



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**HCCA NO. 2 OF 2018**

**FORMERLY ELDORET 44 OF 2008**

**B.O.G TAMBACH TEACHERS TRAINING COLLEGE.....APPELLANT**

**VERSUS**

**MARY KIPCHUMBA.....RESPONDENT**

**JUDGMENT**

1. The appellant was aggrieved by the ruling of the trial Court delivered on 24<sup>th</sup> January 2018 in which the court applied rate of interest of 14% on the principal sum and made what the appellant considered 'unfair and punitive' orders for the payment in instalment of the decretal sum as shown below:

“RULING

This matter has been pending execution of the decrees which were issued on 1/4/2009 and appealed against by the judgment debtors but the appeal was later withdrawn by the judgment debtor before the decree were fully satisfied.

The judgment debtor moved the court for stay of execution which was granted but the stay cannot remain forever as there is no appeal pending. The judgment debtor moved the court to have the claims settled in instalment. Though they challenged the computation pending claims that was calculated by the court.

In the court's ruling 8/9/2017 the court gave room to the parties with the Investigating Officer confirms the court's computation of the pending figures if they were not satisfied with the calculation but to date none of the advocates complied with the said directions and thus the figures that were given on the 8/9/17 remain unchallenged.

The judgment debtor's advocate later raised an issue that the decrees that were made had interest rates based on 8% as per the forms that were prepared, but in the courts computation which is done on the ruling dated 8/9/17 a percentage of 14% was used as the court rates which the judgment debtor approved.

The judgment debtor's advocate filed submissions and stated that the court rate interest was fixed at 14% p.a under section 26 of the Civil Procedure Act. The judgment debtor's advocate submitted that the decrees that were extracted first have never been set aside and thus the applicable rate of interest was 8% on interest.

A look at the judgment that was delivered it was clear that interest rate was for the decretal sum together with cost and thus the judgment debtor's argument will not hold water.

**The interest rate was not specified by the court then, and I will thus make use of the court rates that existed at the time on the judgment which is 14%.**

**The judgment debtor's having not made any computation on which figures they had in mind to be true I find no reasons to disturb the figures that the court gave in the judgment dated 8/9/17.**

I wish to note that the court has indulged the judgment debtor's being a school to see that public interest is taken care of as the judgment debtor's is a public institution but the judgment debtor's official facts that they are the aggrieved parties whereas they are aware that indeed persons were injured there were award made in the year 2009 which is almost 10 years ago, other claims were

paid, other claims out of the same cause of action have not been paid for Kabarnet Court. There is no appeal against the decrees issued as the same was withdrawn and interest rate continues to grow.

I thus find that any more delay to have the claim settled will be against public interest as interest will go beyond to the extent that the college may not be able to settle the claim.

I made efforts to have the parties agreed on mode of payment but the board members were not able to give any reasonable offer and **I will thus make a finding that the judgment debtor should settle the claim in instalment of monthly payment and the rate of one case per the month starting from the first case after subtracting Ksh.1,000,000 which was ordered to be deposited on 6/12/17 until all claims are settled starting with case No. 44/2008 – 51/2008.**

The parties are at liberty to confirm the calculations as the difference if any will be deducted as payment progressed.

The payment to start from February 2018 and in default execution to issue by returning of the attached properties for sale by the decree holders.

**S.O TEMU, PM**

**24/1/2018**

2. The appellant filed a Memorandum of Appeal setting the grounds of appeal as follows:

**MEMORANDUM OF APPEAL**

**(This being an appeal from the ruling of the Hon. S. Temu Principal Magistrate delivered on 24<sup>th</sup> January 2018)**

**The appellant being aggrieved by the decision and ruling of the Principal Magistrate HON. S. TEMU on 24<sup>th</sup> January 2018 in Civil Case no. Kabarnet RMCC 44/08 appeals to this Honourable court against the entire ruling on the following grounds:-**

1. THAT the learned Trial Magistrate erred in law and fact by wrong application of the principles of law.
2. THAT the learned Trial Magistrate erred in law and fact by proceeding to apply the interest of 14% and basing his calculation on the same.
3. THAT the Honourable learned Trial Magistrate erred in law and fact in proceeding to apply the interest of 14% and basing his calculation on the same.
4. THAT the Honourable learned Trial Magistrate erred in law and fact in failing to consider the affidavit evidence tendered as well as the extracted court decrees and documents on record on the applicable interest rates.
5. THE Honourable learned Trial Magistrate erred in law and fact in failing to consider that the court decrees issued pursuant to the judgment had not been set aside.
6. THE Honourable learned Trial Magistrate erred in law and fact in failing to consider all the submissions tendered by the appellant.
7. THE Honourable learned Trial Magistrate erred in law and fact in allowing the execution to proceed on the basis of the warrants and erroneous calculations.
8. THE Honourable learned Trial Magistrate erred in law and fact in failing to consider the status of the appellant institution and the proposals on the mode of payment made by the appellants.

**REASONS WHEREFORE** *the appellants prays that ruling and orders therein be set aside with costs.*

**LEDISHAH J. K. KITTONY & CO**

**ADVOCATES OF THE APPELLANT**

**Submissions**

3. Counsel for the Parties before the court on the hearing of the appeal as follows:

“19/7/18”

Ms. Kipsei, Counsel for the Applicants

Supplementary Record of Appeal dated 11/7/18.

Record of Appeal of 18/6/18.

Part of Record from paragraph 6 – 31 be expunged. The Respondent does not object.

### Court

Paragraph 6 – 31 of Record expunged by consent of the parties

### **8<sup>th</sup> Ground of Appeal**

Item was 1, 2 & 4 together concerning the interest rates applicable.

4 & 5 relate to decree execution.

7 on calculation

8 on mode payment, Justice and fairness.

Ruling of court on 24/1/18 at 3 -5 of Record. The court applied 14% in the ruling.

Claims arise from road traffic accident. Judgement issued by trial court. Cases nos. 44 – 51, 8 cases.

Before execution, appellant filed appeal C.A. 12 – 19 of 2010 at paragraph 43 – 56.

Negotiations and parties agreed on mode of payment and payment commenced.

See paragraph 35 – 37 of the Record. On appeal High court granted conditional stay on 30% on decretal sum to be paid to the respondents. I refer to page 36.

Appellants then withdraw. Appeal no. 12 – 19 withdrawn and the Respondent sought execute the decrees in the lower court.

In the course of the hearing of the application, submissions at page 234, 245, 352 - 359 of Record of Appeal and 246 – 293.

Appellants contented that the decree to be executed were the decrees after judgment specifically stating interest rate as 8% at page 322 – 345

The decree sought to be executed shows the interest was 8% as shown. The appellants contents that the interest must be of 8% as shown.

The interest of 47952 at page 322 is interest for (5) months after judgment. At rate of 8% interest it is improper calculation.

Certificate of cost at 89.305

At page 323 the sum of ksh.93,055 as covered in decree as costs. The difference is because of the difference in the interest rates.

The same case applies to the cases 45 – 51 of 2008. The same argument applies to the files because in all the same interest rates is applied.

If the applicable rate of 8% was applied. The total figure would not be as appearing in the ruling of the court.

The trial court insisted on applying 14%. The court erred when the document is in the name of the decree has never been amended to read 14%.

The appellant applies to the court to set aside the ruling on the trial court and reset the interest rate to 8%.

The figure resulting from the 8% interest are shown in her submission before the trial court.

The court stated at the time of doing the contents it sought assistance of the court clerk .page 418 at 14% rates. See page 324 of the Record of Appeal.

### **Payment mode**

The court ordered appellant to tackle each file per month see page 418. The appellant is a Government Institution whose services are

known.

It was unfair and punitive. The mode of payment at 8% may have been fair.

We pray that the ruling of the trial court be set aside.

In practice Traffic no 1 of 1982 rate of interest at 12%. The decrees have never been set side. The decree's read 8%. The court could only have applied 12% with an explanation by the court for giving the higher rate. There was no explanation.

We pray that the appeal be allowed.

Mr. Gekonga, Respondents Counsel

We oppose the appeal.

Rate applicable for interest execution of Decree and the mode of payment are the issues before the court.

Appellant have written some record. Proceedings of the trial court, judgment and other applications which had been filed are packed for the record.

The appellants filed the 8 appeals to frustrate the respondent and delaying settlement. Appeals filed in 2010. They were withdrawn four years later when we involved the court to strike out the appeal from want prosecution. The notice of withdrawal was filed without informing the respondent.

**Decree at page 322 and 323.**

The decree has drawn by the court not court bound by the application by the plaintiff.

The year 2008 the interest payable was 14%. It was not even 12%.

The chief justice had increased the court interest. The interest was increased to 14% which has been applicable all through.

It is a technicality that the 8% is a standard form. The court officials would counsel the information which has no relevant. The Executive Officer who prepare the decree did not cancel the 8%. If it were computer generated the whole thing should have at 14%. It was a mistake of the court. It never reach the respondent.

The decree has been existence since 2008. It is being re-issued in 2018 after the appellant have exhausted all applications for payment by instalments. I refer to the proceedings. It is purely administrative issue and it cannot be used against the respondents. The Executive Officer was aware that the interest was 14%.

The interest calculation at page 322.

1/4/09 – 9/9/09 the court is 47952 at 14%

It is the administrative issue of calculating the 8% and indicating 14%.

Highway Furniture Mart Limited vs. PS & Another (2006) E.A.LR. The party cannot be penalised for such an error. The court has the power to rectify a decree

If the rates was 12% in 1982 it cannot reverse in 2008 to 8%. We submit that this is one of the apparatus to frustrate payment to the respondent.

At page 99 of the Highway Mat case Chief Justice from the time to time fixes rate of interest that interest is at 14% at 2006. The original judgment of the court state interest. The court interest 14% not 8%.

**Mode of payment**

Cause of action arose in 2007. The respondent have been waiting. The payment was eligible. There were numerous applications and appeals to avoid payment. The payment of one file per month.

This is a special consideration when there is no intention of paying. The respondent has been waiting for the payment. The court had ordered the time to pay the sum.

There is nothing to show that the Government Institution cannot pay the decretal sum. There is no denial before the court to order payment by instalment other ordered by the court.

The appeal has no merit.

Ms. Kipsei, Applicants Counsel

The appellants have paid over 21 million over this accident.

The decree mentioned 8%. The decree has not been amended. We raise the issue on February 2007. No application has been made to amend, after it was raised in the court.

The lower court is court of record.

**Highway Furniture Mart vs. PS.** *It was an application for review that would the respondent should have move the court for review.*

Appeal has merit and should be allowed with cost.”

#### **Issues for Determination**

4. The two issues for determination in this appeal are –
- a. Applicable interest in the circumstances of the case; and
  - b. Mode of payment or execution of the judgment.

#### **Determination**

##### **The question of applicable rates of interest**

5. The twin provisions on interest in the Civil Procedure Act provide for ***interest on the principal sum*** awarded by the Court and ***interest on costs*** of the suit, respectively under section 26(2) and 27 (2) of the Act, as follows:

##### **26. 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.**

##### **27. Costs**

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

[Act No. 19 of 1985, Sch.]

#### **The Chief Justice's Practice Notes on Rate of Interest**

6. Over time the Chief Justice has by Practice Notes given guidance to court as to the reasonable rate of interest that the court may award under section 26(1) of the Act being ***“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”***. For instance, in the Practice Note No. 1 of 1982, the Chief Justice addressed the question of reasonable rate of interest as follows:

**“Rate of interest – 1982**

Made on: Tue, March 16<sup>th</sup> 1982

Practice Note

High court of Kenya

Simpson Ag CJ

March 16, 1982

**Practice note no. 1 of 1982**

Civil procedure act (act 21) section 26

**Interest-rate of interest –power of the court to order payment of interest-interest on principle sum of decree-rate to be applied in the absence of a valid reason to order either a higher or lower rate.**

March 16, 1982, Simpson AG CJ. gave the following practice direction. The Civil Procedure Act (cap 21 laws of Kenya) section 26 enables the court to order interest to be paid at such rate as the court deems reasonable.

**In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%.”**

7. In the case law authority relied on by the respondent, the applicable rate of interest as at 2006 [and so far as I know to date] is 14%. In the case the Court of Appeal, *Highway Furniture Mart Limited v Permanent Secretary Office of The President & another* [2006] eKLR, a claim for a higher rate of 36% claimed by the appellant and upheld the High Court judge in her application of 14% on the principal sum, and observed as follows:

“It is apparent from the three grounds of appeal that the appeal is not against the merits of the decision particularly the findings of fact by the superior court; that appellant did plead but did not pray for the interest rate at 36%; that the appellant did not state in the evidence of its managing director the basis of the rate of interest of 36%; that the court did not award interest rate at 36%; that there was no error on the judgment and that the error was on the decree which included an amount of Shs.30 million as claim for interest which was not prayed for or awarded in the judgment. The appeal concerns the jurisdiction of the court to set aside the decree and order the correction of the decree so that it would agree with the judgment. That notwithstanding, it is necessary to determine the rate of interest awarded in the judgment because the appellant’s counsel maintained in the superior court and still maintains before us that the rate of interest at 36% was pleaded in paragraph 1 of the plaint and that by the phrase: “**Costs of this suit and interest as prayed in the plaint**” in the judgment the judge indeed awarded that interest rate.

It is also necessary to determine the validity of the rate of interest awarded because the jurisdiction of the superior court largely depend on the nature of error or errors that the judge assumed jurisdiction to correct.

As a matter of pleadings and evidence it is true as found by the learned Judge that while the appellant pleaded in paragraph 1 of the plaint for interest at the rate of 36% the appellant did not, however, pray for the rate of interest at 36% as a relief and did not give evidence at all concerning that rate of interest. By **Order VII rule 6** of the Civil Procedure Rules (CP Rules) the plaint should state specifically the relief which the plaintiff claims. The relief claimed by the appellant was specifically pleaded in paragraph 3 (1) of the plaint “**as the principal sum of Shs.11,257,118/= together with interest thereon at court rate from the date of the plaint until payment in full**”. **The Chief Justice from time to time fixes the ceiling of the court rate interest under section 26 of the Civil Procedure Act. The prevailing court rate is 14% p.a. which is the rate applied by Okwengu J.**

The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later v Mbiyu* [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

**“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, 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 by the award of interest”.**

(See also the Uganda case of *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175).

If the plaintiff was indeed claiming interest on the principal sum at 36% it is surprising that Joseph Waitiki Ndegwa who gave evidence in support of the claim did not refer to that rate of interest or give evidence of circumstances which could have justified the award of interest above the court rates. There was no explanation why the appellant had to wait for more than 7 years to file the suit. It is evident that the claim was incontestably unproved.

The judgment delivered by Juma J. did not specifically deal with the claim for interest at 36%. That claim as computed in the decree amounted to Shs.30,119,467/68 which exceeded the principal sum by more than three times. It was undoubtedly a very large claim. It is inconceivable that Juma J could have allowed such a large claim without specifically saying so and without assigning any reasons. The award of interest at 36% cannot be simply implied from the judgment. We are satisfied that Okwengu J correctly construed the judgment of Juma J that court did not award interest at the rate of 36%.”

[underlining mine]

8. It is clear that the Chief Justice's directions in the Practice Notes can only affect or guide the court's exercise of the power to order interest under section 26 (1) of the Act and not the statutory provision of the rate of interest under section 26(2) at 6 % per annum. The rate under section 26(2) being statutorily underpinned can only be amended by an Act of Parliament, through a statute Law Miscellaneous amendment or a special legislation in that behalf, and not by a Practice Note made by the Chief Justice. To be sure the 1982 Practice Note did not pretend to amend or guide application of the rate of interest where the court was silent on applicable interest rate. The Practice Note clearly affected only the power of "*the court to order interest to be paid at such rate as the court deems reasonable*". This power to order reasonable rate of interest is provided for under section 26 (1) of the Act. Indeed, section 26 (2) of the Act applies to situations where the decree of the Court is *silent*, that is where court does not order any rate of interest, and this provision has not been amended.

9. When the opportunity to amend arose in 1985, amendment was **only** effected upon the provision on the interest on costs under section 27(2) of the Civil Procedure Act and not the provision on interest on the principal sum under section 26 (2) of the Act. Such course is not surprising considering that the principal sum is almost always higher than the amount of costs payable so that the 14% interest on **costs** does not have the same escalation effect on the amount payable as on the **principal sum**. It is understandable, therefore, that Parliament in its wisdom did not interfere with the rate of interest on the **principal sum** by the 1985 amendment.

10. Section 27(2) of the Civil Procedure Act on **interest on costs** was amended by the Statute Law (Miscellaneous Amendments) Act No. 19 of 1985 as follows:

“Repeal the words "**six per cent per annum**" and substitute the words "**fourteen per cent per annum**.”

11. The provisions of section 26 (2) of the Civil Procedure Act on interest on **the principal sum** have remained unchanged as follows:

**“(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.”**

12. The Judgment of the Court of 1<sup>st</sup> April 2009 for the respective consolidated suits merely gave judgment in the various amounts for the respective suits "**plus costs and interest**" without indicating any rate of interest from the date of the decree to the date of payment. Had the trial court made provision for rate of interest on the principal sum, it would have been required to be guided by the Chief Justice's Practice Note on interest under section 26(1) of the Act then set at 14% as observed in the **Highway Furniture Mart** decision, supra. In the present circumstances, there being no order on rate of interest by the court, section 26 (2) of the Civil Procedure Act clearly stipulates the applicable rate of interest at **6% per annum**. Interest on costs is, of course, separately provided for under section 27(2) of the Act at **14% per annum**.

### **Power to remand case to trial court**

13. The various powers of the Court on appeal, s. 78 of the Civil Procedure Act are provided as follows:

#### **“78. Powers of appellate court**

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) **To determine a case finally;**
- (b) **To remand a case;**
- (c) **To frame issues and refer them for trial;**
- (d) **To take additional evidence or to require the evidence to be taken;**
- (e) **To order a new trial.**

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

14. Black's Law Dictionary defines the word "**remand**", as relevant to this case, as "**vb. To send (a case or claim) back to the court or tribunal from which it came for some further action.**"

In this case, in view of the finding of application of the wrong percentage of interest, the matter shall be remanded to the trial court for reassessment of the decretal sum in accordance with the correct percentage of interest on the principal sum and costs.

### **The Slip Rule**

15. Needless to say, the trial Court has powers under the Slip Rule to correct errors on the decree etc. arising from accidental slip. In this regard, section 99 of the Civil Procedure Act provides as follows:

**“99. Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”**

16. It is not clear how the figure of 8% rate of interest was provided for in the standard form Decree used by the Court. However, in view of the clear terms of section 26(2) of the Act, the rate must remain at 6% of the principal sum awarded by the court in the various related files.

#### **Payment of Decretal Sum by Instalment**

17. The Civil procedure Rules provide for the court’s power and discretion to order payment of decretal sums by instalment as follows:

**“[Order 21, rule 12.] Decree may direct payment by instalments.**

12. (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

**(2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”**

18. This court considers that this is an appropriate case for the payment of decretal sum together with interest and costs on instalment taking into consideration the public nature of the appellant school with exchequer funding requiring budget inclusion for any lawful payments. But the discretion to order payments in instalment lies with the trial as the court which passed the decree within the meaning of Order 21 Rule 12 of the Civil Procedure Rules. Indeed, in accordance with the principle in *Mbogo & Anor. v. Shah* (1968) EA 93, the appellate court may not lightly interfere with discretion of the trial court.

19. However, as the trial court will have to reassess the amounts payable on the basis of the rate of interest as 6%, in accordance with section 26 (2) of the Civil Procedure Act, the court will also determine the mode of payment execution as appropriate.

#### **Conclusion**

20. With respect, there appears to have been a misconception on the part of Counsel that the rate of 12% or 14% prescribed over time by the directions of the Chief Justice through Practice Notes apply to the situation where **no** rate of interest has been specified in the Judgment. Much to the contrary, the rate of interest given by the Chief Justice in the practice Notes is for the guidance of the court in arriving a reasonable rate of interest in terms of section 26 (1) of the Civil Procedure Act: the Practice Notes apply where the Court awards interest at a specified rate, not where it merely grants interest without specifying a rate of interest. In such a case where the court does not specify the rate of interest, or, in the words of section 26(2) the Act, **“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.”** The directions of Chief Justice’s Practice Notes as to rate of interest do not apply.

#### **Orders**

21. Accordingly, for the reasons set out above, the Court in exercise of its powers under section 78 of the Civil Procedure Act, makes the following orders:

**1. The appellant’s appeal is allowed.**

2. The matter is **remanded** to the trial court for calculation of the decretal sum, that is the judgment sum with interest thereon and interest on costs on the basis of **6% on the sums awarded by the judgment as stipulated in section 26(2) of the Civil Procedure Act and 14% on the costs, as provided by section 27(2) of the Civil Procedure Act.**

**3. The respondent is restrained from executing the decrees of the trial court until such computation of the decretal sum has been done, or until further orders of the trial court.**

4. The lack of clarity on the matter in dispute justifies a direction that there shall be no order as to costs in the appeal.

DATED AND DELIVERED ON 23<sup>RD</sup> DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

**Appearances:**

M/S LEDISHAH J.K. KITTONY & CO. ADVOCATES FOR THE APPELLANT.

M/S GEKONGA & CO. ADVOCATES FOR THE RESPONDENT.