



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 34 OF 2019

JOHN C. OMOLLOAPPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. A. Obina (SRM) dated 14th day of November 2018 in CMCC No. 583 of 2010)

JUDGEMENT

1. The sole issue raised in this appeal relates to the interest on the award made by the trial court. In the memorandum of appeal dated 11th March 2019 the appellant sets out the issue thus;

“1. The trial magistrate erred in law in stating that interest was to [accrue] on the award from the date of judgment and in the circumstances failed to exercise a judicious and proper discretion. In the alternative the said exercise of discretion on interest was not reasoned and went against judicial precedent.”

2. The parties filed written submissions to canvass their respective positions.

3. It is submitted for the appellant that the claim before the trial court was in the nature of special damages and ought to have attracted interest at an earlier date other than the judgment date. The appellant’s counsel faults the trial court for failing to assign a reason for denying the appellant interest from an earlier date and prays that the court orders that interest accrue from the date of filing the suit. Reliance was placed on the cases of **Michael S. Odongo vs South Nyanza Sugar Co. Ltd. Civil Appeal No. 53 of 2018 [2018]eKLR** and **Adero Ojano vs South Nyanza Sugar Co. Ltd [2018]eKLR**.

4. The respondent opposes the appeal for the reason that in this case, the trial court was justified in departing from the general rule of awarding interest from the date of filing suit. The respondent’s counsel contends that the suit before the trial court took 9 years to conclude and that delay was not the respondent’s making. It would therefore be unjust to order that interest run from the date of filing suit. The cases of **Peter M. Kariuki v Attorney General [2014]eKLR**, **Kengeta Beer Distributors Limited v Kubai Kiringo & 2 Others [2018]eKLR**; **Michael Sonye Aoro vs South Nyanza Sugar Co. Ltd. [2018]eKLR**; **South Nyanza Sugar Company Ltd v John Chora Omolo [2019]eKLR** and **South Nyanza Sugar Company Ltd v John Odondi Omolo [2019]eKLR** were cited in support of this argument.

5. The court’s power to award interest is derived from **Section 26 (1)** of the **Civil Procedure Act** which stipulates;

26 (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.

6. The foregoing provision is articulate on the wide nature of the trial court’s discretion in awarding interest. That discretion must however be exercised judiciously. An appellate Court will not interfere with the trial court’s discretion unless the trial court proceeded on an erroneous principle or was plainly and obviously wrong.

7. In the case of **Shariff Salim & Another vs Malundu Kikava Civil Appeal No 15 of 1989 [1989] eKLR** the Court of Appeal observed as follows:-

There is no gainsaying the fact under Section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of

money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially.

8. For special damages, the general principle applicable is that interest will begin to accrue from the date of filing suit. This principle was enunciated in the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469** where the court rendered itself thus;

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.

9. That being said, where a claimant is slack in prosecuting his matter, his claim for interest may be denied. I find useful guidance in the case of **Peter M. Kariuki v Attorney General Civil Appeal No. 79 of 2012 [2014]eKLR** where the Court of Appeal held;

*It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See **METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341** and the decision of this Court in **MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA)**, (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.*

10. In a comparable case, the court in **Adero Ojano v South Nyanza Sugar Company Ltd CIVIL APPEAL NO. 54 OF 2018 [2018] eKLR** held;

10. On the issue of interest, under section 26 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) the court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. In this case the principle to be applied is that interest on special damages is from the date of filing suit. The trial magistrate did not explain why he departed from the principle by awarding interest from the date of the judgment. I would therefore set aside that order.

11. However, I would also depart from the general principle because the case before the trial court took 9 years to be tried. The respondent should not be penalized for the appellant's tardiness when it had in fact applied to dismiss the suit for want of prosecution at one stage. I would therefore award interest on the sum awarded to run from the date of the first hearing, which is 11th May 2015. On that day, the appellant was heard and closed his case and left the respondent to pursue its defence.

11. Similarly, in **South Nyanza Sugar Company Limited v Joash Otieno Ogada Civil Appeal No. 62 of 2016**, the court found;

Ordinarily interest for a claim for special damages will accrue from the date of filing suit. In this case however, the respondent filed his suit on 15th September 2004 and judgment rendered on 1st September 2016 more than a decade later. In the course of the proceedings, the matter was once dismissed for lack of prosecution. I therefore agree with the appellant's contention that the respondent was lethargic in prosecuting his claim and it would be unjust to penalize the appellant for this. I therefore award interest at court rates from the date of the judgment before the trial court until payment in full.

12. Evidently, the trial court failed to consider the principles discussed above in making its finding on the interest applicable. The appellant filed his plaint on 17th December 2010 but only fixed his matter for hearing on 13th March 2017. The delay of 7 years is inexplicable and in my view inordinate. It would be unjust for the respondent to bear the brunt of the appellant's indolence.

13. I therefore allow the appeal only to the extent that interest shall accrue at court rates on the award made from the date the matter was fixed for hearing being 13th March 2017 until payment in full.

14. The parties shall each bear their costs of this appeal.

Dated, Signed and Delivered at Kisii this 20th day of February, 2020.

A. K. NDUNG'U

JUDGE

Gichana holding brief for Oduk, Advocate for the appellant