



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 53 OF 2017

LINDA NASH.....APPELLANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED....DEFENDANTS

J U D G M E N T

1. This appeal raises a single issue for determination. The issue is whether or not the trial court was entitled to deny the Appellant as the successful party the interest of the sum sued for and awarded by the court.
2. The judgment by the trial court, to be found at page 114 of the Record of Appeal, records the court to have said:-

“The defence did not have any witness in support of their case. The defendant did not submit on the matter leaving the plaintiff’s case unchallenged. I have no cause to doubt the plaintiff’s testimony & the authenticity of the documents exhibited herein. I find that in terms of the discharge voucher herein produced plaintiff exhibit – 5. The defendant agreed to settle the plaintiff’s claim for damage and loss of use at the sum of Kshs.350,000.

I have no doubt that indeed the said damage was occasioned to the plaintiff’s motor vehicle and that the plaintiff was denied use of their motor vehicle. There being no evidence to the contrary and the defendant having failed to convince the Court otherwise I find that the plaintiff is entitled to payment for loss and use of the motor vehicle in question. There being no other way I can quantify the same I find that the sum owing to the defendant as loss of use is the balance of the sum agreed upon as payment for damages. As such the Court is for the view that the plaintiff has established her case on the balance of probability judgment is hereby entered in favour of the plaintiff was against the defendant for the sum of Kshs.211,517.90. The plaintiff will also have the costs of the suit”.

3. It is not in doubt that the court entered judgment for the sum claimed plus costs without any mention on interests. Accordingly the Appellant having specifically prayed for interests the court is deemed to have dismissed that prayer for interests.
4. The law on interests provided at Section 26 of the Civil Procedure Act and interpreted by the courts is that interest is awarded to compensate the litigant for the period his money was kept away from him. Under Section 26,Civil Procedure Act, codes the courts power to award interest in the following words:-

“Interests

(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.

(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 the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum”

6. It cannot be in dispute that there is an element of discretion by the court reserved to award interest and the rate thereof including the date of commencement and further interest rates after judgment.
7. However, being a judicial discretion, the court in exercising it one way or the other must give reasons. In this case there is no reason advanced for failure to award interest. A discretion exercised without reason ceases to be judicial and thus improperly exercised and calls for

correction by an appellate court. It demonstrates improper application of the applicable principles. That is what I find the Court of Appeal to have held on *Later vs Mbiyu [1965] EA 392* when the court said:-

“...and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation”

8. When a prayer is expressly made by a party, the court is expected and, I think, duty bound to make a finding on such prayer. When it is left without being adverted to, the court risks being viewed as having escaped from performing its duty to the parties.

9. Flowing from the foregoing findings it follows that I do find the trial court to have erred in failing to award to the Appellant interests in the sum it adjudged to have been improperly withheld from the plaintiff/appellant.

10. For that reason, I do allow the appeal and award to the Appellants the costs thereof. The effect is that to the judgment of the trial court I add an order that the Appellant be paid interests from the date of the suit till payment in full

Dated and delivered at Mombasa on this 31st day of May 2019.

P.J.O. OTIENO

JUDGE