REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 123 OF 2019

BETWEEN

EDWARD MWANGI MACHARIA

T/A HOMELAND DEVELOPERS.....APPELLANT

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....RESPONDENT

(Being an appeal from the Judgment & orders of the Mavoko Senior Resident Magistrate Hon. J. A. Agonda delivered in Mavoko CMCC No. 1406 of 2018 on 30th August, 2019)

EDWARD MWANGI MACHA

T/A HOMELAND DEVELOPERS.....PLAINTIFF

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....DEFENDANT

JUDGEMENT

1. The Appellant herein instituted legal proceedings against the Respondent before the Chief Magistrate's Court, Mavoko in Mavoko CMCC No. 1406 of 2018 in which he claimed Kshs 2,000,000.00 being the refund of the deposit he paid to the Respondent in respect of a contract in which he successfully tendered for harvesting of standing Eucalyptus Trees. According to the Appellant due to the frustrations caused by the Respondent, he was unable to carry on with the contract and despite him demanding for the refund of the said deposit, the Respondent failed to do so alleging that he did not complete the agreement on time.

2. On its part the Respondent denied the Appellant's allegations that it frustrated the Appellant and instead averred that it was a term of the said contract that the Appellant would harvest the marked trees at his own cost within the duration of 6 months and at the expiry thereof the ownership of the trees would revert to the Respondent unless the contract period was extended. The Respondent pleaded that the Appellant failed to perform its part of the contract. It was averred that though the contract period was to run for a period of 6 months and 15 days from the date of signing of the contract between 26th June, 2013 and 10th January, 2014 during which period he was required to harvest 40,000 trees, he however only harvested a total of 533 trees.

3. It was pleaded that after the expiry of the said contractual period, no agreement to extend the contract was signed and as such the ownership of the unharvested trees reverted back to the Respondent meaning that 39,467 trees reverted back to the Respondent in January, 2014.

4. It was therefore the Respondent's case that the suit be dismissed with costs.

5. Together with the plaint, the Appellant filed his witness statement in which he stated that in March, 2013, the Respondent put up a press advertisement for sale of Standing Eucalyptus Trees for harvesting, vide Tender No. EPZA/1/EV/D/2012/2013. According to him, in order to avoid any misunderstanding, it was a term of the said tender document that the Respondent would enter into a written contract with

successful bidders.

6. The Appellant tendered for the same and received a letter of offer dated 7th May, 2014 confirming that his tender was accepted subject to details of the contract which contract was to be entered into within 14 days thereof in terms of the tender document. Upon receipt of the said letter of offer, the Appellant acknowledged the same and expressed his appreciation for the same on 22nd May, 2013. On 29th May, 2013 the Appellant received a confirmation of the tender and an invitation to avail himself for discussion and signing of the contract. Subsequently, on 10th June, 2013, the Respondent forwarded to the Appellant the draft contract for his comments for the preparation of the final document. On 16th June, 2013, the Appellant signed the said contract and forwarded the same to the Respondent for counter-signature. On 25th June, 2013, the Respondent acknowledged receipt of the partly executed Contract and furnished the Appellant with an extra copy for his signature which extra copy the Appellant returned duly executed on 26th June, 2013. However, the Respondent never returned to him the complete contract despite his request to do so.

7. According to the Appellant, between 6th and 25th June, 2013, he paid to the Respondent Kshs 2,000,000.00 being deposit for performance of the contract which payment was received and 4 official receipts issued by the Respondent.

8. It was the Appellant's case that due to the subsequent unfavourable weather conditions coupled with non-commitment on the part of the Respondent to the contract, it became impossible for him to carry on with the project and he therefore by his letter dated 30th May, 2014, demanded for the refund of his said deposit. Further, on 7th July, 2014, he requested the Respondent to agree to a price of Kshs 200.00 per tree.

9. Frustrated by lack of response from the Respondent on 8th January, 2015, through his advocates, he sent the Respondent a demand letter and in response thereto, the Respondent by a letter of 17th October, 2017, the Respondent purported that it could not refund the deposit because the Appellant had not completed the work during the pendency of the contract, an allegation which, in the Appellant's view, was unreasonable.

10. The Appellant therefore sought an order for the refund of his said deposit plus costs and interests.

11. Before the trial court, the Appellant produced the tender document, various correspondences including demand letters, the contract and receipts. According to him one of the letters dated 10th June, 2013 was addressed to an entity called Form Foundation which was unknown to him and which in his view, confirmed the existence of corruption in the award the tenders to different companies. It was his evidence that the letter dated 10th June, 2013 confirmed that he was to get the exclusive permit before undertaking the work. It was his evidence that he neither received the contract nor the harvesting permit. He also was not aware of any specific areas allocated to him since he did not get access to the place. He disclosed that he never harvested any tree and was never given any termination notice.

12. According to him, as per the contract he was to purchase 40,000 trees at Kshs 1,00/= per tree hence aggregating to Kshs 40,000,000/-. It was his case that he was buying trees and not commercial or domestic firewood and he was required to male pre-payment of Kshs 2,000,000/- as deposit while the balance was to be paid at the completion of the harvest. He disclosed that he was the director of his company, Homeland Developers.

13. According to the Appellant as per the Respondent's letter dated 26th July, 2017, the Respondent was processing the refund which was to be made within 30 days of the said date.

14. In cross-examination, the Appellant stated that after signing the contract he returned it to the Respondent but was unaware if the same was signed by the Respondent since it was released to him bearing only his signature. He insisted that he neither cut any trees nor got the permit to do so. Referred to the contract at clause 1.7 thereof he confirmed that the contract was to run for 6 months and that by demanding his refund, he terminated the contract. According to him, there was non-performance by the Respondent as the trees were sold to a different company.

15. On behalf of the Respondent, its Assistant Manager Environment, **Mathew Oliechi Were**, testified that the Respondent had a plantation at Kinanie from where they were harvesting the trees. In his statement he stated that sometimes in 2013, the Respondent placed an advert for tender for sale of Standing Eucalyptus Trees for harvesting pursuant to which two applications were received the Plaintiff's bid was successful having fulfilled the pre-requisite conditions set out in the tender and was informed of the award on 7th May, 2013 which he accepted on 22nd May, 2013. On 10th June, 2013, the Respondent forwarded a draft contract for perusal and approval by the Appellant which was duly signed and the Appellant's copy forwarded to the Appellant on 28th June, 2013.

16. According to the Respondent, the number of trees to be harvested was 40,000 at the sum of Kshs 40,000,000.00 which was to be paid upon the signing of the contract and upon payment, harvesting was to commence 15 days from the date of signing. However, the minimum payable was Kshs 2,000,000.00. On expiry of the contract the ownership of the trees that would not have been harvested would revert to the Respondent unless the contractual period was extended in writing.

17. It was confirmed that the Appellant paid Kshs 2,000,000.00 to the Respondent which the Respondent acknowledged and the contract was to run for 6 months from 26th June, 2013 to 10th January, 2014. Between 27th June, 2013 and 6th July, 2013, the Appellant harvested a total of 533 trees and since at the expiry of the agreement there was no extension the ownership of the unharvested trees reverted back to the Respondent meaning that Kshs 39,467 trees reverted in January 2014.

18. However, on 29th May, 2017, the Respondent received a demand letter from the Appellant the said Kshs 2,000,000.00 on the basis that the Respondent appointed another firm to harvest the same trees. In the witness' evidence, this was contrary to the Appellant's indication that he was facing challenges in cutting trees due to poor infrastructure. However, the Respondent responded explaining the reasons why it was

not going to refund the said sum.

19. It was averred that though the Appellant had an opportunity to extend the contract he did not do so. It was further averred that though the contract had an arbitration clause, the Appellant did not attempt that route first.

20. It was the Respondent's position that the contract was entered into and was signed by the Respondent on 27th June, 2013 and by the Appellant on 26th June, 2013 and not 16th June, 2013 as alleged by the Appellant.

21. In his oral evidence, the witness reiterated that the Appellant cut 533 trees and he produced the schedule for the same. Apart from that 30 trees were cut to make way for the transport. It was his evidence that the Appellant was supposed to cut 2000 trees in the first batch while an aggregate of 40,000 trees were to be cut during the said period of 6 months and that if the Appellant failed to do so, he would forfeit the contract. However, there was no access during weekends and public holidays. However, there was pressure form the Appellant's client, a tea factory in Murangá. He testified that the buyer was to be responsible for import licence for tree cutting and it was given to the Appellant who was facilitated as per the terms of the contract. However, due to rain, the Appellant had challenges as the area was muddy and the Appellant communicated his difficulties to the witness.

22. It was averred that after the lapse of the said 6 months the Respondent appointed another buyer after the Appellant gave reasons for his inability to continue with the contract which led to breakdown of his machines. According to the witness the termination of the contract was not due to the appointment of the new applicant. It was his evidence that the Appellant was only entitled to the sum less 533 trees and not Kshs 2,000,000/= but only on humanitarian grounds since it was a term of the contract that after 6 months the trees would revert to the Respondent.

23. In cross examination, he admitted that there was no provision that in the event that the Appellant did not cut all the trees, the deposit would not be refunded. He admitted that they expressed an intention to make the refund but while admitting that the Appellant paid Kshs 2,000,000/= he denied that the Appellant did not receive the contract. He denied that there were two contracts. It was his evidence that the Appellant commenced the cutting of trees within 15 days of the contract but admitted that he had no gate pass showing that the Appellant loaded the trees away. He admitted that the handwritten documents he relied on were not written by himself and he was not at the gate to receive the cut trees. It was his evidence prerequisite harvesting permit was not applicable and that they allowed the Appellant to enter the exclusive section though he had no documents to support this. He also admitted that no termination notice was sent to the Appellant.

24. In her judgement, the Learned Trial Magistrate found that based on the documents produced, there was a contract between the parties herein for the Appellant to harvest trees from the Respondent's tree plantation. Accordingly, the Respondent could not introduce other conditions which were not expressly or impliedly provided for in the contract. She also found that from the evidence, the Respondent did not issue the Appellant with termination notice which was a grave anomaly by the Respondent considering the fact that the Appellant had already paid a deposit of Kshs 2,000,000.00. She therefore found that the Respondent breached the contract between it and the Appellant. She therefore found that the Appellant proved that the Respondent frustrated the contract who did not take action to arbitrate over the same. She therefore found that the Appellant had proved his case on a balance of probability as required by the law and proceeded to enter judgement in favour of the Appellant in the sum of Kshs 1,467,000/= with interest and costs of the suit.

25. In this appeal it is submitted on behalf of the Appellant that the decision by the Learned Trial Magistrate as to the trees which were harvested was only on the evidence of DW1 and that she failed to consider the Appellant's evidence that he did not harvest the trees at all due to failure to receive any permit from the relevant government agencies through the Respondent; that no specific sections of the plantations were identified to him; that no access to the plantation, a restricted area was given to him; and that some of the trees alleged to have been harvested were those which were allegedly cleared to make way for transportation hence were not part of the contract.

26. According to the appellant it was an error on the part of the Learned Trial Magistrate to have awarded interest on the judgement from the date of filing suit instead of from 25th June, 2015, the date of deprivation of the liquidated sum.

27. On its part the Respondent submitted that the evidence given by DW1 expressly indicated that the Appellant had accessed the plantation and harvested a total of 533 trees as part of the contract. Though the Appellant alleages that 30 trees out of the 533 trees should not form part of the contract as the same were cut to give way and allow the Appellant access the plantation, the Appellant did not provide evidence to show that said trees were to not to be included in the number of trees cut.

28. It was further submitted that the Appellant requested to harvest the trees without any delay as there was immense pressure for the Appellant to deliver and any delay would have immense cost implication on the Appellant. The respondent in an aim of ensuring that the Appellant's is not frustrated and owing to the fact that there was bad weather condition at the time, considered the Appellant request and allowed the harvesting of trees to continue on the weekends even though the same was not in the contract.

29. As regards the interest it was submitted that the same is discretionary under section 26 of the ***Civil Procedure Act*** and reliance was laced on **New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.**

30. It was therefore submitted that the award was the learned magistrate's discretion which this court being an appellate court should be reluctant to interfere with unless the court is satisfied that the discretion was not exercised judicially based on the decision in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** and **Mbogo versus Shah [1968] EA 93** at page 94.

31. According to the Respondent, the judgment delivered by the Learned Magistrate was based on the evidence and documents produced in court by both the Appellant and Respondent. Based on the decision in **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (2004) eKLR** it was submitted that the Court can only rely on or consider what has been produced in evidence. The records show that there was a contract between the Appellant and Respondent, and that it is out of the frustration of contract which was unavoidable. Statements contained in pleadings remain mere allegations unless and until the evidence given was contrary. Without any supporting evidence to show

the reason as to why the Respondent should refund the full amount the suit brought against the respond must fail. This court was therefore urged not to interfere with the decision of the Learned Trial Magistrate.

Determination

32. I have considered the material placed on record before me in this appeal.

33. This being a first appellate court, it was held 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 demeanour of a witness is inconsistent with the evidence in the case generally."**

34. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

35. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

36. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

37. In this case the Appellant's case was that a contract was entered into between the Appellant and the Respondent in which the Appellant was to harvest 40,000 standing Eucalyptus Trees from the Respondent's plantation in the sum of Kshs 40,000,000.00. As part payment, the Appellant deposited Kshs 2,000,000.00. However, the Appellant did not harvest the trees at all due to failure to receive any permits from the relevant government agencies through the Respondent; that no specific sections of the plantations were identified to him; that no access to the plantation, a restricted area was given to him; and that some of the trees alleged to have been harvested were those which were allegedly cleared to make way for transportation hence were not part of the contract.

38. On the part of the Respondent it was contended that the contract was time bound and that by the time the contractual period lapsed, the Appellant had only harvested 533 trees hence under the contract he forfeited the remaining trees.

39. Order 21 rule 4 of the Civil Procedure Rules provides that:

> ***Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.***

40. The Court of Appeal in **Mohammed Eltaff & Others vs. Dream Camp Kenya Limited Civil Appeal No. 318 of 2000** held that:

> **"Order 20 rules 4 and 5 of the Civil Procedure Rules provides that judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and in suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefore, upon each separate issue."**

41. In **Agnes Nzali Muthoka vs. Insurance Company of East Africa Civil Appeal No. 234 of 2000 [2001] 1 EA 143** the Court of Appeal held that

> **"It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision."**

42. In this case one of the issues as correctly appreciated by the Learned Trial Magistrate was whether there was breach of the contract and who was to blame for the same. In her finding the Learned Trial Magistrate correctly, in my view, found that there was in fact such breach and that the Respondent was to blame for the same. However, one issue that ought to have been framed was the relief, if at all, the Appellant was entitled to. This was necessary because whereas the Appellant's case was that he never harvested any tree, the Respondent's position was that he harvested 533 trees. As a result of not framing this issue the Court failed to deal with it. However, this being the first appellate court, the court is bound to deal with the same.

43. In his evidence on the issue, DW1 testified that the Respondent was to prepare the land and cut trees for plaintiff's motor vehicle to pass. While he insisted that the trees were loaded in plaintiff's motor vehicle, he had no gate pass to confirm that the plaintiff loaded the trees away. As regards the handwritten documents which he relied on to support his evidence that the trees were loaded he admitted that he was not the maker of the documents and was not at the gate to receive cut trees.

44. I appreciate that under Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson at Para 95.**

45. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

46. In my view the Appellant having testified on oath that no trees were cut by him, it was upon the Respondent to adduce evidence showing that that was in fact not the positon. The Respondent failed to adduce any credible evidence to confirm this. DW1 had no gate pass and was not at the gate during the transaction. The author of the document he relied upon was never called to testify to the same. In Nairobi HCCC No. 72 of 2008 between **John M. Gaiko T/A Gaikonsult Quantity Surveyors vs. Triple Eight Construction (Kenya) Ltd** this Court expressed itself as follows:

> **"…in this case, the other document relied upon is the said letter dated 31st July 2007. The circumstances under which that letter was written have not been properly explained by either party. The letter is addressed "to whom it may concern". Why it became necessary to write this letter remains a mystery. The defendant on the other hand could have assisted the court by calling the maker of the letter to explain the circumstances under which the said letter was written since it was admittedly authored by its agent. No explanation was given as to why the author was not called and in certain circumstances the court would be properly entitled to draw adverse inference on such failure."**

47. It is a well-known rule of evidence founded on section 119 of the ***Evidence Act*** that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. See **Green Palms Investment Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003; Bukenya & Others vs. Uganda [1972] EA 549; R. vs. Uberle [1938] 5 EACA 58**.

48. In this case the only person who could have explained the circumstances under which he recorded the contents of the said document was the author thereof. Therefore, the failure to call him, leads me to the conclusion that had he been called his evidence would probably have

been adverse to the defence case as regards the harvesting of the trees by the Appellant.

49. It is also noteworthy that when the Appellant in his letter dated 29th May, 2017 demanded for refund of Kshs 2,000,000.00 the Respondent in its letter dated 26th July, 2017 unreservedly confirmed that it was handling the process. Throughout the correspondences there was no mention of the fact that the Appellant had harvested some trees which ought to have been discounted from the refund.

50. In the premises the Learned Trial Magistrate erred in finding that the Appellant was only entitled to Kshs 1,467,000/=.

51. As regards the interest, I agree with the position in **New Tyres Enterprises Ltd vs. Kenya Alliance Insurance Company Ltd [1988] KLR 380,** where it was held that:

> **"Our Superior Courts have, over time, come up with several principles derived from this general rule in Section 26 of the Civil Procedure Act which have, over time acquired stable meanings. The following three principles in this regard seem relevant for the appeal at hand. First, at all times a Trial Court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial Court with utmost respect and should refrain from interference with it unless it is satisfied that the Lower Court proceeded upon some erroneous principle or was plainly and obviously wrong. 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.**
>
> ***Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties*.** **See Gulamhussein v French Somaliland Shipping Company Limited [1959] EA 25; Highway Furniture Mart Limited – v- The Permanent Secretary & Another EALR (2006) 2 EA 94; Mulla – The Code of Civil Procedure (16th Ed.) Vol. 1 at p. 505."** [Emphasis mine].

52. In this case the Appellant claimed interest at court rate. He did not plead the substantive law that justified payment of interest prior to the date of the suit or that under an agreement there was a stipulation for the rate of interest (contractual rate of interest) or that interest was allowed by mercantile usage or there was a statutory right to interest or that an agreement to pay interest could be implied from the course of dealing between the parties.

53. In the premises, I allow this appeal set aside the judgement of the Learned Trial Magistrate and substitute therefor a judgement in favour of the Appellant against the Respondent in the sum of Kshs 2,000,000.00 with interest at court rate from the date of filing suit till payment in full. While I confirm the order as to costs of the lower court proceedings, since the Appellant failed to comply with the directions of this court to furnish soft copies of the submissions, each party will bear the costs of this appeal.

54. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS 11TH DAY OF MARCH, 2021

G V ODUNGA

JUDGE

Delivered the presence of: