

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E210 OF 2023

PRAFULA ENTEPRISES LIMITED APPELLANT

- VERSUS -

MAERSK KENYA LIMITED 1ST RESPONDENT

MAERSK LOGISTICS LIMITED 2ND RESPONDENT

**(Being an appeal from the judgment and decree of Hon. G.N. Barasa SRM
delivered on the 27/11/2023 in Kisumu CMCC No. 316 of 2008, Prafula
Enterprises Limited v Maersk Kenya Limited & Maersk Logistics Limited)**

J U D G M E N T

1. The appellant sued the respondents jointly for a liquidated sum of **USD 1,845,229/-** and **Kshs. 364,680/-** for logistics services rendered to them. The respondents entered appearance and denied the averments made by the appellant putting it to strict proof.

2. The matter proceeded to trial and by a judgment delivered on **27/11/2023**, the trial court entered judgment in favour of the appellant as follows: -
 - a) Kshs. 1,294,958**

 - b) USD 5,300**

- c) Interest on (a) above at court rates from September 2004 to the date of judgment. Each party to bear own costs of the suit.*
3. Being dissatisfied with the said Judgment/decreed, the appellant lodged this appeal vide the Memorandum of Appeal dated **21/12/2023** which only challenged the failure to award costs. It raised three (3) grounds of appeal as follows: -
- a) The learned trial magistrate erred in law and in fact in reaching a finding that each party to bear their own costs when the plaintiff had successfully prosecuted its suit against the respondents.*
- b) The learned trial magistrate erred in departing from the general rule that the cost of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order hence occasioning a miscarriage of justice.*
- c) The learned trial magistrate erred in failing to award interest on the sum of USD 5300 as provided for under Section 26 of the Civil Procedure Act (Cap 21) Laws of Kenya.*
4. The appellant submitted that the trial court did not follow the applicable principles of law laid out in *section 27 of the Civil Procedure Act* to the effect that costs follow the event unless ordered. That there ought to be

good reasons for departing from this general rule such as public interest and the circumstances of the case as was held by the Supreme Court in the case of **Jasbir Singh Rai & 3 Others v Tarlochan Rai & 4 Others (2014) eKLR.**

5. That the appellant was the successful party at the trial and was thus entitled to costs however the trial court failed to take into account relevant factors and failed to give reasons for failure to award it costs.
6. As regards the award of interest, it was submitted that in the absence of any tenable grounds for denying the appellant interest, the trial court fell into error. Reliance was placed on the cases of **Pram Lata v Peter Mbiyu [1965] EA, Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1970] EA 469 & Jane Wanjiku Wambi v Anthony Kigamba Hato & 3 Other [2018] eKLR.**
7. The appellant also submitted that the trial court erred in ignoring various documents in support of the full sum of USD claimed despite evidence it presented and as such the trial court ought to have awarded the full amount claimed.

8. From the foregoing, the grounds of appeal may be summarized to;
whether the trial court erred in failing to award the appellant costs of the suit and interest on the amount of USD 5300.
9. Before determining the ground of appeal, it is necessary to point out that the appellant raised in its submissions the issue of failure to award the full amount claimed since there was sufficient evidence produced. This was an issue raised in the submissions and was not supported by any ground of appeal.
10. It is trite that an appellate court will generally not consider grounds of appeal that were not raised in the **Memorandum of Appeal**, unless leave of the court is obtained to amend the memorandum or to introduce new grounds. Failure to specifically plead a ground in the memorandum of appeal means that that ground cannot be argued or relied upon, as the parties and the court are bound by the pleadings.
11. A party must first plead an issue before it can lead evidence on the same. If a point is not pleaded, the same cannot be entertained. See **Emily N. Mulanya v Kenya Power and Lighting Company [2018] eKLR.**

12. Further to the above, parties cannot rely on submissions to do that which should have been done by pleadings and evidence. See **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR.**
13. Accordingly, the Court will not consider or determine that issue.
14. As regards the award of costs, the general rule is that costs follow the event. Sufficient cause must be shown or reasons must be given in order to depart from that rule. ***Section 27(1) of the Civil Procedure Act (Cap 21)*** provides: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge for good reasons otherwise” order.”

15. In Limuru Country Club & 6 others v Rose Wangui Mambo 15 others [2019] KECA 101 (KLR), the Court of Appeal cited with approval the Supreme Court of Uganda case of *Impressa Ing Fortunato Federice v Nabwire [2001] 2 EA 383* where the Court rendered itself thus: -

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course, like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should follow the event unless the

court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought...”

16. In Farah Awad Gullet v CMC Motors Group Ltd [2017] eKLR the Court of Appeal held: -

“... it is our finding that the position in law is that costs are at the discretion of the Court seized of the matter with the usual caveat being that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning.”

17. In Devram Manji Daltani v Danda [1949] 16 EACA 35 the Court of Appeal for Eastern Africa held that costs are awarded to compensate a successful litigant and not to punish an unsuccessful party. Such successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted.

18. In Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR, the Court of Appeal emphasized that: -

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is

well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge to decide, and the Court of Appeal will not interfere with his discretion in that instance. "Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order." It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably."

19. In the present case, the appellant was successful. The trial court did not give any reasons why it did not award the costs to the appellant. This Court finds that there were no exceptional circumstances or basis upon which the appellant should have been denied its costs having been successful in its suit.

20. In the circumstances, that limb of the appeal hereby succeeds.
21. The second limb is one for failure to award interest in the sum of **USD 5300**. While the award of interest is generally discretionary under *section 26 of the Civil Procedure Act*, courts have established that a total failure to address interest on a liquidated sum or failure to award interest without giving a reason constitutes an error that can be corrected on review or appeal.
22. The granting of interest is governed by *section 26 of the Civil Procedure Act*. In **Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others supra**, the court observed: -

“I have come to the conclusion that the Learned Trial Magistrate 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 liquidated damages, unless there is good cause, the interest should be calculated from the date of filing the suit".

23. In **Mukisa Biscuits Manufacturing Company Limited** (supra), it was held: -

"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 interest 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".

24. The appellant's claim was for a liquidated amount of **USD 1,845,229** and **Kshs. 364,680**. The Court awarded **Kshs. 1,294,958** and **USD 5,300**. *Section 26 of the Civil Procedure Act* provides: -

"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 to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum”.

25. From the judgment of the trial court, there was no reason that was given why interest was not awarded. In this regard, The Court finds this limb of the appeal meritorious.
26. The upshot is that the appeal has merit and is hereby allowed. The judgment of the trial court is varied to the extent that the costs of the suit is awarded to the appellant and the judgment sum is to attract interest at court rate from the date of the suit until payment in full. The appellant will have the costs of the appeal.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 12th day of **February, 2026.**

A. MABEYA, FCI Arb

JUDGE