



**Toner Holdings Limited v Alibhai & another (Environment and Land Appeal  
E061 of 2021) [2023] KEELC 18967 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18967 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E061 OF 2021**

**MD MWANGI, J  
JULY 25, 2023**

**BETWEEN**

**TONER HOLDINGS LIMITED ..... APPELLANT**

**AND**

**AMYNAH AZIZ GULAMHUSSEIN JAMAL ALIBHAI ..... 1<sup>ST</sup> RESPONDENT**

**MALEK AZIZ JMAL ALIBHAI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The appeal before the court is an appeal from the ruling of the Nairobi Milimani Commercial Court, Chief Magistrate Court Case (CMCC) No. E.923 of 2021, delivered on 29<sup>th</sup> July 2021. The ruling which forms part of the record of appeal at pages 100-104 was in regard to an application by the Plaintiffs (Respondents herein) dated 12<sup>th</sup> March 2021 seeking entry of judgment against the Defendant for the sum of Kshs. 3,650,000/-
2. Apparently, parties recorded a consent dated 27<sup>th</sup> May 2021 and which was adopted as a judgment of the court whereby the parties agreed that,  

“..... the sum of Kshs 3,650,000/- being deposit paid on 31<sup>st</sup> October 2014 and 4<sup>th</sup> December 2014 by the Plaintiffs to the Defendant be refunded to the Plaintiffs in three (3) equal installments starting 15<sup>th</sup> June 2021 to 15<sup>th</sup> August 2021 i.e.15<sup>th</sup> June 2021 Kshs 1,216,666.67 15<sup>th</sup> July 2021 Kshs 1,216,666.67 15<sup>th</sup> August 2021 Kshs 1,216,666.67.”
3. It was only the issue of payment of interest on the aforesaid deposit as well as costs of the suit that was left for determination by the Chief Magistrate’s Court.
4. The impugned ruling was in regard to the issue of interest only.



5. The Magistrate's court made a finding on interest and ruled in favour of the Plaintiffs for 'interest at court rates from the date the sale of the apartment by the Respondent was withdrawn till payment in full'.
6. The Appellant appeals against the said ruling. The grounds of appeal are enumerated under the Memorandum of Appeal dated 25<sup>th</sup> August 2021. The Appellant prays that the court allows its appeal, set aside the ruling of the Magistrate's court delivered on 29<sup>th</sup> August 2021 and that the order granting the Respondents interest at court rates from the date the sale of the apartment was withdrawn until payment in full, be set aside.

#### **Court's directions.**

7. The court's directions were that the appeal be canvassed by way of written submissions. Both parties complied and filed their respective submissions which the court has had the opportunity to read together with the authorities cited. The court has also taken time and read the submissions filed by the parties before the Magistrate's court.

#### **Issues for Determination.**

8. This being a first appeal, the court's primary role as the first appellate court is to re-evaluate, re-assess, and re-analyze the evidence before determining whether the conclusions reached by the Learned Magistrate are to stand or otherwise and give reasons either way (*Abok Jame Odera t/a A.J. Odera & Associates* (2013) eKLR).
9. The main issue then for determination then is whether the Respondents are entitled to an award of interest from the date the sale of the apartment by the Appellant was withdrawn till payment in full as granted by the learned Magistrate.

#### **Analysis and determination.**

10. Regarding the issue of granting of interest on a decretal amount, the starting point for such analysis is section 26 of the *Civil Procedure Act*. The sections provide that;
  - “ 1) 1) Where and in so far as 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 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 payment or other earlier date the court shall be deemed to have ordered interest at 6 percent per annum.”
11. Prof. Ngugi J, (as he then was) in the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others* (2017) eKLR, in an elaborate exposition of the issue observed that courts have over time come up with several principles derived from the general rule in section 26 of the *Civil Procedure Act*. He identified the 3 principles as follows: -
  - a. At all times, a trial court has wide discretion to award and fix the rate of interest provided that the discretion must be used judiciously.



- (b) Under section 26(1) of the *Civil Procedure Act*, the court has discretion to award and fix the rate of interests to cover 2 stages namely: -
- (i) The period from the date the suit is filed to the date when the court gives its judgment; and
  - (ii) 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.
- (c) When it comes to the period before the filing of the suit, section 26 of the *Civil Procedure Act* has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest), or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.
12. I have had occasion to keenly read the submissions by the parties before the Learned Magistrate on the issue of interest on the decretal amount.
13. One issue that is not in dispute is that the parties had not entered into a formal contract; neither had the letter of offer been executed by the Respondents signifying acceptance of the offer by the Appellant. Indeed, in paragraph 3.8 of the Plaintiff's submissions before the Magistrate's court, the Plaintiffs submitted that,
- “It is our submission that there exists no valid contract between the parties as the offer does not meet the mandatory requirement of a valid contract for the disposition of land as contemplated in section 3(3) of the *Law of Contract Act*.”
14. In spite of the submissions above, the Plaintiffs still insisted that the Defendant held the deposit with no just cause and therefore interest should be imposed from the date the sale fell through until payment in full. The Plaintiffs placed reliance on the decision of the High Court sitting in Mombasa in the case of *Sedena Agencies Ltd v Presbyterian Foundation* (2017) eKLR, where the court stated that,
- “The purpose of interest is to compensate the decree holder for the period his money was kept from him unjustly.” The court went ahead to order payment of interest as prayed for by the Plaintiff.
15. On its part, the defendant (now Appellant) while acknowledging that the letter of offer was not executed submitted that the parties nevertheless represented by their respective advocates had gone ahead and initiated the terms and conditions of the letter of offer and were therefore bound by the terms of the ‘unexecuted’ and undated letter of offer.
16. On the issue whether interest was payable, the Defendant relied on clause 17.3 in the ‘unexecuted’ and undated letter of offer which provided that any refund to the purchaser would be ‘free of interest’. It was the Defendant's position that interest was not payable to the Plaintiffs.
17. The question that I must now seek to answer is whether considering the principles derived from the general rule in section 26 of the *Civil Procedure Act*, it can be said that the Learned Magistrate proceeded



upon some erroneous principle or was plainly and obviously wrong in awarding interest as she did from date the sale of the apartment was withdrawn until payment in full.

18. First and foremost, I must state that it was plainly wrong for the Learned Magistrate to hold that the terms of the letter of offer were applicable having earlier found that the same was not executed by the parties.
19. Secondly, my conclusion is that the Learned Magistrate erred only in awarding interest for the period before the filing of the suit without proof or evidence placed before the court that, either there was a stipulation for the contractual rate of interest or that it was allowable by mercantile usage (which was not pleaded and proved anyway). It is clear from the record that the Plaintiffs did not adduce any such evidence or to demonstrate that there was a statutory right to interest in the kind of transaction they were engaged in with the Defendant or that an agreement to pay interest could be implied from the course of the dealings between the parties.
20. Accordingly, the appeal is partially allowed to the extent that the award of interest prior to the filing of the suit is set aside. The order granting the Respondents interest at court rates from the date the sale of the apartment by the Appellant was withdrawn till payment in full is therefore hereby set aside and substituted with an order awarding interest on the decretal amount from the date of filing suit until payment in full.
21. On the issue of costs of the appeal, since the appeal has only succeeded partially, I consider it appropriate that each party bears its own costs.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Mutua for the Respondent.

No appearance by the Appellant.

Court Assistant – Yvette.

