



**Kamau v Waweru (Civil Appeal 396 of 2015)
[2024] KEHC 7281 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7281 (KLR)

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

CIVIL

CIVIL APPEAL 396 OF 2015

JN MULWA, J

JUNE 12, 2024

BETWEEN

JOSEPH MUCHEKE KAMAU APPELLANT

AND

ANTHONY THUO WAWERU RESPONDENT

(Being an Appeal against the Judgment/Decree of the Subordinate Court Delivered on 11th March, 2014 by Hon. S. Atambo PM in CMCC NO. 4302 of 2011 Milimani Commercial Courts.)

RULING

1. Judgment in this Appeal was delivered on 12/3/2020 by The Honourable L. Njuguna J in the following terms:
 - a. Liability - 80:20
 - b. General Damages----- Kshs. 450,000/=
 - c. Special Damages ----- Kshs. 3,000/=
 - d. Doctors court attendance costs----- Kshs. 5,000/=

Gross Total----- Kshs. 458,000/=

Less 20% contribution -----Kshs. (91,600/=)

Net Total----- Kshs. 366,000/=

 - i. The Respondent shall have costs of the suit together with interest on the general damages at court rates from the date of judgment and interest on special damages at court rates from the date of filing suit until payment in full.



- ii. Parties shall cater for their own costs of the Appeal.
2. A decree was drawn and issued on 8/2/2022.
3. By an Application dated 27/9/2023 the Appellant approached the court under provisions of Section 1A, 1B, 3, 3A, Order 22 Rule 22, Order 45 Rule 1(a) and (b), Order 51 Rule 1 of the Civil Procedure Rule (CPR) seeking: -
 - a. Directions and interpretation as regards the effective dates of interest accruals in the matter where the decretal sum in the lower court had been deposited in court following a court order.
 - b. Variation, Correction, review and/or amendment of the judgment and/or order delivered on 12/3/2020 to correct particulars contained at paragraph 45 of the judgment in regard to the interest on special damages and general damages on their effective dates when the whole decretal sum was deposited in court.
4. For clarity on due performance of the decree and Stay of Execution of the decree of the trial court pending determination of the appeal, the trial court directed the appellant to deposit the decretal sum of Kshs 458,000/= into court as security which was done on 11/11/2014.
5. However upon conclusion of the appeal, the decretal sum was reduced to Kshs. 366,400/= plus interest on general damages at court rates from date of judgment and interest on special damages at court rates from date of filing the suit until payment in full as stated at paragraphs 1 above, and 45 of the judgment delivered on 12/3/2020.
6. In response to the application the Respondent filed a Preliminary Objection (P.O) dated 26/10/2023 as well as a Replying Affidavit sworn on even date.

At the onset the Respondent confirmed there being no active execution proceedings commenced in the matter terming the application under review vexatious and frivolous.

Further the Respondent deposes that an Application similar to the instant one was filed, heard and determined by Hon. J. N. Njagi J. in a ruling dated 25/07/2023 in Nairobi Misc. Application No. 460 of 2014 between the two parties;
7. And finally, that the twin issues raised in the Application were clearly addressed by the Hon. L. Njuguna J in the judgment at paragraph 45 and that as no Appeal was preferred more than 3 years since the application is brought in bad faith and ought to be dismissed.
8. I have carefully considered the parties affidavits for and in opposition to the application as well as the Preliminary Objection. As a matter of legal principle, a Preliminary Objection ought to be dealt with first as its outcome may dispose of the whole matter before the court.
9. The nature of a Preliminary Objection was clearly explained and defined by Ojwang J. (as he then was) in Oraro V. Mbaja (2005) KLR 141 as follows: -

“Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary objection”.
10. A preliminary objection put differently the High court in John Musakali V. Speaker of County Council of Bungoma & 4 others (2015) eKLR held that: -

“the position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the “A Preliminary Objection correctly



understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle, a true preliminary objection should have the potential to disposing of the suit at that point without need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law”.

11. Back to the preliminary objection.

An issue of importance was raised that the application dated 27/09/2023 is res judicata as the issues for determination in the motion were determined by J. N. Njagi J in a ruling delivered on 25/07/2023 at paragraph 12 in Nairobi Misc. Application No. 460/2014 between the parties herein as well as in the judgment delivered on 12/03/2020 at paragraph 45.

12. The matter of resjudicata is a legal point of law that would ordinarily fall as a preliminary objection. Section 7 of the [civil procedure Act](#) provides as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

13. The ruling by Njagi J. on 25/07/2023 is referred to paragraph 7 of the Replying Affidavit – exhibit no. TKN3

I note that the above is not the only proceedings in respect of the matter of interest accruing on the special and general damages in the courts judgment which from the material facts placed before me has not been appealed against.

14. Aburiri J. – Exhibit No. TKN 4 on the 31/07/2015 also rendered herself on stay of execution of the trial courts judgment and granted the appellant conditional stay upon depositing the then decretal sum of Kshs. 458,000/= in court as security which sum had been deposited on 11/11/2014 to be held by both advocates for the parties in an interest earning account.

15. It is therefore clear in my mind that the decretal sum as at 11/11/2014 was Kshs. 458,000/- If it was deposited as per the courts order, such deposited sum has been earning interest pending the determination of the Appeal which was at the delivery of the judgment on 12/03/2020, a factor for consideration upon which a fresh decree shall be drawn.

16. In the Ruling of J. Njagi J. on 25/07/2023 paragraph 12 exhibit TKN 2, between the same parties the subject was the decretal sum of Kshs. 458,000/= which this court had reduced to Kshs. 366,000/= upon apportionment of liability at 80:20 in favour of the respondent. The contention was the decretal sum and more specifically the accrued interest as at 31/01/2022.

17. Upon hearing the court (Njagi J.) referring to Ahuriri J's Referred to earlier on deposit of the decretal sum into an interest earning account and stated in part at paragraph 12 that if the orders were not complied with then the respondent only has himself to blame and thereof allowed the sum of Kshs. 458,000/= deposited in court to be released to the respondent, then applicant.



18. Without a doubt therefore the issues raised by the Appellant in the instant Application have been litigated severally by at least three competent Courts and Rulings delivered appropriately.
19. The Judgment of Njuguna J. delivered on 12/03/2020 at paragraph 45 in my view needs none of the prayers sought by the Appellant in regard to correction variation or review or amendments there being no basis for such action.

The court rendered itself clearly on when interest rates on special damages and general damages would start to accrue.
20. It is instructive for litigants to note that once money is deposited in court it earns no interest at all as the court is neither a Banking Institution nor a Financial Institution. Additionally, as stated by Njagi J. in his ruling if the decretal sum was not deposited in an interest earning account as directed by Aburiri J. in her Ruling, then the party directed to do so will only have itself to blame and will be obligated to settle the decretal sum with accrued interest as specifically directed by Njuguna J's judgment from the effective dates.

The deputy registrar of this court is most suited to calculate the interest accrued guided by the court's judgment.
21. At the end guided by a myriad of judicial pronouncement I find and hold that the Preliminary Objection dated 26/10/2023 brought by the Respondent in opposition to the Appellant's Application dated 27/09/2023 is merited and upheld as being res-judicata and an abuse of the court process.
22. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE

