



Mwangi v Gichaga (Commercial Case 76 of 2021) [2021] SCC 1 (KLR) (17 May 2021) (Judgment)

Kennedy Kagiri Mwangi v Daniel Mahiri Gichaga [2021] eKLR

Neutral citation: [2021] SCC 1 (KLR)

**REPUBLIC OF KENYA
IN THE MILIMANI SMALL CLAIMS COURT
COMMERCIAL CASE 76 OF 2021
SG GITONGA, RM
MAY 17, 2021**

BETWEEN

KENNEDY KAGIRI MWANGI CLAIMANT

AND

DANIEL MAHIRI GICHAGA RESPONDENT

JUDGMENT

1. This matter was transferred to the Small claims court by the High Court on 27th April 2021. It was previously filed in the Chief Magistrates Milimani commercial court as CMCOMM E360 of 2021.
2. By way of a Plaintiff dated 6th August 2020 the claimant sued the respondent, seeking the following reliefs:
 - i) A sum of Kenya shillings four hundred thousand (Kshs. 550,000/=)
 - ii) Interest on (a) above from 25th November 2016 until payment in full.
 - iii) Costs of the suit with interest thereon at court rates.
3. The claimant's evidence was that he entered into a loan agreement on 25th November 2016 with the respondent where he loaned him a sum of Kshs. 550,000/=. That the said sum was to be repaid within 30 days which at the expiry thereof the respondent failed to repay. The claimant now prays for judgement in his favor for the principal sum of Kshs. 550,000/= plus interest on the above sum from 25th November 2016 until payment in full.
4. The defendant filed a defence dated 5th August 2020. In his defence the respondent averred that the plaintiff loaned him a sum of Kshs1500,000/= which was to attract a one-off profit of Kshs. 50,000/=. That the purpose of the loan was for the claimant to partner with him for the importation of a motor vehicle. He admitted owing the claimant the sum of Kshs. 550,000/= and attributed his failure to pay



due to the prevailing market conditions and also because the parties mutually extended the repayment period until a buyer is found.

5. The matter came up for hearing on 6th May 2021 when counsels for both parties were present. Mr Kiruka counsel for the respondent informed the court that the respondent is not disputing the debt and admits the entire amount of Kshs. 550,000/=. That the only issue in dispute is interest from the date of 25th November 2016 as claimed. He contended that the parties never agreed on any interest payable since the Kshs. 550,000/= was inclusive of the profit to be paid to the claimant. He informed the court that the respondent was willing to pay the debt after parties agree on settlement.

6. Determination.

7. The respondent in his defence an submission by his counsel Mr Kiruka admitted the sum of Kshs.550,000/= as claimed. The issues therefore for determination before me are as follows;

- a) Interest on the liquidated amount of Kshs. 550,000/= from 25th November 2016. to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

Under Section 26(1) of the Civil Procedure Act supra, 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.

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; *Mulla - The Code of Civil Procedure* (16th Ed.) Vol. 1 atp. 505.

The cases cited above reached the conclusion that where a claim is for liquidated damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

- b) Costs of the suit and interest at court rates.

- a) Interest

8. The claimant has urged the court to award interest on the liquidated amount from 25th November 2016 which was the date he advanced the loan to the respondent. According to the loan agreement the said loan was advanced on 25th November 2016 and was to be paid within 30thirty days. The agreement did not bear a default clause. Parties did not agree that incase of default, the sum would accrue interest from the date of advancement neither did they agree on the interest rate. I therefore find no legal basis in this prayer and I decline to grant the same.

9. Section 26 of the Civil Procedure Act, 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 aggregate sum as aforesaid from the date of the decree

Guided by section 26 of the Civil Procedure Act I will therefore exercise my discretion and award interest on the liquidated sum of Kshs. 550,000/= at court rates from the date of filing of the suit until payment in full.

Costs.

10. On the final issue of costs, it is settled law that ordinarily costs should follow the event.

I am well guided by the dictum in NBI HCCC NO 191 OF 2008 ORIX where the court stated:

“In any event, even if costs had not been awarded the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do...”

I therefore award the Claimant costs of this suit.

Stay of execution for 30 days.

11. Orders accordingly.

GA (MRS)

RESIDENT MAGISTRATE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2021.

In the presence of;

1. Mr. Maribo for Kiamah Kibathi & Co. Advocates LLP for the Plaintiff
2. Kirika for Respondent

