation cannot override an Act of Parliament. The position is also captured in Section 81(1E) of the [Civil Procedure Act](#) as well as in the Interpretation and General Interpretations Act, Cap. 2 of the Laws of Kenya.

46. It is on the foregoing basis that this Court agrees with the Learned Judge in BoG Tambach Teachers Training College vs. Mary Kipchumba case (supra) to the extent that the Practice Note issued by the Hon. Chief Justice raising the rate of interest from 6% to 12% cannot override and/or be inconsistent with the express provisions of Section 26(2) of the [Civil Procedure Act](#). The Practice Note must give way to the Act of Parliament.

47. This Court, therefore, calls upon parties seeking money decrees to plead their desired rates of interest with specificity otherwise in absence of such, and failure by the Courts to specify the rate of interest, the applicable rate remains 6% until when Section 26(2) of the [Civil Procedure Act](#) is otherwise lawfully dealt with.

48. For that reason, the ground of appeal succeeds.

Disposition

49. In the end, this Court makes the following final orders: -

- a. The appeal partially succeeds.
- b. The finding of the Learned Magistrate dismissing the Notice of Motion dated 24th January, 2020 is hereby substituted with a finding that the Notice of Motion dated 24th January, 2020 be and is hereby allowed with costs. For clarity, the Auctioneer costs shall be borne by the Appellant.



- c. The trial Court shall re-compute the applicable interest on the decreed sum at the rate of six per cent (6%).
- d. Pending the above re-computation, any execution in respect of the issue of the interest payable is hereby suspended.
- e. As the appeal has partially succeeded, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF OCTOBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Mukulo, Learned Counsel for the Appellant.

Mr. Bisonga, Learned Counsel for the Respondent.

Kirong/ Nawatola – Court Assistants.

