



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 380 OF 2017

JOHN MUCHUI LUBETAA.....APPELLANT

VERSUS

APA INSURANCE CO.LTD.....RESPONDENT

(Being an appeal from the Judgment and decree of Mr. D.N Ocharo (SRM) delivered on the 21st July 2017 in Milimani CMCC 3636 of 2012)

JUDGMENT

1. John Muchui Lubetaa (the appellant) vide the plaint dated 17th May 2012 in Milimani CMCC No. 3636 of 2012 sought to enforce the judgment delivered in CMCC No.3092 of 2010 where he had successfully obtained Judgment against Mr. James Gichuru Wanjihia for causing him bodily injuries while driving motor vehicle registration KAX xxx which was insured by the respondent herein. He had sought for special and general damages plus costs and interest.

2. The respondent filed a defence dated 8th February 2013 denying the claim in the plaint and called for strict proof. It particularly denied that the defendant in CMCC No.3092 of 2010 had ever been its insured and put the plaintiff to strict proof of its allegations. After the full hearing, judgment was finally entered against the respondent as follows:

- a) A declaration is hereby issued that the defendant is bound to satisfy the decree in Nairobi CMCC 3092 OF 2010.
- b) The defendant do pay the decretal sum of Kshs. 421,346/=
- c) The defendant to bear the costs of this suit.
- d) Interest at court rates shall operate from the date of this judgment.

3. The appellant being aggrieved by the judgment filed this appeal through the firm of Nelson Kaburu & Co. advocates citing the follows:

- a) *The learned magistrate erred in his exercise of discretion in awarding interest.*
- b) *The learned magistrate erred by failing to give any or any good reasons for not awarding interest from the date of filing suit or from the date of decree in the primary suit.*
- c) *The learned magistrate erred by failing to take into account that CMCC No.3636 of 2012 was an enforcement suit and interest had been ordered in the primary suit up to date of full payment.*
- d) *The learned magistrate erred by failing to take into account the provision of section 10 of Chapter 405, Laws of Kenya providing for payment of interest on the judgment sum by the respondent.*
- e) *Having issued a declaration that the respondent was liable to satisfy the decree in Nairobi CMCC No.3092 of 2010, the learned magistrate erred by effectively altering or amending that primary decree in relation to interest.*
- f) *The learned magistrate erred by failing to apply the correct legal principles or by applying the wrong legal principles or by reaching an erroneous decision on interest.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. The respondent was represented by J. K. Kibicho & Co Advocates.

5. Mr. Kaburu for the appellant gave brief facts of the case and submitted that the appeal is against the part of the decision on the date from which interest was to accrue. He submitted that trial the court had quoted **Section 10 (1) of the Third Party Insurance Act** as follows:

“...pay the persons entitled to the benefit of the judgment any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to the interests on judgment”

6. The learned counsel submitted that the primary decree in Nairobi CMCC No.3092 of 2010 which was sought to be enforced in the secondary suit had stated as follows:

“That judgment be and is hereby entered for the plaintiff as against the defendant for the sum of Kshs. 358,330/= plus costs of the suit together with interest until payment in full”

It was then ordered and decreed that; -

“A declaration is hereby issued that the defendant is bound to satisfy the decree in Nairobi CMCC No.3092 of 2010”

7. In the foregoing, counsel submitted that it was erroneous to restrict interest from the date of his judgment which is a contradiction of the decree issued and holding on a date of accrual of interest was like an amendment of the primary decree which is wrong since no party invited alteration of the primary decree.

8. It is his submission that interests on judgments as well as costs is provided for under Section 26 and 27 of the Civil Procedure Act and is largely at the discretion of the court. He further referred to Order 4 Rule 6 of the Civil Procedure Rules. Counsel submitted that the reason for ordering for interest has been held to be because the claimant/plaintiff has been kept out of use of money expended or awarded or deprived of by the defendant. On this he relied on the case of **Heinz Broer v Buscar (K) Ltd & Others (2019)** eKLR to support his argument.

9. He further submitted that the trial court did not give any reasons for ordering interests from the date of its judgment or why it altered the primary decree date. He therefore urges the court to hold that the trial court erred in awarding interest from the date of decree in the primary suit. Further, it should also not find any good reason for denying a successful appellant costs of this appeal.

10. Ms. Njau for the respondent submitted that the principal issue emanating from the grounds of appeal is the alleged error by the learned magistrate in awarding interest from the date of judgment in Nairobi CMCC No.3636 of 2012 and not from the date of judgment in Nairobi CMCC No.3902 of 2010.

11. She further submitted that the court’s mandate is to re-appraise, re-assess and re-analyze the evidence on record before it and arrive at its own conclusion on the matter. She relied on the case of **Sumaria & Another v Allied Industries Limited (2007)** eKLR in support of this submission.

12. She urged the court to be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, or based on a misapprehension of the evidence or that the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did.

13. She further relied on **Section 26 of the Civil Procedure Act** which 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”

14. In her submissions counsel contends that a court has wide discretion to award as well as fix the rate of interest provided that the discretion is exercised judiciously. An appellate court is enjoined to treat the original decision by the trial court with utmost respect and refrain from interfering with it unless some erroneous principle or was plainly or obviously wrong.

15. She further submitted that the court has discretion to award and fix the rate of interest and this is provided for under **Section 26(1) of the Civil Procedure Act** and is covered in two stages namely:

a) The period from the date the suit is filed to the date when the court gives its judgment; and

b) 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

16. She argued that courts have invoked their discretion in adjudging the date from which interest should run in such matters. On this she relied on the case of **Patricia Mona Antony & another v Africa Merchant Assurance Company Limited (2019)** eKLR; where interest was awarded from the date of judgment of the declaratory suit.

17. Counsel submitted that the appellant prayed for costs and interests in the declaratory suit which were granted but did not pray for the interests to accrue from the date of the primary suit. To support this argument, she relied on the case of **Independent Electoral and Boundaries Commission & Another. v Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoum Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself on the importance and place of pleadings as follows: -

“...it is now a very trite principle of 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.”

Analysis and Determination

18. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at 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;**

19. I have carefully considered the grounds of appeal, evidence on record, both submissions and the authorities cited, and I find one issue falling for determination. The issue is whether the learned magistrate erred in his exercise of discretion in awarding interest from the date of Judgment in the declaratory suit.

20. By virtue of section 26 (1) of the Civil Procedure Act it is trite to award interest and the rate thereof is at the discretion of the trial court. **In Mbogo & Another vs. Shah [1968] EA 98, it was expressed thus:**

“.....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

21. The same was repeated in the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469** where the court of Appeal stated:

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.”

22. The appellant argued that the learned magistrate erred in not awarding him interest as from the date of filing the primary suit and failed to take into account that CMCC 3636 OF 2012 was an enforcement suit. On the other hand, the respondent believes that the court has discretionary powers to award/fix interests provided that the discretion is exercised judiciously. Further, the respondent states that parties are bound by their pleadings and that the appellant did not pray for interest to accrue from the date of the primary suit.

23. A perusal of the plaint and the prayers sought by the appellant are as follows;

a) A declaration that the defendant is bound to satisfy the decree in Nairobi CMCC 3092 of 2010

b) Kshs. 421,346/-

c) Costs and interest.

24. It is clear from the above that the appellant only prayed for costs in the declaratory suit but did not pray for interest to accrue from the date of the primary suit.

25. In the case of **Galaxy Paints Company Limited v. Falcon Guards Limited Court of Appeal Case number 219 of 1998** the Court of Appeal stated that:

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”

26. Further in the case of **Pan African Insurance company (u) Ltd. v International Air Transport Assoc. (HCT-00-CC-CS-0667 of 2003)** was as categorical that,

“As regarded interest, the principle is that where a party is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another party, he should be awarded interest from the date of filing the suit. Where however, damage does not arise until they are assessed, in such event, interest is only given from the date of judgment.”

27. Further in the Ugandan case of **Libyan Arab Uganda Bank for Foreign Trade and Development & Anor vs. Adam Vassiliadis [1986] UG CA 6** the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **Jones Vs. National Coal Board [1957]2 QB 55** stating this;

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

28. I have perused the original record in CMCCC No. 3092 of 2010. The decree drawn therein shows that Judgment was entered for the appellant in the sum of Kshs. 358,330/= plus costs of the suit together with interest until payment in full. Interest on both special and general damages was calculated at kshs. 9,241/= while costs were calculated at kshs. 53,775/= bringing the total sum to kshs. 421,346/=.

29. In the plaint in CMCCC No. 3636 of 2012 the prayers were for satisfaction of the decree in CMCC 3092 of 2010 which is clearly set out. The decree in CMCC 3092/10 already catered for the interest at the time. Infact from the decree in CMCCC 3092/2010 interest was calculated up to 24th April 2012 and the decree is dated 8th May 2012.

30. The suit CMCC 3636/2012 was filed on 5th July 2012. Judgment was entered for kshs. 421,346 plus costs together with interest until payment in full. Again the decree drawn on 21st July 2017 when Judgment was entered shows the breakdown as:

Decretal sum.....Kshs. 421,346/=

Interest from 21st July 2017 to 4th September 2017..... Kshs. 6372.14/=

CostsKshs. 103,375/=

31. Since interest in the primary suit had been awarded, giving another award of interest as claimed by the appellant would amount to double payment. Secondly the learned trial magistrate gave Judgment in line with the appellant’s prayers as clearly set out at paragraph 23 of this Judgment. The trial court could not give him anything outside his pleadings. I therefore find no reason to make me interfere with the Judgment of the learned trial magistrate delivered on 21st July 2017.

32. The upshot is that the appeal lacks merit and is dismissed with costs. The Judgment by the learned trial magistrate is upheld.

DELIVERED ONLINE, SIGNED AND DATED THIS 23RD DAY OF SEPTEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE