Pickwell Properties Limited v Kenya Commercial Bank Limited (Civil Appeal (Application) 165 of 2016) [2025] KECA 110 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 110 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 165 OF 2016

WK KORIR, JA

JANUARY 24, 2025

BETWEEN

PICKWELL PROPERTIES LIMITED ..... APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT

(Being a reference against the order dated 29th September 2022 by L.D. Ogombe, Deputy Registrar, settling the terms of the judgment of (Sichale, J. Mohamed & ole Kantai, JJA)delivered on 24th July 2020 in Nairobi CA NO. 165 of 2016)

RULING

1. The law firm of Wandabwa Advocates for the applicant (Pickwell Properties Ltd) through the letter dated 8th March 2023 expressed dissatisfaction with the Deputy Registrar's settlement of the terms of the order emanating from the judgment of the Court (Sichale, J. Mohamed & Kantai, JJ.A) delivered on 24th July 2020 in Nairobi Civil Appeal No. 165 of 2016, Kenya Commercial Bank Limited vs. Pickwell Properties Limited and has moved the Court under rule 36 (2) (d) of the Court's Rules seeking the settlement of the terms of the order of the Court.

2. When the file was placed before me on 4th December 2024, the applicant's counsel had filed submissions dated 3rd December 2024. Counsel contested that the decree, as extracted, did not specify and resolve the issue as to whether the applicable rate of interest is simple interest or interest compounded annually. Counsel submitted that the contractual rate of interest particularized in clause 6 (vi) of the tenancy agreement which was the subject of the appeal is what the Court had decreed as applicable to all sums that remained unpaid, not just before the institution of the suit or during the pendency of the suit, but also after judgment until the debt is fully satisfied. Counsel urged that the Court in adopting the contractual rate of interest in this case, meant that the said rate would be compounded annually as prayed by the applicant in the plaint and as upheld by the Court pursuant to the applicant's cross-

appeal. Counsel referred to the definition of compound interest and simple interest in the Black's Law Dictionary, 9th Edition, at page 887 and urged that under clause 6 (vi) of the tenancy agreement, which was the subject of the appeal, the parties intended that the interest due would not be distinct and isolated from the rent due. According to counsel, both the unpaid rent and interest would accrue interest, thereby expressly making the interest payable compound interest. Counsel also relied on the case of Caledonia Supermarket Ltd vs. The Kenya National Examination Council [2017] eKLR, which cited with approval the reasoning in the Canadian case of Bank of America Canada vs. Mutual Trust Company [2002] 2 SCR 601 to submit that clause 6 (vi) of the tenancy agreement having expressly referred to prevailing banking rates, the applicable interest would be compound interest.

3. Additionally, counsel relied on the case of Office Technologies Limited vs. Independent Electoral and Boundaries Commission [2014] eKLR to urge that a commercial rate of interest is any rate that the bank and the borrower may agree upon and is determinable either from the banking practice or from the contract of the parties. The case of KRK Impex PVT Limited vs. Safmarine Kenya Limited & Another [2022] eKLR was also cited to argue that a court should award interest at a rate which broadly represents the rate that would have been applicable had the decretal sum been borrowed from a bank. Counsel urged the Court to take judicial notice that the respondent is a banking institution and compound interest is the only interest applicable in its trade. Counsel consequently prayed that an interest rate of 21% per annum on unpaid balances be compounded and incorporated in the decree.

4. The law firm of Muriu & Co. Advocates filed submissions dated 3rd December 2024 on behalf of the respondent, Kenya Commercial Bank Limited. Counsel started off by pointing out that the request by the applicant compromises his client's right to a fair hearing under Article 50 of the Constitution and should be struck out for the reason that the request does not clearly state the grounds of dissatisfaction with the Deputy Registrar's decree. According to counsel, the only interest rate applicable was 21% per annum since that is what the respondent pleaded thus waiving the right to pursue interest at bank rates under clause 6 (vi) of the tenancy agreement. In urging that the applicant could not benefit from interest of 21%, as well as interest at the prevailing bank rates, counsel submitted that the applicant in any event did not tender any evidence to establish the prevailing bank rates. Counsel also submitted that the issue of compound interest was not pleaded and neither was it addressed by the trial court or this Court. Counsel submitted that decision of the High Court in Firoz Nuralji Hirji vs. Housing Finance Company of Kenya Ltd & Another [2015] eKLR cited by the applicant is distinguishable because that decision arose from an application for review unlike in this case where what is sought is a settlement of the terms of the judgment of the Court. Counsel maintained that since the question of the applicability of compound of interest was not canvased at the trial and on appeal, the Court is functus officio, and lack jurisdiction to accede to the applicant's request. Counsel cited the High Court decision of Baylem Ltd vs. County Government of Nairobi [2021] eKLR, to urge that a party seeking compound interest must plead and prove the same. The holding in Brookside Dairy Limited vs. Attorney General, Industrial Court of Kenya & Bakery Confectionary, Food Manufacturing and Allied Workers Union [2019] KECA 74 (KLR) was cited to urge that under rule 36 (2) (d) of the Court's Rules, the settled order must embody elements drawn from the judgment of the Court. Counsel ultimately submitted that the Deputy Registrar could not be faulted for how she drafted the impugned order.

5. Rule 36 (2) (d) of the Court of Appeal Rules, 2022 provides as follows:

> " Where a decision of the Court is given in a civil application or appeal -
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> a. any party may, within fourteen days from date of judgment or ruling, prepare a draft of the order and submit it for the approval of the other parties;

b. the party to whom the draft has been submitted shall approve the same within seven days from the date of receipt of the draft order under paragraph (a);

c. if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;

d. if the parties do not agree on the form of the order, or if there is non-compliance with paragraphs (a) and (b), the form of the order shall be determined by the Registrar in accordance with the decision of the Court:

Provided that if the parties are dissatisfied with the decision of the Registrar, the issue shall be settled by a single judge after giving all the parties an opportunity of being heard and the decision of judge shall be final; and

e. where an application was certified as urgent under rule 49, any party may, with notice to all the parties, request the Registrar to issue the order arising from a Ruling on the application, on priority basis and the Registrar may, where satisfied, prescribe a shorter period for compliance with the provisions of paragraphs (a) and (b)." [Emphasis mine]

6. The order which is the subject of this application was couched as follows:

"1. The appeal be and is hereby dismissed with costs.

2. The cross appeal is allowed with costs."

7. The applicant was the respondent in the appeal and proposes that the form of the order should have been as follows:

"(a) The Appeal be and is hereby dismissed;

b. The Cross Appeal be and is hereby allowed;

c. Interest on delayed rent at 21% per annum from 1st July 2005 until payment in full be and is hereby awarded to the Respondent.

d. Rent for the period 1st January 2006 to 31st October 2006, together with interest thereon at 21% per annum from 1st January 2006 until payment in full, be and is hereby awarded to the Respondent.

e. Amount deducted from reinstatement sum, together with interest thereon at 21% per annum from 28th August 2006 until payment in full, be and is hereby awarded to the Respondent.

f. All of the above interest on the outstanding payments be compounded."

8. I have read the judgment of the Court. It is important to state that my authority is not akin to the power conferred on the Court by the slip rule as the parties tend to infer in their submissions. Under rule 36 (2) (d), I am to ensure that the order captures the judgment of the Court and no more. In that regard I agree with the holding of Nambuye JA in Brookside Dairy Limited vs. Attorney General, Industrial Court of Kenya & Bakery Confectionary, Food Manufacturing and Allied Workers Union

(supra) that the scope of rule 34 of the repealed Court of Appeal Rules, 2010, which was similar to the current rule 36 (2) (d), is as follows:

> "... under this rule the order to be settled has to embody elements drawn from either the ruling or judgment of the court, in respect of which the order is sought to be settled."

9. Likewise, the Deputy Registrar was bound to issue an order in line with the judgment of the Court. Thus, in her ruling dated 29th September 2022, the Deputy Registrar properly appreciated her role when she stated that:

> "My powers under the Court Rules are limited to extraction of the order in accordance with the decision of the court. The Order is accordingly issued in compliance thereof."

10. The disposal of the appeal and cross-appeal is found in the lead judgment of Jamila Mohammed, JA wherein at paragraphs 51, 52, 54 and 55 she concludes that:

> "51. Regarding award of interest, I have first considered the issue of whether the learned Judge erred in failing to award the contractually agreed rate of interest to the claims of rent paid late and the unpaid rent paid. In this regard, I find that the tenancy agreement expressly provided a rate of interest and its applicability from the date of default until payment. I therefore find that the learned Judge erred in failing to award the rate of interest of 21% per annum to the rent for the period 1st July, 2005 to 30th December, 2005 as it was one of the agreed terms of the tenancy agreement between the parties.
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> 52. From the record, it is undisputed that the rent for the period was delayed and was paid on 12th May, 2006. Further, it is clear that the parties had, in the tenancy agreement, agreed on 21% per annum as the rate of interest on late payment of rent. Thus, in my view, the respondent was entitled to compensation for the delayed payment of rent for the period 1st July, 2005 to 30th December, 2005 from the due date, 1st July, 2005 to the date of actual payment, 12th May, 2006.
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> 54. From the record, the amount of Kshs 3,921,800 was a deduction from sum paid in lieu of the appellant's obligation to redecorate and restore the premises to the original state and condition in compliance with the tenancy agreement. The respondent was therefore entitled to interest on the unpaid amount from 28th August, 2006 when the appellant made the deduction at the agreed rate of 21% per annum for monies in default.
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> 55. The upshot is that I find that the appeal has no merit and it is hereby dismissed with costs. I find that the cross appeal has merit and the same is allowed with costs. The upshot is that I find that the appeal has no merit and it is hereby dismissed with costs. I find that the cross appeal has merit and the same is allowed with costs." [Emphasis mine]

11. It is therefore apparent from the judgment that the applicant was entitled to interest at the rate of 21% per annum. In the circumstances, there is no basis upon which the applicant can claim for the compounding of the unpaid interest considering that the judgment of the trial court, which was upheld on appeal, was not based on the alternative prayer in the plaint for "interest at the prevailing bank rates", so that the applicant's argument that the banking practice of compounding interest can be said

to be applicable in the case. Secondly, as correctly submitted by counsel for the respondent, a claim for compound interest should be specifically pleaded and proved which was not done by the applicant. In that regard, I am persuaded by the holding of Tuiyott, J. (as he then was) in Baylem Limited vs. County Government of Nairobi [2021] eKLR that:

> " In addition, and this is where the Plaintiff's claim for compound interest fails, a party seeking compound interest as opposed to simple interest must plead and then prove it...
>
> Because the Court's order on interest would ordinarily be computed on simple interest, a party seeking compound computation must put the Defendant on notice, through pleadings, that it will be seeking extraordinary interest. In that way then Defendant has an opportunity to confront that claim."

Accepting the applicant's argument that the outstanding interest be compounded will amount to amending the judgment of the Court, and I do have such jurisdiction.

12. For the stated reasons, I find no merit in the applicant's request to settle the terms of the order in any other manner than done by the Deputy Registrar. The request is therefore declined and dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original,

Signed

DEPUTY REGISTRAR.