



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 603 OF 2013

HEINZ BROER.....APPELLANT

VERSUS

BUSCAR (K) LTD & OTHERS (sic).....RESPONDENTS

(Being an appeal from the judgment and decree (sic) of Hon Kipkorir (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 2131 of 2004 delivered on 18th February 2012)

JUDGMENT

INTRODUCTION

1. By a Plaint dated 3rd March 2004 and filed on 4th March 2004 in CMCC No 2131 of 2004 Milimani Commercial Court, the Appellant herein filed suit against Buscar (K) Ltd and Issa Hassan Kassim (hereinafter referred to as "the Respondents") seeking general and special damages, costs of the suit, interest thereon at court rates and such further or other relief the court would deem fit to grant. This followed injuries that he sustained on 19th November 2002 while he was travelling as a fare paying passenger in the 1st Respondent's Motor vehicle Registration Number KAN 211R that was being driven by the 2nd Respondent.

2. In her judgment that was delivered on 1st July 2008, the Learned Trial Magistrate Hon Mokaya, then Acting Principal Magistrate, found the Respondents to have been fully liable for having caused the injuries that the Appellant sustained. She awarded him a sum of Kshs 261,100/= made up as follows:-

a) General damages	Kshs 250,000/=
b) Special damages	Kshs 6,600/=
c) Medical Report expenses	Kshs 1,500/=
d) Court attendance for doctor	<u>Kshs 3,000/=</u>

Kshs 261,100/=

Plus costs and interest of the suit.

3. The Learned Trial Magistrate disallowed a claim made in Germany for £2,197.30 (**sic**) and loss of earnings of £2,177.3 on the ground that the receipts were in German language and had not been accompanied by a translation of the official language of Kenyan courts.

4. The Appellant subsequently filed an application dated 15th November 2012 seeking to review the date from which interest on judgment would start to accrue. Hon. C.C Kipkorir (Ms) Resident Magistrate who heard the application dismissed the same on the ground that he had not set out any of the three (3) reasons permitted for review as provided in Order 45 of the Civil Procedure Rules, 2010.

5. It was her view that the application was also incurably defective in substance and form and that the same could not be cured by the provisions of Article 159 of the Constitution of Kenya, 2010 for the reason that had given him two (2) opportunities to file a proper application but he did not remedy the mistake.

6. When the Appellant appeared before this court on 24th May 2018, this court noted that the Hearing Notice had not been properly served upon the Respondents herein and advised him to get legal representation as he was a layman and from Germany. He never did so and continued to represent himself. The matter came up in court several times and it was only on 8th November 2018 that he provided proof of service of the Mention Notice of the said date.

7. Consequently, this court reserved the date for Judgment as neither the Respondents nor their advocates appeared in court on the said date. His Record of Appeal was dated and filed on 26th June 2015 while his Supplementary Record of Appeal was dated 2nd April 2017 and filed on 13th April 2019. He filed his Written Submissions dated 9th October 2018 on even date.

LEGAL ANALYSIS

8. Having carefully considered the Appellant's Written Submission, it appeared to this court that the only issue that had been placed before it was whether or not Hon C.C Kipkorir (Ms) RM erred in law and in fact in not allowing his Notice of Motion application filed on 9th November 2012 seeking to have interest run from 4th March 2004, which was the date of filing suit, and not from the date of judgment.

9. In his Notice of Motion application filed on 9th November 2012 that was not premised on any provision of the law, the Appellant had sought the following orders:-

1. THAT the case is filed at the 4th March 2004 and that is the start for interest.

2. THAT I request the court change this time corresponding the law.

10. It was supported by his affidavit that was sworn on 15th November 2012. The contents of the said Affidavit were as follows:-

1. THAT I am applicant herein and therefore competent to swear this affidavit.

2. THAT I present myself in court in this case.

3. THAT what is deponed herein is true to the best of my knowledge information and belief.

11. It was clear to this court that, technically, the application as drafted was irregular in form. It was, however, its view that its substance, which was the change of the date from when interest accrued, was clearly discernible from the said application. This court therefore took a different view from Hon C.C Kipkorir (Ms) RM that the application was defective for want of form and substance.

12. This court had due regard to, Order 2 Rule 14 of the Civil Procedure Rules that provides as follows:-

“No technical objection may be raised to any pleading on the ground of any want of form.”

13. Going further, Order 51 Rule 10 of the Civil Procedure Rules stipulates that:-

1. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

2. No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

14. Having said so, this court noted that despite having noted that the said application lacked substance and could not be cured by Article 159 (2) (d) of the Constitution of Kenya that mandates court to administer justice without undue regard to technicalities, Hon C.C Kipkorir (Ms) RM nonetheless proceeded to determine the same on merit. She concluded that since the Appellant did not cite any of the three (3) reasons for review and his Supporting Affidavit did not give the reasons to justify why she could review the judgment, his application could not be allowed.

15. This court took a different view. It was its considered opinion that was an error apparent on the face of the court record within the meaning envisaged in Order 45 of the Civil Procedure Rules that states that:-

1. Any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason (emphasis court), desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or

made the order without unreasonable delay.

16. A careful perusal of the Learned Trial Magistrate shows that she only ordered that the decretal sum was to accrue interest. She did not indicate from when and at what rests the interest would apply contrary to Section 26 of the Civil Procedure Act. This was a sufficient reason for review of her judgment as regards the issue of interest.

17. Notably, Section 26 of the Civil Procedure Act stipulates that:-

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.

18. What is clearly discernible from the aforesaid provisions of the law is that the trial court retains the discretion of deciding from when interest should start or continue accruing and at what rests.

19. There are therefore instances where a court may order that interest accrue from the date of filing suit while in other cases, that interest accrue from the date of judgment.

20. In the cases of Lei Masaku vs Kalpama Builders Ltd [2014] eKLR , Oluoch Eric Goga vs Universal Corporation Ltd [2015] eKLR, Joseph Kiarie Njoroge vs Njue Kiarie [2007] eKLR and 100 minor suing through father and next friend MOR vs Franciscan Sisters of the Immaculate [2018] eKLR, Mabeya, Aburili, Mumbi Ngugi JJ and Visram J (as he then was) held and found that interest on general damages ought to run from the date of judgment while interest on special damages ought to run from date of filing suit.

21. In the case of Francis Joseph Kamau Leatha vs Housing Finance Company of Kenya Ltd [2015] eKLR, Odunga J held that interest therein would accrue from the date of filing judgment. He had due regard to the case of Lwanga vs Centenary Rural Development Bank [1999] 1 EA 175 where it was held that:-

“The award of interest prior to the institution of the suit is rationalised in two ways: (1). that the plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the defendant wrongfully withheld the plaintiff’s money. The emphasis here is on the Defendant’s wrongful withholding of the Plaintiff’s money. On that basis, interest is to run from the date when the Defendant ought reasonably to have settled the plaintiff’s claim. This is rather punitive.”

22. The payment of interest on general damages from the date of judgment has been settled by the Court of Appeal in the cases of Shariff Salim & Another vs Malundu Kikava [1989] eKLR and Royal Media Services Ltd & Another vs Hon Jakoyo Midiwo [2018] eKLR amongst other cases.

23. In particular in the case of Shariff Salim & Another vs Malundu Kikava [1989] eKLR (Supra), the Court of Appeal rendered itself as follows:-

“There is no gainsaying the fact under Section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. In the case of Prema Lata vs Peter Musa Mbiyu [1965] EA 592, the appellant, in a suit for damages for personal injuries, was awarded Kshs 24,000, as general damages and Kshs 1,742.80 as special damages but the judge refused an application to award interest on these two sums from the date of filing suit until judgment. On appeal, the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit.....The judge gave no reason for ordering that interest even on general damages was to be paid from the date of filing the suit. According to the authorities interest on general damages should be paid from the date of assessment which of course is the date of judgment. That is the earliest date when the defendant’s liability to pay does arise. That order even in relation to payment of interest on special damages is, in our view, unsupportable. Quite apart from the fact that the claim for special damages was not proved by any evidence beyond being itemised in the plaint, except for kshs 100, paid for police abstract, the remaining items had not been paid for at the date of the filing of the suit on August 19, 1983. As a result, it is impossible to ascertain the reasons which compelled the judge to award interest from the date of filing suit and this leads us to the inevitable conclusion that the learned judge wrongly exercised his discretion. This ground of appeal accordingly succeeds.

24. The basis of awarding interest on general damages from the date of judgment is premised on the ground that a plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of institution of the suit. Interest on special damages would, however, accrue from date of filing suit as a plaintiff will have incurred expenses from the date suit is filed and he will have been kept away from his monies until judgment is delivered.

25. Following the same reasoning, this court was not persuaded that the issue of accrual of interest on general damages should be determined

in any other way. It was its holding and finding that interest on general damages would accrue from the date of judgment. The Learned Trial Magistrate erred in not pronouncing herself clearly on this issue. Fortunately, the time from when interest could accrue on the general damages was correctly discerned at the time of issuance of the Decree.

26. As the Appellant had been kept out of monies he had incurred as special damages, interest on the same ought to have been from the date of filing suit. Bearing in mind the provisions of Order 45 of Civil Procedure Rules and Section 80 of the Civil Procedure Rules, this court was inclined to find and hold that the Appellant's appeal was successful as far as the question of accrual of interest on special damages was concerned.

DISPOSITON

27. Accordingly, the upshot of this court's decision was that the judgment that was delivered on 1st July 2012 regarding interest is hereby set aside and/or vacated and in its place, it is hereby directed that judgment be and is hereby entered in favour of the Appellant for Kshs 261,100/= made up as follows:-

General damages	Kshs 250,000/=
Special damages	Kshs 6,600/=
Medical Report expenses	Kshs 1,500/=
Court attendance for doctor	<u>Kshs 3,000/=</u>

Kshs 261,100/=

Plus costs and interest of the suit at court rates. For avoidance of doubt, interest on the general damages and court attendance for doctor will accrue from date of judgment at court rates until payment in full while interest on special damages and medical report expenses will accrue from the date of filing suit.

28. As the Appellant's appeal was partially successful and the Respondents did not participate in these proceedings, this court makes no orders as to costs.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of April 2019

J. KAMAU

JUDGE