



REPUBLIC OF KENYA



KENYA LAW
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**Pembe Flour Mills Limited v Multiple Hauliers EA (Civil Appeal
100 of 2019) [2023] KEHC 821 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 100 OF 2019
MW MUIGAI, J
FEBRUARY 9, 2023**

BETWEEN

PEMBE FLOUR MILLS LIMITED APPELLANT

AND

MULTIPLE HAULIERS EA RESPONDENT

*(Being an appeal from the ruling of the Principal Magistrate's Court at Mavoko by
Hon. Michieka (P.M) delievered on 18th July 2019 in Mavoko CMCC No. 288 of 2016)*

JUDGMENT

Trial Court Record

1. The Ruling being appealed against arises out of an Application dated 4th April 2019 filed by the Plaintiff seeking the following orders;
 - a. Spent
 - b. The Hon. Court be pleased to review/ amend the decree dated 27th February 2019 on account of an apparent error on the face of the record, having omitted to factor in the true and correct interest and costs awarded by the Hon. Court when the judgement was delivered on 25th February, 2019.
 - c. Costs of the application be provided for.
2. The Application is supported by the affidavit of John Diro, Advocate who deposed on an even date in which it was contended that the suit was filed on 25th January 2016 for damages resulting form an accident caused by the negligence on the part of the Defendant and judgement was entered in 25th February 2019 in favor of the Plaintiff. A decree was extracted for purposes of executing the judgment and the defendant had settled Kshs 1,577,783 vide enclosed cheques being part payment of



the judgement amount however it was his contention that the decree had an apparent error; it had failed to factor in the true and correct interest awarded by the Hon. Court when entering the judgement was entered.

3. The Defendant Advocate, Justus Maronga Omagwa, filed a replying affidavit in response on 10th April 2019 in which he contended that after judgment as entered, the Plaintiff extracted a decree on 17th February 2019 and proceeded to proclaim the Defendant's property through Taifa Auctioneers and the Defendant proceeded to settle the decretal sum of Kshs 1,577,782 on 1st April 2019. It was deposed that the error/omission on the decree should not be visited on the Defendant as it is they that extracted the decree and proceeded to rely on the same for purpose of execution. Further, that the Application has been overtaken by events as the warrants of attachment have already been executed, the decretal amount settled and the only remedy is an appeal. It was indicated that the Defendant would suffer prejudice if the Application is allowed.
4. The Application was disposed off by way of written submissions.

Trial Court Ruling

5. The Trial Court while relying on the cases of *Republic vs Attorney General and 15 Others, ex parte Kenya Seed Company Limited and 5 others* [2010] eKLR and Nairobi HCCC 250 OF 2015 *Kartar Singh Dhupar & Co Limited vs Lianard Holdings Limited* [2017] eKLR as well as Article 159 (2) (d) of *the Constitution* of Kenya, 2010 stated that the main aim of civil actions is compensation for loss and it should not be turned into a "punitive voyage."
6. The Trial Court in allowing the application found that;

“the Applicant having obtained judgment against the defendant has a right to enjoy his fruits of his judgment to the fullest extent possible in compensation for his loss. Limiting his access to parts of his judgment as ordered by the court for whatever reason would be punitive for those reasons.”

The Appeal

7. Dissatisfied by this ruling, the Appellant filed Memorandum of Appeal on 23rd July 2019 seeking to review the Trial Court and consequential orders therefrom set aside with costs to the Appellants both in the Lower Court and on Appeal.
8. The Appeal is founded on two grounds;
 - a. The Learned Magistrate erred in law and fact in reviewing/ amending a decree dated 27th February 2019 without justification, legal and/or evidential justification.
 - b. The Learned Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.
9. The Appeal was canvassed by way of written submissions.

Appellant Submissions

10. The Appellant filed submissions on 18th of February 2022 and submitted on two major grounds, as to whether the learned magistrate erred in law and fact in reviewing/ amending the decree without



jurisdiction, legal and/ or evidential justification, it was submitted that the procedure for extracting a decree provided under Order 21 Rule 8 (2) and (5) of the *Civil Procedure Rules* 2010 was not followed. While relying on the case of Nairobi HC Miscellaneous Application No 78 of 2015 *Edward Kamau & Another vs Hannah Mukui Gichuki & Another* [2015] eKLR and Nairobi ELRC NO 892 of 2015, *David Mutemi Ngumi vs Kamili Packers Limited* [2019] eKLR, where the Courts emphasized that the decree was extracted in conformity with Order 21 Rule 8 CPR and the Deputy Registrar's signature is an indication that it was in conformity with the judgment and therefore ought not be altered further.

11. As to whether the learned Magistrate erred in law in failing to appreciate the long-established principles of stare decisis, bringing law into confusion and thereby deriving an erroneous conclusion, the Appellant submitted that they would suffer prejudice as there would be disharmony and disruption in the day to day activities if execution was undertaken of the disputed interest especially noting that it had settled the decretal sum. Relying on Nairobi HCCC 250 OF 2015 *Kartar Singh Dhupar & Co Limited vs Lianard Holdings Limited* [2017] eKLR it was submitted that the decretal sum was Kshs 1,354,992 and costs of Kshs 220,340 and after being subjected to the liability ratio of 80:20 in favour of the plaintiff against the Defendant, the amount is Kshs 1,083,993. The interest charged commenced from the date of filing the Plaint dated 25th January 2016 to the judgment date on 25th February 2019, approximated at 3 years. The Appellant contends that he has already paid Kshs 1,577,782 and the amount of Kshs 534,324/= being sought by the Respondent is excessive and incorrect.

Respondent Submissions

12. The Respondent filed submissions on 18th October 2022 in which it was submitted that the Trial Court had jurisdiction to make the orders in question. It was contended that the decree was done in conformity with Order 21 Rule 8 of the Civil Procedure Rules, the Appellant concedes and hence it is regular. The Respondent contends that it is entitled to enjoy the fruits of litigation and judgement of the lower court and admits that in extracting the decree it made mathematical errors that the law allows it to emend. Reliance was placed on the case of *Fredrick Mwangi Macharia and 13 others vs Edward Ombwori Gichana and another*, Petition E057 of 2022.

Determination

13. The Court has considered the Appeal, the Trial Court record and the submissions of both parties on record.
14. This being a first Appeal, the Court shall apply principle in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“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 which 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

15. From the Trial Court Record, the Plaintiff filed suit vide Amended Plaint of 6/10/2016 an Defendant filed Amended Defense on 2/12/2016. The hearing was through the Plaintiff's PW1's evidence and the Motor Vehicle Assessor Pw2's evidence and production of documents. The parties through their



advocates had agreed by consent to liability at 80%/20% in favor of the Plaintiff against the Defendant. The judgment was delivered on 18th July 2019 in the following terms;

- a. Pre -accident cost of vehicle plus VAT Kshs 961,292
- b. Motor Assessors Fees Kshs 11,600
- c. Police Abstract Kshs 100
- d. Towing Charges Kshs 80,000
- e. Motor Search Kshs 500
- f. Loss of user Kshs 300,000

Total Kshs 1,353,492

16. From the Decree attached, the claim is for Kshs 1,354,992/- (Decretal sum) and the costs amount to Kshs 220,340/- The Respondent has not denied that Kshs.1,577,782/- has been settled by the Appellant and I find that not to be in contention.
17. The judgment of the Trial Court delivered on 18th July 2019 made no mention finding or judgment on interest and/or costs. Costs follow the event that was factored in the impugned decree. However, the Trial Court was silent on interest. To that extent the Respondent was entitled and did file the application for review on 4/4/2019 of the Trial Court's judgment and decree.
18. This Court notes that from the pleadings specifically the Amended Plaint filed on 6/10/2019 among prayers sought included;
Interest on a) [Ksh1,354,992] General damages and b) at Court rates.
19. The Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR expressed itself as follows: -
“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.....”
20. Parties and the Court are bound by pleadings and the Plaintiff/Respondent pleaded the relief sought in the Plaint that included interest that was omitted from the judgment of the Trial Court. Clearly, in the absence of any mention on interest as prayed for there was an error apparent on the face of the record, which the Trial Court legally could rectify, hence the application for review prescribed by Section 80 CPA & Order 45 CPR 2010.
21. The Ruling by the Trial Court of 27th November 2019 held;
“The Applicant having obtained judgment as against the Defendant has a right to enjoy his fruits of his judgment to the fullest extent possible in compensation for the loss. Limiting his access to parts of his judgment as ordered by the Court for whatever reason would be



punitive and for those reasons, I am inclined that the Application is merited and hereby allow it in its entirety with no orders as to costs.”

22. This Court relies on Section 26 of CPA that provides as follows with regard to interest in a civil suit;

- (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 so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum

23. In *Kenya Commercial Bank Ltd versus Thomas Wandera Oyalo* [2005] eKLR it was held: -

“I have already stated that the Respondent should have led evidence to justify why he claims interest at a rate of 32% per annum. Since the Respondent failed to prove that fact, then the Trial Court should have exercised its discretion to award interest under section 26 of the *Civil Procedure Act*. In this case the trial magistrate awarded the rate of interest as prayed as though it was a matter of cause yet the same was not proved. The learned Trial Senior Resident magistrate therefore acted outside the laid down rules governing interest.”

24. In *Highway Furniture Mart Ltd versus Permanent Secretary Office of the President & Another* (2006) eKLR where the court stated;

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later v Mbiyu* [1965] EA 592, the forerunner of this Court said at page 593 paragraph E: “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”.

25. From the above authorities, it is proved that the Appellant was/is entitled to interest on the accrued and judgment sum as pleaded in the Plaint. Although the Trial Court was silent on interest this is cured by the terms set out by Section 26 of *Civil Procedure Act*.

26. . The Appellant relied on Order 21 Rule 8 of the Civil Procedure Rules 2010 on preparation and dating of decrees and orders and took issue with the impugned decree the subject of the appeal; the provision provides;

- (1) A decree shall bear the date of the day on which the judgment was delivered.
- (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied



that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

- (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
- (4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
- (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.
- (6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.
- (7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.

27. The Appellant took the view that the decree was/is invalid as the provisions of Order 21 Rule 8 CPR 2010 was not followed. With respect, whereas the procedure of processing the decree was not followed as required by law, that decree shall be set aside and another drawn as required by the laid down procedure. However, the pertinent issue is whether the Ruling of 18/7/2019 which is the subject of the appeal was erroneous in granting interest to the judgment sum as pleaded by the Plaintiff/Respondent or not.
28. To that question, this Court finds that, the decree-holder was/is entitled to the fruits of its judgment which includes costs which follow the event and interest as pleaded for but not provided for in the Trial Court’s Judgment.
29. The justice of the case demands that interest is calculated in terms of the decretal amount deducting 20% liability as prescribed by Section 26 CPA for the period upto the Ruling of 18/7/2019. Thereafter, the Appellant cannot be held liable as the interest was not granted by the Trial Court until the Ruling of 18/7/2019.
30. The Court has seen the warrant of attachment on record for Kshs 534,324 but it is not clear how the decree to that effect was extracted. The said decree and warrants of attachment are hereby set aside and fresh decree drawn in line with Order 21 Rule 8 CPR 2010

Disposition

1. In the premises, the appeal is dismissed with costs and the Ruling of 18th July 2019 upheld. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9TH FEBRUARY, 2023
(PHYSICAL/VIRTUAL CONFERENCE).**

M.W.MUIGAI

JUDGE



IN THE PRESENCE OF:

No Appearance - For The Appellant

No Appearance - For The Respondent

Patrick/geoffrey - Court Assistant(s)

