



REPUBLIC OF KENYA



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**Kenya Planters Co-operative Union Limited v Interchem Co. Limited & 6 others
(Civil Appeal 341 of 2018) [2024] KECA 178 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 178 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 341 OF 2018
MA WARSAME, K M'INOTI & JM MATIVO, JJA
FEBRUARY 23, 2024**

BETWEEN

KENYA PLANTERS CO-OPERATIVE UNION LIMITED APPELLANT

AND

INTERCHEM CO. LIMITED 1ST RESPONDENT

SAFINA LIMITED 2ND RESPONDENT

HENCHEM LIMITED 3RD RESPONDENT

GOODWILL STORES LIMITED 4TH RESPONDENT

GATONGA T/A BERMA FARMERS AGENCIES 5TH RESPONDENT

PATRICK MUREITHI T/A VETAGRO PULPERS 6TH RESPONDENT

NGATHO AGRO-PRODUCTS SERVICES 7TH RESPONDENT

*(Being an appeal from the Ruling and/or Order of the High Court at Nairobi
(Hon. Mr. Justice L. Kimaru) given on 30th May 2018 in HCCC No. 269 of 2006)*

JUDGMENT

1. By a plaint dated 2nd May 2006, the respondents instituted a suit against the appellant for an aggregate sum of Kshs.6,737,495.20 plus interest till payment in full, costs of the suit and any other relief that the court may deem fit to award. The respondents described themselves as carrying on supply business with the appellant jointly under the consortium merchandising agents' forum as a result of which the sum claimed from the appellant accrued on diverse dates during the year 2004 and 2005.
2. Despite the filing of the defence by the appellant denying owing the respondents such sums as claimed, relying on privity of contract, the respondents successfully filed an application resulting in the striking



out of the defence with judgment entered in their favour. By ruling delivered on 28th May 2008 the court stated as follows:

“...The plaintiffs have established that the defendant indeed owe them a sum of Kshs.6,737,495.20 being in respect of agricultural inputs and other goods supplied to the farmers contracted to deliver coffee to the defendant. The defendant has no defence to the plaintiff’s claim. The defence filed on 26th June 2006 is hereby struck out. Judgment is entered for the plaintiffs jointly and severally for the sum of Kshs.6,737,495.20. The plaintiffs shall have the costs of the application and the suit.”

3. The respondent never challenged this decision. Thereafter, a decree was extracted on 10th August 2011 in which it was indicated that the said decretal sum was awarded “plus interest till payment in full.” On 10th October 2017, the respondents set in motion execution process for the recovery of Kshs.16,600,050.00
4. The appellant moved the High Court filing an application dated 13th December 2017 seeking inter alia to set aside or amend the decree.

The appellant maintained that the ruling of the trial court made on 28th May 2008 was silent on the question of payment of interest and the inclusion of an award of interest in the decree as extracted rendered it irregular.

5. The trial judge, in a ruling made on 30th May 2018 dismissed the application holding that in the absence of the ruling specifically stating that interest would be paid in respect of the decretal sum, it did not mean that the respondents were not entitled to such interest.
6. It is this ruling that is now subject of the appeal before court. In its memorandum of appeal, the appellant faults the learned judge for failing to appreciate sufficiently or at all that no interest was awarded on the principal sum in the ruling delivered on 28th May 2008; that having not exercised discretion to award interest, the learned Judge erred in purporting to award interest suo moto by placing reliance on the provisions of section 26 of the *Civil Procedure Act*; that in the context of the ruling of 28th May 2008 the provisions of section 26 of the *Civil Procedure Act* do not apply at all; that a specific discretion not to award interest is not a typographical and/or arithmetical error that the Judge could correct long after the delivery of the ruling and that the entire ruling of 30th May 2018 is a belated afterthought and a clear travesty.
7. In its submissions 29th March 2019, the appellant invites the Court to revisit the guiding principles on interference of the exercise of discretion by the learned Judge. These are encapsulated in *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* Civil Appeal No.36 of 1983. To the appellant, the central question to be determined in this appeal turns on the interpretation of the provisions of section 26(2) of the *Civil Procedure Act* and whether a party is entitled to interest notwithstanding the fact that the court did not exercise its discretion to order payment of interest on the principal amount.
8. The appellant reiterates his arguments presented at the trial court, which submissions, it contends the trial court failed to consider. In addition, citing Order 21 Rule 7 of the Civil Procedure Rules and the dicta in *Highway Furniture Mart Limited vs. Permanent Secretary Office of the President & Another* [2006] eKLR, the appellant maintained that since the decree does not conform to the judgment, the decree is a nullity and should be set aside ex debito justitiae. The appellant also cites the dicta in *Peter Baraza Rabado vs. Nation Newspaper Limited* [2017] eKLR in which he submits that the court did



not award interest, no appeal was lodged against the decision, and the Court of Appeal found no basis to interfere with the decision of the trial court on interest.

9. The appellant also posits that section 26(2) of the [Civil Procedure Act](#) has been subject of vast judicial interpretation. Referring to R v The Permanent Secretary Ministry of Health Judicial Review No.669 of 2004 and Joseph Kamira Wanjau vs. Lloyd K. Kabaiya & 2 Others Nakuru HCCC No. 3 of 2014, the appellants urge that the pronouncements in those decisions construe the said statutory provision to be limited to payment of further interest, a finding contingent on the court first exercising discretion to award interest on the principal sum under section 26(1) of the Act. The appellant prays that the appeal be allowed and the decree issued on 10th August 2011 be set aside and replaced with a decree for the decretal sum of Kshs.6,737,495.20 together with costs of the application and costs of the suit.
10. In opposing the appeal, the respondents filed joint submissions dated 9th January 2020. The submissions address three issues – whether the trial judge had discretion to decide on the issue of interest in his decision dated 30th May 2018; whether the trial judge acted injudiciously in declaring, in his decision of 30th May 2018, that the respondents were entitled to interest on their principal debt from the date of judgment till payment in full; and what is the construction of section 26(2) of the [Civil Procedure Act](#)?
11. On the first issue, the respondents affirm that if the decision to award interest is discretionary in nature, then the decision was for the trial court rendering the appeal frivolous at the outset. They add that the later decision of 30th May 2018 confirmed that the trial judge did not intend to deny the respondents interest. On the second issue, the respondents fault the appellant for not demonstrating that the decision on interest was arrived at injudiciously. To buttress this argument, the respondents point out that the appellant misconstrues section 26(2) of the [Civil Procedure Act](#) failing to appreciate that it is the same trial court that rendered itself on the issue of interest and that the appellant’s grounds of appeal fail to appreciate that the decree in question was extracted jointly and a challenge belatedly brought by the appellant with an intention to abscond its obligations in payment of the decretal sum in full.
12. On the third issue, the respondents differ with the appellant’s interpretation of section 26 of the [Civil Procedure Act](#). Their position is that while section 26(1) gives the court discretion to determine a reasonable interest rate to be paid on the principal sum where a decree is for the payment of money, section 26(2) comes into effect where such a decree is silent in respect of payment of further or other interest from the date of judgment and not silent on the interest rate already ordered under subsection (1) above. The respondents conclude that with the decision on 30th May 2018, it is immaterial to interpret the sections as the court has expressly stated that interest on the principal is due from the date of judgment till payment in full. They therefore call for the dismissal of the appeal with costs to the respondents who have been denied their judgment from back in 2005.
13. The Court is being called upon to exercise its appellate jurisdiction as donated by Article 164(3) of [the Constitution](#) and section 3(1) of the Appellate Jurisdiction. Time and again, we adhere to our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. In doing so we are guided by Rule 31 of the [Court of Appeal Rules](#) 2022.
14. As we have already noted, the bone of contention in this appeal is whether the ruling as delivered on 28th May 2008 by the trial court permitted the award of interest. What is inescapable is that this issue, though not by way of appeal or review but in the course of execution proceedings found itself not just before the High Court, but before the very trial Judge that had issued the said ruling, albeit 10 years later. This resulted in the second ruling of 30th May 2018 that is now the subject of the appeal before us.



15. From the evidence before us, it is apparent that the prior to the extraction of the decree from the ruling of 28th May 2008, Counsel for the respondents had made efforts to get the draft approved as evidenced by the letter dated 21st July 2011 addressed to the appellant's erstwhile Advocates. This letter was adduced in evidence and placed on record by the respondent's advocate in the replying affidavit to the appellant's application to set aside the decree. At the onset therefore, the appellant was aware of the intention to extract the said decree containing the element of interest on the decretal sum. The appellant has steered clear of this fact in the appeal before us.
16. What remains central for our determination is the application of section 26(1) and (2) of the [Civil Procedure Act](#) in this appeal, and if so, the extent of such application. In doing so, we start from the common ground by the parties that the award of interest remains at the discretion of the court. Like every other discretion, an appellate court can only interfere with exercise of such discretion if it is demonstrated that the discretion was exercised injudiciously. See [CFC Stanbic Limited vs. John Maina Gitbaiga & Another](#) [2013] eKLR and [Shah vs. Guilders International Bank Limited](#) [2003] eKLR.
17. In arriving at its decision to award interest, and in exercise of judicial discretion, the trial court was not amused by the appellant's conduct and castigated it for not having paid the principal sum immediately after the ruling was delivered and thereafter sought a review of the decree extracted. Moreover, the trial court bore in mind that the subject of the dispute was a commercial transaction. Thus, it would be unconscionable for the respondents to be paid principal sum without interest especially where it was evident.
18. From the foregoing we see no semblance of abuse of discretion to warrant interference with the trial court's finding. The appellant's conduct that persuaded the trial court has not been rebutted or demonstrated to have been erroneous. We agree with the trial court's consideration of the conduct in several respects. First, when the respondents availed the draft decree for the appellant's input before extraction, the appellant simply ignored it. Second, the appellant never appealed or demonstrated its dissatisfaction with the decree. Third, the applicant took almost 10 years from the time the decree was made to file the present application, without any explanation for the delay. This in our view borders on an afterthought on the part of the appellant. As if that is not enough, the appellants attempted to settle the decretal sum and when their payment proposal fell by the wayside, it resorted to the application. Finally, the respondents are in business and it is only just that they be entitled to the fruits of their commercial enterprises by way of interest on their claim amount.
19. As for the applicability of section 26 of the [Civil Procedure Act](#), we are satisfied that the matter having been placed before the trial judge, and the same one at that, he was well placed to express his discretion on the issue. In confirming the applicability of interest, the provisions of section 26 having been brought to his attention the trial judge stated:

“... This court therefore holds that the fact that it did not specifically state that interest would be paid in respect of the decretal sum in the Ruling, did not mean that the Plaintiffs were not entitled to be paid interest on the decretal sum. Indeed, section 26(2) of the [Civil Procedure Act](#) applies where no other interest is specified, the court rate shall apply.”
20. Section 26 of the [Civil Procedure Act](#) is the guiding principle in respect of interest and it 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.”

21. Manifestly, the trial judge construed section 26(2) of the Civil Procedure Act, disjunctively from section 26(1). In this regard, we agree with the trial court that section 26(2) applies where no other interest is specified.

22. In the end, we are satisfied that the appeal is not merited and is for dismissal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

