Haria & another v Shah (Civil Appeal 362 of 2018)
[2024] KECA 527 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 527 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 362 OF 2018

SG KAIRU, JW LESSIT & GWN MACHARIA, JJA

MAY 9, 2024

BETWEEN

NAVIN HARIA ..... 1ST APPELLANT

MANU SHAH ..... 2ND APPELLANT

AND

JAYESH HASMUKH SHAH ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Milimani Commercial Court at Nairobi (Hon. Mbogholi Msagha, J. (as he was then) dated 31st July 2018) in Civil Case No. 488 of 2007)

JUDGMENT

1. Jayesh Hasmukh Shah (the respondent) filed a suit against Navin Haria and Manu Shah (the appellants), being High Court Civil Case No. 488 of 2007 (the suit). The suit was commenced by way of a plaint dated 4th June 2007. The respondent's case was that on 7th November 2001, he filed a suit in the Federal High Court of Ethiopia claiming a judgement sum of USD 250,000 from the appellants and Shoewind Private Limited Company incorporated in Ethiopia (the Company).

2. The Federal High Court of Ethiopia heard the parties and delivered its judgement on 20th May 2004 dismissing the suit in favour of the appellants. However, on appeal to the Federal Supreme Court of Ethiopia, the appellate court set aside the decision of the Federal High Court and entered judgement in favour of the respondent. The respondent partly executed the decretal amount and thereafter instituted a suit before the High Court of Kenya seeking the balance thereof.

3. As at the time of filing the suit before High Court in Kenya, the respondent was claiming from the appellants jointly and severally Ethiopian Birr 4,839,161.40, being an equivalent of Kshs. 36,191,604/= at the prevailing exchange rate of 1 Ethiopian Birr to Kshs. 7.4789/=, together with the contractual

rate of interest of 18% from 1st June 2007 until payment in full. The respondent also sought costs together with interest at court rates from the date of filing the suit until payment in full and any other relief the court deemed fit to grant.

4. The appellants entered appearance and filed a statement of defence dated 11th July 2007. They denied the existence of the alleged loan. In particular, they stated that the Ethiopian legal system was different from the Kenyan legal system; that Ethiopia is not a member of the Commonwealth system; that the findings of the Federal Supreme Court of Ethiopia was against the Common law principle of separate legal personality; that the two jurisdictions had not signed a Foreign Judgements Enforcement Treaty; and that therefore the said judgement is irrelevant and inapplicable.

5. The appellants further averred that the Kenyan courts cannot hear and determine the matter since the loan was signed under the Ethiopian Laws, hence, the dispute fell outside the jurisdiction of the High Court. They reserved the right to file a Preliminary Objection seeking to strike out the suit for want of jurisdiction.

6. Before the suit proceeded for the main hearing, the respondent filed an application dated 12th July 2007 seeking summary judgement against the appellants for Kshs. 36,191,604/=. The High Court dismissed the application in its ruling dated 27th January 2009.

7. The learned Judge (R. N. Sitati, J.) found that the appellants raised pertinent issues that should be determined by way of viva voce evidence. Some of the issues the learned Judge isolated included reciprocity of enforcement of the Ethiopian judgment; the allegations that the Ethiopian judgment was not made by a court of competent jurisdiction; and that there was fraud on the part of the respondent while pursuing his claim before the Ethiopian court.

8. Aggrieved by the said ruling, the respondent appealed to this Court. The appeal was heard and determined by a judgement dated 26th February 2016 (Githinji, J. Mohammed & Otieno- Odek, JJ.A). This Court addressed itself extensively on the applicability and enforceability of foreign judgments from non-designated countries and the procedure for enforcement of foreign judgments from non-designated countries as per the Kenyan law.

9. The learned Judges found that, although there was no treaty in place between Kenya and Ethiopia pursuant to which either country's judgment may be enforced by either country's courts, and despite the fact that the Ethiopia's Federal Supreme Court is not a "designated court" within the meaning of Kenya's Foreign Judgment (Reciprocal Enforcement) Act, in the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law, while taking into account the provisions of section 9 of *Civil Procedure Act* on the requirements needed to be fulfilled to enforce a foreign judgment in Kenya from a non-designated country.

10. While upholding the decision of the High Court in dismissing the application for summary judgement, this Court held that the suit between the parties should proceed to a full trial and the common law principles on enforcement of foreign judgment as read with section 9 of the *Civil Procedure Act* should be applied in arriving at the final determination of the issues in this suit.

11. The learned Judges went on to state that the High Court of Kenya pursuant to the provisions of section 3 of the *Judicature Act* and its original and unlimited civil jurisdiction provided in Article 165 (3) of *the Constitution* has jurisdiction to hear and determine any issue relating to enforceability of foreign judgments from non- designated countries.

12. The suit proceeded for hearing before the High Court. The respondent testified as PW1 while the 1st appellant testified as DW1.

13. The trial court delivered its judgement on 31st July 2018 which is the subject of this appeal. The learned trial Judge (Mbogholi Msagha, J.) (as he was then) observed that the issues which the appellants were raising before him, that is, whether the judgement was contrary to Common law principle of separate legal personality, were not raised in their defence before the Ethiopian courts; that the appellants did not deny receiving the money; and that they were sued jointly with the limited liability company.

14. The learned Judge, as he was then, went on to find that the case before him was not fresh litigation; that the main issue zeroed in on enforceability of the foreign judgement; and that the High Court could not impeach the judgement sought to be enforced or examine it on merit as that was a preserve of the court which rendered the judgement.

15. The trial court also found that from the evidence presented, the appellants had not proved that the judgment fell within the exceptions set out under section 9 (a) to (f) of the *Civil Procedure Act*; that the provisions of section 9 of the *Civil Procedure Act* which provide that a foreign judgement shall be conclusive as to any matter are instructive; and that since the matters that the court was being asked to decide on had been litigated between the same parties and adjudicated upon in the foreign court, the same were res judicata.

16. On that basis, the suit was allowed as prayed by the respondent.

17. Aggrieved, the appellants preferred this appeal. Vide a Memorandum of Appeal dated 28th September 2018, they outlined four grounds of appeal as follows:

    a. That the learned Judge erred in entering judgement against the appellants in favour of the respondent as prayed in the plaint with costs and interest contrary to the law and facts of the matter.

    b. That the learned Judge erred in law and in fact in holding that the appellants failed to prove that the foreign judgement fell within the exceptions set out under section 9 (a) to (f) of the *Civil Procedure Act*.

    c. That the learned Judge erred in law and in fact in failing to address the effect and import of section 9 (c) of the *Civil Procedure Act* to the foreign judgement's enforcement in Kenya.

    d. That the learned Judge erred in law and in fact in entering judgement against the appellants for interest which was not part of the foreign judgement to be enforced contrary to the law.

18. For those reasons, the appellants prayed that the judgement of the trial court be set aside, this appeal be allowed and the respondent's claim be dismissed with costs to the appellants, both before this Court and the High Court.

19. The appellants filed written submissions dated 4th December 2020. They faulted the learned Judge for finding that they could not reopen their case, yet this was occasioned by his (the Judge) failure to apply his mind to the exceptions set out in section 9 of the *Civil Procedure Act*.

20. They submitted that in the Ethiopian suit, the company and its shareholders were sued, but their case was that shareholders are distinct from a company and cannot be sued for the debts of a company. They faulted the Ethiopian court for not addressing the issue of the distinctiveness of a company from its shareholders, consequent to which it entered judgement against the appellants jointly and severally.

21. On that basis, the appellants submitted that the learned Judge should have re-looked into the issue and consequently found: that the respondent loaned the company USD 250,000 in anticipation of becoming a 3rd shareholder; that the sum was paid directly to the company; and that the appellants never took the loan nor did they guarantee the company for the loan. It was contended that there was no contract which existed on the advanced loan other than the fact that the money was deposited in the company's account.

22. The appellants contended that, had the High Court considered the above uncontroverted facts, it would have arrived at a different conclusion, more so that the suit was not tantamount to re-opening the case, but rather that, it was only affirming the provisions of section 9 of the *Civil Procedure Act* which provides that where foreign judgements go against our (Kenyan) laws, they are not enforceable.

23. The appellants further submitted that once a limited liability company is incorporated, it becomes a separate legal entity and therefore, the appellants should not have been held personally liable for the company's debts. To support this proposition, they relied on the cases of Salmon vs. Salmon & Co. Limited (1897) A.C. and Victor Mabachi & Anor vs. Nurturn Bates Limited (2013) eKLR where the principle of distinctiveness of a company from its shareholders was enunciated. The appellants further referred to the provisions of section 16 (2) of the *Companies Act* for the same proposition.

24. The appellants stated that in some instances, the court will lift the corporate veil to enable it do justice by treating a particular company as identical with the person who controls the company as provided for in section 323 (1) (a) of the *Companies Act*. They referred us to the case of Mugenyi & Company Advocates vs. The Attorney General (199) 2 EA 1999 where the court set out 10 instances in which the veil of corporate personality may be lifted and submitted that the respondent failed to adduce evidence to warrant lifting of the company's veil. The appellants reiterated that they did not receive money on behalf of the company and, as such, no claim ought to have been brought against them. To them, the basis upon which the suit was predicated was made against the provisions of the Ethiopian laws and more importantly, against the laws of Kenya, namely that liabilities of a limited company cannot be visited upon its shareholders without lifting the corporate veil.

25. On the interest rate, it was submitted that since the Ethiopian court awarded judgement strictly premised on US Dollars, then the commercial interest rate cannot be based upon the Ethiopian currency. It was argued that the international interest rates for the Dollar has never been more than 5 % and, as such, the rate should be applied on the sum awarded in Dollars and then converted to the local currency so as to get the accurate actual sum awarded. It was their view that applying the 18% interest rate would distort the amount awarded.

26. In urging their final arguments, the appellants stated that the appeal hinges on the interpretation of section 9 of the *Civil Procedure Act*, and in their view, the foreign judgment falls afoul of the three exceptions thereof. For this reason, it cannot be enforceable in Kenya and to that extent, the appeal should succeed.

27. The respondent relied on written submissions dated 29th January 2024. On whether the Ethiopian judgement is excluded from enforcement in Kenya, it was submitted that this issue was determined by this Court in Jayesh Hasmukh Shah vs. Navin Haria & Another Civil Appeal No. 147 of 2009 (2016) eKLR, therefore effectively disposing off this issue.

28. The respondent submitted that the appellants' defence under paragraph 6 (c) of their statement of defence that the Ethiopian judgment is not enforceable in Kenya for contradicting the principles of distinctiveness of a limited liability company from its shareholders leading to the conclusion that section 9 (c) of the *Civil Procedure Act* is applicable, is not tenable; that the exception under section 9

(c) only applies where a party demonstrates that the proceedings were founded on an incorrect view of international law or a refusal to recognise Kenyan laws where they are applicable; and that the appellants had failed to demonstrate that the Ethiopian judgement was founded on any of these conditions.

29. It was submitted that international law deals with a State's conduct towards other States, but the Ethiopian Federal Supreme Court judgement had no such element; that the judgment was for a claim of money between private individuals; and that it was not at all averse to the Kenyan law.

30. The respondent contended that the appellants and the company were sued jointly and severally, and that therefore the judgment for all intents and purposes is executable against the appellants; that in any case, it is the appellants who negotiated the terms of the loan and as at the time the loan was advanced, the company had not been incorporated. We were urged to note that before the Ethiopian courts, the appellants advanced the defence that no loan was advanced, contrary to their current defence that the money was advanced to the company and not themselves.

31. On the issue of jurisdiction, the respondent submitted that the appellants cannot now be heard to say that the Ethiopian courts were not seized of competent jurisdiction while they never disputed it at the right time; and that instead, they subjected themselves both to the Federal High Court and the Federal Supreme Court respectively. The respondent referred to this Court's case of Kanti & Co. Limited vs. South British Insurance Co. Limited (1981) eKLR where it was held that once a defendant enters an unconditional appearance, he or she is deemed to have submitted to the jurisdiction of the court and the court is ultimately seized of jurisdiction to try the suit.

32. On the issue of the interest rate, it was submitted that the Supreme Court of Ethiopia entered judgement in equivalent of Ethiopian currency when it pronounced itself that the USD 250,000 would be paid in its equivalent amount in Ethiopian currency at the exchange rate applicable on 26th October 2011. The respondent stated that he sought the judgement in the High Court in Kenya Shilling, after converting Ethiopian Birr 4, 839, 161.40 into Kenya Shillings to arrive at an amount of Kshs. 36, 191, 604/=; and that none of these calculations were disputed by the appellants.

33. It was the respondent's further submission that he is entitled to a claim on interest from the date of filing the suit. In support thereof, he relied on the High Court case of British American Investments Company (K) Limited vs. Njomaitha Investments Limited & Another (2018) eKLR where it was held that interest can be adjudged for any period prior to the institution of the suit. Reliance was also placed on this Court's case in Ajay Indravadan Shah vs. Guilders International Bank Limited (2003) eKLR where it was held that the court's discretion to award and fix interest can be claimed at any of the three stages, namely; the period from the date the suit is filed to the date when the court gives its judgement; from the date of judgement to the date of payment of the sum adjudged; or such earlier date when parties by their agreement have not fixed the interest rate payable.

34. In this case, the respondent submitted that the parties had agreed to a contractual interest rate of 18% and the respondent prayed for the same from 1st June 2017 until payment in full; that although the Ethiopian law sets a bar of interest rate at a maximum of 12%, the Kenyan law does not prescribe a maximum interest rate; and that section 26 (1) of the *Civil Procedure Act* would apply and thus, the contractual interest rate would run from the date of filing the suit in the High Court. For this reason, he urged us to uphold the decision of the High Court as the appellants had not demonstrated that the learned Judge improperly or wrongly exercised his discretion in regard to the order on interest. On the whole, were urged to uphold the entire judgment of the High Court.

35. When the appeal came up for plenary hearing, Mrs. Nyaencha appeared for the appellants while Mr. Sarvia was present for the respondent. Both counsel whilst relying on the respective parties' written submissions also made oral highlights. The oral submissions were largely a regurgitation of the written submissions and we therefore see no need to recall them.

36. Being a first appeal, our mandate as a first appellate court is to re-evaluate the evidence before the trial court as well as the judgment and arrive at our own independent judgment on whether or not to allow the appeal. See Selle & Another vs. Associated Motor Boat Co. Ltd.& Others (1968) EA 123 and Peters vs. Sunday Post Limited (1958) E.A. page 424.

37. Further, the predecessor of this Court in Mbogo vs. Shah (1968) EA 93 stated as follows:

> " ...a court should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice"

38. We have considered the record of appeal and the written and oral respective rival parties' submissions. We have consolidated the arguments as put forth and it is our considered view that the issues for determination can be condensed into two, being firstly, whether the foreign judgement was not conclusive because it offends the provisions of section 9 (c) of the *Civil Procedure Act* and secondly, when the interest on the decretal sum should start running and what rate should be applicable.

39. It is no longer an argument of whether the foreign judgement from the Ethiopian court can be adopted in our courts. This issue was settled by this Court in the Jayesh Hasmukh Shah (supra) case. The learned Judges of this Court held that enforcement of judgements from non-designated countries in Kenya can be done as claim in common law. We need not belabour further on this issue.

40. The issues which the High Court was mandated to consider as directed by this Court were those raised in the appellants' defence in paragraphs *6* and *7*. We think that it is crucial we reproduce these paragraphs as under:

> " 6. The defendants will aver that in view of the following facts:
>
> a. The Ethiopian legal system is different from the Kenyan legal system.
>
> b. Ethiopia is not a member of the Commonwealth and hence shares little with Kenya in its legal system.
>
> c. The finding of the Federal Supreme Court of Ethiopia as stated in paragraph 6 was on the face of it against the commonwealth laws of the distinctiveness of a limited liability company from its shareholders.
>
> d. The two jurisdictions have not signed a Foreign Judgment Enforcement Treaty: then clearly the said judgment is irrelevant and inapplicable.
>
> 7. Without prejudice to the foregoing and without admitting the relevance and legality of the Ethiopian judgment herein, the defendant will aver that the said judgment was obtained under doubtful circumstances and its veracity must be scrutinized by the Kenyan courts."

41. The averments in the two paragraphs raised the issues of the difference of the legal systems between Kenya and Ethiopia; Ethiopia being not a member of the Commonwealth; the consequences of the

two jurisdictions having not signed a Foreign Judgement Enforcement Treaty; the findings on the distinctiveness of a limited liability company; the circumstances under which the judgement was obtained; and its veracity.

42. The arguments which arose in the High Court which are also the subject of this appeal relate to the exceptions outlined in section 9 (a) - (c) of the *Civil Procedure Act* on adoption of a foreign judgement. They specifically relate to when a foreign judgment is not conclusive. They provide:

> 9. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—
>
> a. where it has not been pronounced by a court of competent jurisdiction;
>
> b. where it has not been given on the merits of the case;
>
> c. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;
>
> d. where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> e. where it has been obtained by fraud;
>
> f. where it sustains a claim founded on a breach of any law in force in Kenya.

43. We have understood the argument by counsel for the appellants to be chiefly that the judgement ought not to be enforced since the Ethiopian Federal Supreme Court failed to appreciate the principle of distinctiveness of a company from its shareholders. Mrs. Nyaencha's argument was based on section 9 (c) of the *Civil Procedure Act* which we shall once more reproduce below:

> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

44. The law provides that the two instances when a foreign judgement cannot be adopted in our courts is if the proceedings were founded on an incorrect view of international law or the refusal to recognize the law of Kenya where it is applicable. The dispute between the parties was contractual in nature between private parties. The Ethiopian Federal High Court dismissed the respondent's case in favour of the appellants but on appeal to the Ethiopian Federal Supreme Court, the decision was overturned.

45. We have taken the liberty to peruse the decisions of the Ethiopian Federal High Court and the Ethiopian Federal Supreme Court. What we have understood from the decision of the Federal High Court is that the respondent's case was dismissed solely on the basis that there was no contractual evidence to show that the sum of USD 250,000 was remitted to the appellants. The said Court was also of the view that the sole evidence of the respondent and another witness was not sufficient.

46. The learned Judge, Hirut Melesse had this to say at pages 35 and 36 of the record towards the tail end of the judgement:

> "Defendants did not deny to have received the amount mentioned in the claim. However, they have pointed out that there is no contract between plaintiff and themselves as that mentioned by the plaintiff. The (sic) have no knowledge whatsoever about such contract.

> That is their contention. Defendants stated that the amount remitted by plaintiff was a repayment of the money lent to him. On the part of plaintiff, only the 1st defendant's witness was able to clarify about the contract...According to the court's conviction it is note (sic) sufficient evidence which can prove the facts enumerated in the claim. The two witnesses named by the plaintiff have denied the facts stated by the plaintiff. Only one witness testified in support of the claim. Therefore, it is considered as irrelevant to decide in favour of plaintiff's claim based solely on the attestation of this one witness only. In general, as attempted to point out above, plaintiff did not positively prove his claim with adequate evidence. Hence, the claim is hereby dismissed and has defendants are set free according to the ruling pronounced by the court."

47. On appeal, the Ethiopian Federal Supreme Court Judges faulted the learned Judge for finding that the testimony of the other independent witness was not sufficient and held as follows at last paragraph of page 51 of the record of appeal through to page 52 first paragraph:

> "The witness testified at court that the respondents agreed to allow the appellant to be a shareholder of the company should he be satisfied with the way business was doing and that he would be reimbursed otherwise. This was a verbal agreement, according to the witness. The High Court denied the claim of the appellant after hearing the testimony of the witness saying that it would not be appropriate to decide based on the testimony of one witness only. However, there is no reason for the testimony of one witness to be considered as inadequate as long as it is strong, reliable and acceptable. Hence, it is not appropriate to say one person's testimony is inadequate. There is no reason for a court not to accept the testimony of a single witness as long as such testimony is viable in pursuance to the law unless the other party produced evidence to nullify such testimony. The testimony of the witness is, hence, in line with the submission of the claim at the lower court and should have been duly considered."

48. From the above discourse and reading the judgement of both Ethiopian courts, it is not hard to see that the subject of the distinctiveness of a company with its shareholders was not the subject of litigation before the Ethiopian Courts.

49. The assertion that the appellants now want us to believe that the issue was not considered cannot hold water. The appellants now want the Kenyan courts to assume jurisdiction and litigate the suit afresh based on the principle of liability of a company and its shareholders. The issue in question was whether the appellants were liable to refund the USD 250,000 lent to them by the respondent and in our view, this was well settled before the Ethiopian courts.

50. We will go on to further observe that even if the issue of distinctiveness of a company from its shareholders was discussed by the Ethiopian Federal High Court, it was not the basis upon which that Court based its decision. Furthermore, once the Ethiopian Federal Supreme Court pronounced itself on the issue and vacated the decision of the Federal High Court, the decision which bound all the parties in question was the decision by the Federal Supreme Court. The findings of the Federal High Court cannot be relied upon as it has been overturned. Hence, a party cannot be heard to refer to the proceedings which have been set aside by a superior appellate court.

51. We further observe that the appellants have not told us which part of the international and Kenyan law they perceive the Ethiopian courts did not address properly regarding refund of the advanced money. We therefore find and hold as did the learned Judge of the High Court that we cannot revisit the issue as it was conclusively adjudicated upon by the Ethiopian courts. The only courts which can settle the issues between the parties herein are the Ethiopian courts. We emphasise that it has not been shown to us that the Ethiopian Federal Supreme Court judgement has been reviewed and/or set aside based on

breach of international law or that there was a breach of the rules of natural justice or perhaps fraud played a role in obtaining the said judgement.

52. In view of the foregoing observation, we are not persuaded that the Ethiopian Federal Supreme Court judgement falls under the exception set out in section 9 (a)-(f) of the *Civil Procedure Act*. That is to say that it has not been shown: that the judgment was not pronounced by a court of competent jurisdiction; that it was not given on the merits of the case; that it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable; that the proceedings in which the judgment was obtained are opposed to natural justice; that it was obtained by fraud; and that it sustains a claim founded on a breach of any law in force in Kenya.

53. On the issue of interest, the argument by the respondent is that the contractual interest rate was agreed upon between the parties to be 18%. However, the Ethiopian Federal Supreme Court capped the same at 12% based on jurisdictional law. On the other hand, the appellants have taken the position that the international interest rates for the Dollar has never been more than 5% and, as such, it should be the applicable rate.

54. We observe from the proceedings in the Ethiopian courts and the documents on record before us that there was a contract signed between the parties to show that the interest rate of 18% was applicable. It was conceded to by both parties that the same was agreed verbally at 18% and that is why the Ethiopian Federal Supreme Court elected to cap the interest rate at 12%. The 12% rate was based on the provisions of Article 2479(1) of the Ethiopian Civil Code of 1960 which provides that "The parties may not stipulate a rate exceeding twelve per cent per annum."

55. We are alive to the fact that under our jurisdiction, while an award of interest is largely discretionary, courts are guided by the provisions of section 26 (1) and (2) of the *Civil Procedure Act* is applicable. It provides as follows on the issue of interest:

> 26. Interests
>
> 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.

56. It is trite then that a court under our jurisdiction has discretion to order that interest be paid on the amount adjudged from the date of the suit, before the institution of the suit, from the date of the court's decree and where the decree is silent with respect to payment of further interest, the same is payable from the date of decree to the date of payment or earlier date.

57. We have stated herein above that parties are not relitigating the dispute as the same was settled with finality by Ethiopian courts. Further, alive that we cannot purport to sit as an appellate court to the decision of the Ethiopia Federal Supreme Court, it is our view that the interest rate at which the decretal sum should be paid should remain at 12% as adjudged by that Court, and we so hold.

58. As regards to when the interest rate should start accruing, we are of the view that this being a contractual liquidated sum, the interest should run from the date of filing the suit as this was money due to the respondent but he was kept out of it. This is a scenario unlike in general damages where the sum due must be assessed first by the court and the interest thereof starts running from the date of judgement.

59. In so holding, we are fortified by the decision of this Court in *South Nyanza Sugar Company Limited vs. Oreko (Civil Appeal No. 138 of 2017*) [2022] KECA 570 (KLR) (24 June 2022) where it was held that:

> " The objective for awarding interest is to ameliorate the loss suffered by a party who has been kept out of use of money that would otherwise be due to him...The indubitable outcome is that interest on special damages will be from the date of filing of suit as the money would have been due to the claimant at the very least on that date."

60. We find and hold that the interest on Kshs. 36, 191, 604/= shall run from the date of filing suit, that is 19th July 2007 and at the rate of 12% until payment in full.

61. The net effect of our findings is that the appeal is devoid of merit and it is hereby dismissed. The judgement of the High Court is set aside only to the extent of varying the date that the interest should start running and the rate of interest payable, which we have adjudged to be at 12%.

62. The respondent shall have the costs of this appeal and of the suit in the High Court.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR