



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 8 OF 2017

DOMINIC WAINAINA MUTURI.....APPELLANT/RESPONDENT

=VRS=

PETER KIRAGU KIERE.....RESPONDENT/APPLICANT

{Being an appeal against the Ruling of Hon. R. Kahara– RM – Keroka dated and delivered on the 25th day of October 2016 in the original Keroka Principal Magistrate’s Court Civil Case No. 131 of 2015}

RULING

On or about 17th July 2015 the applicant/respondent herein filed a claim for compensation for personal injuries sustained in a motor accident involving the respondent’s motor vehicle KBP 580V. The court heard the parties and by a judgement delivered on 25th October 2016 decided in favour of the applicant/respondent and awarded him general damages of Kshs. 380,000/=, special damages of Kshs. 6,500/=, costs of the suit and interest.

The respondent/appellant being aggrieved preferred an appeal in this court but by judgement dated 11th April 2019 this court dismissed the appeal, affirmed the decision of the trial Magistrate and awarded costs of Kshs. 40,000/= to the respondent.

The applicant/respondent has now approached this court by way of a Notice of Motion dated 17th January 202 for orders that: -

“1. This honourable court do order the Appellant to pay the Respondent the interest accrued on the decretal sum from the date of judgement in the trial court till the time of payment of the decretal sum.

2. Costs of this application be provided for.

3. Such further and/or other orders be made as the court may deem fit and expedient.”

The application is supported by the affidavit of the applicant sworn on 17th January 2020 which is premised on grounds that: -

“(a) That trial court delivered its judgement on 25th October 2016 awarding the Respondent general and special damages of Kshs. 386,500/= together with costs and interest thereof till payment in full.

(b) That the Appellant was aggrieved with the trial court’s finding and appealed which appeal was dismissed on the 17th April 2019 with costs to the Respondent/Applicant.

(c) That upon filing the appeal herein the appellant was ordered to despot the entire decretal sum together with assessed costs into a joint interest earning account as security for the decree and the appellant chose the bank and the account and the Respondent was only given forms to sign and the money was deposited.

(d) Upon the dismissal of the appeal parties agreed to have the money in account released to the Respondent only for the Respondent to discover that the money was deposited in a savings account as opposed to a fixed deposit account and as such, the same had attracted levies and no interest earned thus reducing the amount deposited.

(e) That Respondent is entitled to interest on special damages from the date of filing the suit and on general damages from the date of judgement in the trial court till payment in full and since the Appellant is the one who chose the bank and account type, should bear the interest.

(f) The efforts by the Respondent to have the interest paid have remained futile as the Appellant insists that he is only supposed to pay Kshs. 45,091/= accrued prior to depositing the decretal sum in the joint account which still he has not paid to date.

(g) It is therefore necessary that this honourable court do intervene and order the appellant to pay the Respondent accrued interest both on special and general damages from the date of filing the suit and judgement in the trial court respectively till payment in full.”

The respondent/appellant opposed the application through the affidavit of Joseph Mboya Oguttu, Advocate sworn on 19th February 2020 in which he concedes that the stay of execution granted to the respondent/appellant was conditioned upon the opening of an interest earning account in the joint names of the advocates. He however deposes that the advocate for the applicant/respondent was well aware of the nature and terms of the account opened as the account opening forms were forwarded to him for perusal and it is not now open to him to plead ignorance. Counsel further deposes that in any event the amount that was to be deposited in the account was the decretal amount plus the interest accrued up to that point and the total figure was specified in the order. He deposes therefore that as the sum left the hands of his client he cannot be called upon to make further payments on account of interest which would have become payable as if the monies remained in his possession. Counsel further deposes that interest was payable only up to the date of the judgement and the prayers in this application are therefore at variance with the order of the court. Counsel deposes that in the circumstances the application is misconceived, is legally untenable and devoid of merit and so it should be dismissed.

On 27th February 2020 the respondent/appellant filed a preliminary objection challenging the jurisdiction of this court to hear the application on the grounds that firstly it is *functus officio* and secondly that the application does not disclose a reasonable cause of action.

The application and the preliminary objection were heard together and were both canvassed by way of written submissions as agreed by Counsel for the parties.

On the issue of jurisdiction, Counsel for the respondent/appellant submitted that in dismissing the appeal the only order made by this court was payment of costs of Kshs. 40,000/= which have been paid; that this court cannot now be invited to address the issue of payment of interest which it did not award as that would be tantamount to varying the judgement hence sitting on appeal in respect of its own decision. Counsel submitted that this court is *functus officio* and relied on the case of **Raila Odinga v The IEBC & 3 others, Supreme Court Petition No. 5 of 2013 (unreported)** to buttress his arguments. On the merits of the application, Counsel reiterated the depositions in his replying affidavit and urged this court to find the application devoid of merit and dismiss it.

Counsel for the applicant/respondent on his part submitted that this court has jurisdiction to entertain this application to enforce compliance of the order granted as a condition for stay. In support of this argument Counsel cited the case of **Joseph Kiarie Njoroge v Njue Kiarie [2007] eKLR** where the court entertained an application for calculation of interest after delivering judgement on appeal. On the merits, Counsel for the applicant/respondent submitted that his client is entitled to interest on special damages from the date of filing suit and on general damages from the date of judgement and in the case of an appeal from the date of the judgement of the trial court. Counsel negated that the applicant was furnished with the account opening forms to verify the nature of account; that the respondent/appellant having obtained a conditional order in his favour it was incumbent upon him to ensure that the account was an interest bearing one or bear the consequences of none compliance. Counsel contended that in any event the rate of interest to which the applicant is entitled to is court rates (12% per annum) and it follows that even if the amount would have been deposited in an interest earning account but whose rates are less the applicant would still have shouldered the deficit but if the interest of the account was higher than court rates then the excess would automatically revert to the respondent/appellant. Counsel urged this court to affirm the above position.

The issues that call for determination are: -

(a) Whether this court has jurisdiction to dispose this application.

(b) Whether the applicant/respondent is entitled to the orders sought.

I have considered the submissions of Counsel carefully. On issue (a) my finding is that **Section 3A** of the **Civil Procedure Act** clothes this court with power to hear and determine the Notice of Motion. **Section 3 A** states: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The issue raised in the Notice of Motion flows directly from the suit and the appeal and has not been adjudicated before and the applicant/respondent has a right to be heard and to hold that this court is *functus officio* would be tantamount to asking it to abdicate its duty.

On the merits of the application I do find the arguments by Counsel for the respondent/appellant untenable. His client being desirous of being granted a stay of execution pending appeal undertook to be bound by whatever conditions the court would impose. The court in its discretion directed that the respondent/appellant do deposit a sum of Kshs. 483,206/= in an interest earning account to be held jointly by the advocates as a condition for the stay. From the record that was the total decretal sum as at 22nd November 2017 when Nagillah J granted the order for stay of execution. The sum was made up of the damages, interest at court rates up to and including the said date as well as the assessed costs. The sum was to be deposited within 90 days from the date of the order as **“security for the due performance of such decree or order as may ultimately be binding on the applicant/appellant”**. Such security was in my view not only intended to demonstrate the bona fides of the applicant/appellant in the application but it was also to ensure that the applicant received back his money with some interest in the event he succeeded in the appeal. As for the respondent now applicant such a deposit would only guarantee him of the safety of the decretal sum in the event the appeal was dismissed as certainly the rate of bank interest was bound to vary from the court rates. Up until the date of the deposit the interest due to the applicant/respondent had been calculated. However, he was still entitled to

interest at court rates from that date until payment in full. In my considered view the rate of interest applicable would only be the bank rate if it was same as the court rate. I agree with Counsel for the applicant/respondent that if the bank rate was lower then the respondent/appellant should meet the deficit. In his judgement Majanja J, who heard the appeal as a judge of this court, affirmed the decision of the lower court in its entirety and it cannot be therefore said that he did not pronounce himself on the issue of interest. Interest was one of the issues in the judgement that he upheld. The applicant/respondent had been awarded interest and the order of the lower court being silent with respect to the payment of further interest from the date of the decree to the date of payment then **Section 26 (2)** of the **Civil Procedure Act** became operational. It does not mean that the applicant/respondent would after the judgement not be entitled to interest. It only means that the interest payable from the date of judgement or earlier would be calculated at the rate provided in **Section 26 (2) of the Civil Procedure Act**. In the premises I do find merit in the applicant/respondent's Notice of Motion and the same is allowed and the costs thereof are awarded to the applicant. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This Judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines in view of the Covid-19 pandemic, the Advocates for the parties having consented.