



**ABC Capital Ltd v Nzioka (Commercial Civil Case E046 of 2020)  
[2021] KEHC 77 (KLR) (Commercial and Tax) (24 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 77 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E046 OF 2020**

**MW MUIGAI, J**

**SEPTEMBER 24, 2021**

**BETWEEN**

**ABC CAPITAL LTD ..... APPELLANT**

**AND**

**PETER MUSAU NZIOKA ..... RESPONDENT**

**JUDGMENT**

1. On 4<sup>th</sup> September, 2020 Hon LL Gicheha, Learned Chief Magistrate dismissed Appellant's Application of 26<sup>th</sup> February 2020 where the Court the setting aside of Judgment entered on 30<sup>th</sup> July 2019 by Hon P.N. Gesora.
2. The Application sought setting aside of the judgment on grounds that the computation of the decree included an unjustifiable and illegal discrepancy of Ksh 498,862/- between the principal sum of Ksh 863,862 contained in the decree and the sum claimed by the Plaintiff dated 26<sup>th</sup> May 2010.
3. The Memorandum of Appeal details grounds of appeal, that the Trial Court failed to consider;
  - a. that judgment of 30<sup>th</sup> July 2019 and resultant decree of 24<sup>th</sup> January 2020 was proper;
  - b. There is unjustifiable and unlawful discrepancy of Ksh 863,862 between the amount claimed in the Plaintiff and the decretal sum.
  - c. The Plaintiff did not serve notice of judgment of entry of judgment as required under Order 22 Rule 6 *Civil Procedure Rules*.



- d. The interest levied is not in contravention of Section 4(4) of Limitations of Actions Act.
4. The Appellant urged that the appeal should be allowed because; the formal proof hearing proceedings of 30<sup>th</sup> July 2019 and subsequent judgment of 30<sup>th</sup> July 2019 and decree of 24<sup>th</sup> January were not proper and ought to be declared a nullity.
  5. The Formal Proof proceedings were uncalled for as the Plaintiff's claim is a liquidated claim and interlocutory judgment was entered under Order 10 rule 4 CPR 2010.
  6. Secondly, the Appellant who entered appearance was not served with the notice of hearing of formal proof and if served such evidence was not presented to the Trial Court.
  7. Thirdly, the Appellant sought setting aside of the judgment and the suit dismissed with costs as the Respondent failed to formally prove their claim for additional sums owing and the Respondent introduced new documents and the Trial Court amended the Respondent's claim and/or pleadings at the expense of the Appellant herein.
  8. The Claim for damages must be specifically pleaded and it was not included in the Plaintiff's claim and therefore Ksh 863,862 an was therefore not justified.

#### RESPONDENT'S RESPONSE

9. The Respondent submitted in objection to the appeal the Plaintiff's Plaintiff of 26<sup>th</sup> May 2010 sets out the prayers sought that included Ksh 365,000 true market value of 8545 shares as at October 2008 or the value of shares during compensation whichever is higher.
10. There is also a claim of general damages for loss of income, interest on the prayers (a) & (b) sought above at Court rates from 3<sup>rd</sup> October 2008 until payment in full, and Costs of the suit.
11. With regard to the claim that the Appellant ought to have been served with notice of entry of judgment, the Respondent relied on Order 10 Rules 6,9 & 10 CPR and the notice of judgment was not required.
12. Secondly, the matter regarding the issue that default judgment, it is resjudicata as the Appellant's appeal vide HCCA 74 of 2011 ABC LTD vs PETER MUSAU NZIOKA which sought to set aside the Trial Court's Ruling that dismissed the Application that sought to set aside Interlocutory judgment was dismissed by High Court on 4<sup>th</sup> May 2018.
13. The instant appeal is against the Ruling of Hon. Mrs CM L. Gicheha of 4<sup>th</sup> September 4<sup>th</sup> 2020 and therein the issue regarding execution of the decree was not in issue and therefore, the matter regarding execution ought to be before the Trial Court and not on appeal as the issue was not dealt with in the Trial court.
14. On the issue of interest the Respondent relied on Section 26 of CPA and Section 4(4) of Limitation of Actions Act and supported the finding by the Trial Court.

#### DETERMINATION

15. The Memorandum of Appeal raised 3 issues for determination;
  - a) The computation that included an unjustifiable and illegal discrepancy of Ksh 498,862/- between the principal sum of Ksh 863,862 contained in the decree and the sum claimed by the Plaintiff dated 26<sup>th</sup> May 2010.



- b) The Plaintiff did not serve notice of judgment of entry of judgment as required under Order 22 Rule 6 CPR 2010.
- c) The interest levied is not in contravention of Section 4(4) of Limitations of Actions Act.
16. With regard to alleged increase of the amount pleaded and sought by the Plaintiff in the Plaint filed on 26<sup>th</sup> May 2010; sought prayers which was both liquidated and unliquidated sum, Ksh 365,000/- and there was/is also claim of general damages for loss of income.
17. Therefore, after entry of the Interlocutory judgment of 13<sup>th</sup> July 2010, the matter proceeded for formal proof as there was a prayer for general damages. The Plaintiff proved the liquidated amount outstanding, by proving increased value of shares and dividends as prayed for in the Plaint. The Trial Court found in the judgment of 30<sup>th</sup> July 2019 as follows;
1. When the matter was set down for hearing the Plaintiff produced exhibits in support of his case. He explained that the value of shares stood at Ksh 863,862/- He gave a breakdown of the same as Ksh 626,438 /- value of shares and value of dividend as Ksh 237,424/-. There being no Defense filed, I proceed to enter judgment in favor of the Plaintiff against the Defendants in the sum of Ksh 863,862/- plus Costs and interest at Court rates to be calculated from the date of filing the suit being 26<sup>th</sup> May 2010 until payment in full.
18. The Court finds that the Trial Court properly conducted Formal proof proceedings in the circumstances and considered evidence presented orally and the documents produced to prove the claim. Thereafter, the Court entered judgment for the proved amount as prayed for in the Plaint and the amount is not illegal or unjustified.
19. On the issue of lack of service to the Appellant on entry of judgment contrary to Order 22 Rule 6 of CPR 2010, the notice is couched in mandatory terms that where judgment in default of filing appearance or defense is entered, the notice shall be served to the Defendant in not less than 10 days before execution, attachment or eviction. In the instant case, the notice was not served and/or such evidence was not been availed to the Trial Court or on Court record. However, the issue of notice relates to execution of the decree, a matter not on appeal but yet to be heard and determined before the Trial Court. Secondly, the notice of entry of judgment is not timebound, it should be served 10 days before execution and does not affect the judgment at all. Therefore, before execution if need arises, the notice ought/shall be served to the Defendant.
20. The issue of interest was pleaded in the Plaint of 26<sup>th</sup> May 2010 as follows;
- interest on the prayers (a) & (b) sought above at Court rates from 3<sup>rd</sup> October 2008 until payment in full and that is what the Trial Court granted in its Judgment of 30<sup>th</sup> July 2019.
21. The Appellant took issue with the interest levied in the judgment, that it is in contravention of Section 4(4) of Limitations of Actions Act which reads thus;
- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.



22. This Court interprets the provision to provide that interest shall accrue from the date of judgment and recovery of interest shall be made upto and not after 6 years from the date of judgment.
23. In the instant case, the Trial Court's Ruling of 30<sup>th</sup> July 2019 granted;  

interest at Court rates to be calculated from the date of filing the suit being 26<sup>th</sup> May 2010 until payment in full.
24. The Respondent invoked Section 26 of CPA on the Court's discretion in grant of interest on the principal sum adjudged from the date of the suit to the date of the decree and/or any period before the institution of the suit.
25. In the instant case, the Trial Court's discretion was exercised and granted interest as prayed for in the Plaint.
26. The Court granted what the Plaintiff sought in the Plaint and in the absence of any objection, granted interest as prayed. In the premises, the court shall retain interest at Court rates from the date of filing suit until payment in full and not beyond 6 years from the date of judgment of 30<sup>th</sup> July 2019.
27. The issue(s) raised regarding the setting aside of the Interlocutory judgment was heard and determined on appeal as evidenced by Judgment of Hon J Sergon of 4<sup>th</sup> May 2018. This is a Court of equal, concurrent and competent jurisdiction to this Court. The issue is now moot.
28. The claim that the Trial Court failed to consider evidence on record is very vague and in the absence of specificity of what evidence was not considered and lack of Trial Court's proceedings, this Court cannot verify the claim.

All other claims raised in submissions were not part of the Appeal as demonstrated by Memorandum of Appeal and this Court cannot legally address them at this stage.

#### DISPOSITION

The appeal is dismissed with Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 24<sup>TH</sup> SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**MR. DACHI FOR APPELLANT**

**MR. KITULU FOR RESPONDENT**

**COURT ASSISTANT - TUPET**

