



**Gulamhussein t/a Hussein Service Station v Konza Merchants Limited & 2 others
(Civil Appeal 228 of 2017) [2024] KEHC 16974 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 16974 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 228 OF 2017
F WANGARI, J
FEBRUARY 16, 2024**

BETWEEN

**GULAMHUSSEIN F GULAMHUSSEIN T/A HUSSEIN SERVICE
STATION APPELLANT**

AND

KONZA MERCHANTS LIMITED 1ST RESPONDENT

STELLA ANNE MUSYOKI 2ND RESPONDENT

REUBEN MUSYOKI MULI 3RD RESPONDENT

(Appeal arises from the Judgement and Decree of Trial Court delivered on 28th September 2017 by Hon. A.S. Leesotia, Senior Resident Magistrate in Mombasa CMCC No. 1562 of 2008.)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 28th September 2017 by Hon. A.S. Leesotia, Senior Resident Magistrate in Mombasa CMCC No. 1562 of 2008.
2. The Trial Court dismissed the Appellant's prayer for 2.5% interest on the accrued sum, which was a credit facility advanced to the Respondent. The Appeal is only on the dismissal of the prayer for interest. It is thus a partial appeal on the Judgment of the Trial Court.
3. In the Memorandum of Appeal dated 24th October 2017 and amended on 16th March 2023, the Appellant pleads that Trial Court erred in not finding that the Respondent was liable to pay a further 12% to all overdue accounts from the date of filing the suit until payment in full.



Pleadings

4. The Appellant filed the suit vide the Complaint dated 8th July 2008 and Amended on 4th June 2015, the Appellant sought interest at court rates and bank charges on dishonored cheque. During trial, the Appellant produced a form dated 14th July 2005 executed by the parties as contract.

The Respondents case

5. The Respondents entered appearance and filed Defence dated 19th September 2008 and amended on 30/10/2025 denying the averments in the Complaint.

Submissions

6. The Appellant filed submissions dated 17th March 2023. It was the submission of the Appellant that parties agreed that the facility was to be payable with 2.5% interest and so constituted the term of contract. They relied on the case of Mamta Peeush Mahajan v Tashwant Kumar Mahajan (2017) eKLR.
7. On the claimed interest rate of 12%, counsel submitted that the same was awardable under Section 26(1) of the Civil Procedure Act and the Trial Court erred in not awarding it. This court was urged to allow the Appeal.
8. Directions were issued that the parties do file submissions. I have not had sight of the Respondent's submissions.

Analysis

9. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue that fall for this Court's determination is whether the Trial Court erred in law and fact in dismissing the Appellant's case on interest at the rate of 2.5%.
10. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
11. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

12. I have perused the Record of Appeal and note that the issue of interest rate of 2.5% was not pleaded in the Amended Complaint. Parties are bound by their pleadings.



13. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

14. Therefore, the Appellant has made attempt to depart from the pleadings. The Pleadings did not claim interest of 2.5%. Even if the Trial Court made a determination on 2.5% interest, this does not make it a pleaded matter. The fact remains that interest of 2.5% was not pleaded and as parties are bound by their pleadings, the same was not available to the Appellant.

15. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as follows when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....



In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

16. Whereas I agree with the submission of the Appellant that the Trial Court was not entitled to dismiss the claim on interest of 2.5% on the reasoning that it was not available to the Appellant who was not a financial institution, I do not agree that the Appellant was entitled to the interest. I say so because if the interest rate had been pleaded, the court would have been in a position to determine whether the interest rate of 2.5% per month on overdue accounts was excess as to be unconscionable.
17. If the rate would be found reasonable, then the court would allow it. But this was not a matter before the court as even the Respondents had not anticipated it due to its absence from the pleadings. As such, they did not prepare any defense in that regard.
18. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu & INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as follows;

“In *Belgore Versus Ahmed*(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -

“Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.
19. Further, the interest rate of 2.5% being sought in my view would fall under the category of a commercial rate interest. I find no basis for the Appeal on this ground. Interest at commercial rates has to be proved. It should also arise from the Pleadings. In the case of *Intraspeed Logistics Ltd & 15 others v Commissioner of Police & another* [2018] eKLR, the court stated as follows:

“...The plaintiffs are entitled to interest but in the absence of proof of commercial rates they are only entitled to interest at court rates.”
20. I have also perused the Memorandum of Appeal and note that the Appellant pleads that Trial Court erred in not finding that the Respondent was liable to pay a further 12% to all overdue accounts from the date of filing the suit until payment in full. I understand this to be interest at court rates because in the submission, the Appellant relies on Section 26 of the *Civil Procedure Act*.
21. It is also settled that simple interest on liquidated damages should commence from the date of filing the suit. In the celebrated *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1970) EA 469 the court stated as follows:

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.”



22. Therefore, whereas the Appellant submitted that the Appellant proved that 2.5% interest was applicable, I still hold the view that as the same was not pleaded in the Plaintiff hence it was not available. A party cannot be allowed to travel beyond its pleadings. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

23. Therefore, the Appellant was entitled to simple interest and not interest at commercial rates. I note that Trial Court awarded interest at Court rates from the date of judgement. This was in error. Interest on liquidated damages accrue from the date of filing the suit, not the date of Judgement. I do interfere with the Judgment to this extent. In Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR, the court stated as follows:

32. I have come to the conclusion that the Learned Trial erred by not advertent her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts’ repeated application of Section 26 of the Civil Procedure Act. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

24. The Trial Court committed a reversible error of fact in awarding interest a liquidated sum from the date of Judgement. That is the only extend to which this court makes a variation on the Judgment of the Trial Court, the rest of the Appeal is without merit. The Appeal otherwise lacks merit.

Determination

25. In the upshot, I make the following orders:
- i. The Appeal is devoid of merit and is dismissed.
 - ii. For the avoidance of doubt, interest on the award by the Trial Court will accrue from the date of filing the Amended Plaintiff.
 - iii. The Respondents shall have the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

Watama Advocate h/b for Atancha Advocate for the Appellant

N/A for the Respondent

M/S Salwa, Court Assistant

