



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal Suit 210 of 2006

IBRAHIM OCHOGO.....APPELLANT

VERSUS

LUMUMBA NYABERI.....RESPONDENT

JUDGMENT

On 12th July, 2004 the appellant filed a suit against the respondent claiming ksh. 41, 283/= together with interest at 10% per month from June 2003 to the date of filing the suit. On 19th July, 2004 the respondent entered appearance and filed a statement of defence. He admitted having borrowed from the appellant kshs. 41,283/= on the 4th June, 2003 but denied that there was any agreement that interest on the said sum be paid at a rate of 10% per month.

On 10th August, 2004 the appellant filed an application seeking to strike out the statement of defence and entry of judgment as prayed in the plaint. A replying affidavit was filed in response to the said application. After several adjournments the application was set down for hearing on 19th July, 2005. On that date the respondent's advocate did not attend court and the trial Magistrate, Soita, P.M, allowed the appellant's application as prayed.

On 7th September, 2005 costs were assessed at kshs. 37,061/=. The appellant's advocate appeared before the trial court on 8th March, 2006 and sought direction on the issue of interest. The court stated that the same would be charged at 10% per annum with effect from June, 2003. After some time, the respondent was served with a notice to show cause why execution should not issue. As at 20th March, 2006 the decretal sum was kshs. 155,507/=. That sum was largely made up of interest.

It is evident that the interest had not been calculated at 10% per annum. On 11th April, 2006 a warrant of arrest was issued against the respondent and the respondent was arrested. The total amount shown therein was ksh.163,452/=. That figure was based on the interest rate of 10% per month. An application was made for release of the respondent.

On 19th July, 2006 the trial Magistrate ordered that the rate of interest be calculated at the rate of 10% per annum with effect from June 2003. The court also directed that the principal sum of kshs.41,283/= be deposited in court within 21 days from the date of the ruling.

The appellant was aggrieved by the said ruling and preferred an appeal to this court.

In his memorandum of appeal, the appellant stated that the learned Magistrate erred in law in varying and/or interfering with the judgment and decree of the court dated 19th July, 2005 in the absence of any formal application to warrant such a review. He added that the trial Magistrate, having dismissed the respondent's application dated 13th April, 2006 for want of prosecution, in varying the rate of interest, he in effect re-heard the application. He further stated that the rate of interest of 10% per annum is irregular and illegal since the interest rate statutorily provided for is 12% per annum. The appellant urged the court to allow the appeal and set aside the ruling of the trial Magistrate dated 19th July, 2006 and reinstate the decree dated 19th July, 2005 and particularly the rate of interest so that it remains 10% per month.

The respondent's advocate did not attend court when the appeal came up for hearing.

I have considered the above submissions. In the plaint, the appellant alleged that there was an agreement between him and the respondent that interest be paid at the rate of 10% per annum. That was denied by the respondent. No evidence was adduced to prove that allegation. The appellant's application to strike out the statement of defence and enter judgment as prayed was summarily allowed, simply because the respondent's advocate failed to attend court.

Under section 26(1) of the Civil Procedure Act, the court has discretion to award and fix the rate of interest where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest payable, the court has no discretion in the matter and must enforce the agreed rate unless it is shown that either the agreed rate is illegal or unconscionable or fraudulent; see AJAY I SHAH VS GUILDERS INTERNATIONAL BANK LTD. [2002] I.E.A 269.

According to practice Note No. 1 of 1982, in the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest allowable by court was fixed at 12% per annum.

The rate of interest that was claimed by the appellant amounted to 120% per annum, that is, 10% per month x 12 months. That kind of interest is unconscionable and fraudulent since there was no proof that parties had agreed upon the same. If the appellant was seriously pursuing that kind of interest, he ought to have adduced evidence to prove the same.

When the appellant's advocate appeared before the trial Magistrate on 8th March, 2006 and sought direction on the rate of interest, the court directed that it be charged at 10% per annum. No appeal was preferred against that order. The appeal was preferred against the same order but which was repeated on 19th July, 2006.

Although the trial Magistrate was exercising his discretion when he made the aforesaid ruling, and perhaps because he considered the rate of interest claimed as unreasonable, it was not shown that there was any good reason of fixing the same below the permitted court rate.

Under section 78(2) of the Civil Procedure Act, an appellate court has power to perform as nearly as the same duties as may be performed by courts of original jurisdiction in determination of suits. Considering the nature of the case that was before the trial court where the only dispute is over the rate of interest chargeable on the principal sum of Kshs. 41,283/=, I make the following findings:

- a. I set aside the trial court's decision that the rate of interest be calculated at the rate of 10% per annum with effect from June 2003.
- b. I substitute thereof an order that interest be calculated at 12% per annum with effect from June 2003.
- c. The respondent shall bear the costs of the suit.
- d. Each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED at Kisii this 6th day of JUKY, 2009.

D. MUSINGA

JUDGE