



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. NO.305 OF 2017

NDUGU TRANSPORT COMPANY LIMITED.....APPLICANT

VERSUS

CHARLES L. KASAMANI.....RESPONDENT

RULING

Before the court for determination, is the Notice of Motion dated the 7th July, 2017 brought by the Applicant, under Section 60(10) (b) of the Advocates Act (1989), Sections 1A, 1B, 3A,26, 27 and 63(e) of the Civil Procedure Act seeking the following orders:

- 1. THAT this Honourable Court be pleased to adopt as an Order of this court the judgment given by the Advocates Disciplinary Tribunal on the 12th day of June 2008 and amended on the 6th day of July 2009 in favour of the Applicant.***
- 2. THAT this Honourable Court be pleased to award interest at court rates from the date the complaint was filed until payment in full.***
- 3. THAT a decree do issue for a sum of Kshs.2,130,995.60/- plus interest as prayed in 2 above.***
- 4. THAT the costs and expenses as are incidental to the Order and execution of this application be provided for.***

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by MANJEET SINGH SEMBI, on the 7th day of July 2017.

The Deponent, who is the managing director of the applicant, depones that the applicant instructed the firm of Kasamani & Co. Advocates to recover the sum of Kshs.11,595,661.15/-, which the Advocates did, pursuant to a Decree issued in Nairobi HCCC 305 of 1993 (Ndugu Transport Company Limited Vs. Peter Oloo Aringo) The Respondent had personal conduct of the matter.

That, the execution proceedings commenced as a result of which, part of the decretal sum was collected in installments by the said firm of Advocates which amount, the Respondent failed to remit to the applicant as a consequence of which, the Applicant filed a complaint before the Advocates Disciplinary Tribunal.

That, the complaint was heard and determined on merits and judgment entered in favour of the applicant for a sum of Kshs.1,130,995.60cts. which was subsequently rectified to read 2,130,995.60cts. as there was an error in the figure.

It was deponed that since the said judgment was entered, the Respondent has refused to pay the money despite several promises to do so thus denying the applicant access to the same which, had it been paid to it, it would have utilized the same towards business enterprise. The Applicant has thus prayed for interest on the judgment sum.

The Respondent filed a Replying affidavit on the 24th August 2017 in which, he has deponed that the application is misconceived and an abuse of the court process by reason of not disclosing payments made to the applicant before the filing of the motion herein. He avers that the prayers sought by the applicant cannot be granted as prayed for the reason of non-disclosure and the need for taking accounts.

He avers that pursuant to the Tribunal's judgment dated 12th June 2008, he made payments totaling to Kshs.980,000 which was done on various dates yet no credit has been given to him. He further depones that the order dated the 6th July 2009 signed by Mercy K. Wambua is invalid for the reason that she has no capacity to sign Disciplinary Tribunal orders and therefore the same should be struck out. That, in any event, the rectification of the judgment was made ex-parte without notice to him and it's not supported by the proceedings of 6th July 2009. He contends that in civil claims, interest is chargeable at the rate of 12% court rates which must be calculated on a reducing balance basis from the date of the judgment unless otherwise ordered by the tribunal or the trial court at the time of the delivery of the judgment.

In a further affidavit sworn by Manjeet Singh Sembi on 9th October 2017, he depones that the replying affidavit of Charles Lutta Kasamani ought to be expunged from the record as it is a mere and irregular denial, devoid of truth and the same is deponed in bad faith and its only aimed at delaying the applicant's cause herein.

He averred that the Respondent had as at 3rd March, 2015 paid a total of Kshs.730,000/- leaving a balance of Kshs.1,590, 353/- which he promised to pay vide a letter dated 26th January 2016 addressed to the Law Society of Kenya. He had promised to pay the same by 25th day of March 2016 which he failed to do. That, parties appeared before the Disciplinary Tribunal on several occasions to confirm payment but the same was not forthcoming which eventually led to the striking of the Respondent off the Roll of advocates with effect from 19th September 2017.

With regard to the rectification of the judgment amount, he deponed that the order was given by the Disciplinary Tribunal and all what the secretary of the Law Society of Kenya did, was to sign the same which was in order and in any event, the rectification only captured the current amount of the money owed by the Respondent which was clearly a typographical error in the initial judgment and it does not prejudice the Respondent in any way as he never disputed the figures. He avers that by raising the issue, the Respondent's intention is to delay the Applicant from recovering monies duly owed to it.

In its submissions, the applicant has raised four key issues why interest should be applied which are that:

- (i) The Advocates Disciplinary Tribunal intended the Respondent to settle the outstanding balance of Kshs.2,320,353 and the Tribunal ordered that the amount be paid with interest.
- (ii) The applicant is a business entity that has been severely prejudiced by the Respondent's act of withholding the judgment amount for a period of over 10 years.
- (iii) The applicant has incurred excessive costs in pursuing the judgment amount from the Respondent both before the Discipline Tribunal and the High Court.
- (iv) The Advocates Deposit Interest Rules provide for the application of interest when money is held on behalf of the client by the Advocate.

On the part of the Respondent, it was submitted that in its judgment dated the 12th June 2008 and rectified on the 6th September 2009, the Tribunal did not order any interest on the amounts that were supposed to be paid and since the Respondent decided to execute the judgment the court cannot order interest. It was further submitted that if the Respondent was dissatisfied with the Judgment of the Tribunal, he had a right to file an Appeal or seek a review at the Tribunal.

In his rejoinder, counsel for the Applicant submitted that the award of interest is a discretionary remedy and the Applicant has shown good reasons why the court should exercise its discretion.

The court has considered the application and all the material before it. The main issue that this Honourable court will have to determine is whether the applicant is entitled to an award of interest at Court rates from the date of the complaint until payment in full.

Section 26 of the Civil Procedure Act is on costs and it 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 rate as the court thinks fit".

From the above provision, application of interest is a discretionary award as the word used in Section 26 is "may" and not "shall."

However, under sub-section 2, where a decree is silent with respect to the payment of further interest on such an aggregate sum from the date of the decree to the date of the payment of other earlier date, the court shall be deemed to have ordered interest at 6% per annum.

Our case falls squarely under Section 26(1) and not 26(2). The Applicant argues that it is entitled to interest at court rate from the date of filing of the complaint until payment in full. The court has perused the judgment delivered by the Tribunal dated the 12th day of June, 2008 which is annexed as annexure A to the applicant's affidavit in support of the application. In the said judgment, the Tribunal found the Respondent guilty and committed him accordingly and found that he owed the Applicant a total sum of Kshs.1,130,995.60cts. which was later amended to read Kshs.2,130,995.60cts. Though the Respondent has an issue with that amendment, he has not denied that the money is owing to the applicant.

Under Section 60(5) of the Advocates Act, the Tribunal is empowered to make such orders as to payment by any party of any costs or witness expenses and of the expenses of the Tribunal or the members thereof in connection with the hearing of any complaint as it may think fit. It follows therefore that the Tribunal has powers to award interest in a matter it has heard and determined. In its judgment, there was no award on interest. As pointed out earlier in this ruling, under Section 26 of the Civil Procedure Act, an award on interest is a discretionary remedy. The Tribunal not having made any order on interest, this court cannot interfere with that discretionary unless it is by way of Appeal against the refusal to make the award.

What is before the court is a Misc. Application seeking to adopt as an order of this court, the judgment given by the Discipline Tribunal. As rightly submitted by the Respondent, the recourse that the applicant had was to apply for a review of the judgment given by the Tribunal on the basis that it did not make an order for award of interest or file an Appeal against the refusal which avenue was not exploited.

In the premises, I find that prayers 2 & 3 of the application are not tenable and I disallow the same but prayer 1 is granted as prayed.

A further order is made that a decree do issue for the balance of the unpaid amount.

There shall be no order as to cost.

Dated, Signed and Delivered at Nairobi this 7th day of February, 2019

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L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Applicant**

..... **For the Respondent**