



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 52 OF 2018**

**FREDRICK MAGERIA GITHINJI.....APPELLANT**

**VERSUS**

**CHARLES MWANGI MURIITHI.....RESPONDENT**

**RULING ON DIRECTIONS**

**Brief facts**

1. On 13/7/2021, the parties sought a clarification on the issue of payment of costs and interests of the awards made by this court as well as the magistrate's court. Judgment was delivered on 18<sup>th</sup> March 2021 which reduced the sum awarded by the trial court.
2. The respondent claimed that since the trial court did not determine the issue of costs, he proposes that costs should be awarded to him and be in line with the damages awarded by the appeal court. He further contends that the parties cannot agree on whether interest should run from the date of judgment or from the appeal. The final contention is to whom should the interest earned in the account in the names of both advocates as security for judgment be paid.

**Issues for determination**

3. After careful analysis, the main issues for determination are:
  - a) Who is entitled to costs of the suit before the Magistrate's court.
  - b) When does interest for the damages awarded start running.
  - c) Who is entitled to interest of the funds deposited in the joint account of the advocates for the parties herein.

**The Law**

**Who is entitled to costs of the suit before the Magistrate's court.**

4. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably.

5. Section 27(1) of the Civil Procedure Act provides:-

**(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 purpose 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 for good reasons otherwise order.**

6. Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously. It is trite law that where the court denies costs to a party who is successful in a suit, reasons for such decision must be clearly stated.

7. In the suit before the Senior Principal Magistrate Mr. P. N. Mutua, the respondent herein was the successful party. He was awarded general and special damages totalling to Kshs. 936,056/- with the agreed contribution of 80:20 ratio having been taken into consideration. On appeal, the general damages of Kshs. 900,000/- were found to be inordinately high and reduced to Kshs. 600,000/- The sum payable to the respondent in the appeal judgment was Kshs. 560,000/-.

8. As for the costs of the appeal, the court ordered that each party meet their own costs of appeal because the appeal was only partly successful. I have perused the judgment of the learned magistrate delivered on 28/8/2018 and noted that following the award of damages, the magistrate ordered:-

“The plaintiff shall also have the costs and interests.”

The High Court on appeal did not alter the orders of the Senior Principal Magistrate on costs in respect of the suit before that court. The order was crystal clear on the award of costs. Once the court has made an order, it remains valid unless it is subsequently set aside on review or altered on appeal which is not the case herein.

9. I am of the considered view that the orders of the magistrate’s court and on appeal are clear on the issue of costs and ought to be followed. The parties are hereby directed to comply with the said orders and that interests on costs will be at court rates.

#### **When does interest for the damages awarded start running.**

10. In regard to what stage interests on damages starts to run, **Section 26 of the Civil Procedure Act** is a good guide. It provides:-

**(1) Where and in so far as a decree is for 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.**

11. The authority and discretion of a court to award interest on costs is provided for in **section 27(2) of the Civil Procedure Act** as follows:-

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

12. The payment of interest on general damages from the date of judgment has been settled by the Court of Appeal in the case of **Shariff Salim & Another vs Malundu Kikava [1989] eKLR:-**

**“.....on appeal, the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit.....The judge gave no reason for ordering that interest even on general damages was to be paid from the date of filing the suit. According to the authorities interest on general damages should be paid from the date of assessment which of course is the date of judgment.”**

13. The basis of awarding interest on general damages upon the date of judgment is premised on the ground that a plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of the institution of the suit. **Heinz Broer vs Buscar (K) Ltd & Others [2019] eKLR.** As such, it is trite law that the interests on general damages ought to run from the date of judgment of the learned magistrate.

14. As regards special damages, such funds have already been expended at the time of filing the suit. This principle has been enunciated in various persuasive authorities namely, **Lei Masaku vs Kaplama Builders Ltd [2014] eKLR, Oluoch Eric Goga vs Universal Corporation Ltd [2015] eKLR, Joseph Kiarie Njoroge vs Njue Kiarie [2007] eKLR and 100 Minor suing through father and next friend MOR vs Franciscan Sisters of Immaculate [2018] eKLR,** Mabeya J, Aburili J, Mumbi Ngugi J and Visram J held and found that interest on general damages ought to run from the date of the judgment while interest on special damages ought to run from date of filing the suit.

15. Consequently, it is hereby directed that interests on special damages shall run from the date of filing the suit and those of general damages to run from the date of judgment of the magistrate’s court. Since no interests rates were given, the court rates shall apply in both instances.

#### **Who is entitled to interest of the funds deposited in the joint account of the advocates for the parties herein.**

16. The trial court on 19<sup>th</sup> March 2019 granted conditional stay of execution and ordered that the appellant pay the respondent Kshs. 400,000/- and deposit the balance in an interest earning account in both the advocates names. The appellant complied with the order and deposited the money in a joint account of both counsels. The bone of contention is who is entitled to the interest emanating from the joint

account. This was settled in the persuasive case of **Centre for Mathematics Science and Technology Education in Africa (CEMESTE) vs Apex Security Services Limited** where Chitembwe J held:

**“The applicant did not have the power to negotiate the interest rate with the bank so that it could be equal to the 12% interest rate or higher than that. The decretal sum could have as well been deposited in court and no interest rate could be payable. In my view once the decretal sum is deposited in court or in a joint account of the parties or their counsels, the judgment debtor is set free from any interest payable to the decretal sum, as the purpose of providing security would have been fulfilled. It is not the applicant who ordered for the decretal sum to be deposited in a joint account. At times the order to deposit the decretal sum in a joint account is made by consent and the only logical presumption is that should the appeal fail or the judgment of the trial court be varied, the judgment debtor will seek the release of the amount awarded on appeal from the joint account plus the pro rata accumulated interest.”**

17. It is important to emphasize that the security deposited in the joint names of the advocates for the parties, either by consent or by an order of the court remains the money of the depositor in the appeal until the appeal is determined. This reasoning has a bearing on the fact that the appeal may fail or it may succeed. However, in the event of a successful appeal, the appellant is entitled to apply that the funds be released to him/her depending on the circumstances of the case. Such circumstances such as enhancement or reduction of damages will guide the court or the parties as to how much may be released to the party/parties entitled.

18. It goes without saying that since the amount herein was deposited as security for judgment, the decree-holder’s funds will be paid from the amount deposited therein and that the judgment debtor takes the balance of the funds in the account, if any.

19. I reach a conclusion that the amount deposited in the joint account in the names of the advocates for the parties plus any interests accrued are the appellant’s funds from which the whole or part of the sum will be utilized to settle the amount of the decree including costs that may be owing to the respondent.

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 25<sup>TH</sup> DAY OF AUGUST, 2021.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 25<sup>TH</sup> DAY OF AUGUST, 2021.**