



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 16 OF 2012 'A'

**IN THE MATTER OF: HIGH COURT CIVIL CASE NO. 115 OF 2002 (HIGH COURT COMMERCIAL CASE NO. 131 OF 2006)
– MICHAEL WAWIRE VS. KENYA PORTS AUTHORITY**

AND

**IN THE MATTER OF: THE JUDGMENT AND DECREE OF THE COURT IN HCCC NO. 115 OF 2002 (HIGH COURT
COMMERCIAL CASE NO. 131 OF 2006) MICHAEL WAWIRE VS. KENYA PORTS AUTHORITY DATED 25TH AUGUST,
2010**

AND

IN THE MATTER OF: THE KENYA PORTS AUTHORITY ACT, CHAPTER 391 LAWS OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

BETWEEN

MICHAEL WAWIRE.....APPLICANT

VERSUS

MANAGING DIRECTOR, KENYA PORTS AUTHORITY.....RESPONDENT

RULING

The Application

1. By a Notice of Motion Amended and dated 3rd October, 2016 the Respondent/Applicant prays for the following orders:

- (i) That this application be certified urgent and service hereof be dispensed with in the first instance.
- (ii) That pending the hearing and determination of this application, the execution of the Warrant of Arrest in execution issued by this Court on the 19th day of July 2016 be stayed.
- (iii) That the purported Decree issued herein on 13th July, 2016 and the Warrant of Arrest in execution issued by this Court on the 19th July, 2016 be set aside as being invalid and a nullity.
- (iv) That the Order made on 26th July 2012 be varied by deletion of the words “...for the amount of Kshs.4,952,086.40 plus accrued interest” in relief No.1 granted in the Judgment delivered that day.
- (v) That the costs of this application be provided for.

2. The application is premised on the grounds set out therein and by Supporting Affidavit sworn by Micahel Sangoro on 20th July, 2016 and a Supplementary Affidavit sworn by Stephen Kyandih on 3rd October, 2016.

3. The Applicant's case is that by its Judgment delivered in Mombasa HCCC No.131 of 2006(Michael Wawire vs. Kenya Ports Authority), this Court ordered the Defendant to pay to the Plaintiff, the sum of KShs.1,374,734.30 plus interest on the sum in (f) above at Court rates and costs of the suit. Subsequent thereto, the Ex-parte Applicant filed these Judicial Review Proceedings and on 26th July, 2012, using this Court to issue an Order of Mandamus directed at the Respondent to comply with the Decree of the Court in HCCC No.115 of 2002 (High Court Commercial Case No.131 of 2006) and pay to the Ex-parte Applicant the sum due thereunder. A dispute arose as to the question of interest payable and this dispute was referred to Mr. Justice Azangalala for clarification which he made, Ruling that interest was to apply on the total sum in paragraph (1) at court rates. The Respondent/Applicant states that the Ex parte Applicant has and continues to abuse the process of this court by purporting to levy interest at rates far in excess of court rates which is statutorily set at 6% per annum. The Applicant states that a Warrant of Arrest in execution has been issued in these proceedings without jurisdiction, and that this court and the Deputy Registrar cannot purport to execute an alleged Decree dated 13th July, 2016 in these proceedings when these proceedings are Judicial Review proceedings and not the ordinary civil proceedings to which the provisions of The Civil Procedure Act apply. Further, the Applicant states that no Draft Decree has been forwarded to the Respondent's Advocates for approval and the Warrant of Arrest issued on 19th July, 2016 by the Deputy Registrar is invalid in law and issued without jurisdiction. Further, it is alleged that there is no provision to order the arrest of the Respondent in Judicial Review Proceedings and particularly without any Notice to Show Cause being issued or the Respondent being asked to show cause why further steps ought not to be taken. In any event, the application of 14% interest on the sum adjudged to be paid is wrongful and unlawful and in contravention of the Provisions of Section 26 of The Civil Procedure Act. The Applicant states that the sum of KShs.9,004,742.83 for which the purported decree is being executed and the Warrant of Arrest has been issued is not due and owing as claimed by the Ex-parte Applicant.

The Response

4. The motion is opposed by the Ex parte Applicant/Respondent vide a Replying Affidavit sworn on 12th August, 2016 by Japheth Asige and a Further Affidavit also sworn by Mr. Asige on 7th October, 2016. Mr. Asige is the counsel to the Ex parte Applicant.

5. The Respondent's case is that the Judgment was delivered in this matter on 26th July, 2012 when the Respondent was by mandamus ordered to pay the Ex parte Applicant Kenya Shillings 4,952,086.40 plus accrued interest and costs of the suit. The Respondent did not dispute the decision and a decree was issued on 13th July, 2016 for the payment by the Respondent of KShs. 4,952,086.40 plus accrued interest and costs of the suit. The decree approved and issued by the court is in total conformity and compliance with the Judgment of the court delivered on 26th July, 2012. However, in spite of numerous requests made, the Respondent has neglected and or refused to make payment as decreed resulting in the application and issuance on 19th July, 2016 of a Warrant of Arrest of the Respondent's Managing Director. The Ex parte Applicant denies abusing the process of this court in the way of calculating interest as decreed on 26th July, 2012. The Ex parte Applicant states that the Chief Justice from time to time fixes the ceiling of the court rate of interest under Section 26 of the Civil Procedure Act. In 1982 for example, by Practice Directions, the Chief Justice fixed the rate of interest at 12% by Practice Note No 1 of 1982. The prevailing court rate of interest is now 14% p.a. which rate was applicable and prevailing in June, 2006 as the Court of Appeal ruled in **Highway Furniture Mart Limited vs. Permanent Secretary Office of the President & Another [2006]**. The Ex parte Applicant states that he applied and computed the interest awarded in the Judgment and decree of the court at the current prevailing rate of 14% per annum. The Respondent has refused and or neglected to make payment to the Ex parte Applicant in this cause since 26th July, 2012 when it was so ordered and decreed. Mr. Asige states that the Respondent was aware of the execution process. The Respondent's advocates appeared and attended the Ruling of the Taxation of Costs which was delivered on 15th April, 2016. The Respondent's advocates were also served with a demand for the payment of the decretal amount plus interest and costs. The Respondent's advocates did not and have not ever disputed the decretal sum. Mr. Asige submitted that however, before the attempted execution of the Warrants of Arrest, the Managing Director of the Respondent was served with the Notice to Show Cause personally. Also, prior to the issuance of the Notice to Show Cause a decree has been validly, lawfully and regularly approved and issued by the court, the matter having arisen from a Judgment and Order made in a Judicial Review Cause which is categorized as being neither civil nor criminal. The Ex parte Applicant states that these Judicial Review proceedings were essentially execution proceedings of the decree and Judgment issued in the original suit being Mombasa High Court Commercial Case No. 131 of 2006 (Michael Wawire vs. Kenya Ports Authority). **Submissions**

6. Parties filed submissions. Mr. Khagram for the Applicant/Respondent submitted the Respondent has no desire to frustrate the Ex-Parte Applicant and shall pay any sum lawfully due to the Ex-Parte Applicant accruing out of the Decree issued in his favour in Mombasa High Court Civil Case No. 131 of 2006 which the Ex-Parte Applicant has sought to enforce through these proceedings. The Applicant submitted that from the outset, there is a clear error apparent on the face of the record in this matter as far as the order made by this Court on the 26th July 2016 is concerned and which ought to be, under the inherent powers of this Court as well as the provisions of Article 159(2) of the Constitution of Kenya 2010, corrected and the 'slip rule' is clearly applicable in the circumstances of this matter. The Order issued by this Court in its Judgment delivered on the 26th July, 2012 was that:-

“1. An Order of Mandamus is hereby issued commanding the Managing Director of Kenya Ports Authority to comply with the decree dated 25th August 2010 issued in Mombasa High Court Civil Suit No. 115 of 2002 (High Court Commercial Case No.131 of 2006) for the amount of KShs.4,952,086.40 plus accrued interest.

2. The Ex-parte Applicant is awarded the costs of this suit.”

7. The Applicant referred the court to Exhibit marked as “SK-1” which is a true photostat copy of the Decree in the above suit dated the 25th August, 2010. The said Decree, according to the Applicant, is categorical that it is for a sum of KShs.1,374,744.30 plus costs and interest as stated therein but subjecting the sum of KShs.856,971.30 of the pension lumpsum amount to tax. The Applicant submitted that it is clear that this Court erred on the face of the record when it directed compliance with a Decree ‘...for the amount of KShs. 4,952,086.40...’ and to uphold this would be tantamount to sanctioning an illegality and compelling the Respondent to discharge obligations not decreed by the

Court in the said Mombasa High Court Civil Case No. 115 of 2002 (Mombasa High Court Commercial Case No. 131 of 2006). The Applicant submitted that to hold otherwise would not only contravene this Court's duties under the provisions of Article 159(2) of the Constitution but produce an absurd result that would entitle the Ex-Parte Applicant to unlawfully and unjustly enrich himself thereby infringing upon the Kenya Ports Authority's rights to protection of its property. It was submitted that in any event, the leave granted to the Ex-parte Applicant herein was to apply for an Order of Mandamus to compel the Managing Director of the Kenya Ports Authority to comply with the decree dated 25th August, 2010 issued in Mombasa High Court Civil Case No. 115 of 2002 (High Court Commercial case No. 131 of 2006) - Michael Wawire vs. Kenya Ports Authority and pay the entire decretal amount, plus accrued interest and costs less the sum of Kshs.2,784,217.15 paid (which sum the Ex-parte Applicant acknowledged having received in his Affidavit filed in support of the Application for leave). The Applicant submitted that the Ex-parte Applicant could not apply for and obtain any prerogative orders other than those for which leave had been sought and that this court only had jurisdiction to grant to the Plaintiff the relief for which leave had been granted and that the Order directing the Respondent to comply with the Decree dated 25th August, 2010 for the sum of Kshs.4,952,086.40 plus accrued interest was clearly a nullity. Essentially, the court could only grant a relief by way of a prerogative order in the terms of which leave was granted. The Applicant further submitted that it is trite that this Court's Order made by way of Mandamus can only have been to compel the Respondent to comply with the aforesaid decree and cannot have been intended to unjustly enrich the Ex parte Applicant who now appears to want to take advantage of the error on the face of the record in order to obtain a 'windfall' at the expense of the Respondent. The Applicant submitted that upon delivery of the Judgment which resulted in the aforesaid Decree, there was a variance in the hand written and typed Judgments which necessitated the parties to seek directions of the Honourable Mr. Justice Azangalala who presided over the case in the High Court Commercial Case No. 131 of 2006. The Judge clarified that interest was awarded on the total sum in paragraph 1 of the summary and not just the sum in sub-paragraph 1(f). This Order on directions was given in Court on the 22nd October 2014. The Applicant annexed and marked as Exhibit 'SK-2' a true photostat copy of Schedule of calculations of payment showing that upon payment of the sum of Kshs. 2,784,712.15 on the 30th November 2011, there was a credit due to the Ex-Parte Applicant in the sum of Kshs.123,672.15 by way of an overpaid amount. It was submitted that no interest was ordered to be paid on any amount payable by way of future monthly pension payments which the Plaintiff was in any event, obliged to collect and/or give his bank account details to enable payment to be made to him. The Ex-Parte Applicant did neither. It was submitted further that even if interest were payable, it can only have been so for future pension amounts for the period they remained unpaid after they fell due for payments. Even then, as is evident from the schedule of calculations, only a sum of Kshs.977,518.02 would have been payable. It was submitted that the Honourable Judge in this matter could not have made an order by way of a prerogative Order in Mandamus compelling the Respondent to pay any sums other than those decreed in Mombasa High Court Civil Case No. 131 of 2006, and that there is no calculations or other detail on the record of how the Claimant has arrived at a figure in excess of Kshs.9,000,000.00 as the balance allegedly due under the decree in High Court Civil Case No. 131 of 2006.

8. Mr. Asige for the Ex parte Applicant on his part submitted that the Amended Notice of Motion is a disguised appeal against the Judgment of Kasango J. and therefore impermissible in law as this court has no jurisdiction to sit on appeal against the Judgment made by a court of concurrent jurisdiction. Mr. Asige submitted that the Respondent had opposed the Ex parte Applicant's Judicial Review motion and its case was considered by the court. The issues now being raised by the Respondent were not raised in opposition to the Judicial Review application which was determined by Kasango J. by ordering the Respondent to pay Kenya Shillings 4,952,086.40 plus accrued interest and costs of the suit. The Respondent did not challenge the computation made by the Applicant in the Judicial Review motion which the court considered and affirmed. Mr. Asige submitted that the Amended Notice of Motion herein is a gross abuse of the court process as the Respondent has never challenged the decision of Kasango J. for over four years now and it is evident that the Respondent is intent to continue defying this court's order thereby denying the Applicant of the fruits of his Judgment. Further, it was submitted that the Respondent duly participated in the taxation of costs before the Taxing Master and did not dispute the Judgment sum which was the basis of the instruction fees. The Ex parte Applicant submitted that there is no error on the face of the record as alleged in the application and therefore the slip rule is not applicable. The Ex parte Applicant urged the court to dismiss the amended motion.

The Analysis and Determination

9. I have carefully looked at the hand written proceedings in this matter and have followed chronologically the vents. Mr. Asige for the Ex parte Applicant also provided detailed chronology of events. The Warrant of Arrest issued by this court was to arrest the Respondent's Managing Director in enforcement of an order of mandamus issued in favour of the Ex parte Applicant on 26th July, 2012. The Judgment and order had been delivered in this cause on 26th July, 2012 (by Kasango J.) when the Respondent was ordered to pay the Ex parte Applicant Kshs. 4,952,086/40 plus accrued interest and costs. When the Warrant of Arrest was issued by the court on 19th July, 2016 the decretal sum as awarded together with accrued interest and costs was Kshs. 9,004,742/83. At page 3 paragraph 1 of the Respondent's written submissions the Respondent has alleged:

(i) "On 16th March, 2012 the Ex parte Applicant without leave of the court filed another Notice of Motion seeking an order of mandamus to compel he Respondent to comply with the Judgment of the court delivered on 25th August, 2010 in Mombasa HCCC No. 115 of 2002 (Michael Wawire vs. Kenya Ports Authority) as aforesaid and pay the Ex parte Applicant the balance of the decretal sum of Kshs. 4,952,086/40 plus accrued interest to the date of payment."

(ii) The submissions go on to further allege at paragraph 2 of page 3 that:

"It is imperative to note that no leave had been granted to the Ex parte Applicant to bring Judicial review proceedings for ...” ...the balance of the decretal amount in the sum of Kshs. 4,952,086/40 plus accrued interest...” nor was any leave granted to the Ex parte Applicant to amend its Notice of Motion as the said Ex parte Applicant sought to do.”

(iii) And finally the submissions at page 3 paragraph 3 conclude:

"It is based on this fresh Amended Notice of Motion dated 16th March, 2012 and filed in court on the same day that the Honourable Lady Justice Kasango granted the order of mandamus as contained in her Judgment delivered on 26th July, 2012...”

The allegation that Lady Justice Kasango granted the order of mandamus on an Amended Notice of Motion dated 16th March, 2012 without leave of the court is the core and basis of the remedy of review of the Judgment of Lady Justice Kasango as sought in this Amended Notice of Motion of 3rd October, 2016.

Indeed the Respondent asserts at the last paragraph of page 3 of its submissions that:

“My Lord it is the Respondent’s humble submissions that the Ex parte Applicant’s Amended Notice of Motion dated 16th March, 2012 and filed in court on the same day was fatally defective and could not form the basis of any orders made thereon by way of a Judgment. In fact it is the Respondent’s view that that Notice of Motion was filed in abuse of the court process and was, in effect a nullity and of no consequence”.

Mr. Asige submitted that the attack against Lady Justice Kasango’s Judgment of 26th July, 2012 is that it was granted upon an Amended Notice of Motion dated 16th March, 2012 without the leave of the court. Mr. Asige in dismissing this assertion as untrue, submitted that the leave of the Court was granted on 12th March, 2012 by Lady Justice Kasango to Amend the original Notice of Motion dated 21st February, 2012. Counsel referred the court to page 14 of the handwritten notes by the Court where it is clearly shown that the Court granted leave to Amend the original Notice of Motion dated 21st February 2012 when it ordered as follows:-

“I order that Ex parte Applicant to amend the Notice of Motion to state the exact amount sought. The Respondent has 7 days to file and serve a replying affidavit. Matter adjourned for hearing on 20th March 2012 for further hearing”.

10. The leave granted to amend the original Notice of Motion dated 21st February 2012 was made in the presence of both Counsel for the Applicant (Ex-Parte Michael Wawire) and Respondent. The Ex parte Applicant pursuant to the leave to amend granted by the Court amended, filed and served upon the Respondent the Amended Notice of Motion dated **16th March 2012**. The Ex parte Applicant attached to his submissions a copy of the Amended Notice of Motion dated **16th March, 2012** and filed on the same date marked “MW1”. An original copy is also in the proceedings in this file.

11. On 20th March, 2012 when the Notice of Motion came up for hearing before Kasango J, the Ex parte Applicant notified the Court that the leave granted on 12th March, 2012 to amend the Notice of Motion and to state the exact amount sought had been duly complied with by the filing of the Amended Notice of Motion dated 16th March, 2012. The above appears at page 20 of the record of the handwritten proceedings of the Judge.

12. On 20th March, 2012 Mr. Kassim Shah appeared for the Respondent and Mr. J. Asige appeared for the Ex parte Applicant when the Amended Notice of Motion dated 16th March, 2012 came up for hearing before Kasango J.

13. At the hearing on 20th March, 2012, Mr. Kassim Shah for the Respondent opposed a further affidavit filed with the Amended Notice of Motion on the ground that the Court had not granted leave to file the affidavit. The affidavit was expunged from the record. However the Court granted the Ex parte Applicant leave to file a further affidavit within 7 days from the date of the order on 20th March 2012. The above appears at page 21 of the record of the handwritten proceedings made by the Judge.

14. The Court then ordered that further hearing of the Amended Notice of Motion dated 16th March 2012 be held on 26th April, 2012 (see page 21 of the record of the handwritten proceedings made by the Judge).

15. On 30th May, 2012, at page 23 of the record of the handwritten proceedings made by the Judge, the Amended Notice of Motion continued to be heard in the presence of both Counsel for the Respondent and the Applicant namely Mr. Kassim Shah and Mr. J. Asige.

16. Mr. Kassim Shah informed the Court that the further hearing was in respect of the Amended Notice of Motion dated 16th March, 2012. Mr. Shah further notified the court and admitted that the Amended Notice of Motion of 16th March, 2012 now disclosed the balance of the decretal sum due and payable for which an order of mandamus was sought.

17. Mr. Shah further submitted to the Court that the Respondent had filed a replying affidavit to the Amended Notice of Motion sworn by Mr. Songoro. These proceedings appear at page 23 of the record of the handwritten notes made by the Judge. The Ex parte Applicant Counsel submitted and notified the Court that the Amended Notice of Motion with the leave of the Court disclosed how the balance of the sum sought to be satisfied by an Order of Mandamus was worked out.

18. Record shows that the Court finally delivered its Judgment on the Amended Notice of Motion on 26th July, 2012.

19. Arising from the above excerpts as disclosed in the record of proceedings maintained herein Mr. Asige submitted that the allegation that the Ex Parte Applicant’s Amended Notice of Motion dated 16th March, 2012 was filed without the grant of leave by the Court is unfounded and wholly mistaken and misplaced. Counsel submitted that it is essentially upon the lack of leave to file the Amended Notice of Motion dated 16th March, 2012 that this Respondent’s Amended Notice of Motion is premised. And having shown that leave was granted by the Court to the Ex Parte Applicant to file the Amended Notice of Motion dated 16th March, 2012 which Amended Notice of Motion was duly filed and served upon the Respondent, Mr. Asige submitted that the Respondent’s Amended Notice of Motion dated 3rd October, 2016 should be dismissed.

20. Mr. Asige also denied the allegation that Warrant of Arrest was obtained wrongfully and unlawfully against the Respondent’s Managing

Director to embarrass and extort payment not due. Counsel submitted that the payment of the decretal sum as ordered in the Court's Judgment dated 26th July, 2012 was lawfully due, and that the Ex parte Applicant has not been mischievous or extortionist or driven by any collateral purpose will or desire as alleged by the Respondent.

Analysis of Reliefs Sought

21. Prayers number 1 and 2 sought in the Amended Notice dated 3rd October, 2016 are now spent. Prayer number 3 seeks to set aside the Decree issued on 13th July, 2016 and a Warrant of Arrest in execution issued on 19th July, 2016 on the ground that the Decree and Warrant of Arrest are invalid and a nullity. In answer to the above Ex parte Applicant denies that the Decree and Warrant of Arrest are invalid and a nullity. Prayer number 3 seeks to vary the Order of the Court made on 26th July, 2012 by the deletion of the words “..... for the amount of KShs. 4,952,086.40 plus accrued interest”.

This prayer is premised on ground number “c” of the grounds in support of the Amended Notice of Motion dated 3rd October 2016 which alleges that:

“ there is a clear error on the face of the record in so far as the amount which is stated at Kshs. 4,952,086/40 instead of Kshs. 1,374,734/30 as set out in the Decree dated 25th August 2010”.

22. Prayer number 4 is a prayer seeking the review of the Order of Court made on 26th July, 2012 awarding the Ex parte Applicant the sum of Kshs. 4,942,086/40 by an Order of Mandamus. It is the finding of this court that there is no error on the face of the record in the decree of the court made on 26th July, 2012. Indeed it is the finding of this court that an error or complaint or challenge to the contents of the said decree are not an error on the face of the “record” as contemplated in Order 45 of the Civil Procedure Rules 2010 which the Respondent is seeking to invoke for the grant of the relief sought in prayer 4.

23. This court affirms that the decree and order made by the court on 26th July, 2012 is in accordance and compliance with the Judgment of the court delivered by Kasango J. The Amended Notice of Motion dated 16th March, 2012 filed by the Ex Parte Applicant with the leave of Court sought the Order of Mandamus to compel the Respondent to pay Kshs. 4,952,986/40 which was the balance of the decretal sum accrued as per the Judgment of the court given on 26th July, 2012. Since the delivery of Judgment on 26th July, 2012, the Respondent has known and acknowledged the decretal sum of Kshs. 4,952,086/40. The Amended Notice of Motion dated 16th March, 2012 by the Ex Parte Applicant broke down and particularized the sum that was due and subsequently granted by the court in the Judgment of 26th July, 2012. The Respondent did not appeal against the decree and Judgment of the court made on 26th July, 2012. The Respondent indeed participated in taxation of the bill of costs based on the sum awarded by the Court on 26th July, 2012. At no time did the Respondent dispute the decretal amount during taxation or the subsequent demand notice served upon the Respondent to pay. The Respondent is attempting through this Amended Motion to appeal against the Judgment and order of the Court five (5) years after the Judgment was delivered. This court is not a Court of Appeal and has no jurisdiction to sit on appeal and hear and determine a Judgment and order made by a court of concurrent jurisdiction. The submission made by the Respondent that Kasango J. had no jurisdiction to hear and determine the Amended Notice of Motion dated 16th March 2012 filed by the Ex Parte Applicant is completely mistaken and misconceived. Kasango J. had jurisdiction to hear and determine the Amended Notice of Motion dated 16th March 2012 for which leave had been granted by the court to amend. In exercise of the Court's jurisdiction in the Judicial Review application, Kasango J. made the orders and Judgment delivered on 26th July 2012 compelling the Respondent by an Order of Mandamus to pay the Ex Parte Applicant Kshs. 4,952,086/40 plus accrued interest and costs. It is not challenged that Kasango J. wrongly exercised her judicial discretion in the Amended Judicial Review Application filed by the Ex Parte Applicant on 16th March 2012. In **Republic vs. The Permanent Secretary Ministry of Planning and National Development, Ex-Parte Kaimenyi**, the High Court held:-

“Judicial Review Proceedings are intended to avoid technicalities of procedure in order to achieve flexibility, promptness, speed and finality hence the avoidance of the application of the Civil Procedure Rules hook, line and sinker”.

The Court went on to observe and affirm:

“The scope or ambit of amendment under Order LIII rule 2, is not defined and there is no specific ban to the introduction of a new cause of action, even at the hearing stage.”

And the question of jurisdiction was settled when the court held:-

“It is also significant to note that the wording of Order LIII rule 4(2) clearly stipulates that an amendment to the statement may be sought on the hearing of the motion

As regards the amendment of the Notice of Motion, I hold that the Court has inherent powers to allow it so that the purpose of the proposed amendment in the statement is not defeated

It is a question of the court's ability to do justice in every situation....”

24. In conclusion, this court finds that it cannot be called upon to sit on appeal in a decision of a court of concurrent jurisdiction. The matter before the court was properly defended at every stage from conception to taxation of Bill of Costs. If at any of those stages the Respondent was dissatisfied the remedy of appeal was always available. This court cannot go back on how interests were calculated. The moment Justice Kasango granted the order to amend the original notice of motion, and the moment the Ex parte Applicant introduced into the said motion the

sum of Kshs. 4,942,086/40 it was the duty of the Respondent to challenge that figure at that stage. The Respondent's counsel participated in these proceedings. They cannot now allege that the Ex parte Applicant seeks to enrich himself through unjust calculations of sums due and interest. The time to challenge those sums is long past and this court cannot assume an appellate jurisdiction over a court of concurrent jurisdiction.

25. For the foregoing reasons the amended Notice of Motion dated 3rd October, 2016 is dismissed with costs to the Ex parte Applicant/Respondent herein.

That is the order of the court.

Dated, Signed and Delivered in Mombasa this 16th day of July, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Asige for Ex parte Applicant

Mr. Ondego for Respondent

Mr. Kaunda Court Assistant