



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NO.46 OF 2010**  
**CHANNAN AGRICULTURAL CONTRACTORS.....APPELLANT**  
**VERSUS**  
**ANNA JOHN ONORO.....RESPONDENT**

**R U L I N G**

By its application dated 20/8/14 the applicant prays that the balance of the decretal sum deposited at M/s Kenya Commercial Bank Limited Kisumu Branch in the joint names of Otieno Ragot & Company Advocates and M/s Ouma Njoga & Company Advocates be released to the firm of Otieno, Ragot & Company Advocates.

The other prayer is consolidating Civil Appeals Nos 44, 45, 48, 49, 50, 51, 52 and 53 of 2010 for purposes of any decision herein.

The same is supported by the affidavit of Mr. Ragot sworn on 20.8.14. The facts leading to this application are clear and straight forward. The respondent had sued the applicant at the lower court at Nyando pursuant to a road traffic accident. Various suits namely Nyando SRMCC 334, 335, 336,337,338, 339, 340 and 343 of 2006 were filed. Judgment was awarded to the respondents where liability was determined at 90% in favor of the respondents and 10% against the appellant/applicant. Being dissatisfied the applicant filed various appeals which were all consolidated and by a consent order dated 20.4.13 they varied the lower court's judgment where liability was apportioned at 70% in favor of the respondents and 30% against the applicant. The said consent was grafted as follows:

- a. **“ That the judgment of the subordinate court on the finding of liability at 90:10 in favour of the Respondent be and is hereby set aside and in its place, the same is hereby substituted with a finding on liability at 70% against appellant;**
- b. **That the award of special damages be and is hereby retained;**
- c. **That the cost of the Respondent as assessed in the lower court shall not be subjected to the variation on finding on liability;**
- d. **That each party to bear its own costs of the appeal;**
- e. **That the order on this appeal shall apply and be adopted to Civil Appeal in Kisumu HCCA No.44, 45, 48, 49, 50, 51, 52 and 53 of 2010 having arisen from the same judgment on the issue of apportionment of liability in the lower court arising from the same suit accident.”**

Apparently and from the history of this matter the applicant on filing the appeals had been granted a conditional stay namely to deposit in the bank the decretal sum in a joint interest earning account in the names of the two law firms which it did. As shown above the parties decided to settle its appeal vide the above consent.

The only issue therefore that the parties failed to agree is how to share the interest which accrued as a consequence of fixing the amount in the banks.

According to the applicant the only entitlement by the respondent is the decretal sum and nothing else. Already it appears that the undisputed amount has been released to the respondents and what is remaining is the interest. The applicant further contends that the amount so fixed was way beyond what had been ordered by the trial court and this resulted from an over-computation by the applicant's law firm. That position was not contested by the respondents

By the replying affidavit of Robert Njoga sworn on 6/10/14 the respondent has objected vehemently on this argument. He argued that the deposit of the decretal sum in a joint account did not stop the earning of interest from the date of judgments and that in any event the consent at the high court did not revise the position of the subordinate court's judgment on the issue of interest to the respondent. According to Mr. Njoga, the respondents are entitled to interest as the interest that accrued from the bank as a consequence of joint deposit belonged to both the applicant and the respondents.

Having read the rival affidavits together with the attached annexures the issues for determination are:

- a. **Whether the consent on appeal varied the entire judgment at the lower court;**
- b. **Whether or not the interest earned pursuant to the joint deposit of the decretal amount should be shared or be paid to the respondent.**

The decree from the lower court stated as hereunder:

- a. **“Liability is apportioned at 10:90 in favour of the plaintiff;**
- b. **That the plaintiff is awarded general damages of Kshs.120,000/= less 10% contribution amounting to Kshs.108,000 and Ksh.1,500 as special damages and costs of this suit and interest.”**

In the consent decree at the high court which compromised the appeals the issue of liability was tampered with but the issue of special damages and costs was never touched.

In answering the first issue therefore I do not think that the consent on appeal entirely varied the lower court's decree. More specifically the question of interest in favour of the respondents was retained. In the premises I do find that the respondents are still entitled to interest as awarded by the lower court. If the parties intended to vary this question of interest then there was nothing difficult in grafting the consent in that manner.

The next question or issue is where should that interest come from? When should it commence? My finding is that the interest ought to be paid from the date of judgment at the lower court to the date of payment. However since the parties seemed to have had disagreement on its computation, as evidenced by the numerous correspondences contained in the rival affidavits, I find that the interest due to the respondents shall be payable from the date of the lower court's judgment till 18/3/13 when the consent was signed.

Before penning off on this issue the other factor which I shall delegate to the deputy registrar of this court to determine is the computation of that interest. Having apportioned liability it is upon the parties to agree on the current figures or the deputy registrar can arbitrate.

The next issue raised by the parties is whether the respondent is entitled to the interest earned from the joint deposit at the bank. Having critically read the facts and the averments contained in the affidavits I conclude that it is only the applicant who should enjoy the same. This is informed by the fact that the amount is still the property of the applicant and was deposited only as a precondition to the determination of the appeal. In any case had the applicant won the appeal it would have strolled to the bank and collected both the principal and the interest.

Further the applicant would have had the liberty of depositing the money in court which would have naturally not earned any interest. Equally by the time the parties were grafting the consent they were well aware of the amount at the bank together with the earned interest. This is clearly exemplified by changing the account from NIC bank to Kenya Commercial Bank, ostensibly because the latter did not provide further interest.

I further find that to allow the respondents to enjoy the interest would mean that it shall have earned interest twice namely from the judgment of the lower court as earlier stated and from the bank pursuant to the joint deposit.

Having arrived at the above finding I do allow the application as follows:

**a. the applicant shall pay to the respondents interest accruing from the decretal amount and as varied by the consent of 18/3/13 on liability from the date of the lower court judgment to 18.3.13.**

**For avoidance of doubt any accrued interest shall be subject to liability of 70:30 as agreed by the parties;**

**(2) the amount pending in the Kenya Commercial Bank Limited Account No.1140142518 of Reference No.MM131600237 and customer No.3753936 be released to M/S Otieno Ragot & Company Advocates subject to order (a) above.**

**(c) The parties be at liberty to apply to the deputy registrar of the court for purposes of any taxation if need be.**

**(d) Each party shall bear their respective costs.**

**Dated, signed and delivered this 5th day of October, 2015**

**H. K. CHEMITEI**

**J U D G E**