



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)

CIVIL SUIT 46 OF 2008

REGINA NYIHA)

GEOFFREY M. LANGAT)(Both suing as the Administrator

of the estate of the late DAVID KIPTOO LANGAT.....PLAINTIFFS

VERSUS

AKAMBA PUBLIC ROAD SERVICES.....1ST DEFENDANT

RAYMOND NYAGWOKA BARASA.....2ND DEFENDANT

JUDGMENT

1. The application before me is the Plaintiffs' Notice of Motion dated 19/01/2009 by which they seek an order for summary judgment against the Defendants in the sum of Kshs.729,180/00 together with interest thereon from 23/04/2004 at 9% per annum till payment in full, plus interest at court rates from the date of the filing of this suit until payment in full. The Plaintiff also prays that the 1st Defendant do bear the costs of this suit. The application is premised on eight (8) grounds appearing on the face thereof, that is to say that:-

- a) ***The 1st Defendant was the deceased's employer.***
- b) ***The deceased's entitlement under the Workmen Compensation Act (repealed) was assessed at Kshs.729,180.00***
- c) ***The said amount is by law payable.***
- d) ***The 1st defendant truly owes the money.***
- e) ***The 1st Defendant has no Defence against the claim for the workmen compensation dues.***
- f) ***There is nothing to go to full trial vis-à-vis the workmen compensation. (sic)***

g) No useful purpose will be served in going to full trial.

h) It is fair just and expedient that this application be allowed.

2. The application is also supported by the sworn affidavit of **Regina Nyiha** dated 19/01/2009, in which she says that she is willing to compromise the common law claim in preference to the Workmen Compensation assessment, on the ground that the amount of damages under the Workmen's Compensation Act are likely to exceed the common law award. She also says that the liability of the 1st Defendant to pay damages under the Workmens Compensation Act (now repealed) has not been disputed and it is absolute.

3. The principal claim for Kshs.729,180/00 is admitted by the Defendants. The only issue that is due for determination is on interest and costs of the suit. The parties put in their written submissions on this point. The Plaintiff submits as follows:-

On Interest

4. Says she is entitled to interest by virtue of S. 26 of the Civil Procedure Act. She relies on **Highway Furniture Mart Limited –vs- Permanent Secretary, Office of the President and the Attorney General – Civil Appeal No. 52 of 2005** and argues that interest is claimable as a matter of right as long as a monetary award is made in favour of the Plaintiffs.

5. In the **Highway Furniture Mart** case (above) the Appellant pleaded that it was entitled to interest at 36% p.a for some period prior to the filing of the suit. Their lordships held that the rate of interest must not only be pleaded, but that it must be proved and particularly when the interest claimed relates to a period prior to the filing of the suit. Their lordships also made certain other specific observations which I think are relevant to the case before me.

6. Regarding the purpose of interest, their lordships reiterated the age old principle that payment of interest is meant to compensate a Plaintiff for the deprivation of any money or specific goods through the wrong act of the Defendant. The court quoted from **Later –vs- Mbiyu [1965] EA 592** where the East African Court of Appeal at page 593 paragraph E thereof said as follows:-

“In both cases the successful party was deprived of the use of the 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 by the use of the goods or money to which he is entitled should be compensated for such deprivation by the award of interest.” (Also see **Lwanga –vs- Centenary Rural Development Bank [1999] 1 EA 175**).

Their lordships also stated that the rate of interest cannot be implied from the judgment. Such rate of interest must be proved, especially when the claim is for payment of interest before the institution of the suit.

7. The Plaintiff in this case argues that she is entitled to payment of interest by virtue of Section 26 of the Civil Procedure Act. Section 26(1) of the Civil Procedure Act which is relevant for purposes of the issues before me provides as follows:-

“26 (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 to adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

Their lordships in the **Highway Furniture Mart** case (above) referred to **New Tyres Enterprises Ltd. – vs- Kenya Achand Insurance Company Ltd. [1988] KLR 300** in which the issue of payment of interest

prior to filing of suit was in contest. The court therein held that the award of interest for any period prior to the filing of the suit is a matter of substantive law and that Section 26(1) of Civil Procedure Act (above) does not refer to payment of interest accrued prior to the institution of the suit. The court said that such interest is payable in the following circumstances:-

§ where under an agreement there is a stipulation for the rate of interest (contractual rate of interest) or

§ where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or

§ where there is statutory right to interest or

§ where an agreement to pay interest can be implied from the course of dealing between parties.

8. On the basis of the above principles, their lordships found and held in the **Highway Furniture Mart** case (above) that the Appellant did not prove before the trial court that interest before the institution of the suit was awardable in law in the circumstances of the case and therefore that the claim for interest at 36% for the period prior to the institution of the suit was not maintainable in law. The Plaintiffs herein contend that they have both pleaded and proved their case.

On Costs of the Suit

9. The Plaintiff contends that these are payable to her by virtue of Section 27 of the Civil Procedure Act which reads as follows:-

“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 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 percent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

10. The Plaintiff contends that the reasons advanced by the 1st Defendant in the Replying Affidavit of **Hellen Omiti Machora** are not convincing, especially when it is clear from the Plaintiff's standpoint that it is the 1st Defendant who failed to comply with the District Labour Officers letter of 23/04/2004 requiring the 1st Defendant to pay the assessed amount before the suit was filed. The Plaintiff argues further that the 1st Defendant has not denied receiving the letter under reference, and that the Plaintiff only filed suit when it became abundantly clear that the 1st Defendant was not paying the assessed amount and that it was now just 3 days before the expiry of the limitation period. The Plaintiff also contends that if the 1st Defendant had paid the money, even into court then the provisions of Order XXIV Rule 6 would have come into play and costs and interest would not have become payable.

11. It is also the contention of the Plaintiff that if the 1st Defendant had been serious about settling the assessed amount, it should have paid the amount even before the hearing of the instant application but that having failed to do so, the 1st Defendant should now pay the full costs of the suit. The Plaintiff finally says that the 2nd Defendant has not filed any Replying papers to show that it is entitled to costs.

12. The 1st Defendant has contested the claim both for interest and for costs of the suit.

On Interest

The 1st Defendant argues that Section 26 of the Civil Procedure Act envisages payment of interest in a situation where there is a decree. The 1st Defendant argues that there is no decree in this case and that interest can only accrue when this Honourable Court issues an order for payment and not otherwise. The 1st Defendant alleges that the Plaintiff rushed to court to claim under common law when the same was not necessary in the first place and that the Defendant should not be condemned for the Plaintiff's mistake. The Plaintiff has said that she only came to court as a last resort when it became abundantly clear to her that the 1st Defendant was not about to settle the assessed amount and when it was also clear to her that she was running out of time. From the records, the cause of action herein arose on 24/12/2003 and suit was not instituted until 20/12/2006 by way of a plaint dated 19/12/2006.

13. It would appear from the records too, that by a letter dated 23/04/2004 (just some months after the accident had occurred) the Ministry of Labour and Human Resource Development wrote to the 1st Defendant informing the 1st Defendant that workmen compensation in respect of 100% liability under the Workmens Compensation Act (since repealed) was Kshs.729,180/= and that if the parties agreed, they could sign forms LD 110 for approval by the District Labour Officer, Kiambu. The Plaintiff Applicant says that the amount assessed by the Ministry of Labour attracts interest at the rate of 9% from the date of assessment and further interest thereon pursuant to Section 26 of the Civil Procedure Act.

14. In their farther arguments, learned counsel for the 1st Defendant contend that the **Highway Furniture Mart** case (above) is not applicable since the issues therein, namely an application for review, are not the same as those in the instant application. I hasten to add that the position taken by the Defendant's counsel is not completely correct because their lordships delved into issues of interest payable and in what circumstances and also considered the issue of costs.

On Costs

15. The 1st Defendant says that though costs follow the event; this honourable court has the discretion not to award the same or order each party to bear their own costs. The 1st Defendant argues that it could not pay the amount assessed under the Workmen's Compensation Act because the Plaintiff rushed to court. I think I have already set out facts hereinabove to show that the Plaintiff did not rush to court; that she came to court as a last resort on realizing that the 1st Defendant was not about to pay the assessed amount under the Workmen's Compensation Act and that the time for filing suit was also running out on her.

16. The 1st Defendant also says that in view of the fact that the Plaintiff has now conceded to being paid the Workmen's Compensation amount, the court should consider the provisions of Section 27 of the Civil Procedure Act as read together with Order XXIV Rules 3 and 4 of the Civil Procedure Rules. The 1st Defendant says that since the Defendants are entitled to costs in the abandoned claim, each party should be made to bear their own costs or alternatively find that the Plaintiff is not entitled to any costs as held in **Devran Manji Daltani –vs- Singh Chadah (1949) 16 Eala 35 & Scop –vs Jackline A Nyawada & Others – Kisumu HCCCA No. 167 and 165 (2003) Tanui J – 11/11/2003.**

17. Finally, learned counsel for the 1st Defendant has argued that the 1st Plaintiff has no audience before me because she has not sworn a Verifying Affidavit as to the correctness of the plaint. From the records before me, I do not think that this contention by the 1st Defendant is valid. There is a Verifying Affidavit on record dated 19/12/2006 sworn by **Regina Nyiha**, the 1st Plaintiff herein. It is filed in court on 20/12/2006. There is also the Verifying Affidavit sworn on 19/12/2006 by **Geoffrey Muriithi Langat**, and filed in court on 20/12/2006. In my view therefore, the question of the 1st Plaintiff giving her consent to the 2nd Plaintiff does not arise as she herself is in the matter. The fact that the suit was transferred from Eldoret Court to Nairobi does not place any extra burden on the 1st Plaintiff to swear a new or fresh Verifying Affidavit.

18. I have now considered the facts of the case. I have also considered the submissions made by both counsel on the issues at stake. I have also considered the law as cited to me by both counsel. On the basis of the above, I am satisfied that the Plaintiff/Applicant is entitled to both interest and costs of the suit. In my view, the interest payable to the Plaintiff shall be 14% p.a with effect from the date of this order until payment in full. The Plaintiff has not shown that the claims for 9% interest was either pleaded or proved.

19. As to costs, it is my considered view that the Plaintiff is entitled to the same. If the 1st Defendant had paid the assessed amount as early as April, 2004 or at least before the instant application came up for hearing, I would have agreed with learned counsel for the 1st Defendant that the Plaintiff would not be entitled to costs. In the instant case, the Plaintiff had to move to court otherwise she would have been locked out on her claim. I also find and hold that the Plaintiff's claim to compromise her claim under common law should not be used against her.

20. In the result, I enter judgment for the Plaintiff's as against the 1st Defendant in the sum of Kshs.729,180.00 together with interest thereon at the rate of 14% p.a. from the date of this judgment, until payment in full. The Plaintiff shall also have the costs of the suit to be borne and paid by the 1st Defendant.

It is so ordered.

Dated and delivered at Nairobi this 15th day of May 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... for the Plaintiffs

.....for the Defendants

Court clerk –