



REPUBLIC OF KENYA



**Kivuu v Muthiani (Civil Appeal E041 of 2021)
[2024] KEHC 2209 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E041 OF 2021**

**RK LIMO, J
MARCH 5, 2024**

BETWEEN

ALFRED KYALO KIVUU APPELLANT

AND

MUENI JOHN MUTHIANI RESPONDENT

JUDGMENT

1. This is an Appeal that arose from a ruling delivered in Kitui Chief Magistrates Court Civil Case No. 282 of 2008 by Hon. Senior Principal Magistrate Margaret Kasera on July 29, 2021.
2. In that case, the appellant had been sued by the Respondent because of a road traffic accident that had occurred on April 17, 2008 involving Motor Vehicle Registration No. KAT xxxx belonging to the appellant and in which the Respondent was travelling as a fare-paying passenger.
3. The Respondent's suit against the appellant was based on tort of negligence which he attributed to the appellant, his driver/or agent while managing the cited motor vehicle.
4. The trial court upon trial found in favour of the Respondent by finding the appellant 100% liable for the accident and awarded him KShs. 110,000/= in general damages and costs that was later to be assessed at KShs. 37,240/=. The record from the trial court indicates that the Respondent executed the decree passed through a Notice to show cause which was slated for 13/3/2020. On 8/9/2020 the trial court issued a warrant of arrest against the appellant who was the judgment debtor.
5. Following the execution, the appellant moved the trial court vide an application dated January 25, 2021 and sought the following orders namely;
 - i. Lifting of warrants of arrest against him.
 - ii. Stay of execution



- iii. A prayer to be allowed to liquidate the decretal by monthly instalment of Kshs. 20,000/= till payment was made in full.
6. It was the appellant's case in the trial court that a moratorium had been declared against its insurance company on March 11, 2009 and that it was its insurance company that was liable to settle the decretal amount. The respondent opposed the application for the reason that the decree and certificate of costs relating to this matter were issued before the moratorium was declared over the insurance company. Further, that the decretal sum had remained unsettled for a period of over 13 years and the respondent's proposal of liquidating the decretal amount would result to an additional delay of over a year before the amount was paid in full. The application was dispensed by way of written submissions and the trial court rendered itself vide its ruling of July 29, 2021 where it found that the decree and certificate of costs fell out of the moratorium. The trial court also found that the decretal amount had remained unpaid for a period of 12 years and 10 months as at that time and the appellant had not demonstrated any good will in settling the same. As a result, the trial court dismissed the application which led to filing of the present appeal.
 7. The appellant felt aggrieved by the trial court's ruling and filed this appeal raising the following grounds namely;
 - i. The learned trial magistrate erred in law when she made a decision which is contrary to the express provisions of section 26 (2) of the Civil Procedure Act Chapter 21 Laws of Kenya.
 - ii. The learned trial magistrate erred in law when she made a decision which is contrary to the express provisions of section 27 (2) of the Civil Procedure Act, Chapter 21 Laws of Kenya.
 - iii. The learned trial magistrate erred in law when she dismissed the appellant's application even when the interest payable on the principle sum and the costs was contested and undetermined.
 - iv. The learned trial magistrate erred in law when she failed to allow the appellant's application, an error that led to failure to determine the issue of the disputed interest on both principal sum and costs.
 8. In his written submissions dated 14.7.23, the appellant faulted the trial court for dismissing his application wholesomely without addressing its mind to the specific prayers sought. He also contends that the interests accruing should have been at 6% rather than 14% per annum as applied. He urges this court to find that the interests payable on the principal sum was 6% and not 14% per annum.
 9. Counsel submits that the respondent was able to demonstrate how the decretal amount has remained unpaid for over 13 years and is opposed to the proposed mode of payment by the appellant. Counsel submits that interest should be calculated as per the provisions of sections 26 and 27 of the Civil Procedure Act.
 10. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."



11. I have considered this appeal and the response made. The appellant's gist of grievance centres around the interests rate payable and whether or not the trial court properly exercised her discretion by dismissing his application to be allowed to pay the decretal sum by monthly instalments of Kshs. 20,000/=.
12. To begin with, the host issue on interests payable, the appellant says he sought for a review of the same from 14% to 6% per annum. But a look at the application dated 25.1.2021 shows that the appellant never sought such a relief. The appellant cannot therefore fault the trial court for not giving him an order/relief he had not sought. That was never raised and it is belated to raise it now at this stage.
13. I have also noted that contrary to the appellants contention that his application was dismissed wholesomely without specific findings on the prayers sought is also unfounded. The trial court considered the substantive prayer which was prayer 5 in the application, a prayer to be allowed to pay the decretal sum through monthly instalments of Kshs. 20,000/= till payment was made in full. The other prayers was incidental to the main substantive prayer. The trial court found no merit in the substantive prayer and dismissed the application. The trial court found that the appellant had 12 years and 10 months prior to approaching the court and had only paid Kshs. 80,000/= out of the total decretal amount. It found that the appellant had not shown good faith and dismissed the application.
14. The only issue the appellant can legitimately raise is whether the trial court exercised its discretion well given that the prayer to be allowed to pay by installments is a discretionary one.
15. Order 21 rule 12 (2) of the [Civil Procedure Rules](#) provides as follows:

“After passing of decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit.”
16. An order for liquidation of the decretal amount as observed above is a discretionary one issued following demonstration of sufficient cause by the judgment debtor. In the present case the appellant advanced two reasons, first, that the suit motor vehicle was covered under Standard Assurance (K) Ltd and that there was a moratorium declared on March 11, 2009 over all claims relating to its policy holders. To this assertion, the trial court found that judgement by the trial court was issued on November 25, 2008 and seeing as the moratorium was declared on March 11, 2009, the judgement, decree and certificate issued fell outside its scope. Additionally, there is no evidence in the trial court record that there were third party proceedings against the Standard Assurance (K) Ltd enjoining it in the suit for it to cover liability against the appellant herein. This is a requirement provided under Section 10 (2) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) which provides;

No sum shall be payable by an insurer under the foregoing provisions of this section;

 - a. in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings...
17. The question between the appellant and his insurer was something between the two parties. Without a 3rd party notice, the insurance Company was a stranger in the proceedings and the appellant could not place reliance on moratorium for failure to pay up. The question of moratorium in any event was only raised after NTSC had been issued.



18. Secondly, the appellant cited inability to pay the decretal amount in full to which the court found was not a sufficient reason to exercise discretion. In the case of *Daniel Obata Osemo v Exon Investments Limited* [2021] eKLR, it was held as follows;

In making an order for payment of a decretal sum by instalments, and especially where the decree-holder has not consented to liquidation of the decretal sum by instalments, a court must act on sufficient cause that the judgment debtor is obligated by the afore-cited law to show. It was held in the case of *Keshavji Jethbbhai & Bros Limited –vs- Saleh Abdalla* [1959] EA 260 as follows: -

“...it is laid down that the mere fact that the debtor is heard pressed or unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily should be required to show his bonafides by arguing prompt payments of a fair proportion of the debt.... prompt payment of a fair proportion of the debt is a condition precedent for the granting of the discretion of granting instalments. Each case has to be decided on its own merit, the predominant fact being of course the bonafides of a debtor.”

19. The trial court in my considered view exercised her discretion well because one of the factors to be considered in payment by instalments in good faith on the part of the judgment debtor. The same was missing in this instance because of the effluxion of time. A party cannot come to court after more than a decade after a decree is passed and ask to be granted to liquidate the decretal amount by instalment. The decree holder also is entitled to fruits of his judgment.

In the premises this court finds no merit in this appeal and is dismissed with costs. This Judgment shall also apply to HCCA No. E041/21 as they are similar.

DATED, SIGNED AND DELIVERED AT KITUI THIS 5TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE

