



Nairobi City County v Maksam Pioneer Services Limited & another (Civil Appeal 327 of 2017) [2023] KECA 91 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 91 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 327 OF 2017
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

NAIROBI CITY COUNTY APPELLANT

AND

MAKSAM PIONEER SERVICES LIMITED 1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court in Nairobi (Honourable Justice E. K. O. Ogola) delivered on 17th February 2017 in HCCC Case No. 1180 of 2001)

JUDGMENT

1. The genesis of the dispute in the High Court is a claim for Kshs. 35,000,000 allegedly owed to the 1st respondent by the appellant, being the unpaid balance of the purchase price for 4 Hanomag wheel loaders supplied to the appellant in 1998. The 1st respondent sued for the said sum of Kshs. 35,000,000/= together with interest thereon at the rate of 36% p.a., from 2nd March 1998 until payment in full, and costs of the suit.
2. The 1st respondent claimed that it had delivered 4 Hanomag wheel loaders to the appellant in the month of February 1998 on the undertaking by the appellant that it would pay to the 1st respondent the sum of Kshs. 60,000,000/= immediately on delivery.
3. According to the 1st respondent, the appellant paid the sum of Kshs. 25,000,000/= in February 1998 and undertook to pay the balance of the purchase price of Kshs. 35,000,000/= to Oraro and Rachier Advocates as instructed by the 1st respondent. According to the 1st respondent, this undertaking was not honored.
4. It was the 1st respondent's case that, on 2nd March 1998, the 1st respondent, through its advocates notified the appellant that the outstanding balance of Kshs. 35,000,000/= would accrue interest at the



rate of thirty-six percent (36%) p.a. until payment in full for the duration that the appellant would be in default. Therefore, its' claim before the trial court was for the principal sum of Kshs. 35,000,000/= being the unpaid balance of the purchase price of the 4 Hanomag wheel loaders supplied to the appellant with interest thereon at the rate of 36% p.a. from 2nd March 1998 until payment in full, and costs of the suit.

5. The appellant admitted that 4 Hanomag wheel loaders were delivered to it, but denied that it undertook to pay the purchase price of Kshs. 60,000,000/= to the 1st respondent immediately. The appellant further admitted that it paid the sum of Kshs. 25,000,000/= to the 1st respondent, but denied that it undertook to pay the sum of Kshs. 35,000,000/= to Oraro and Rachier Company Advocates in the month of March 1998, or that it neglected and or refused to make payment to the firm of Oraro & Company Advocates as directed by the 1st respondent. It further denied being notified that interest would be charged for non-payment upon delivery at the rate of 36% p.a.
6. The appellant alleged fraud and contended that payment of the Kshs. 60,000,000/- to the 1st respondent was fraudulent, and gave the particulars of fraud to be two - fold: that the 1st respondent did not disclose to the appellant, that the wheel loaders had been attached by Kenya Commercial Bank, which bank had placed Kwanza Motors under receivership and the 1st respondent therefore, had no title to the said wheel – loaders and secondly, that the 1st respondent had purported to sell the same, wheel – loaders which had been sold and had been paid for in 1994, the same being the subject matter of HCCC No. 635 of 1995; Kwanza Motors Limited v Nairobi City Council, facts which had not been disclosed in the suit.
7. The appellant further averred that the 1st respondent did not disclose that the wheel loader it supplied had been attached by the 2nd respondent through a notice of appointment of a receiver on 3rd April 1995. The appellant stated that the 1st respondent did not disclose that the vehicles were subject of the ruling in civil application No. Nai 316 of 1997, which was delivered on 16th January 1998. Further, it averred that the 1st respondent had sold to the appellant the same wheel loaders it had paid for in 1994, and which were the subject matter of HCCC No. 635 of 1995 between Kwanza Motors Limited v Nairobi City Council.

In addition, the appellant stated that the 1st respondent did not disclose, that it was associated within Kwanza Motors Limited, and that the transaction and payment of Kshs. 60,000,000/= was not authorized by the appellant's finance committee, and that it was contrary to the repealed Local Government Act.

8. In addition, the appellant raised a counter – claim against the 1st respondent claiming; that since the 1st respondent was paid for goods, which it did not have title to, the appellant was entitled to a refund of the money it paid to the 1st respondent; that the Kshs. 60,000,000/- paid to the 1st respondent by the appellant, was due to the 1st respondent's misrepresentation and non – disclosure of material facts; that the contract for supply of the four wheel – loaders was void ab initio and no money was payable to the 1st respondent by the appellant; and that the contract was illegal and/ or irregular as neither the contract nor the payment was authorized as provided under the *Local Government Act*.
9. The appellant thus sought the following prayers in the counter - claim; a declaration that the contract entered into between the appellant and the 1st respondent was illegal, null and void ab initio and in the alternative, a declaration that the contract was voidable at the instance of the appellant; that the 1st respondent refunds Kshs. 60,000,000/= plus interest at commercial rates, together with costs of the suit and interest thereon.



10. Upon hearing the parties, the High Court (E.K.O. Ogola, J.) held as follows:

“To deny that they received Kshs. 35,000,000/= would amount to the plaintiff stretching its luck too far. Already, it is perceived that the contract before the plaintiff and the defendant could have amounted to a collusion between the officers of the plaintiff and the defendant. That perception would get credibility if the plaintiff insists that it did not give instructions to the Third Party to disburse the said Kshs. 35,000,000/= as aforesaid. Indeed, the disbursement of the said amount was pursuant to negotiations, and there is a Ruling on record that the whole of the purchase price was paid before this suit was brought to court.

107. Indeed, the plaintiff was right when it initially filed this suit to claim only interest since it believed the principal sum had been paid. Indeed, even while amending its plaint to include the said principal sum, the plaintiff already knew that the said Kshs. 35,000,000/= had been fully paid. However, the plaintiff intended to benefit from the legal confusion of money being paid to a third Party and continued to feign ignorance. That is what I call utmost bad faith. What was always due to the plaintiff, if at all, was the interest on the balance of the said Kshs. 35,000,000, and that is what this court will now consider.

Issue of interest

107. This court has already established that there was a contract between the plaintiff and the defendant. However imperfect that contract was, it was endorsed by both parties and the parties benefited under it. The defendant under the agreement acquired the four Hanomag wheel loaders and had them registered in its name and had them in their possession. The plaintiff on its part received a down payment of Shs. 25,000,000= and expected the balance of Shs. 35,000,000/= to be paid in due course. ... In my view, the transaction was commercial in nature, and even if it was not time specific, and there was no clause on interest or applicable rate of interest, the balance was to be paid within a reasonable time to avoid the applicability of interest. The plaintiff issued a notice of the applicability of interest and rate to the defendant on 2nd March, 1998 and reiterated this position by its letter dated 2nd April 1998. The defendant never made any response to the said notice and letter. So, the finding of this court is that this was a commercial transaction and that the balance of the purchase price was payable with interest at commercial rates prevailing during that time. The plaintiff stated that the relevant commercial rates during that time ranged from 24% per annum to 37.5% per annum inclusive of default penalties. On their part, the defendant submitted that there was no agreement on interest or applicable rate and that if the court were to find that interest was applicable, then the same should be at court rates.

Final Orders

110. This court finds that the plaintiff has proved its case on a balance of probability that it was entitled to interest at commercial rates on the balance of Kshs. 35,000,000= which was paid to it on 4th April, 2000. Accordingly, Judgment is hereby entered for the plaintiff against the defendant, and further orders are made as follows: -



- a. Subject to any calculation errors to be corrected, the Defendant shall pay the Plaintiff interest on Kshs. 35,000,000/= at 28% p.a. with effect from 2nd March 1998 to 4th April 2000, that is Kshs. 20,471,111=.
- b. Interest shall accrue on (a) above at court rates from 5th April 2000 until the same is fully paid.
- c. Plaintiff's costs assessed herein at 30% shall be paid by the Defendant.
- d. The Plaintiff's claim for Kshs. 35,000,000/= is dismissed.
- e. The Defendant's claim against the Third Party is dismissed with costs to be paid by the Defendant.
- f. The Defendant's counter-claim is dismissed."

11. Aggrieved by the above findings of the trial court, the appellant filed this appeal raising 6 grounds, which can be summarized as follows: that the learned Judge erred by awarding interest on a dismissed claim; that the learned Judge erred by awarding interest at 28% despite there being no clause on interest in the parties' pleadings; that the learned Judge erred in awarding 30% of the costs to the 1st respondent; and that the learned Judge erred by dismissing the appellant's counter-claim. The appellant prays that the appeal be allowed and the counter-claim be allowed as prayed.
12. The appellant filed written submissions dated 22nd January, 2018. On its part, the 1st respondent also filed written submissions dated 14th June, 2022.
13. On whether or not the learned Judge erred in dismissing the 1st respondent's claim and awarding interest on the dismissed claim, the appellant submits that the judgment was made per incuriam because, in the absence of a decretal amount, the court had no jurisdiction to award interest in a vacuum. It further submitted that the learned Judge erred in awarding interest at 28% p.a, whereas the same was not provided for in the agreement, and that that was tantamount to rewriting the agreement as between the parties.
14. The appellant further submitted that the learned Judge erred in awarding 30% of the costs to the 1st respondent. According to the appellant, the assessment and/ or taxation of costs is within the jurisdiction of the deputy registrar of the High Court and/ or the taxing master.
15. The 1st respondent submits that the grounds of appeal raise three issues for determination:
 - a. whether a trial court can award interest on the principal claim in a suit despite finding that the principal sum had been settled before judgment;
 - b. whether a trial court can assess and award costs following the determination of a suit; and
 - c. whether a trial court can dismiss a counterclaim where it finds the counterclaim has no basis and is not justified.
16. According to the 1st respondent, the main issue as revealed from the grounds relates to the award of interest. The 1st respondent submits that the Judge, in awarding the 1st respondent interest, considered: that the transaction was commercial in nature and was, therefore, subject to ordinary commercial practices and customs; and that the 1st respondent issued a notice of imposition of interest and the rate applicable on 2nd March 1985 and 2nd April 1998; that there was no objection from the appellant to the



notices. It submitted that the Judge made a correct finding in awarding interest to the 1st respondent following failure on the part of the appellant to perform its obligation under the transaction within a reasonable time.

17. On costs, the 1st respondent submits that it was partially successful against the appellant on the claim of interest in the trial court, as well as having the counterclaim dismissed, and that the learned Judge, in exercise of his discretion, relieved the appellant of 70% of the 1st respondents' costs, thus, the appellant misapprehended the Judge's order on costs, which is (on) an award under section 27 of the Civil Procedure Act.
18. At the hearing of the appeal on 31st October 2022, the appellant was not represented. Mr. Issa for the 1st respondent highlighted his submissions and stated that the sum of Kshs.35, 000,000/= was paid after the institution of the suit. Therefore, the learned Judge correctly held that interest for the period between 2nd March, 1998 and 4th April, 2000, was payable as a result of the delay in settlement of the balance that was due to the 1st respondent. He further submitted that the 1st respondent had paid interest on the facility that had been advanced to it, and that the rate of interest applicable on the facility was between 24% and 36%, which was the commercial rate of interest that had been applied by the bank.
19. Counsel for the 1st respondent submitted that the learned Judge was correct when he awarded an interest rate of 28% p.a. instead of the 35% sought by the 1st respondent. Counsel further submitted that the appellant's argument that the sum of Kshs. 35, 000,000/= was paid before judgment was delivered was neither here nor there because there had been a delay in the settlement of the principal sum.
20. On the issue of costs, the 1st respondent submitted that the learned Judge has been improperly castigated by the appellant because what the learned Judge did was not to assess costs, but to cap off costs at 30% of such costs as would have ordinarily become due to the 1st respondent; that the learned Judge considered that a counterclaim by the appellant had been dismissed, and that the 1st respondent was only partially successful only on the claim of interest, and hence capped the interest at 30%; that he did not assess nor award any particular figure; and that the assessment was left to the deputy registrar of the High Court to compute the payable to the 1st respondent.
21. Ms. Obago appearing for the 2nd respondent stated that the 2nd respondent would not take a position in the appeal, as the appeal did not seek any relief against the 2nd respondent; and that the High Court in its judgment, determined that the appellant had no claim against the 2nd respondent.
22. From a careful perusal of the record of appeal, the parties' submissions, and the authorities, the legal issues arising for determination can be discerned to be: whether the learned judge misdirected himself in awarding interest on the suit amount; and whether the learned judge erred in awarding the 1st respondent 30% of the recoverable costs.
23. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions, warning ourselves that we did not have the advantage of seeing the witnesses. It is thus the duty of the Court to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle v Associated Motor Boat Co.* [1968] EA 123, this approach was expressed as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow



the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.)”

24. The crux of this appeal is whether the 1st respondent was entitled to the interest awarded by the trial court. It is not in dispute that the agreement between the parties did not provide for interest. The record reveals that the 1st respondent made demands for payment vide a notice of the applicability of interest and rate applicable. The first notice was sent to the appellant on 2nd March 1998, which was followed by another one dated 2nd April 1998. This communication did not elicit a response from the appellant.

25. The general rule is that a party cannot charge interest if not provided for in the contract, unless the right to charge interest was agreed on when the contract was made. In the Court of Appeal case of *Bakshish Singh & Brothers v Panafric Hotels Limited*, [1986] KLR, the Court held:

“In order for there to be a good contract, there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by the agreement between the parties.”

26. The issue of interest is a critical issue, and one which needed to be settled before the contract was concluded. The fact that it was left out of the contract only shows that there lacked “*consensus ad idem*” and the intention of the parties was to exclude interest in the contract. If that intention changed at any one time, then the parties should have entered into an agreement signed by both parties introducing interest as a term of the contract. The 1st respondents’ letter and the notice to the appellant did not amount to a contract. To be binding upon the appellant, it had to be made in the same way as the agreement.

27. However, under section 26 (1) of the *Civil Procedure Act*, in decree for payment of money, the court has discretion to award interest at such rate as it deems reasonable. In the case of *Ajay Indravadan Shah v Guilders International Bank Ltd* [2003] eKLR, it was held, *inter-alia*:

“Section 26 (1) of the *Civil Procedure Act*, cap 21 Laws of Kenya provides that:

“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.”

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 its 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.”

28. We note that section 26 of the *Civil Procedure Act* is not applicable to the present proceedings because the power to award interest thereunder relates to “where and in so far as a decree is for payment of



money.” In the instant case, no decree was made by the trial court because the claim for money was dismissed as having been paid long before the filing of the suit.

29. In the case of *Barclays Bank (K) Limited v William Mwangi Nguruki* [2014] eKLR, the court relied on the case of *Highway Furniture Mart Limited v The Permanent Secretary & Another*, EALR (2006) 2 EA 94, wherein it was stated that interest antecedent to filing suit, is only claimable:
- a. where there is an agreement stipulating the contractual rate of interest;
 - b. where there is no stipulation, but interest is allowed by mercantile usage which must be pleaded and proved;
 - c. where there is a statutory right to interest;
 - d. when an agreement to pay interest can be implied from the course of dealing between the parties.
30. In the instant case, there was no stipulation for payment of interest at a fixed rate and, therefore, the court must consider the law where there is no stipulation at all for the payment of interest. In such cases, a party would not be entitled to interest except in the following cases:
- a. Mercantile usage - but such usage must be pleaded and proved. This does not apply to the case under consideration.
 - b. Statutory right to interest. In the instant case, no such right is conferred by statute.
 - c. Implied agreement - where an agreement to pay interest can be implied from the course of dealing between the parties.
31. Based on the above principles, the inevitable conclusion is that the learned Judge erred by awarding interest to the 1st respondent despite there being no decree of a liquidated sum awarded by the court. In the circumstances, we fail to see the basis on which interest would become payable at the rate of 28% p.a.
32. It is also noteworthy that the 1st respondent did not plead and prove the claim for interest under the mercantile usage limb. It is also not in dispute that the claim for interest is not a statutory right of the 1st respondent. In addition, there is no implied agreement that may be derived from the dealings and correspondence between the parties. Accordingly, we find that the interest awarded by the learned Judge had no basis in law.
33. The Indian case of *Bengal Nagpur Railway Co v Rattaji Ramji* 6 S I A 66 (1938) 2 Cal 73 deals with cases in which Courts of Equity allow interest. However, in that case, the Court followed the dictum of the House of Lords in London, *Chatham and Dover Railway Company v South Eastern Railway Co* [1893] AC 429 to the effect that interest cannot be given by way of damages for detention of a debt.
34. Moreover, the transaction herein seemed to have been marred with irregularities and, therefore, the appellants could not be blamed for the delayed payments. These irregularities or undisclosed facts are captured by the learned Judge as follows:
68. Mr. Kinyua submitted that there was an interesting turn of events in the courts. On 24.10.1997, the Honourable Justice D. M. Rimita J. (as he then was) delivered ruling in Nakuru HCCC 248 of 1997 allowing the Application by the directors of Kwanza Motors of 28/05/1997 effectively reinstating the directors of Kwanza Motors Limited into management of the company and suspending the receiver managers (pages 187 - 196 of the Defendant's Bundle of Documents - specifically page 196).



69. On the 28.10.1997, the Receiver Managers applied for stay of the said orders but in a ruling delivered by the same judge on 11.12.1997, the application was dismissed (pages 223 -229 Defendant's Bundle of Documents specifically page 229). The only option left was to seek intervention of the Court of Appeal in Nairobi Civ. Appl. No. Nai 316 of 1997 which relief came in the ruling of 16.01.1998...
70. Counsel submitted that from the foregoing, it is to be noted that there was a brief period between 24.10.1997 and 16.01.1998 that the management of Kwanza Motors Limited had reverted back to the directors. During this period, from the evidence of the plaintiff, it would seem the four wheel loaders changed hands from Kwanza Motors, to Merchandised Clearing & Forwarding Company Limited who later sold to Maksam Pioneer Services Limited (the Plaintiff herein). It was the later who offered the four trucks to the Defendant which offer was accepted and trucks delivered. The purchase price agreed was Kshs. 60,000,000.00/= of which 25,000,000.00 was paid leaving a balance of Kshs. 35,000,000.00.
71. The Receiver managers on resuming receivership found out that the trucks had been supplied to the Defendants. In their letter of 06/02/1998 (see page 21 of the Defendants Bundle of Documents) the lawyers for Kenya Commercial Bank who were acting for the Receiver Managers of Kwanza Motors Limited protested and warned the Defendant against engaging in the transactions of purchasing the four wheel loaders with other parties other than the Receiver Managers. In the letter, it is also threatened that an action in contempt of court would be taken if the wheel loaders were not surrendered to the Receiver Managers by 13th February, 1998. However, no such action was ever taken even though the trucks were never surrendered as threatened.
73. It is said that a meeting did take place on 03.03.1998 between the Receiver Managers of Kwanza Motors, Mr. Geoffrey Asanyo of Maksam Pioneer Services Limited and The Late Mr. John Ougo of Oraro & Rachier Advocates as can be seen in the letter by the Receiver Managers dated 16.03.1998 addressed to the Defendant (see page 73 of the Pleadings Bundle and also pages 56, of the Third Party's Bundle).
74. Counsel supposed that it was in the said meeting that it was discussed that proceeds of the sale of the Hanomag wheel loaders was to be paid to M/s Oraro & Rachier Advocates. Indeed, the lawyers representing the Plaintiff at the time, Konosi & Company Advocate's letters dated 02.03.1998, 02.04.1998 and 09.10.1999 (see pages 28, 29 & 30 of the Defendant's Bundle of Documents and also page 44(a) and 44(b) of the Plaintiff's Bundle) all make mention of the fact that the amount of Kshs. 35,000,000.00 was to be paid to Oraro & Rachier Advocates. Earlier, it would seem the said Mr. Geoffrey Asanyo had also entertained the thought and instructed the Defendant along the same lines as can be seen in the letter dated 10.02.1998 (see page 38 of the Third Party's Bundle of Documents)."
35. It is clear from the record that the 1st respondent did not divulge that the motor vehicles were subject to receivership commenced by the 2nd respondent. This is one of the issues that caused the delay in payment of the balance of the purchase price of Kshs. 35,000,000/=.
36. It should also be noted that, in its pleadings, the 1st respondent had refuted that it had ever instructed the appellant to pay the sum of Kshs. 35,000,000/= to the firm of Messrs Oraro and Rachier Advocates. From the above-quoted passage of the judgment, it is evident that the 1st respondent was being economical with the truth.



37. Furthermore, what seems to come out clearly is the fact that the 1st respondent and the company, Kwanza Motors Limited, have a nexus, which was well captured by the learned Judge in paragraph 78 where he stated:

“78. On further submissions, Mr. Amoko stated that from the evidence led at the trial of the action, some of the facts are indeed convoluted, and that the confusion was intentionally sowed by the Plaintiff, which it seeks to exploit. It was submitted that Mr. Geoffrey Asanyo, together with his wife, were the two directors of Kwanza Motors Limited (KLM), and Mr. Asanyo was the principal mover behind Kwanza Motors Limited. And despite claims otherwise, it is Mr. Asanyo who, together with Mr. Nyabiba, were the sole shareholders as well as directors of the Plaintiff, and was the principal mover behind the supposed deals between the Plaintiff and the Defendant.”

38. The 1st respondent thus seems to be the author of its' own misfortune, and cannot be allowed to benefit, in terms of interest, from the confusion and the inconvenience it caused to the appellant of being dragged to court over a matter, it was well aware of right from the beginning, but chose not to disclose. The Judge therefore erred in awarding interest without any basis known in law.

39. There being no express or implied agreement for payment of interest, or statutory provision for award of interest on delayed payment, the 1st respondent was not entitled to any interest as the same was not only unjustifiable, but had no basis in law.

40. It is noteworthy that the learned Judge found that the debt had been paid before filing of the suit, and thus the claim was dismissed. The question that begs for an answer is, what then was the basis for the learned Judge to award interest at the rate of 28% per annum?

41. Ideally, the rate that is mostly used by the courts absent special or exceptional circumstances which are not proved here, is to award an interest rate of 12% per annum from the date of filing suit until payment in full. Even if the 1st respondent's claim was found to have merit, which it did not, the learned Judge would still have erred in awarding the interest rate at 28% per annum since there was no such a term in the agreement, and no basis had been laid for the award at that rate.

42. The appellant has urged that the appeal be allowed, the orders allowing the 1st respondent's claim for interest be vacated and set aside, and its counterclaim dated 23rd May 2014 be allowed. However, a cursory reading of the judgment reveals that the same was not proved before the trial court and, hence, this court lacks a basis for which to allow the counterclaim as prayed.

43. It is instructive to note that the learned Judge, in paragraph 75, held:

“The defendant had filed a counter-claim. However, there was no attempt by the defendant to prove the said allegation of counter-claim. In fact, the defendant never listed counter-claim as an issue.”

44. On the issue of costs, we note that the appellant submitted that section 27 of the *Civil Procedure Act* did not confer the trial court with jurisdiction to assess and/ or tax costs and that assessment and/ or taxation of costs was within the jurisdiction of the Deputy Registrar of the High court and/ or taxing master. On its' part, the 1st respondent submitted that it was partially successful against the appellant on the claim of interest in the superior court, as well as succeeding in having the counter claim dismissed; that it was trite law that costs followed the event, hence the Judge in proper exercise of his discretion awarded costs to the 1st respondent at 30%.



- 45. According to the 1st respondent, it submitted that the Judge did not deal with the quantum of costs, but in the exercise of his discretion, relieved the appellant of 70% of the 1st respondent costs; that the appellant had misapprehended the Judge's order on costs which was on award under Section 27 of the Civil Procedure Act.
- 46. We note that in his judgment, the learned Judge capped the costs recoverable by the 1st respondent at 30% on the basis, that they had partially succeeded on the issue of interest. We have already found, that the 1st respondent was not entitled to the claim for interest, therefore it follows that the claim for costs of 30% fails as it lacks legal basis and should not have been awarded.
- 47. The upshot of the foregoing is that we find that this appeal has merit and it succeeds. Accordingly, we hereby order and direct that:
 - a. The appellant's appeal be and is hereby allowed with costs to the appellant.
 - b. The orders allowing the 1st respondent's claim for interest and 30% of the costs made on 17th February 2017 in High Court Civil Case No. 1180 of 2001 be vacated and set aside, and the same be substituted for an order dismissing the 1st respondent's claim in its entirety.
 - c. For avoidance of doubt, the order dismissing the appellant's counterclaim is hereby upheld.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIARB, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

