REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO. E039 OF 2020

JULIUS INGOSI TALIANI.....APPELLANT

VERSUS

NGISA RONALD MORARA T/A MORARA NGISA & CO. ADVOCATES.....RESPONDENT

***(*Being an appeal from the judgment and decree of Hon. D. M Kivuti (Mr.), CM**

at the Chief Magistrate's Court at Milimani Commercial Court, Nairobi in

CMCC 4863 of 2016, delivered on the 7th day of August, 2020)

JUDGMENT

1. The Appellant, **Julius Ingosi Taliani**, was the Plaintiff in **Milimani CMCC 4863 of 2016**. Vide a Plaint dated 13th July, 2016, the Appellant sought judgment against the Respondent for payment of Kshs. 2,750,000/= together with interest at 18% p.a from 7th July, 2015 until payment in full as well as costs of the suit. The amount sought was on account of the balance of the purchase price of the Appellant's property which had been paid to the Respondent in his capacity as the Appellant's advocates in a sale transaction. The Respondent denied the claim alleging that the said sum of money related to a debt which the Appellant was repaying due to an aborted transaction.

2. After full trial, the trial magistrate found that the Respondent indeed received the balance of Kshs. 2,750,000/= from the Purchaser's advocates in the said transaction but had already paid the Appellant the sum of Kshs. 200,000/=. As such, judgment was entered against the Respondent for the sum of Kshs. 2,550,000/= together with interest at court rates from the date of the judgment. The Appellant was partially aggrieved by that decision and filed the instant appeal.

Background

3. The Appellant's claim as pleaded in the trial court was that on 4th June, 2015, he entered into an agreement for sale of land known as L.R. No. 19952/362 Nairobi between himself as the vendor and one Michael Nyongesa Barasa as the purchaser. He engaged the Respondent to represent him in the transaction.

4. It was a term of the Agreement that:

a. The purchase price would be Kshs. 5,500,000/=.

b. The sum of Kshs. 2,750,000/=, being the deposit, be paid to the Respondent's account number xxxxxx on or before the execution of the said agreement by way of electronic RTGS transfer, to hold the same as a stakeholder pending the completion of the transaction.

c. The balance of the purchase price that is, Kshs. 2,750,000/= was to be paid on exchange of the completion documents.

d. The rate of interest to be applied for failure by any party to meet his or her obligations was 18%.

5. By a letter dated 28th May, 2015, the Purchaser's Advocates confirmed having transferred the deposit into the Respondent's account as per

clause 3.1 of the Agreement. On 7th July, 2015, the Purchaser's advocates transferred the balance of Kshs. 2,750,000/= to the Respondent's aforesaid account. However, the Respondent refused to release the balance of Kshs. 2,750,000/= to the Appellant thus causing him loss and denying him the use of the money. By a letter dated 24th April, 2016, the Respondent admitted indebtedness and promised to pay the amount due but this did not materialize.

6. PW1, Julius Ingosi Taliani, the Plaintiff herein reiterated the above in his examination in chief. He added that he complied with the terms of the sale agreement but the Respondent only released to him the initial deposit. As such, his advocate wrote a letter to the Respondent demanding for the balance of Kshs. 2,750,000/= plus the interest accrued thereon. The Respondent responded and admitted to owing the Appellant the said amount of money and promised to release it within three weeks from 27th April, 2016. PW1 also lodged complaint No. 16 of 2016 against the Respondent in the Advocates' Disciplinary Tribunal which is still pending judgment. Further, PW1 denied owing the Respondent any money and also denied the allegation that his title was fake since neither the Purchaser nor the Respondent's counsel had ever complained to him about the same. PW1 however noted that the Respondent's counsel paid him the sum of Kshs. 200,000/= after he filed the suit in the trial court.

7. In cross examination, PW1 stated that he is not aware whether the transfer was executed. He also noted that the Respondent did not collect the Title for the property.

8. In re-examination, he stated that there is no clause in the sale agreement indicating that the Respondent is holding the balance as stake holder. Further, PW1 noted that there is no issue pending between him and the Purchaser.

9. PW2, Stephen Kibungei was the Purchaser's advocate in the transaction. He adopted and produced his witness statement as his evidence in chief. He confirmed that he transferred the balance of purchase price through a cheque to the Respondent on 7th July, 2015 for onward transmission to the Appellant.

10. On cross examination, he stated that the Respondent was holding the monies as a trustee. He stated that the Respondent herein confirmed receipt of the monies that he paid him on account of the sale transaction. PW2 further noted that the Respondent sent him all the completion documents save for the Title.

11. In re-examination, he stated that there are no issues between his client and the Appellant. He also confirmed that by a letter dated 1st September, 2015, the Respondent sought for more time to avail the original title of the property.

12. In the Respondent's statement of Defence dated 31st August, 2016 and filed on 1st September, 2016, he denied the averment that the Purchaser's advocate transferred to him the sums stated in clause 3.1 of the agreement. He averred that the sum of Kshs. 2,750,000/= referred to by the Appellant related to a debt out of an aborted transaction which the Appellant was repaying. He stated that the Appellant was the author of his own misfortune for having presented a Title Deed that was not genuine hence making it impossible to transact. It was also his view that the Appellant could not have suffered any loss after breaching the contract.

14. The Respondent neither testified nor called any witness during the hearing of the case to adduce evidence against the Appellant's claim.

Grounds of Appeal

14. The Appellant raised the following four grounds in his Memorandum of Appeal dated 4th September, 2020.
:

> **1. The Learned Magistrate erred in law and fact in awarding interest from the date of judgment instead of awarding from 7th July, 2015 as prayed for in the Plaint.**
>
> **2. The Learned Magistrate erred in law and fact in failing to consider that this was a liquidated claim and interest should run from the date when the amount was due.**
>
> **3. The Learned Magistrate erred in law and fact in failing to consider and/or award costs of the suit as prayed for in the Plaint.**
>
> **4. The Learned Magistrate erred in law and fact in failing to consider the evidence, relevant authorities and submissions by the Appellant thus arriving at a wrong conclusion with respect to the above.**

Submissions

15. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 8th May, 2021 while the Respondent filed submissions dated 13th June, 2021.

The Appellant's Submissions

a. Grounds 1 and 2 of the Memorandum of Appeal

16. The Appellant submitted that he adduced sufficient evidence to show that the amount claimed ought to have been transferred to him by the Respondent on 7th July, 2015. The Appellant argued that **Section 26(1)** of the **Civil Procedure Act,** Chapter 21, Laws of Kenya,

provides that interest shall be charged on the principal sum from the date of filing suit to the date of the adjudication of the suit. This section, according to the Appellant, further enables the court to order interest to be paid at such rate as the court deems reasonable. Further, he stated that where a party has demonstrated that he has been denied the use of his money, Courts have held that he is entitled to compensation in the form of interest as was the positon in the case of **Magic Chemicals Inc v Prapid Enterprises Limited (EA.) Limited [2016] eKLR**.

17. It was the Appellant's further submission that the Respondent deliberately deprived him of the benefit of the money for more than five years without giving any justifiable reason for such conduct. In the Appellant's view therefore, the trial Magistrate decision to award interest from the date that the Judgment was delivered instead of from 7th July, 15 as prayed, does not sufficiently compensate him from the deprivation of the use of the money.

18. Further, the Appellant contended that it is trite that interest is only awarded from the date of judgment where general damages have been assessed by the Court while interest in special damages and/or a liquidated damages is awarded from the date the loss is incurred. Reliance was placed on the case of **Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] eKLR** where the court stated that:

> **"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment. In the present case, the respondent has conceded that the trial judge erred in awarding interest on general damages from the date of dismissal. It does appear to me that the error was caused by the trial judge in lumping special damages together with general damages. The appellant never pleaded or prayed for such a high interest. Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment. The rate of interest of 20% should have been awarded on special damages from the date of interdiction or dismissal till payment in full."**

19. The Appellant was thus emphatic that since his claim was for a liquidated amount, the interest it attracts should not be awarded from the date of the Judgment but from the date the amount fell due. He therefore urged the Court to interfere with the holding of the trial magistrate and award him interest from 7th July, 2015 until payment in full.

Ground 3 & 4 of the Memorandum of Appeal

20. On this, the Appellant submitted that as a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the Court has good reason to order otherwise. He stated that the basis for awarding costs is **Section 27 (1)** of the **Civil Procedure Act, Cap. 21 of the Laws of Kenya.** He submitted that he has successfully demonstrated to the Court that the Respondent was guilty of some misconduct or wrong which necessitated him to file the suit and this entitles him to costs as the innocent party. Further, it was the Appellant's contention that by failing to indicate any reasons for omitting to award costs to the Appellant, the trial magistrate fell into error which warrants this Court to interfere with the judgment. In support of this submission, he relied on the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority. CA No. 85 of 2006** where the Court of Appeal held that:-

> **"Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation. In our view the learned Judge's order was wrong."**

21. Further, the Appellant submitted that an award of costs is not intended to punish the losing litigant, rather to compensate the successful litigant for all the costs incurred in pursuing the litigation and thus, a party's entitlement to costs cannot be wished away. He relied on the case of **Stanley Kaunga Nkarichia v Meru Teachers College & another [2016] eKLR** where it was held that a successful party is entitled to a recompense of expenses he has expended in this litigation. According to the Appellant therefore, he incurred legal costs in filing and prosecuting case and should be rightfully compensated by an award of the costs of the case at the Chief Magistrate's Court.

The Respondent's submissions

22. In the Respondent's submissions, he appeared to be raising a cross appeal as he submitted that he was also aggrieved with the trial court's judgement and raised the following grounds of appeal:

> **1. The learned Magistrate erred in fact and in law in holding that the Respondent should pay the sum of Kshs. 2,550,000 to the Appellant.**
>
> **2. The learned Magistrate erred in fact and law by making conclusions on evidence based on pleadings which are not otherwise supported by any concrete evidence or proof.**

23. The Respondent went on to submit that whereas **Section 26 (1)** of the **Civil Procedure Act** empowers Court to award interest on pecuniary judgments, this is a discretionary power which should be exercised cautiously, judicially and in the interest of justice. He argued that the said provision does not provide for a mandatory award of interest or a method of computing interest.

24. Further, the Respondent submitted that the trial Magistrate failed to consider the provisions of the law on sale agreements, agency relationship and termination of sale agreements. He argued that the Appellant never released the title to the advocate in the case to enable him undertake completion of the sale transaction. He also contended that no completion notice has ever been issued regarding the sale

agreement hence there is no basis for a dispute. Further, he reiterated that the Appellant never handed over the original title to him yet that was a critical completion document. In his view therefore, he could not release funds if he had no title to give the purchaser as doing so would expose him to legal action. He relied on the case of **Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki [2018] eKLR** where the Court stated that:

> **"Further in the case of Millicent Perpetua Atieno vs Louis Onyango Otieno [2013] eKLR, the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land."**
>
> **"Where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain."**

25. In addition, the Respondent argued that the trial magistrate therefore failed to have regard to the express provisions of the contract. That the trial magistrate failed to consider that the Appellant being a disclosed and known principal to a different party, in absence of express instructions to that effect, all binding instructions had to come not from the Respondent but from his own client. In his view therefore, the trial Magistrate purported to make contracts for parties where there was none. Lastly, he submitted that the trial magistrate erred by failing to make reference, have regard and/or, all documentary evidence produced by both parties.

26. The Respondent thus urged this court to set aside and quash the entire judgment delivered by Honourable Dennis Kivuti on 7th August, 2020; consider the evidence afresh and render its own decision or remits it for hearing before an alternative magistrate; and condemn the Appellant to bear the costs of this appeal.

Analysis and Determination

27. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)*** in the following manner:-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."**

28. Before I proceed however, I find it necessary to mention that the Respondent has not filed a proper appeal before this court. If the Respondent was dissatisfied with the trial court's decision, he should have filed a cross appeal in good time or sought for an extension of time to file a Memorandum of Cross Appeal rather than attempting to sneak in a cross appeal at the submissions stage. In the premises, this judgment will only be limited to the appeal lodged by the Appellant.

29. In my considered view therefore, the Court's only task is to determine two issues being: whether the trial magistrate erred on the issue of interest and whether the Appellant is entitled to costs of the suit in the trial court.

On Interest

30. The starting point on the issue of interest is **Section 26** of the **Civil Procedure Act** which provides 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."**

31. In the case of **Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR,** the court stated as follows:

> **"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.**
>
> **28. 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. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

29. 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.

30. 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."

32. In **Prem Lata v Peter Musa Mbiyu (1965) EA 592**, the Court of Appeal held that:

"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.

33. Further, in the famous case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469** the court had this to say:

"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."

34. Guided by the above legal provision and the general principles that flow from the issue of interests, can it be said that the trial magistrate erred in law and fact in awarding interest from the date of judgment rather than from 7th July, 2015 as prayed for in the Plaint?

35. It is not disputed that this was a liquidated claim. I have perused the judgment and noted that the learned trial magistrate correctly addressed his mind to the fact that interest could not be awarded as prayed since there was no contractual agreement between the Appellant and the Respondent regarding the same. The agreement was between the Appellant and the Purchaser who was not a party to the suit before the trial court.

36. Be that as it may, I find that the learned trial magistrate failed to address his mind to the fact that this was a liquidated claim which was ascertainable and that the Appellant had been deprived of the use of the said amount of money due to the actions of the Respondent. Had the trial magistrate done so, he would have reached the conclusion that the Appellant was entitled to an award of interest at court rates from the time of filing the suit and not from the date of judgment. I therefore find that the interest at court rates ordered in the trial court's judgment ought to apply from the date of filing the suit until payment in full.

37. As regards the appropriate interest rate, I find that in the absence of any special or exceptional circumstances, the applicable rate shall be 12% per annum which is the normal court rate.

Costs

38. It is well settled that an award of costs is also in the discretion of the court and such discretion must also be exercised judiciously. This is brought out **in Section 27** of the **Civil Procedure Act, Cap 21**, **Laws of Kenya** which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

39. The learned trial magistrate did not address himself on the issue of costs despite making it clear that the Appellant was the successful party in the case. No reason whatsoever was tendered by the trial magistrate for not awarding the Appellant costs in the circumstances. **It is also clear from the judgment that no vexatious conduct was attributed to the Appellant which would suffice as a reason for not being awarded costs.**

40. In **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, the court stated as follows on the issue of costs:

> **"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion …. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."**

41. In **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, at page 101,** the author authoritatively states as follows on the issue of costs:

> **"The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs- the Court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course".**

42. In view of the above authorities and the circumstances of this case, I find that the learned trial magistrate erred in law and fact by failing to award the Appellant the costs of the suit as prayed for in the Plaint.

Deposition

43. In the end, I find that the Appellant's appeal succeeds in its entirety. The Appellant is awarded interest on the judgment at 12% per annum (p.a.) from the date of filing the suit. The Appellant is also awarded costs of the suit in the trial court together with interest thereon. The costs of this appeal shall be borne by the Respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH OCTOBER, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms. Masai for the Appellant.

2. Mr.Makori for the Respondent.