REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBUCIVIL

APPEAL NO. 32 OF 2016

JANE WANJIKU WAMBU.....APPELLANT

VERSUS

ANTHONY KIGAMBA HATO.....1ST RESPONDENT

STEPHEN NJENGA HATO.....2ND RESPONDENT

DAVID NGIGI HATO.....3RD RESPONDENT

(*ALL T/A AS PAFE ENTERPRISES*)

HATO HOLDINGS LIMITED.....4TH RESPONDENT

JUDGMENT

1. The Appellant took out a Plaint and Summons at the Thika Chief Magistrates Court in Civil Case No. 864 of 2013 suing the Respondents herein for a refund of Kshs. 850,000/= plus "interest at the current commercial rates"; the sum of Kshs. 100,000/= plus interests; and costs "with interest at Court rates." The suit was one sounding in contracts and was based on an alleged breach of contract for the sale of property.

2. The gist of the claim by the Appellant was that she entered into a contract for the sale of property known as LR No. Thika Municipality/Block 20/2562 (Ngoingwa) ("Suit Property") with the first three Respondents. In pursuance of a Written Sale Agreement, the Appellant paid a deposit in a total sum of Kshs. 850,000/= which, by the terms of the agreement, was paid to the 4th Respondent.

3. However, the Appellant claimed that at the appointed time of transfer as per the Agreement, the Appellant was unable to transfer the property to herself because she discovered at that point that the property was registered in the name of PAFE Entreprises whose two co-owners are Paul Hato Kigamba and Felistas Muthoni Hato and not the 1st, 2nd and 3rd Respondents. The Appellant further belatedly discovered that the two co-owners of PAFE Enterprises are long deceased and that no administrators or executors for their respective estates have been appointed. As such, it was legally impossible and possibly criminal to deal with any properties owned by the Co-owners of PAFE Entreprises. Since the Suit Property is one such property, it followed that the 1st, 2nd and 3rd Respondent would not be able to transfer the Suit Property to the Appellant.

4. Given these discoveries, the Appellant rescinded the contract and demanded to be paid back the Kshs. 850,000/= she had already paid to the Respondents plus the Kshs. 100,000/= agreed damages stipulated in the Contract.

5. The Respondents balked at the idea of refunding the monies paid and insisted on going ahead with the contract. They insisted that they were able and willing to consumate the contract for sale – and even managed to somehow obtain consent to transfer the land from the Land Control Board. They turned over the original title document and the signed Consent and Transfer forms to the Appellant's brother to process the transfer.

6. However, at this point, the Appellant would have none of it. She was already aware that the Suit Property was owned by the Deceased parents of the 1st, 2nd and 3rd Respondents and knew that any transfer to her before the three had filed for, and obtained Letters of Administration or probate with respect to the estate would be illegal and possibly criminal. She, therefore, declined to turn over the documents to the Respondents so that they could effect the transfer.

7. The suit in the lower Court followed next when the Respondents refused to pay back the monies deposited with them despite a demand to do so. They insisted that they were able and willing to transfer the property and that it was the Appellant who was in breach of the contract. The Respondents persisted in this position through the trial in the lower Court.

8. After a fully-fledged trial, the Learned Trial Magistrate held that the Sale Agreement was void since the 1st, 2nd and 3rd Respondents did not have the capacity to sell the property and could not, therefore, pass good title to the Appellant. From this analysis, the Learned Trial Magistrate held that "neither party can benefit from [the] provisions [of the Sale Agreement] as the same is unenforceable." She proceeded to make the following orders:

> a. That the [Appellant] be refunded the Kshs. 850,000/= she had deposited;
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> b. That the Sale Agreement is voided and thus neither party will receive the quantified damages;
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> c. That the original title be returned to the Respondents or administrators on application after the Appellant has been refunded her money;
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> d. That the costs of the suit were awarded to the Appellant.

9. The Appellant is partly aggrieved by the judgment and orders of the Learned Trial Magistrate. She has not challenged the part of the judgment that declared the Sale Agreement void. Instead, however, she has challenged the failure of the Learned Trial Magistrate to award interests on the special damages and the costs. Though the Appellant's Memorandum of Appeal raises four grounds of appeal, in reality, there are two real grounds – the other two merely providing the contextual or evidential scaffolding for the other two. The two grounds are thus:

> a. That the Learned Magistrate misdirected herself both in fact and in law when she failed, as she did, to award the Appellant herein interest on the sum of Kshs. 850,000/= (which was paid as consideration for the suit property) at current commercial rates (15%) from 21st September, 2010 until payment in full.
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> b. That the Learned Magistrate also misdirected herself both in fact and in law when she failed, having awarded the costs of the suit to the Appellant, to award the Appellant herein interest on the said costs at court rates from the date of filing suit until payment in full, which costs at include a sum of USD 1,393.40 at the prevailing exchange rates on 30th April, 2015 when the Appellant's air ticket was paid for, being the travel expenses/airfare incurred by the Appellant in travelling from the United States where she is domiciled to Kenya and back for the hearing on 25th August, 2015.

10. Before I delve into these two substantive grounds of Appeal, there is one matter the Respondents have raised for the first time on appeal which I wish to deal with first: the issue of jurisdiction. The Respondents say that the Plaint in the lower Court was filed on 25/10/2013 after the establishment of the Environment and Land Court pursuant to the requirements of the Constitution in Article 165(2). The

Respondents therefore argue that the Learned Trial Magistrate had no jurisdiction to hear the matter since it was a land matter which should have been filed at the Environment and Land Court. The Respondents, therefore, urge me to find that the Trial Court had no jurisdiction and, therefore, all the proceedings there – including the orders made – were a nullity.

11. It is true that jurisdiction is the soul and lifeblood of judicial activity. Jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to hear is void *ab initio.* It has been famously stated that jurisdiction is everything and without it the court has no power to make any further step and must down its tools. (See ***The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Ltd (1989) KLR 1*****)**. However, in the same case, ***Nyarangi J*****.** remarked that:

> *I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.*

12. Parties are, therefore, expected to raise the issue of jurisdiction at the earliest opportunity. However, since jurisdiction goes to the question of judicial authority to decide a matter on its merits, our Courts have been consistent that the issue of the issue of jurisdiction can be properly raised by a party at any stage – including on appeal. Hence, in ***Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR,*** the Court of Appeal held that the issue of jurisdiction can be argued at any time. The Court remarked as follows:

> *"It has been held in the case of* ***Kenindia Assurance Co. Ltd v Otiende (1989) 2 KAR 162*** *that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."*

13. The Court of Appeal recently cited this case with approval in reaching the same conclusion in ***Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR.***

14. Hence, this Court can take up the issue of jurisdiction at this stage even though it frowns upon the practice by parties to wait until the appeal stage to raise the issue. I would prefer to dispose of this jurisdictional issue first. I can do so rather summarily.

15. The jurisdictional question does not favour the Respondents for two reasons. First, the question whether Magistrates' Courts can hear land matters is a "live" question in our Courts where a decision is awaited by the Court of Appeal. That Court has issued a stay of execution against the judgment entered by the High Court in Malindi Constitution Petition No. 3 of 2016 ***Malindi Law Society v The Attorney General & 4 Others.*** The effect of the stay is to permit magistrates courts to continue hearing land matters within their pecuniary jurisdiction.

16. Secondly, and more importantly, the matter that was before the Learned Trial Magistrate was not, in my view, a land matter. The suit, as can be gleaned from the pleadings, was one claiming for a return of deposits paid and a breach of contract. There was no claim for land. The case could, therefore, appropriately be handled by a Court without jurisdiction over land.

17. Having gone over the jurisdictional hurdle, I will next delve into the complaint that the Learned Trial Magistrate erred by failing to award the Appellant interests on the sum of Kshs. 850,000 at "current commercial rates (15%) from 21st September, 2010 until payment in full."

18. The Appellant's Counsel submitted that the Learned Trial Magistrate was in obvious error for not realizing the weight of authorities is that unless there is good reason to order otherwise, interests are awarded at commercial rates for special damages from the date of filing of the suit. The Appellant's Counsel cited three cases – two of vintage lineage and one recent one - to demonstrate this position.

19. First, Counsel cited ***Prem Lata v Peter Musa Mbiyu (1965) EA 592*** where 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.*

20. Counsel also cited the celebrated ***Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469*** which was to the same effect in the following words:

> *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.*

21. Gikonyo J. cited with approval these cases, restated and applied the principle in the recent case, ***Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others (2014) eKLR***.

22. The Appellant's argument is that Courts have set a stable precedent of awarding interests on principal liquidated amounts at court rates and that failure by the lower Court to award the same on the Appellant's claim in the main suit was a miscarriage of justice. This is so, the Appellant argues, because the claim was for a liquidated sum for monies paid on a parcel of land that the Respondents had no right to sell hence leading to a deprivation of the use of the money for a period of more than six years.

23. It is fair to point out at this point that Counsel for the Appellant seemed to be fluidly oscillating between three positions:

> a. Whether the interests Counsel is claiming for the Appellant is payable from the date the deposits were paid by the Appellant or the date the suit was filed. Counsel's Memorandum of Appeal and Plaint in the lower Court appear to imply it is the latter but his arguments in the Written Submissions on appeal suggest it is the latter.
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> b. Whether the interest rates he is claiming for his client are "commercial interest rates" or "court rates". Counsel often talked of "Court Commercial Interests Rates" which is a lexicon unknown to our jurisprudence.

24. The Respondents opposed the appeal and their Counsel filed Written Submissions. The gist of the Respondents' opposition is that parties are bound by their pleadings and the Appellant had prayed for a refund of Kshs. 850,000/= plus interest at the current commercial rates from the date of deposit with the Respondents until payment in full. The Respondents insist that the Appellant have framed her prayer that way, the Learned Trial Magistrate had no choice but to decline the prayer since granting the prayer would have been "illegal, unlawful and unenforceable." This is because, the Respondents argue, a Court cannot grant what is not pleaded.

25. The Respondents further argue that the Learned Trial Magistrate could not allow the prayer to grant interest at commercial rates since courts can only grant interest at Court rates and not commercial rates "otherwise the Court is being urged to engage in usury or merchantable enterprise which would force the Court to deviate from its core mandate of provision of justice."

26. The starting point for this analysis as both the advocates for the Appellant and the Respondents agree, is Section 26 of the Civil Procedure Act. That Section 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 ggregate 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.

27. 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; <u>Mulla – The Code of Civil Procedure</u> (16th Ed.) Vol. 1 at p. 505.***

31. Starting with these general principles, can it be said in any proper sense that the Learned Trial Magistrate "proceeded upon some erroneous principle or was plainly and obviously wrong" in failing to award interest rates as the Appellant urges?

32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the Civil Procedure Act. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

33. Would it have been a bar that the Appellant had requested for interest from the date she deposited the monies with the Respondents? I do not think so. As analysed above, a party is only entitled to interest prior to filing where some substantive law permits the party to recover such. Here, there is no such substantive law and certainly no contractual agreement between the parties since the Sale Agreement was declared void. It would then have been proper and fitting for the Learned Trial Magistrate, in exercising

her discretion to award and fix interest rates under Section 26 of the Civil Procedure Act to rely on our decisional law to award interest from the time of filing.

34. One last issue is what the appropriate interest rate should be. Counsel for the Appellant has suggested a figure of 15% as the "current commercial rates." Counsel has not disclosed where that figure has come from. On my part, I will, again, rely on our stable jurisprudence and judicial practice to determine what the appropriate interest rate on liquidated damages is. The rate that is mostly used by the Courts absent special or exceptional circumstances which are not proved here, is to award an interest rate of 12% per annum from the date of filing suit until payment in full. See, for example, the ***Orix Oil (Kenya) Limited Case*** (supra) and ***Autolog Kenya Limited v Navisat Telematics (Kenya) Limited (2013) eKLR*** and ***Permuga Auto Spares & another v Margaret Korir Tagi [2016] eKLR.***

35. I will now turn to the eminently easier second substantive issue raised by the Appellant: That the Learned Magistrate midirected herself both in fact and in law when she failed, having awarded the costs of the suit to the Appellant, to award the Appellant interest on the costs at court rates from the date of filing suit until payment in full.

36. This point does not require much analysis. Counsel for the Appellant does not really state why they believe interest should have been awarded except to point out that the Court was silent on the question.

37. The authority and discretion of a Court to award interest on costs is provided for in Section 27(2) of the Civil Procedure Act. It is in the following terms:

> *The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.*

38. Hence, like interest on damages, the Trial Court has a wide latitude to award interest on costs. However, there is no rule of thumb that a successful litigant who has been awarded costs must get interest on those costs. Indeed, the decisional principle in our jurisdiction seems to run in the opposite direction: it is not normal to award interest on costs. This was the holding in ***Hasanali v City Motor Accessories Ltd & Others [1972] EA 423***.

39. In any event, in our jurisdiction, the normal rule is that interest on costs begins running from the date of the judgment or order containing the entitlement to costs. Interest on costs cannot begin at an earlier date before the Court pronounces entitlement to those costs. Indeed, there is some ambivalence whether, where interest on costs are awarded the costs should start running on the day the judgment is pronoounced (known as the *'incipitur'* rule) or from the date when costs are assessed (known as the *'allocatur'* rule). Suffice it to say that interest on costs should not be allocated from a date earlier than when judgment is delivered.

40. In this particular case, the Learned Trial Magistrate did not award interests on costs. It was within her discretion not to do so. The Appellant has not persuaded me on appeal why this was an abuse of the Court's discretion not to award interest on costs since that is the normal rule in our jurisdiction. Consequently, I find no reason to interfere with the finding and holding of the Learned Trial Magistrate on this point.

41. In the end, therefore, the result is as follows:

> **a. The Appeal is allowed only to the extent that the Appellant is awarded interest on the liquidated damages of Kshs. 850,000/=. The interest shall begin running from the date of filing suit until payment in full. The interest rate shall be at the rate of 12% per annum.**
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> **b. The part of the appeal contesting refusal to award interest on costs is without merit and is dismissed.**
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> **c. As the Appellant has succeeded in large part on appeal, she shall have the costs of this**

Appeal.

42. Orders accordingly

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE