REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC APPEAL NO. 520 OF 2010

SYSTEMS RELIABILITY LIMITED.....1ST APPELLANT

HORATIUS DA GAMA ROSE.....2ND APPELLANT

VERSUS

YAYA TOWERS LIMITED.....RESPONDENT

(Being an appeal from Ruling and Order made on 1st November, 2010 by Hon. S. N. Riechi (Mr.) at Milimani Commercial Court in CMCC 8207/2006 Formerly HCCC 194/2002)

YAYA TOWERS LIMITED.....PLAINTIFF

VERSUS

SYSTEMS RELIABILITY LIMITED.....1ST DEFENDANT

HORATIUS DA GAMA ROSE.....2ND DEFENDANT

JUDGMENT

The respondent herein filed a suit against the appellants in the High Court at Nairobi on 4th February, 2002 seeking the following reliefs:

(a) Payment of Kshs.1,980,469.20 being rent and service charge arrears;

(b) Outstanding electricity charges of Kshs.988.00;

(c) Costs of the suit;

(d) Interest on (a), (b) and (c) at court rates;

(e) Any other or further relief as the court may deem fit or just to grant.

The appellants entered appearance and filed a defence and counter-claim on 16th April, 2002. In their counter-claim, the appellants sought judgment against the respondent for Kshs.1,519,283.50 together with interest thereon from 1st September, 2000 and the costs of the counter-claim.

On 6th July, 2006, the suit was transferred to the Chief Magistrate's Court at Nairobi and given a new number namely, Nairobi CMCC No. 8207/2006. The suit was heard by Hon.E. N. Maina C.M. (as she then was) who in a judgment that was delivered on her behalf by Hon. J. Ragot, P.M. on 6th May, 2010 entered judgment for the respondent against the appellants on the following terms:

> ***"Accordingly, I enter judgment for the plaintiff against the 1st and 2nd defendants jointly and severally for a sum of Kshs.1,989,995.20, costs of the suit and interest at court rates and dismiss the Counter-claim with costs to the Plaintiff. It is so ordered."***

Following that judgment, a decree was extracted for execution in which interest on the principal sum of Kshs.1,989,995.20 was computed from the date of filing suit namely, 4th February, 2002. The appellants were dissatisfied with the said decree and moved the court by way of

Notice of Motion dated 20th September, 2010 brought under Section 1A, 3A and 26 of the Civil Procedure Act and Order XX rule 6 of the Civil Procedure Rules seeking the following orders:

> (a) The decree dated 31st May, 2010 be amended to correspond with the judgment delivered on 6th May, 2010 by deleting accrual of interest on the principal sum from 4th February, 2002 and in place thereof inserting that interest accrues from the date of judgment.
>
> (b) A decree be issued showing the principal sum of kshs.1,989,995.20 is to accrue interest from the date of judgment until payment in full and that the principal sum of kshs.1,989,995.20 be deposited in an interest earning account in the joint names of the advocates on record.

The application that was supported by the affidavit of the appellants' advocate Fredrick Ngatia was brought on the grounds that the decree that was drawn on 31st May, 2010 did not reflect the relief that was granted to the respondent in the judgment delivered on 6th May, 2010 in that the decree provided that the principal sum was to attract interest from the date of filing suit while the respondent did not pray for interest from the date of filing suit and could not therefore have been awarded the same by the court. The appellants urged the court to determine the date from when the interest was to accrue on the principal amount and in the meantime the said principal amount be deposited in an interest earning bank account.

The application was opposed by the respondent through a replying affidavit sworn by its advocate, Saadia Karimbux–Effendy. The respondent contended that the decree complained of by appellants was drawn by the court and not by the respondent. The respondent contended that the court had the discretion to award interest on the principal sum in a decree from, before and after the date of the decree and that the court exercised its discretion correctly in awarding interest from the date of filing suit. The respondent contended that where a claim is for a liquidated amount the court normally awards interest from the date of filing suit.

The appellant's application was heard by Hon. S. N. Riechi C.M. (as he then was). In a ruling delivered on 1st November, 2010, he found that the decree was drawn in accordance with the judgment. Hon. Riechi held that the judgment that was delivered by the court on 6th May, 2010 was a money judgment and that Section 26 of the Civil Procedure Act gives the court discretion to award interest on the principal amount at the rate deemed reasonable from the date of filing suit to the date of the decree. He held further that where judgment is silent on the date when interest is to start accruing, the courts have resorted to the principle that interest normally accrue from the date of filing suit.

It is against this ruling that the appellants preferred this appeal. The appellants challenged the decision of Hon. S. N. Riechi on several grounds which are set out in their memorandum of appeal dated 26th November, 2010. The appellants put forward the following grounds of appeal:

> 1. The learned Magistrate erred in law and in fact in not appreciating sufficiently or at all that whereas the trial magistrate had discretion to award interest from the date of filing suit, the discretion had not been exercised and could not be exercised post delivery of judgment.
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> 2. The learned magistrate erred in law and in fact in allowing interest on the principal sum from the "date of filing suit" when no such prayer had been pleaded or issued by the trial court.
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> 3. The learned magistrate erred in law and in fact in allowing an addition to be made to the judgment namely that interest shall accrue from the date of filing suit after judgment had been delivered.
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> 4. The learned magistrate erred in law and in fact in holding that a decree which included interest from the date of filing suit was in agreement with the judgment.
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> 5. The learned magistrate further erred in law in considering that he could again amend the decree adjudged to be in agreement with the judgment administratively and without hearing the appellants.
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> 6. The learned magistrate erred in law and in fact in not appreciating sufficiently or at all the fact that two (2) decrees were now in existence in the same suit.
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> 7. The learned magistrate erred in law and in fact in not appreciating sufficiently or at all that interest given to the respondent in the 1st decree and the enhanced interest given to the respondent in the 2nd "amended" decree was unlawful and constituted a windfall profit.
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> 8. The learned magistrate erred in law and in fact in making decision contrary principles of law and judicial precedents that were binding upon him.
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> 9. The learned magistrate erred in law and in fact in constituting himself to be the trial court so as to direct from when interest should accrue instead of limiting his inquiry to the terms of the judgment that was delivered by the trial court.

On 17th November, 2014, the parties were directed to file written submissions. The appellants filed their submissions on 10th December, 2014 while the respondent filed its submissions on 19th January, 2015. The parties were thereafter given opportunity to highlight their submissions on 30th January, 2018.

I have considered the proceedings of the lower court, the judgment of the court dated 6th May, 2010 by Hon. E. N. Maina C.M., the ruling

dated 1st November, 2010 by Hon. S. N. Riechi C. M. which is the subject of this appeal, the grounds of appeal put forward by the appellants against the ruling and the submissions of counsel. What I need to determine in this appeal is whether the lower court was correct in its decision that the interest that was payable on the principal sum of Kshs.1,989,995.20 pursuant to the judgment that was delivered on 6th May, 2010 was to accrue from the date of filing suit.

Before I go to the merit of the appeal, I wish to dispose of a procedural issue that was raised by the respondent in its submissions. The respondent contended that the appeal before the court is incompetent for failure by the appellants to include crucial documents in the record of appeal. The respondent contended that although what gave rise to this appeal was the amended decree dated 9th November, 2010, the appellant did not include the said decree in the record of appeal. The other primary document which the respondent claimed to be missing from the record of appeal was the Notice of Motion dated 20th September, 2010 that was filed by the appellants in the lower court and which gave rise to the said amended decree. The respondent cited the case of Kenya Industrial Estates Ltd. *v* Samuel Sang and Hema Investments Ltd. [2007] eKLR and submitted that primary documents which include pleadings, trial judge's notes and certified copy of a decree cannot be added to the record of appeal by way of a supplementary record and that omission of any or parts of a document falling in the primary category renders an appeal incurably defective and incompetent.

The respondent submitted that before this court interferes with the exercise of judicial discretion by the trial court, all the material that was before that court should be looked at before the court can come to the conclusion that the trial court erred or that it was plainly wrong. The appellant urged the court to dismiss the appeal herein for being incompetent. During the highlighting of the written submissions, the appellants' advocate, Ms. Nyaga admitted that she had omitted to include the Notice of Motion dated 20th September, 2010 in the record of appeal. She however argued that the omission was not fatal. She submitted that the omission could be excused under Article 159 of the Constitution of Kenya. She urged the court to render justice without undue regard to procedural technicalities.

I have considered the respondent's preliminary objection to the appeal. I am in agreement with the respondent that the documents which were omitted by the appellants from the record of appeal are primary documents and that they are crucial for the determination of the appeal. I am however not in agreement that failure to include in the record of appeal some or part of the primary documents should render an appeal defective. I am of the view that the omission can be corrected by the filing of a supplementary record of appeal. The case that has been cited by the respondent in support of its submission that primary documents cannot be added to the record of appeal by way of a supplementary record was decided prior to the promulgation of the Constitution of Kenya 2010 and I doubt if it is still good law in light of the provisions of Article 159 (2) (d) of the Constitution.

There is no contention by the respondent that it has been prejudiced by the omission to include the said documents in the record of appeal or that the omission would lead to injustice or a miscarriage of justice. Although the said documents were not formally included in the record of appeal prepared by the appellants, and no supplementary record was filed by either party to add them as part of the record, the documents are nevertheless before the court. I have before me the entire record of the lower court which contains all the pleadings and other documents that were filed in that court. The Notice of Motion dated 20th September, 2010 and the amended decree dated 9th November, 2010 are part of the record before me. The two (2) documents were annexed to the affidavit of Horatius Da Gama Rose sworn on 26th November, 2010 in support of the appellants' application for stay of execution of the same date.

The documents are before the court although they are technically not part of the record of appeal. The court will no doubt look at them when considering the appeal and as such no prejudice would be occasioned to any party by the failure on the part of the appellants to include the said documents in the record of appeal. It is my finding that failure to include the said documents in the record of appeal was a procedural mishap which is excusable under Article 159 (2) (d) of the Constitution and does not render the appeal defective and incompetent. I therefore decline to dismiss the appeal summarily.

On the merit of the appeal, it is common ground that the lower court in its judgment dated 6th May, 2010 awarded interest to the respondent. What the court failed to specify was the date from when the said interest was to accrue. In their application dated 20th September, 2010, the appellants wanted the court to determine the date from when the interest was to accrue on the principal sum that was awarded to the respondent. In paragraph 9 of the affidavit of Fredrick Ngatia sworn on 20th September, 2010 in support of the said application, he stated as follows:

> ***"THAT it is therefore necessary for this honourable court to determine the date from when interest is to accrue….."***

There being no date in the judgment from when the interest was to accrue and the court having been called upon to determine the said date, it had to make a decision. The appellants urged the court to find that the interest on the principal amount was to accrue from the date of judgment. On the other hand, the respondent contended that interest was to accrue on the principal amount from the date of filing suit.

It is common ground that under section 26 of the Civil Procedure Act, the court has discretion to make an order for interest to be paid on the principal amount at such rate as deemed reasonable. In the case of Shah *v* Guilders International Bank Ltd. [2002] 1 EA 269(CAK) that was cited by the respondent, the Court of Appeal stated as follows with regard to Section 26 of the Civil Procedure Rules:

> ***"This Section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages namely;***
>
> ***(1) the period before the suit is filed;***
>
> ***(2) the period from the date the suit is filed to the date when the court gives judgment; and***
>
> ***(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may in its***

discretion fix."

It is clear from the foregoing that the court had the discretion to award interest on the principal sum from the date of filing suit to the date of judgment and from the date of judgment until payment in full. I have not been persuaded by the appellants that the lower court erred in its finding that the respondent was entitled to interest from the date of filing suit. The court noted that the judgment that had been made in favour of the respondent was for a liquidated amount and after reviewing a number authorities, the court held that the respondent was entitled to interest from the date of filing suit.

What has been challenged is the exercise of discretion by the lower court. In the case of Shah *v* Guilders International Bank Ltd. (Supra) the court stated that:

> *"In fixing the rate of interest at 35% per annum, Mr. Commissioner Ransley was clearly exercising his discretion. To be able to interfere with his exercise of discretion, the appellant was bound to demonstrate that in coming to this decision, the commissioner took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account, or that he misapprehended the law applicable, or that he did not correctly appreciate the bearing of some evidence or that the decision itself was plainly wrong."*

The appellant did not establish any of these matters. I find no merit in grounds 1, 2, 3 and 4 of appeal. The learned magistrate Hon. S. N. Riechi did not award interest post judgment as alleged by the appellants. The respondent had already been awarded interest by Hon. E. N. Maina in her judgment delivered on 6th May, 2010. What was before Hon. S. N. Riechi for determination as I stated earlier was the date from when the interest was to accrue. The learned magistrate in my view had power under section 99 of the Civil Procedure Act and Order XX Rule 7 of the old Civil Procedure Rules to correct the omission in the judgment of the accrual date of interest on the principal amount. I am surprised that the appellants who moved the lower court to determine when interest was to accrue are the same ones complaining about such determination. In my view, the learned magistrate did not make any addition to the judgment of 6th May, 2010 as claimed by the appellants. The court mainly settled the decree by clarifying the date when interest was to accrue on the principal amount that was awarded to the respondent thereby correcting the omission in the judgment of 6th May, 2010. Similarly, I find no merit in grounds 5, 6 and 7 of appeal.

It is not correct that the learned magistrate amended the decree administratively. From the material on record, it appears that the original decree dated 31st May, 2010 had arithmetical error. It is this error that was corrected and amended decree issued on 9th November, 2010. This amendment had nothing to do with the decision of the lower court made on 1st November, 2010 which is the subject of the appeal herein. It is not clear to me as to where the two (2) decrees referred to in ground 6 of appeal are coming from. In my view, once the original decree was amended, it ceased to have effect. The appellants did not elaborate in their submission on what basis the interest in the amended decree can be termed unlawful. The interest was calculated in accordance with the decision of the lower court made on 1st November, 2010 which I have held to be correct. I find nothing illegal in the computation of interest in the amended decree. Grounds 8 and 9 of appeal also have no merit. As I have stated earlier, the lower court reviewed a number of authorities before arriving at its decision of 1st November, 2010. The submission by the appellants that the decision was contrary to well established principles of law and judicial precedents is therefore not correct. With regard to ground 9 of appeal, I have already dealt with the issue. The learned magistrate had power to determine the date from when interest that was awarded by the court to the respondent was to accrue. He did not therefore commit any error in his decision that interest was to accrue on the judgment sum from the date of filing suit.

In view of my findings above, the appellants' appeal fails wholly. The same is accordingly dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 25th day of October 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the 1st Appellant

No appearance for the 2nd Appellant

Ms. Effendy for the Respondent

Catherine - Court Assistant