



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL CASE NO. 8 OF 2018**

**CENTRE FOR MATHEMATICS SCIENCE AND TECHNOLOGY**

**EDUCATION IN AFRICA (CEMESTEVA).....APPLICANT**

**VERSUS**

**APEX SECURITY SERVICES LIMITED.....RESPONDENT**

**RULING**

The application dated 5<sup>th</sup> October 2020 seeks the following orders:-

- 1. THAT there be an order for stay of execution of the judgment delivered on 29.11.2019 in this matter as well as the decree arising from Nairobi Milimani, Chief Magistrate Court Civil Case No. 4552 of 2016 between Apex Security Services Limited Vs. Centre for Mathematics, Science and Technology Education in Africa delivered on 14th December, 2017 and as well there be a stay of further proceedings in NRB CMCC No. 4552 of 2016 and all subsequent orders pending the hearing and determination of this application**
- 2. THAT The Honourable Court do make a declaration in this case on whether the court interest rate applicable is, 12% or 6% P.A.**
- 3. THAT The Honourable Court do make a declaration as to the period which the interest claimable on the decretal amount is payable in this case i.e. either from 14.7.2016, i.e date of filing suit or from 14.12.2017, the date of entry of Summary Judgement.**
- 4. THAT the Honourable Court be pleased to determine the question of the rate of interest applicable, on the decretal amount, where the decretal sum is deposited in a joint bank account i.e whether the court rates are suspended and or the Banks Deposit rates applies.**

The affidavit of Bradon Musyoki Sila sworn on 5<sup>th</sup> October, 2020 supports the application. A replying affidavit sworn by Charles Ndungu Ndirangu on 21<sup>st</sup> October, 2020 was filed by the respondents.

The applicant's position is that the application revolves around the issue of interest, the main issue being whether the court interest rate is applicable and the period interest is payable. It is submitted that under Section 26 of the Civil Procedure Act, the court's power to grant interest on a decree is discretionary. The court rate of 12% was established under practice notice No 1 of 1982 by Simpson Acting Chief Justice. The judgment of the lower court did not award interest. The Appeal judgment delivered on 29/11/2019 provided for interest but did not fix the applicable rate. Under Section 26(2) of the Civil Procedure Act, where the judgment is silent on interest, then the applicable interest is 6%. Counsel relies on the case of **B.O.G. TAMBACH TEACHERS TRAINING COLLEGE –V- MARY KIPCHUMBA; (2018) eKLR** where Justice Edward Muriithi states:-

**"To be sure the 1982 Practice Note did not pretend to amend or guide application of the rate of interest where the court was silent on applicable rate. The Practice Note clearly affected only the power of "the court to order interest to be paid at such rate as the court deems reasonable". This power to order reasonable rate of interest is provided for under Section 26 (1) of the Act. Indeed. Section 26 (2) of the Act applies to situations where the decree of the court is silent, that is where court does not order any rate of interest, and this provision has not been amended."**

It is submitted that in the case of B.O.G. Tambach Teachers Training College (supra), Justice Muriithi adopted 6% as the interest rate applicable since there was no order on the applicable rate. Counsel also submit that in the case of **MARGARET WANJIRU MBURU & 3**

**OTHERS –V- KENYA COMMERCIAL BANK**, Justice Emukule (as he then was) adopted 6% P.A as the applicable rate.

On the issue of the period from when interest should be applicable, it is submitted that interest should be applied from the date of the decree and in this case from 14/12/2017 when the lower court judgment was delivered. Counsel rely on the case of **NEW TYRES ENTERPRISES LIMITED –V- KENYA ALLIANCE INSURANCE COMPANY LTD (1988) eKLR** where Justice Masime C.A stated as follows:-

**“In the present case, the liability of the Respondent to pay for the appellant loss was not determined until the date of the judgment and that is the date from which interest should be payable.”**

On their part, counsel for the respondent concedes that there is dispute on the applicable interest rate on the decretal sum as well as the period covered by the interest. On 29/11/2019, the High Court ordered that the respondent was entitled to interest at court rate and not bank rate. The Honourable Judge was well aware that the decretal sum had been deposited in a joint bank account earning interest at bank rate but went ahead to rule that the applicable rate is the court rate. The applicant’s contention that the applicable rate is 6% is not well founded. Counsel relies on the case of **JANE WANJIKU WAMBU –V- ANTHONY KIGAMBA HOTO & OTHERS, (2018) eKLR** where Justice Joel Ngugi stated:-

**“Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:**

**a. The period from the date the suit is filed to the date when the Court gives**

**its judgment; and**

**b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.**

It is submitted that the respondent’s claim was a liquidated one and interest should be payable from the time of filing suit at the rate of 12%P.A.

In its plaint dated 14<sup>th</sup> July, 2016, the respondent claimed a sum of Kshs.5,450,000 being money payable under a security tender entered into between the parties. The respondent filed a Notice of Motion dated 6/10/2019 seeking judgment for Kshs.6,088,000. In its ruling delivered on 14/12/2017, the Chief Magistrate’s Court in CMCC No 4552 of 2016 allowed the application as prayed. The plaint at paragraph 9 sought interest on the claimed sum at court rates. The trial court did not award any interest as the application itself did not have a prayer for interest.

The applicant filed this appeal and in a judgment delivered on 29/11/2019, Justice Charles Kariuki made the following orders:-

**i. The appeal succeeds partially to the extent that the judgement of trial magistrate is substituted with Ksh.5,540,000/. Otherwise the appeal is dismissed on the other grounds.**

**ii. The respondent is entitled to 2/3 costs and interest at court rates.**

The background of the dispute poses a challenge in that the case was not heard and the application which granted the judgment did not have a prayer for interest. Further, Justice Kariuki did not state whether the interest he awarded was to be applied from the date of the trial court’s ruling or from the date of his judgment or from the date the suit was filed. The applicant also contends that the decretal sum was deposited in a joint account. Counsel for the respondent’s view is that the court awarded interest at court rate and is therefore entitled to that rate and not the Bank rate which is lower.

Section 26 of the Civil Procedure Act states as follows:-

**(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) 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.**

From the provisions of Section 26(1) the court can award interest in many ways namely:-

**i. From any period before the institution of the suit.**

**ii. From the date of filing the suit.**

**iii. From the date of the decree.**

The court can distribute the interest according to the nature of the amount claimed. For instance, in an accident claim, the accident victim incurs medical expenses before a suit is filed. The court can award interest from the time such medical expenses are incurred and this court be immediately after the accident. When the court awards general damages arising from the accident, it can award interest from the date of the judgment. In some instances, the court can award interest from the date of filing suit.

In the case of **MUKISA BISCUITS MANUFACTURING CO. LTD –V- WEST END DISTRIBUTORS LIMITED (No 2) [1970] E.A, 469 at 475**, Spry V.P states as follows:-

***“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.”***

The claim herein is for liquidated damages. The respondent offered services and was not paid. The agreement was signed in November, 2014 and subsequently extended upto 2016. The suit was filed in 2016. I do hold that interest is payable from the date of filing the suit. The debt was due before the suit was filed. In essence therefore, the applicant breached the agreement.

The applicant maintain that the decretal sum was deposited in a joint interest earning account. The bank rate is 5% P.A. The respondent wrote a letter dated 3<sup>rd</sup> December, 2019 calling for the amount deposited in the joint account plus interest at bank rate. In my view, before the money was deposited in the joint account, the interest payable would be the court rate as ordered by Justice Charles Kariuki. This will be 12%. The applicant’s contention that since the judgment of the trial court was silent on interest and therefore the applicable interest is 6% is contrary to Justice Charles Kariuki’s judgment. I do find that before depositing the decretal sum in the joint account, the interest rate applicable is 12%. For clarity purposes the decretal sum attracts interest at 12% from the date of filing suit until when it was deposited in the joint account of both counsels. The silence of the ruling by the trial court was rectified on appeal. The judgment of Justice Charles Kariuki operates backwards and imposed interest on the decretal sum at 12%. The decretal sum was reduced from Kshs.6,088,000 to Kshs.5,540,000. I do find that the 6% interest rate under Section 26(2) of the Civil Procedure Act is not applicable.

The next issue relates to the interest rate applicable on the decretal sum deposited in a joint account. On 19<sup>th</sup> February, 2018 Justice J. Kamau delivered ruling and granted orders staying execution pending the hearing and determination of the appeal on condition that the appellant/applicant deposit the entire decretal sum of Kshs.6,088,000 within Sixty (60) days, that is by 21<sup>st</sup> November, 2018. The applicant complied. Justice Charles’s judgment was delivered one year later on 29/11/2019.

In my considered view, the applicant did comply with a court order and deposited the money in a joint account of both counsels. The applicant did not have the power to negotiate the interest rate with the bank so that it could be equal to the 12% interest rate or higher than that. The applicant therefore, cannot be called upon to pay the difference between the bank rate and the court rate. The bank rate is said to be 5% and this gives a difference of 7% from the court rate of 12%. It will be unfair to condemn the applicant to pay the difference of 7% interest. The decretal sum could have as well been deposited in court and no interest rate could be payable. In my view once the decretal sum is deposited in court or in a joint account of the parties or their counsels, the judgment debtor is set free from any interest payable to the decretal sum as the purpose of providing security would have been fulfilled. It is not the applicant who ordered for the decretal sum to be deposited in a joint account. At times the order to deposit the decretal sum in a joint account is made by consent and the only logical presumption is that should the appeal fail or the judgment of the trial court be varied, the judgment debtor will seek the release of the amount awarded on appeal from the joint account plus the pro rata accumulated interest. In this case, the respondent is entitled to the sum of Kshs.5,540,000 plus the interest that has accumulated from the date the money was deposited until it is released. The applicant is entitled to the balance of about Kshs.548,000 plus the interest that has accumulated for that amount.

In summary, I do make a declaration that the interest payable on the decretal sum is 12% and not 6%. I do further declare that interest is payable from the date of filing suit since this was a claim for liquidated damages. The debt was incurred in 2016. Thirdly, I do declare that the interest payable on the decretal sum deposited in the joint account shall be the bank interest rate and NOT the court rate. Finally, I do order that parties shall meet their respective costs of this application.

**Dated and Signed at Nairobi this 8<sup>th</sup> day of March, 2021**

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**S. CHITEMBWE**

**JUDGE**