



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 51 OF 2016

MT. ELGON CONSTITUENCY

DEVELOPMENT FUND.....APPELLANT

VERSUS

MADAM KIRUI KISACH (t/a FELISHA AGENCIES).....1ST RESPONDENT

BOM MASA EK S.A.

PRIMARY & BOARDING SCHOOL.....2ND RESPONDENT

JUDGMENT

The appellant Mt. Elgon CDF Committee was the Defendant in Kimilili SPMCC No. 98/2014 and the Respondent Madam Kirui Kisachi T/A Felisha Agencies was the Plaintiff. By Plaint dated 25.9.2014 the Plaintiff sought Judgment against the defendant for Sum of Kshs.490,000/= arising from a contract to construct a dormitory and ablution block for the appellant at an agreed cost of Kshs.2,860,272/= which was paid less the claimed amount. The Respondent therefore in their plaint stated;

REASONS WHEREFORE the plaintiff prays for judgment against the defendants jointly and severally for;

- (a) Kshs.490,000/=**
- (b) Interest at the rate of 26% w.e.f. July 2012 upto the date of Judgment.**
- (c) Costs .**
- (d) Interest from the date of Judgment at the Court rate, till payment.**

On 21.10.2014 the record in the proceedings show;

“Defendant having been duly served with summons to enter appearance and a copy of the plaint and having failed to file memorandum of appearance and written defendant statements of defence within prescribed period of time, Judgment is hereby entered in favour of the plaintiff against the defendant as prayed in the plaint.”

Thereafter a decree was drawn from the Judgment and execution proceeded. The appellant filed a notice of Motion dated 15.7.2016 seeking orders:-

- i). That the court be pleased to correct the decree herein and amend the arithmetic and accidental error of award of 26% and also at court rates and that interest be calculated at court rates from the date of filing suit.
- ii). That the court orders that excess amount paid to the plaintiff be refunded to the 2nd defendants together with interest from 16/5/2016 until payment in full.
- iii). The court makes any other order it deems fit.
- iv). Costs be provided.

The learned trial Magistrate dismissed the application. The appellant dissatisfied with the ruling filed this appeal premised on the following grounds:-

1. The learned Magistrate erred in law in failing to appreciate that a claim in interest at 26% p.a. is not part of a liquidated claim and the same ought to have gone for full trial.
2. The learned Magistrate erred in law and fact in failing to exercise his discretion to correct the decree of the Lower Court.
3. The learned Magistrate erred in failing to appreciate the mandatory Provisions of the Order 10 of the Civil Procedure Rules on Entry of Interlocutory Judgment.
4. The learned Magistrate erred in law and fact in failing to appreciate the determination of a court and role of an Executive Officer of the court in performance of administrative issues.

Mr. Kiarie for the Respondent Madam Kirui Kisach filed application dated 15/12/2016 seeking to have the appeal struck out with costs to the borne by Mt. Elgon CDF Committee on the grounds that the Ruling by Onyango – SPM did not give rise to a decree which is appealable under Sec 65 C.P.A., that the appeal is incompetent and misconceived and is otherwise an abused of the court process.

Otieno Yogo for the appellant submits that the Respondent claimed that the basis upon which he prayed for Interest at 26% is because she had borrowed funds from National Bank of Kenya Kitale Branch at that rate. He submits that the matter should have gone to full trial to give 1st Respondent to prove the same; by producing relevant documents. Secondly Counsel for the appellant submits that there was an error on

the decree in as much as it gave interest at 26% which had not been proved and finally that entry of interlocutory Judgment is governed by Order 10 rule 7 and that such Judgment ought not to have been entered as the appellant had entered appearance.

Mr. Kiarie for Respondent submits that this appeal is incompetent as the appellant did not seek leave of the court to do so and should therefore be struck out.

Upon perusing the submission and the proceedings, this appeal is arising from the ruling of the trial magistrate Onyango who dismissed the appellants application dated 15.7.2016. Aggrieved by the ruling, the appellant filed this appeal.

The main issue in this appeal is whether the trial magistrate erred in dismissing the appellants application dated 15.7.2016 and only allowing the correction of errors in the Judgment as relates to date when interest of 26% was due. From the submission, the only issue for determination is whether the Respondent claim was liquidated or not.

The claim was as in Paragraph 7 of the plaint and was as follows:-

- (a) **Kshs.490,000/=**
- (b) **Interest at the rate of 26% w.e.f. July 2012 upto the date of Judgment.**
- (c) **Costs .**
- (d) **Interest from the date of Judgment at the Court rate, till payment.**

The claim in this suit was a money claim, the amount claimed was known and specified, the interest on the amount was specified at 26% and the period known w.e.f. 1.1.2012 upto date of Judgment. In my understanding the claim was ascertainable and could be known by mathematical calculations. There was no uncertainty on amount claimed or Interest demanded or Interest to be payable for what period. In my view therefore I do not find that interest was subject to be proved by the Respondent. The trial magistrate in his ruling stated;

I have however noted from the plaint herein that the plaintiff only claimed interest from July 2012 upto the date of Judgment. There appeared to have been no further claim of interest after Judgment. It is trite law that parties are bound by their pleadings. There was therefore no basis to award further interest after judgment is no such claim was made. The decree is there erroneous to the extent that it purported to award interest (whether at 26% or 14%) after payment. I find that any further interest awarded after Judgment was made in error and due to an accidental slip by the court. It is therefore in order to correct this anomaly to give effect to the Judgment as prayed and granted.

I have considered the appeal and submissions, I find the ruling by the trial magistrate clear and based on sound foundation of law, I find and uphold the same. Consequently I dismiss this appeal with costs. Same order to apply to **HCCA No. 50/2016 MT. Elgon Constituency Development Fund Vs. Madam Kirui Kisach (t/a Felisha Agencis) BOM Masaek S.A. Primary & Boarding School.**

Dated and Delivered at Bungoma this 22nd day of May, 2019.

S.N. RIECHI

JUDGE