



REPUBLIC OF KENYA



**Ngugi v Ugi (Civil Appeal E059 of 2024)  
[2024] KEHC 14442 (KLR) (Civ) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14442 (KLR)

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

**CIVIL  
CIVIL APPEAL E059 OF 2024**

**MA OTIENO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**BENSON WACHIRA NGUGI ..... APPELLANT**

**AND**

**BENEDICATA MWENDE UGI ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Honourable P.K ROTICH (SPM)  
delivered on 12th October 2022 in the Milimani CMCC No. 915 of 2019)*

**JUDGMENT**

**Introduction**

1. This is an Appeal from the Judgment of the magistrate's court delivered on 12<sup>th</sup> October 2022 in the Milimani CMCC No. 915 of 2022 where the trial court delivered its judgment, allowing the Appellant's claim for Kshs. 1,708,300/- against the Respondent. The court also awarded costs of the suit and interest on the decretal sum from the date of the judgment.
2. Aggrieved with the trial court's decision to award interest on special damages only from the date of the judgment until payment in full, and not from the date of filing of the suit until payment in full, the Appellant lodged this appeal on the grounds that; -
  - i. The learned magistrate erred in law in failing to award to the Appellant, interest on special damages from the date of filing of the suit to the date of the judgment.
  - ii. The learned magistrate erred in law and fact in not giving any reason for the failure to award the plaintiff interest on special damages from the date of filing suit to the date of judgment



- iii. The learned magistrate violated the rules of natural justice by unreasonably delaying the release of the judgment to the plaintiff and thereby occasioning a miscarriage of justice.
3. The appeal was canvassed by way of written submissions. The Appellant's submission is dated 25<sup>th</sup> July 2024 whilst that of the Respondent is dated 8<sup>th</sup> August 2024.

### **Appellant's submissions**

4. The Appellant submitted that the learned trial magistrate erred in law and fact in failing to award interest on special damages from the date of the filing of the suit. According to the Appellant, the law and practice is that interest on special damages is awardable from the date of filing.
5. Citing the provisions of Section 26(1) of the *Civil Procedure Act*, the Appellant urged this court to set aside the trial court's finding that interest on the decretal sum be awarded from the date of the judgment (12<sup>th</sup> October 2022) and substitute the same with an order of this court awarding interest from the date of filing of the suit, that is, 19<sup>th</sup> November 2019.
6. The Appellant cited among others, the case of *Akamba Public Road Services Limited v Tabitha Kerubo Omambia* [2013] eKLR and prayed that the appeal be allowed with costs.

### **Respondent's Submissions**

7. On her part, the Respondent supported the trial court's Judgment and urged this court to uphold the same.
8. According to the Respondent, Section 26 of the *Civil Procedure Act* gives discretion to courts to appoint the date from which the payment of interest is to run. Consequently, the Respondent submitted, that the trial court cannot be faulted in awarding the interest on the decretal sum to be from the date of the judgment in the manner it did.
9. Citing the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Limited* [1985] E.A., the Respondent submitted that an appellate court can only interfere with the discretion of the trial court where it is established; first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.
10. Finally, the Respondent submitted that the Appellant did not, in his prayers before the trial court, seek interest on the special damages from the date of filing the suit, and that his claim in the suit was granted as prayed. Citing the case of *Daniel Otieno Migore versus South Nyanza Sugar Co. Ltd* [2018] the Respondent submitted that the Appellant ought to be bound by his pleadings.
11. The Respondent therefore urged this court to dismiss the appeal with costs in her favour.

### **Analysis and determination**

12. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that, unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in *Peters vs Sunday Post Limited* [1958] EA where the court stated that; -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

13. From the memorandum of appeal and the submissions by the parties in support of their respective positions, it is apparent that the only issue for determination in this appeal is whether the appellant ought to have been awarded interest from the date of filing the suit (19<sup>th</sup> November 2019) as opposed to from the date of the judgment (12<sup>th</sup> October 2022) as was awarded by the trial court.
14. While the Appellant in his submissions maintains that the learned trial magistrate erred in failing to award interest at court rates from the date of filing the suit, the Respondent thinks otherwise.
15. It is critical to note that under section 26 of the *Civil Procedure Act*, the award of interest is an exercise of the court’s discretion. In *Mbogo & Another V Shah* [1968] EA 93, the court set down the principles under which an appellate court may interfere with the trial court’s exercise of discretion, as follows; -

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

16. Further, in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, Madan JA (as he then was) stated as follows regarding the circumstances under which an appellate court may interfere with the discretionary powers of the trial court; -

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

17. To justify the proper exercise of judicial discretion, it is always critical that the trial court explains the basis of its decision. Without any explanation, then it becomes difficult to assess whether or not the discretion was properly exercised.
18. Section 26 of the *Civil Procedure Act* provides as follows regarding the period from which interest is to run in a decree for payment of money; -

“26 (1) Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court may deem 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.”



19. From the above, it is clear that the provisions of Section 26 of the Act vest upon the court the discretion to award interest on the principal sum covering three distinct periods as follows; -
- i. Interest on the principal sum from the date of the institution of the suit to the date of the decree/judgment; plus;
  - ii. The interest found to be payable on the principal sum for any period prior to the institution of the suit; and
  - iii. Further interest on the aggregate of (i) and (ii), from the date of the judgment to the date of payment (or to such earlier date as the court may think fit)
20. In the context of this case, I note from the record of appeal that the Appellant sued the Respondent seeking to be paid a sum of Kshs. 1,708,300/- being money owed on account of the contract for excavation services offered by the Appellant to the Respondent.
21. It was pleaded by the Appellant in the plaint that the excavation services were undertaken between January 2018 to January 2019 and that the total amount that was to be paid under the contract was to be a sum of Kshs. 2,178,000/-. It was further pleaded that the Respondent only paid a sum of Kshs. 475,000/- leaving a balance of Kshs. 1,703,300/-, which was the subject of the suit in the lower court.
22. From the record, it is also apparent that during the pendency of the suit, the Respondent made further payments of Kshs. 675,000/- to the Appellant, thereby leaving a balance of Kshs. 1,033,000/- only as an outstanding sum at the time of the judgment/decree by the trial court.
23. Applying the provisions of Section 26 of the *Civil Procedure Act* to the facts of this case as set out above, the trial court had the discretion, and indeed the authority, to award interest as follows; -

- i. Interest on the principal sum adjudged from the date of the institution of the suit to the date of the decree/judgment; -

Application: The suit was instituted on November 19, 2019, and judgment/decree was issued on October 12, 2022. The case was, therefore, in court for three years. Taking the principal sum is Kshs. Kshs. 1,703,000/-, then the trial court had the discretion to award interest on this sum from the time of filing of the suit up to the time of the judgment/decree.

- ii. Any interest adjudged on the principal sum to be payable for any period prior to the institution of the suit.

Application: As of the filing of the suit (19 November 2019), Kshs. 1,703,000/— was still outstanding under the contract. Assuming the same was due 30 days after completion of the contract, that is, by 28 February 2019, then it therefore means that as of 19 November 2019, the amount had remained unpaid for 9.5 months.

The court therefore had the discretion to award, in its judgment, interest on the outstanding amount, from the period when it was due to the time of filing the suit.

- iii. Further interest on the aggregate of (i) and (ii) above from the date of the judgment to the date of payment (or to such earlier date as the court may think fit);

Application: This will be interest on the aggregate sum (principal + any interest before filing of suit + interest from the date of filing to the date of judgment) until payment in full or such other shorter period as the court may direct.



24. From the above illustration it is clear that the scheme and design of Section 26 of the *Civil Procedure Act* is to guarantee fairness to the decree-holder by ensuring that the longer the decretal sum remains unpaid, the higher the interest judgment debtor continues to accrue, of course, subject to the capping the trial court may in its discretion impose.
25. In my view, the discretion given to courts under section 26 of the Act to stop further accumulation of interest (under approach (iii) above) is for a good reason and is simply intended to ensure that the total interest accumulated on the principal does not exceed the principal amount. This restriction is in line with the common law rule that states that interest on a debt stops when the total amount of interest owed is equal to the principal amount, commonly referred to as the in-duplum rule.
26. In the instant case, there was no claim by the Appellant that the principal sum attracted any interest accrued on the principal prior to the institution of the suit neither was there any evidence led in that regard. Consequently, and having in mind the spirit behind Section 26 of the Act as indicated above, it is the view of this court that the interest ought to have been awarded by the trial court from the time of filing of the suit until payment in full (or such other shorter period as the court may direct). This is what is captured under option (iii) indicated above.
27. The reasoning for awarding interest from the time of filing of the suit is that from the proceedings in the lower court, it is clear that this was a contractual claim for a liquidated sum which the defendant did not dispute at the hearing. The Appellant worked for the Respondent, however, due to some unexplained reason, the Respondent failed to make the payments when they fell due, resulting in this case.
28. In the premises, I find that this is a proper case for this court, in the exercise of its appellate jurisdiction, to interfere with the discretion of the trial court. I therefore find that the trial court erred in awarding interest only from the date of the judgment (12<sup>th</sup> October 2022) until payment in full. I am therefore entitled to interfere with the learned magistrate's discretion.
29. Accordingly, I allow the appeal and order as follows; -
  - i. The Judgment of the trial court delivered on 12<sup>th</sup> October, 2022 awarding interest on the Appellant's claim from the date of judgment until payment in full, is hereby varied to the extent that interest be and is hereby awarded from the date of filing suit (in this case being the date 19/11/2019) until payment in full.
  - ii. The principal sum for the purposes of computing the interest shall be Kshs. 1,033,000/- being the initial sum of Kshs. 1,708,300/- claimed in the plaint, less the Kshs. 675,000/- paid by the Respondent during the pendency of the suit.
30. The appeal having succeeded, costs are hereby awarded to the Appellant.
31. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of:

Moses – Court Assistant

Ms. Chege..... for the Appellant



N/A.....for the Respondent

