



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 122 OF 2008

FISH PROCESSORS LTDAPPELLANT

VERSUS

AGGREY DIMO OGOLARESPONDENT

JUDGMENT

The Respondent herein moved to the seat of justice by way of a plaint dated 14th day of October 2002. The salient features of the same are as follows:-

- The plaintiff supplied fish to the defendant.

- 16th May 2002 an agreement was reached between the two that the plaintiff do supply fish to the defendant to enable the defendant recover a loan of Kshs. 397,960.00 owed to the defendant by the plaintiff.

- The deduction towards the loan repayment was to be at the rate of Kshs. 5,000.00 from the amount found due and payable to the plaintiff as proceeds of fish supplied to the defendant.

- The defendant was to finance the purchase of the fish which the defendant failed to do and in the process paralyzed the plaintiff's operations.

- Vide paragraph 9 that the plaintiff borrowed Kshs. 250,000/= to enable him continue with the business.

- Vide paragraph 10 that the defendant started deducting 10,000/= up from 5,000/= and in the process ate into the plaintiff's profits.
- Vide paragraph 11 that in further breaching of the agreement, the defendant retained Kshs. 221,900.00 money due to the plaintiff from the defendant as proceeds of payment for the supply of fish by the plaintiff to the defendant.
- Vide paragraph 13 that the plaintiffs' average earnings monthly is Kshs. 163,200/=

In consequence thereof, the plaintiff sought orders for :-

- (a) **Specific performance of the agreement dated 16th May 2002**
- (b) **General and special damages for loss of business**
- (c) **A refund of the monies retained by the defendant**
- (d) **Costs of the suit**
- (e) **Interest on (b) (c) & (d)**
- (f) **Further or other relief deemed just.**

The appellant who was the defendant filed a defence dated 13th day of November 2002, but later amended on the 21st day of April 2006. In it the defendant denied the contents of paragraph 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint and put the plaintiff to strict proof.

- Vide paragraph 10 B, **“that the plaintiff owed the defendant Kshs. 429,960.50 in respect of the amount advanced to the plaintiff and in respect of the engine sold by the defendant to the plaintiff which amount the plaintiff has refused and or neglected to settle particulars of which are within the plaintiff's knowledge and that if the defendant retained any money owed to the plaintiff then the same was lawfully retained”.**

In the counter claim vide paragraph 1, 2, and 3 reiterated the content of paragraph 10 B of the defence to the effect that they advanced to the plaintiff Kshs. 397,960.50 as a loan in the year 2002, and a motor boat engine to the plaintiff at a price of Kshs. 32,000.00 amended to read Kshs. 12,000 which he counter claimed.

There was reply to amended defence reiterating the averments in the plaint.

Parties were heard resulting in the judgment of the learned trial magistrate of 20th November 2008. The reasoning on assessment of the evidence starts at page 33 line 14 from the bottom. The findings in a summary form on the evidence are as follows:-

- It is admitted that as at 16th May 2002, the plaintiff owed the defendant Kshs. 397,960.50 on account of fish to be supplied to the defendant.

- That the plaintiff borrowed capital from a friend and continued with the supply of fish and payment was normal on three occasions though up from 5,000 to Kshs. 10,000.00.

On the 4th occasion, the defendant retained 10,000/= as deductions towards the loan as well as Kshs. 221,900/= which was due to the plaintiff as proceeds for the supply of fish to the plaintiff.

- It transpired that the defendant company as at the time had in possession the plaintiff's log book and motor vehicle registration number KZL 081 Toyota corolla DX and title deed whose particulars the plaintiff gave.

- That the terms and conditions of repayment of the amount owing did not include withholding capital proceeds of fish supplied to the defendant by the plaintiff as proceeds for the supply of fish.

- By reason of the above findings, the learned trial magistrate found that the defendant's withholding of the plaintiff's capital was unjustified and the plaintiff was entitled to the release of Kshs. 221,900/= which was withheld by the defendant with interest accruing thereon from the date of the filing of the suit until full payment.

- That the defendant is holding the plaintiff's log book and motor vehicle which should be sufficient security for the money owed and if the same is returned to the plaintiff in motorable condition then the amount will fall due and payable to the defendant and or the parties may now specifically agree on another mode of payment.

- At the time the agreement was signed, there was no mention of money owed on an engine.

- The court cannot import terms which are adverse to one party into a contract which is very clear in its terms.

- The plaintiff did not strictly prove his losses.

- Special damages must be strictly proved.

- Interest ordered to accrue on the 221,900.00 should be able to cushion to some extent the kind of loss alleged to have been suffered.

- Entered judgment for the refund to the plaintiff of the cash unlawfully retained together with interest.

The appellant became aggrieved with that decision and has appealed to this court citing 7 grounds of appeal namely that the learned trial magistrate erred:-

- (1) In arriving at a finding in respect of the counter claim and or set off based on issues which were not pleaded and prayed for and in respect of which no evidence was adduced.**
- (2) In arriving at an erroneous finding in respect of the counter claim and for set off.**
- (3) In reaching a conclusion that was contrary to the evidence before her.**
- (4) In not awarding interest on the amount awarded to the respondent from the date of judgment**
- (5) There was misdirection on the part of the trial magistrate in awarding interest from the date of filing of the suit.**
- (6) Erred in treating the interest awarded as a cushion to the losses suffered by the respondent after having dismissed the claim for loss of business.**
- (7) Failed to appreciate the submissions made on behalf of the appellant.**

In her oral submissions to court counsel, for the appellant stressed the following:-

- **They are happy with the finding of the learned trial magistrate that the appellant / defendant owed the plaintiff /respondent Kshs. 221,900/= and that the plaintiff owed the defendant Kshs. 397,960.00**
- **The learned trial magistrate was bound by the rule that a party is bound by his / her own pleadings.**
- **There was no judgment entered in favour of the defendant on the counter claim.**
- **The issue of security had not been prayed for in the pleadings and no pronouncement should have been made on account of the same.**
- **The issue of security arose in the plaintiffs evidence wherein only the issues of the log book was mentioned as security and the issue of the motor vehicle having been given to the defendant as security did not arise. Neither was there proof that the said motor vehicle was with the defendant.**

- **Contends that the defendant could not deny the issue of the log book and motor vehicle operating as security because it had not been pleaded.**
- **Judicial discretion on the issue of interest was wrongly exercised as no reason was given for giving interest from the date of filing suit.**
- **There was also no finding on the issue raised in the defendant's counter claim.**
- **The learned trial magistrate failed to note that the succeeding party is the defendant.**
- **The learned magistrate ruled that no loss was suffered by the plaintiff and yet awarded interest.**

In response, the learned counsel for the respondent stressed the following:-

- **Outlined the history of the matter as set out in the pleadings of either side already set out on the record.**
- **That issues for determination both at the lower court and at the Appeal court level revolved around the counter claim, interest on Kshs. 221,900/= and costs.**
- **Concedes the total sum owed to the defendant by the plaintiff at the time of the agreement was Kshs.397,965/=.**
- **Concedes that repayment of the said sum was to come from the proceeds payable to the plaintiff by the defendant at the rate of Kshs. 5,000/= per trip of fish supplied.**
- **That money which had been borrowed for the supply of fish got lost or was stolen, forcing the respondent to borrow from elsewhere in order for the contract to continue,**
- **Maintains that as pleaded the respondent supplied fish where upon the defendant deducted Kshs. 10,000/= leaving a balance of Kshs. 221,900/= and instead of paying this money over to the respondent plaintiff, the same was retained by the appellant/defendant.**
- **It is their stand that the withholding of the said money was unjustified because there was no default on the part of the respondent/plaintiff.**
- **Contends that the appellant is not entitled to the counter claim because the demand for the same is premature because had the supply continued, the respondent/plaintiff would have honoured his part of the bargain and for this reason the appellant cannot be allowed to benefit from his own illegal conduct.**

- That the court was entitled to make a finding that the respondent/plaintiff was entitled to a refund.
- That if the amount of Kshs.221,900/= is given back to the respondent, he will continue supplying the fish and the counter claim will be taken care of.
- Contends the counter claim was disallowed and dismissed by the magistrate.
- That evidence for setoff was not adduced.
- The order on repayment of costs is justified because the appellant/defendant illegally withheld money from the respondent/plaintiff.
- Since the respondent was successful, he was entitled to costs.

In response counsel for the appellant added the following:-

- There was no specific finding on specific performance.
- There is no cross appeal.
- Their contention is right as the appellant was entitled to a pronouncement on the counter claim either as being dismissed or allowed.
- Contends that judgment on Kshs. 397,000/= was denied because there was an alleged security of a log book and a motor vehicle which had not been pleaded.
- The learned trial magistrate should have been bound by the agreement between the parties which had been produced in court and relied upon by the respondent/plaintiff.
- The said agreement guided the appellant/defendant on how to go about the said agreement.

On case law, the court was referred to the case of Kiska =vs= DE Angelis [1969] 6 where the court of appeal for Eastern Africa held inter alia that:-

- (i) The proper procedure should have been for the judge to enter judgment for the appellant for the balance due to it with costs and the judge should not have given to the respondent costs on his claim.
- (ii) The appellant as the successful party should have had the costs of the evidence debene-ese.
- (iii) The appellant as the successful party should have had the costs of the reference.

The case of **Ole Nganai –VS- Arap Bor [1983] KLR 233** also a court of appeal decision where the court held inter alia that:-

- (1) Whenever a settlement is brought to court, it must be clear what the terms of the settlement are and the terms cannot be left to inference.**
- (2) It was wrong for the judge to grant an order to the defendant which had not been asked for by that party.**
- (3) The judge ought to make a decision or order on every claim made. In this case the judge's order was nebulous, uncertain and indefinite as no reasonable decree could be drawn from it. The effect was that the proceedings and subsequent order were a nullity and the suit should be remitted to the high court to be reheard.**

This court has given due consideration to the afore set out rival arguments, and in its opinion, the following are own framed questions for determination in the disposal of this appeal:-

- (1) What is the mandate of this court when dealing with this appeal?**
- (2) What complaint is the appellant raising?**
- (3) What response has the respondent made to those complaints?**
- (4) What are this court's findings on the said complaints and response?**
- (5) What are this courts final orders in the disposal of this appeal?**

In response to the afore set out own framed question 1, 2, 3 and 4, it is clear that being an appeal, the mandate of this court in the assessment of facts on appeal is as set out in Section 78 of the Civil Procedure Act and as construed by case law, that this court has judicial notice of both decided by the court of appeal and courts of concurrent jurisdiction, namely to revisit the facts that were before the lower court, assume the role of the lower court, when assessing the said facts, then assess the said facts, apply the law to the same, and then determine whether the conclusions reached by the lower court are to stand or not, while giving reasons for the conclusions reached.

The major complaints raised against the said findings are already on record in the form of grounds of appeal but in a summary form and for purposes of reasoning in the assessment these are:-

- (i) The learned trial magistrate should not have introduced the issue of extraneous matters regarding the giving of the Log book and the motor vehicle as security for the amount advanced and yet these had not been pleaded**

(ii) There should have been a pronouncement made on the issue of the counter claim whether allowing it, dismissing it or granting a set off in its favour.

(iii) The learned trial magistrate having found as a fact and as per the agreement entered into by both sides that, the appellant was owed Kshs. 397,906.00 on the one hand, and on the other hand that the Respondent /plaintiff is owed Kshs. 221,900.00, the court should have granted a set off and if a set off had been given, the court would have found that it is the appellant / defendant who was owed money and not the respondent/plaintiff

(iv) By reason of the reasoning in number (iii) above, the victorious party should have been adjudged to be the appellant and he should have been given the amount due to him by way of set off.

(v) By reason of what has been stated in number (iii) (iv) and (v) above, the respondent should not have been awarded costs. The right party to have been awarded costs should have been the appellant.

(vi) The court having found that loss of business had not been established by the respondent/ plaintiff he should not have been awarded interest.

(vii) Even if it can be stated that interest is payable, the same should not have been ordered to run from the date of filing of the suit but from the date of the judgment.

The response from the Respondent / plaintiff on the other hand is also on record and in a summary form it is as follows:-

(i) The appellant breached an agreement duly entered into by both sides and the court has a right in ordering specific performance of the refund of the withheld proceeds of supply of fish to the appellant.

(ii) That the appellants counter claim was disallowed and dismissed and for this reason, the issue of set off does not arise.

(iii) The respondent / plaintiff succeeded in his claim and so he was entitled to costs.

(iv) Interest was properly awarded.

This court has made due consideration of the above summary of both complaints of the appellant and the response of the respondent on the other hand and the court proceeds to make the following findings on the same:-

(1) It is undisputed that there is an agreement between the parties found at page 5 of the record

having been made on the 16-5-2002 which form the anchor of the Respondent / plaintiff's claim.

(2) It is not disputed that the said agreement duly acknowledged that the respondent/plaintiff owed the appellant /defendant the amount forming the counter claim.

(3) There is no dispute that the said amount owed to the appellant / defendant was to be repaid by means of proceeds of sale of fish supplied to the appellant by the respondent/plaintiff to the tune of Kshs. 5,000/= . It is also on record that this procedure was followed on a few occasions and there the appellant/defendant unilaterally changed his mind and started deducting a total of Kshs. 10,000/= per trip of the supply. This happened on three occasions and then on the 4th occasion, the appellant/ defendant deducted Kshs. 10,000/= for the supply of fish and also then went ahead to withhold the amount claimed by the plaintiff which was due to him as the recycling capital.

(4) It is not disputed that when the appellant withheld the said amount of Kshs. 221,900/= there was no indication that the appellant stated that he had repudiated or rescinded the agreement of 16-5-2002. Infact it is observed by the learned trial magistrate at page 34 of the judgment line 1 from the top and page 56 of the record, that "it is not clear as to why" the appellant/defendant decided to withhold the amount that was to be paid to the respondent/plaintiff.

(5) It is undisputed that although it is not clear from the reasoning of the court, it is apparent that failure of the appellant to rescind or repudiate the agreement of 16-5-2002 contributed immensely towards the learned trial magistrate's finding that the withholding of the said amount by the appellant was unlawful. It is the finding of this appellate court that it is in agreement with this inference because from the face of the terms of the agreement, the appellant / defendant but only withhold the said proceeds upon stating that it has either rescinded or repudiated the said agreement.

(6) It is on record that the respondent had in his plaint prayed for specific performance of the contract of 16-5-2002. There is no specific pronouncement in the learned trial magistrate's judgment that the appellant do specifically perform the contract of 16-5-2002. But the learned trial magistrate's pronouncement at page 34 of the judgment (page 56 of the record, line 13 from the bottom, that "the defendant's act of withholding the plaintiff's capital was unjustified and unfair in the circumstances and therefore the plaintiff is entitled to release of Kshs. 221,000/= which was withheld by the defendant unlawfully " amounts to a pronouncement of specific performance. This is so because as per the subject agreement, what the appellant/defendant was expected to perform in respect of the said terms is that once fish is supplied by the respondent/plaintiff, price of the same determined, all that the appellant/defendant was required to do as performance of its part of the contract was to deduct Kshs. 5,000/= towards the repayment of the loan owed to it by the Respondent/Plaintiff and then pay over the balance of the proceeds to the respondent/ plaintiff. By being ordered to pay over the amount that was withheld, it meant that he was being called upon to specifically perform his part of the bargain.

(7) With regard to allegation of extraneous matters, it is clear that issues of security are not alien to the agreement of 16-5-2002, because at clause one, there is mention of a logbook for the named vehicle and a title deed for land as security. It is agreed by this court that at page 34 of the judgment. (page 56 of the record, at line 5 from the top, there is mention that:- "it was not denied by the defendant company that it was in possession of the plaintiff's logbook as well as motor vehicle registration KZL 081 Toyota Corolla DX and title deed whose particulars the plaintiff didn't give...." It is however clear that issues pertaining to the security offered though allegedly testified upon were not pleaded in the plaint nor responded the appellant/defendant's counter

claim.

(8) This court agrees that in the absence of issues of security offered having been pleaded in both pleadings, they should not have formed a basis or counted towards the assessment of the findings to be made by the court in resolving the dispute. It is therefore the finding of this court that it was erroneous for the learned trial magistrate to order the return of the plaintiff's motor vehicle in a motorable condition as a precondition for the owed amount to be found to be due and payable to the defendant because as rightly submitted by the appellants counsel, the issue of the actual handing over of the motor vehicle to the defendant is absent in the said agreement. The court also agrees with the submissions of the appellants' counsel and case law cited for guidance of this court, that there is no jurisdiction donated to a court of law to grant a relief not asked for by parties to litigation.

(9) The holding in number 8 notwithstanding, it is the opinion of this court that even if this bit of evidence is discounted towards the final determination of the case, there is still other sound evidence on the record on the basis of which the learned trial magistrate could have arrived at the decision reached. The reason being that as at the time the money was withheld, the agreement reached between the disputants had not been rescinded.

10. It is agreed that indeed the appellant put in a counter claim and there should have been a specific pronouncement on the position of the counter claim. Failure to so pronounce does not prevent this appellate court from revisiting that issue and making a specific pronouncement on the same, since by reason of the provisions in section 78 (2) of the Civil procedure Act, this court has power to assume the role of a court of original jurisdiction, assess the facts and then make a pronouncement on the same.

11. Tying upto number 10 above, is the issue of set off. Indeed the appellant /defendant was owed monies more than what the Respondent / Plaintiff owed to them, and in normal circumstances a set off would be appropriate. It is however to be noted that out of this money, the learned trial magistrate at the same page 34 line 4, from the bottom disallowed the claim for the cost of the engine forming item (b) of the reliefs in the counter claim, because this was allegedly not part of the terms of the contract on which the respondent / plaintiff anchored the plaint. This was not to be considered as part of the amount to apply towards the set off. It is also to be noted that there is no relief for rescinding the contract and set off the amount the Respondent / plaintiff allegedly owed the appellant/defendant. There is also no plea of the usual auxiliary relief routinely put whereby the court is asked to grant such other or further relief as the court may deem fit to grant.

12. It is correctly submitted by the appellants counsel and or demonstrated by case law cited to court that a court of law has no jurisdiction to grant a relief not prayed for. In as much as counsel for the appellant submitted that the respondent / plaintiff should be held to be bound by this principle, it is this court's opinion that the principle applies to both litigants. There is no jurisdiction to apply the principle selectively when so applied, the court finds that the appellant is also bound by its pleadings. Their right of set off could only have arisen upon their rescinding of the contract and demanding payment of the amount due for set off. It is observed from the content of the counter claim that there is no mention of a demand having been made for the balance owing after set off of the amount withheld. Further this should have been specifically pleaded in the counter claim as it is a special claim. In the absence of rescinding of the contract, demanding the shortage and pleadings set off as well as having the amount to form a set off specifically pleaded as special claim, the learned trial magistrate cannot be faulted for failing to make a pronouncement on set off. Further such a relief could have been granted as any Auxiliary relief under the famous clause of "such other relief as the court may deem fit to grant which the appellant did not include under the reliefs they sought in the counter claim"

13. Having ruled that without rescinding the contract made on the 16th May 2002, outside the pleadings, and alternatively without having pleaded that the said contract be deemed to have been rescinded, and thirdly, having ruled that without pleading a set off and inclusive of a plea of an auxiliary relief of such other relief as the court may deem fit to grant, there is no way the appellant can be declared to be the victorious party who should have been granted costs once the appellant's counter claim is ousted, as demonstrated above, then the only contending claims left in the arena are those of the plaintiff which were allowed by the learned trial magistrate. It is on record, that the appellant has no quarrel with the finding of the learned trial magistrate that the plaintiff is entitled to Kshs. 221,900.00, then definitely the victor of the two is the plaintiff and that is the party entitled to benefit from an order for costs. Justification of this finding is found in Section 27 of the Civil Procedure Act. It reads:-

“Section 27 (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 the 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 afore said 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 percent per annum and such interest shall be added to the costs and shall be recoverable as such.

This court has made due consideration of this Section, and considered its own construction of it in the light of decision of case law both by the court of appeal as well as the superior courts that this court has judicial notice of, and in its opinion the correct position on the issue of a court's right to grant or withhold an order for an award of costs is as follows:-

- (a) Costs usually follow the event, meaning that a successful party should be entitled to an award of costs unless if the contrary is shown for good reason.
- (b) An award of costs is within the discretion of the court seized of the matter, signified by the use of the word “shall be in the discretion of the trial judge. This court has judicial notice of principles of case law decided by the court of appeal and as dutifully followed by the superior courts and subordinate courts on the exercise of judicial discretion and these are that.
 - (i) The said discretion has to be exercised judiciously with a reason.
 - (ii) It should not be exercised capriciously.
 - (iii) The sole aim of such exercise is for doing justice to both sides
- (c) Whereas vide the proviso to Section 27 of Cap 2, where the court is inclined to withhold costs from the successful party the court should show good reason.

When the afore set out principles on the exercise of the courts discretion are applied to the learned trial magistrates' orders on costs, the court is of the opinion that the learned trial magistrate cannot be faulted on the said order because as found by the said learned magistrate and also as found by this appellate court that, the Respondent / Plaintiff was the victorious party, the order for costs had no alternative but to follow the event. This being the case there was no obligation on the part of the learned trial magistrate to give reasons for the award of costs as the same had not been withheld from the successful party, although if reasons had been given, the same would have been in order.

The court draws inspiration from the case of Nelson Kaburiu Felix =vs= Paul Muringa David Mugo and leo Masore Nyangau Nairobi Court of Appeal number 143 of 2002 decided by the Court of Appeal on the 4th day of March 2011. At page 6 of the judgment there is observation from line 1 that "it was not in dispute that the appellants sought costs of the suit As we have stated and as is borne out by the record, he succeeded in having the suit dismissed but was not granted costs of the suit. That is the borne of his contention".

At the same page 6 line 6 from the top, the learned law lords of the Court of Appeal set out the full text of Section 27 (1) of the Civil Procedure Act already set out herein. At line 4 from the bottom the court had this to say:-

"That rule (Section 27), makes it clear that although whether or not to award costs to a party is at set the discretion of the judge, none, the less the judge has guideline set out by the provisions and these are that costs of any action or cause or other matter shall follow the event the word "shall" means that it as most a must. But the law envisages that these may vary very well because where this may not be fair and just or where difficulties may arise if costs follow event, for example where a party applies for extension of time and the court grants the same only to enable justice to be done although otherwise the party did not deserve the orders because of being indolent or for other reason, an award of costs may not follow, the event. In such situation the law states that where costs do not follow the event, the judge or court needs to give reasons. It is not necessary to state that such reasons must be spelt out in the judgment or ruling or order. It would not be considered a reason the judge keeps it in his mind, but does not spell it out in his decision. This requirement is not new. It is well known in the corridors of justice that any exercise of discretionary jurisdiction must be carried out upon reason and cannot be carried out on the whims of the court or capriciously".

At page 8 of the judgment line 6 from the bottom, the court went on.

"As we have stated above, the learned judge never gave reasons for refusing costs and never attempted to do so. The provision of the Civil Procedure Act enjoined him not only to give reason if he was minded to refuse costs, but to give good reason. He refused to award costs and assigned no reason, let alone good reason for that decision. This is therefore a fit case for our intervention and we do so with the result that the appeal is allowed. The decision of the superior court declining to award costs to the appellant is set aside" This court therefore right in ruling that the Respondent who pleaded for an award of costs and is the successful party was rightfully awarded costs by the learned trial magistrate.

14. Turning to the issue of interest awarded, the complaint in this was two fold, namely that no reason was given for an award of the same on the one hand, and on the other hand that it should have been ordered to run from the date of the judgment as opposed to it being ordered to start running from the date of the filing of the claim.

For guidance the court will have recourse to Section 26 of the Civil Procedure Act. It reads:-

“Section 26 (1) where and in so far as a decree for the payment of money, the court may in the decree, order interest at such rates 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 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 payments of further interest on such aggregate sums as aforesaid, from the date of decree, to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 percent per annum”.

This courts’ construction of this provisions is to the effect that these are the applicable principles with regard to right of the court either to award or withhold an award of interest in any one particular incident:-

- (i) There is special emphasis where the decree is for payment of money, like in the circumstances of this case where the decree is for the refund of the amount of proceeds withheld namely 221,900.00
- (ii) The court has a discretion in granting an order for interest by use of the word in “May”.
- (iii) The rate of interest payable is as the court deems just.
- (iv) There is jurisdiction to order the interest to run from the date of the suit to the date of the decree.
- (v) The interest ordered to run from the date of the decree may be in addition to any interest ordered to run for any period before institution of the suit.
- (vi) There is also jurisdiction to order for the interest to run from the date of the decree to the date of full payment or to such earlier date as the court thinks fit.
- (vii) Even where the decree is silent on payment of further interest from the date of the decree, until full payment, it is deemed that interest for this period is claimable and it is payable at the rate of 6 per annum percent.

This was the position held by a court of concurrent jurisdiction in the case of **Sansora of Wire and Mallworks Ltd vs= Shreeji Enterprises Kenya Ltd [2005] 2 KLR 12**, where Ochieng J held inter alia:-

“That the court has a discretion to order for the payment of interest on the decretal amount at such rate as it deems reasonable, whether from a date before the institution of the suit, the date of the suit or from the date of the decree. The interest may be directed to be payable either to the day of payment or until such earlier date as the court thinks fit.

The court draws inspiration from the case of **Richard Kamiri Gachwe Kahia** the administrator of the estate of the late **Mrs. Rahab Waithera Kahia -VS- Edward Kamau Nganga, Nairobi CA 16 of 2001** decided by the court of appeal on the 19th day of March 2004. A perusal of the same reveals that the respondent who was the plaintiff in the superior court did not plead to be awarded interest at the rate of 25%. Neither did him or any party give testimony with regard to that, but the superior court none the less awarded interest at that rate without assigning reasons. On appeal, at page 13 of the judgment line 10 from the top there is observation that:-

“We were told by Mr. Ikua that the learned judge was right in awarding interest rate at 25% because that was within his discretion. But nowhere in the plaint did the plaintiff / respondent herein plead that rate of interest.....” At page 13 quoted with approval own decision in the case of **Kenya Commercial Bank Ltd –VS- Mwanzau Mbauka & Another, Civil Appeal 274 of 1997 (UR)** whose central theme was that a trial court can only frame issues for determination from the general facts pleaded. Then went on at line 13 from the top on page 14 to state thus:-

“We would express ourselves in similar ways as regards that 25% of interest ordered by the learned judge, since the plaintiff neither pleaded 25% interest rate nor led evidence to prove it. We are therefore satisfied that the appellant must succeed on this ground.....”

The appellant has succeeded on the last ground of appeal, and hence the order on interest at the rate of 25% is set aside and substituted thereof with an order of interest at court rates which shall be 12% on the principal amount and 14% on costs of the suit”.

Applying that reasoning to the facts herein, it is clear that the plaintiff/respondent herein in the lower court pleaded for an order for interest and was rightly awarded the same upon him being declared the successful party. The award was within the applicable principle as shown in the assessment. Issue as raised about the learned trial magistrate dismissing the claim for loss protects and yet went ahead to hold that the Respondent / Plaintiff will be dishonoured against this loss by an award of interest which should not have been the case. Indeed the learned trial magistrate made these remarks but a scrutiny of the findings reveal that the award of interest held up to the amount ordered to be refunded of Kshs. 221,900.00.

For the reason given in the assessment, the appellants appeal stands faulted and the same is dismissed with costs to the Respondent /Plaintiff for the following reasons:-

- (i) The appellant / defendant having conceded existence of the agreement of 16/5/2002 vide which the amount owed to him was to be liquidated by deductions from proceeds of supply of fish to appellant /defendant by the Respondent / Plaintiff, the right to withhold the balance of proceeds payable to the Respondent / Plaintiff could only arise after the appellant / defendant had expressly indicated that he had either repudiated or rescinded the contract of 16th May 2002 making the balance due to him payable.
- (ii) It is this failure to rescind or repudate the agreement which contributed immensely in the learned trial magistrate’s holding that the withholding of the Kshs. 221,900.00 due to the Respondent / Plaintiff was unlawful and therefore a proper candidate for a refund.
- (iii) Despite making a pronouncement that the appellant / defendant do specifically perform the contract the finding by the learned trial magistrate that the unilateral withholding of the said sum of Kshs. 221,900.00 was unlawful, and unjustified and that it should be paid over this amounts to an order for specific performance with the act specifically performed being the refund of the amount withheld .

- (iv) The court agrees that indeed the issue of other security for the loan advanced namely issue of log book and return of the motor vehicle, as a basis for the withholding of the money was indeed extraneous but that notwithstanding this court is of the view that even if this piece of evidence is discounted, there is a balance of sound evidence to support the learned trial magistrate findings.
- (v) The amount for set off formed a special claim which should have been specifically pleaded.
- (vi) Set off could further arise only after the appellant / defendant could have pleaded repudiation and rescinding of the agreement of 16th May 2002, and demanding the outstanding which was not done.
- (vii) The appellant / defendant not having rescinded the contract outside the pleadings, not have pleaded that the contract be deemed to have been rescinded or repudiated, and not having pleaded an auxiliary relief of “**such other and further relief as the court may deem fit to grant**”, there is no way he could have been declared the victorious party. His claim was rightly declined.
- (viii) The court is in agreement that the learned trial magistrate should have made a pronouncement on the said counter claim. Failure to do so does not preclude this court from pronouncing the dismissal of the counter claim under Section 78 (2) of the Civil Procedure Act and it is so dismissed with costs to the Respondent / Plaintiff but adds failure to so pronounce has not prejudiced the appellant in any way.
- (ix) Having ordered a refund of Kshs. 221,900.00 to be paid back to the Respondent / Plaintiff and having faulted the appellants’ counter claim, the victorious party in the litigation is the Respondent / Plaintiff and was entitled to an order for an award of costs and was rightfully awarded costs.
- (x) The learned trial magistrate was not obligated to give reasons for the award of costs on the plaint because costs followed the event and reasons only arise if these were being withheld from the successful party.
- (xi) The order of interest being ordered to run from the date of filing of the suit was both within the principles of law as well of case law on the subject and the same is proper.
- (xii) Although the learned trial magistrate erroneously mentioned, that the award of interest would cushion the Respondent / Plaintiff for the loss of business, a scrutiny of the findings reveal that the award of interest was tied to the refund of the Kshs. 221,900.00 only and not anything else. The allegations of the learned trial magistrate on the interest in balancing the cost of business can be ignored without prejudice to the balance of the findings.

Dated, signed and delivered at Kisumu this 14th day of July 2011.

R. N. NAMBUYE

JUDGE

RNN/aao