



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 318 OF 2007

**AFRICAN ECONOMIC RESEARCH CONSORTIUM.....
APPELLANT/ORIGINAL PLAINTIFF**

VERSUS

**MURJI SHAMJI NATHAN.....RESPONDENT/
ORIGINAL RESPONDENT**

(Being an appeal from the Ruling of the Resident Magistrate Courts at Milimani Commercial Courts delivered by D. Toigat Esq in CMCC No. 10988 of 2001 delivered on 26th April 2007)

J U D G M E N T

I. BACKGROUND

1. On 25th January 2007, judgment in the subordinate court was delivered concerning a running down matter that involved a collision between two motor vehicles. A claim of Ksh. 198,669/= was put in by the original plaintiffs as costs of repairs to be incurred. The trial magistrate gave the following award:

I Liability

100% against the defendant

II Quantum

Costs of repairs proved:

Ksh. 198,026/10 plus costs of suit

2. A decree was drawn. It was then that the original plaintiff discovered that the trial magistrate awarded no interest. This prompted them to file an application dated 5th April 2007 seeking orders of review of that said judgment under Order XL10 r 1, Order L r1 Civil Procedure Rules, Section 3A, Section 2691) of the Civil Procedure Act.

II APPLICATION 5TH APRIL 2007 BEFORE THE SUBORDINATE COURT

3. When the matter came before the trial magistrate, the advocate for the appellant was absent. The advocate for the respondent/original defendant was present. He argued that interest should run from the date of judgment. The Hon magistrate gave orders that interest to run from the date of judgment. Later when the advocate for the appellant appeared in the absence of the respondent, he was notified of the ruling of court dated 26th April 2007.

4. The appellant filed appeal to this High Court.

II APPEAL

5. The ground of appeal being:

5.1 That the learned trial magistrate erred in law when she held that interest on the liquidated claim was to run from the date of judgment till payment in full.

5.2 That the learned magistrate erred in law and in fact in failing to appreciate that the plaintiff's claim was for special damages which attracted interest from the date of filing suit till payment in full.

5.3 That the trial magistrate erred in law when she failed to award interest from the date of filing suit till payment in full without giving any reasons for the same.

6. The appellant/original plaintiff argued that Section 26(1) of the

Civil Procedure Act provides that interest run from the date of filing suit. This section states:

“Where 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 either earlier date, the court shall be deemed to have ordered interest at 6% per annum.”

7. In relying on the case law of

Mount Kenya Safari Club – Vs – Donald Jenkins

Court of Appeal at Nairobi

CA 192/94

G.S. Pall JA.

8. The issue arose as to how to settle the award made. G.S Pall JA (as he then was) had been assigned the task of settling the order. The main High Court suit awarded damages in TORT for an accident case. The respondent had been awarded the damages in US Dollars. The question arose as to when should the USA Dollars be converted and when should the interest begin to run.

9. Whereas, the Hon. Judge ruled that the conversion from dollars to Kenya Shillings would be from the date of judgment as specifically ordered by the trial judge, the interest on general damages should run from the date of judgment. The interest on special damages was awarded from the date of filing suit at the normal rate of 12% per annum. The Hon. Judge in arriving at this findings relied on the

Section 26(1) of the Civil Procedure Act Cap 21 Laws of Kenya.

10. To illustrate that, in awarding a liquidated claim of special damages, that the courts have always awarded interest from the date of filing suit, the appellant relied on the following cases:

10.1 Ali Abdalla Mbarak – Vs – Jagdish Udan

Mombasa HCCC 3/2002

Maraga Ag J

“Interest on special damages shall, as usual, run from the date of filing suit and on general damages from the date of judgment”

(27th July 2004)

10.2 Sanah Navisoi Muciiri – Vs – John Thomas Kamau

Nairobi HCCC 825/85

Mbaluto J

“..... there will be judgment for the plaintiff for Ksh. 800/= being the consent of special damages claimed. This sum will carry interest at court’s dates from the date of filing suit. There will also be judgment for the plaintiff for the sum of Ksh. 440,000/= being the total award in respect of general damages to carry interest from to day.”

(4th June 1986)

10.3 Rose Wambui Kibui & Another

– Vs –

Benjamin Maina & 2 Others

Nairobi HCCC 1720/95

Ang’awa J

“ cost of this suit and interest on geneal damages from the date of this judgment. Interest on special damages from the date of filing suit.”

14th June 1999.

10.4 Zadock Kasembeli – Vs – Albert Thande

Nairobi HCCC 2872/96

Ang’awa J

“..... interest on special damages from the date of filing suit. .. interest on general damages from the date of this judgment.....”

(26th July 2001)

11. The appellant original plaintiff prayed that the appeal be allowed and the orders of the trial magistrate on the issue of interest be set aside and to read interest from the date of filing suit.

12. The respondent/original defendant also relying on Section 26(1) of the Civil Procedure Rules, more particularly to the clause that states:-

“where as 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” (Emphasis supplied.)

13. The key word is “may”. It is at the discretion of the court to award the interest rates from the date of judgment. The trial magistrate was correct in its findings that interest on the special damages be from the date of judgment.

14. The appellant failed to attend court when the orders were made. They should have first filed an application to set ex-parte orders before making an appeal to this court.

15. In trying to declare this appeal incompetent, the respondent attention was brought to Order 42 r 13(2) Civil Procedure Rules on the jurisdiction of this court being admitted by the respondent.

III OPINION

16. On the issue of procedure, this court is of the opinion that orders by the Hon. Magistrate were issued exparte and in the presence of the respondent. The appellant was at liberty to request for those orders to be set aside and parties be heard interparte. Order IX b

Civil Procedure Rules (now order 12 Civil Procedure Rules)

17. The appellant/original plaintiff opted to appeal, to which the respondent conceded to this court’s jurisdiction to hear this appeal.

18. The arguments put forward by the respondent that the words “may” is at the discretion of the court, it must be pointed out that the words “may” refer to the court’s discretion in awarding the rates of interest. This would normally be 12%, 14% or 6% depending on the circumstances of the discretion being exercised.

19. Section 26(1) of the Civil Procedure Act speaks of the decree being ordered to have interest paid from the date of the suit to the date of the decree.

20. As explained by G.S. Pall JA:

“A claim for special damages is of court for payment of money. It is the loss which the plaintiff claims he has already incurred at the date of the suit. Thus when the superior court said “the plaintiff was entitled to interest, it meant that interest on special damages shall be from the date of the suit.”

21. This court is guided and bound by the above decision of the court of Appeal that has interpreted Section 26(1) of the Civil Procedure Act in its findings.

22. I would accordingly hold that this appeal be allowed. The orders of the trial magistrate be set aside on the issue of interest.

23. This court, on appeal orders that interest on special damages awarded by the subordinate court be from the date of filing suit.

24. Costs of the appeal to the appellant.

DATED THIS 6TH DAY OF SEPTEMBER 2011 AT NAIROBI

M.A. ANG’AWA
JUDGE

