



Mugacha t/a Galaxy Auctioneers v Songa & 2 others (Sued as administrators of the Estate of Dan Oyallo Songa (Deceased)) (Appeal E016 of 2021) [2024] KEHC 1193 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL E016 OF 2021
FG MUGAMBI, J
FEBRUARY 9, 2024**

BETWEEN

ST MUGACHA T/A GALAXY AUCTIONEERS APPELLANT

AND

VIOLET MERAB SONGA 1ST RESPONDENT

EUGENE HARRY SONGA 2ND RESPONDENT

EUNICE JEANETTE SONGA 3RD RESPONDENT

**SUED AS ADMINISTRATORS OF THE ESTATE OF DAN OYALLO SONGA
(DECEASED)**

(Being an appeal from the ruling of Hon. P. Muholi (PM) delivered on 24/2/2021 at the Principal Magistrate's Court at Nairobi Milimani Commercial Courts Civil Suit Number 6626 of 2014)

RULING

Brief background

1. The appellant's bill of costs was taxed on 14th October 2014 and a Certificate of Taxation issued on 27th October 2014 for the sum Kshs.1,375,862/=. On 5th November 2014 the appellant filed suit against the respondents seeking entry of judgment on the taxed costs. Eventually, the respondents consented to the entry of judgment on the taxed sum but contested costs and interest.
2. By a ruling dated 24th February 2021, the Learned Magistrate awarded the appellant interest at court rates from the date of judgment and costs of the suit at 50%.



3. Dissatisfied with that decision, the appellant filed the present appeal on the basis that interest ought to be levied from either the date of the bill of costs, date when costs were assessed or the date of filing suit on the taxed sum and the full costs of the suit. The Memorandum of Appeal dated 25th February 2021 specifically points out the following grounds of appeal:
 - i. The learned magistrate erred in law and in fact by holding that the respondent had shown good will in starting to pay the decretal amount before his decision which is not a legal consideration and by so doing failed to appreciate that the respondent only agreed to settle the taxed costs after they lost their final appeal at the Court of Appeal thus took 6 years before settling the taxed costs.
 - ii. The learned magistrate misdirected himself in law and in fact by awarding interest to the Appellant from the date of judgment i.e 24/2/2021 as opposed to 30/7/2013 being the date the auctioneer first tendered his bill of costs or in the alternative 6/11/2014 being the date the auctioneer filed his suit seeking entry of judgment on his already ascertained, assessed and taxed costs.
 - iii. The learned magistrate erred in law and in fact by failing to consider that since the auctioneer costs had already been ascertained, assessed and taxed, what was before him was a liquidated claim and as such interest should have been awarded from, the date of filing the suit as envisaged by section 26(1) *Civil Procedure Act*.
 - iv. The learned magistrate erred in law and in fact by holding that the Appellant was only entitled to 50% of the costs as opposed to 100% costs notwithstanding the Appellant fully succeeded in his claim.
 - v. That the learned magistrate erred in law and in fact by wrongly applying the well-founded principles of law on assessment of costs and interest.

Analysis

4. The appeal was canvassed by way of written submissions by the appellant dated 5th August 2022 while the respondent filed opposing submissions dated 25th January 2023. The Court has analysed and considered the same and in doing so, I am guided by the principles espoused in the established case of *Mbogo & Another v Shah* [1968] EA, p.15 that:

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
5. The five grounds of appeal can be consolidated to the following issues for determination:
 - i. Issue 1: Whether the learned magistrate misdirected himself both in fact and law in failing to award the appellant interest from either the date of the bill of costs, the date when costs were assessed or the date of filing this suit on the taxed sum.
 - ii. Issue 2: Whether the learned magistrate erred in fact and in law in failing to award the full costs of the suit.



Issue 1: On interest awarded

6. Vide a ruling dated 24th January 2021 the learned magistrate found that the appellant was entitled to interest at court rates from the date of judgment.
7. The appellant, relying on the provisions of section 26 of the *Civil Procedure Act*, submitted that the aforementioned ruling ought to be set aside and replaced with an order awarding interest from either the date the appellant filed the bill of costs being 30th July 2013, or when the bill of costs was taxed on 27th October 2014 or from 6th November 2014 when the appellant filed his suit before the trial court.
8. They have cited several decisions including Nairobi High Court Civil Appeal No. E039 of 2020, *Julius Ingosi Taliani v Ngisa Ronald Morara T/A Morara Ngisa & Co Advocates*, [2021] eKLR and *Galaxy Paints Co. Ltd v Falcon Grounds Ltd*, [2000] 2 EA 385 in support of their case.
9. Conversely, the respondent submitted that the appellant did not produce any evidence to prove his claim of interest at the rate claimed or that any interest was due for that matter. The respondents also agreed with the appellant that in the absence of any substantive provision or contractual agreement on the question of interest, the court was within its right to determine the interest payable, by dint of section 26 of the *Civil Procedure Act*.
10. My reading of section 26 is that it is a very broad provision which vests a wide discretion upon the Court when determining the issue of interest awardable in a money decree. It states as follows:

“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.”
11. Judicial pronouncements point out to principles that the Court ought to consider in determining an award of interest. In *Prem Lata v Peter Musa Mbiyu*, [1965] EA 592, the Court of Appeal held that:

“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.”
12. The same principle was applied in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited (No. 2)*, [1970] EA 469 at 475, where the Court summarized the position in the following holding:

“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.”(emphasis mine).
13. According to the plaint which is dated 5th November 2014, the appellant confirms at paragraphs 4 and 5 that following an order of this Court on 19th July 2013, the respondents were liable to pay costs to the appellant, which were assessed at Kshs. 1,375,862/= on 14th October 2014. The appellant consequently



prayed for judgment for the above amount together with costs, totalling to Kshs. 1,376,037/= with interest at court rates from 30th July 2013 when the plaintiff first tendered his bill of costs for taxation against the respondents.

14. The Learned Magistrate acknowledged that the appellant herein presented its bill of costs for taxation and the bill was taxed at Kshs. 1,376,037/=. That the respondents failed to settle the amount, forcing the appellant to sue so as to enforce the bill.
15. The Learned Magistrate correctly noted that the appellant had not prayed for interest from the date of the ruling in the taxation matter. The converse is also true that they did not pray for interest from the date of judgment either, which the learned magistrate awarded nonetheless, on account of his discretion under section 26 of the *Civil Procedure Act*. This is despite noting that ‘it would have made sense if he had asked for interest from the date of the ruling in the taxation matter but that is not what they asked for in the plaint and parties are bound by their pleadings’.
16. I am cognizant of the observation expressed in *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 Others*, [2018] eKLR, that ‘an appellate Court is, therefore, enjoined to treat the original decision by a trial Court with utmost respect and should refrain from interference with it unless it is satisfied that the Lower Court proceeded upon some erroneous principle or was plainly and obviously wrong’.
17. This notwithstanding, I find that the learned trial magistrate failed to address his mind to the fact that this was a liquidated claim which was ascertainable and that the appellant had been deprived of the use of the said amount of money due to the actions of the respondent. Had the trial magistrate done so, I believe that he would have reached the conclusion that the appellant was entitled to an award of interest at court rates from the date when the appellant’s bill of costs was taxed, being 14th October 2014, as this is when the Court gave an assessment of the amount that was due to the appellant, until payment in full.

Issue 2: On costs of the suit

18. The learned magistrate awarded costs at 50%. In doing so the Court stated as follows:

“I have weighed the above principles and the circumstances of the case and the overall discretion of the court. I am of the view that the applicant has been in court litigating and is therefore entitled to costs. I however note that the applicant has consented to the entry of judgment. They have also shown good will by commencing payments. They have also shown willingness to pay the balance. Consequently, I will depart from the norm that costs follow the event and direct that the applicant shall be entitled to 50% of the costs to be assessed by the taxing master.”
19. The appellant submitted that no good reason was shown as to why the magistrate departed from the general rule to award the successful party full costs and that the respondent had litigated until they exhausted all their appeals and only accepted to pay the decretal amount when they had no other choice. On the other hand, the respondent submitted that the court had the discretion to award costs in the suit and that it had duly considered the conduct of the parties.
20. In the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 Others*, [2013] eKLR, it was held:

“It is clear from the authorities that the fundamental principle underlying the award of costs is twofold. In the first place, the award of costs is a matter in which the trial judge is given discretion...But this is a judicial discretion and must be exercised upon grounds on which a



reasonable man could come to the conclusion arrived at. In the second place, the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

21. I concur with the finding above. The general rule is that costs should be awarded to the successful party and this rule is not departed from except under good reasons to do so. The rule is not meant to penalise the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the case.
22. Under section 27 of the Civil Procedure Act, the court has the discretion to award costs and give conditions as to its payment. In this case the lower court reasoned that appellant was entitled to 50% of the cost of the suit as the respondent had consented to the entry of judgment and shown good will by commencing payments and was willing to pay the balance.
23. In my view the lower court’s considerations are reasonable in deciding the costs payable in the suit as it appreciated the conduct of the parties during the pendency of the suit. The respondent consented to the entry of the judgment in the suit and willingly paid the sums of money as ordered and this had the effect of reducing the time and costs expended by the appellant in prosecuting the suit. I find therefore that the learned magistrate exercised his discretion judiciously in granting 50% of the costs to the appellant and there is no reason to interfere with that decision.

Determination

24. In the end, the appeal is partially successful. The decision of the lower court on interest is set aside. The appellant is awarded interest at court rates applicable at the time, from the date when the appellant’s bill of costs was taxed, that is 27th October 2014 until payment in full. I do however find that the learned magistrate did not err in awarding the appellant 50% costs of the suit. Bearing in mind that this appeal succeeds only in part, each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9TH DAY OF FEBRUARY 2024.

F. MUGAMBI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

