



**Kipchumba v BOG Tambach Teachers Training College (Civil Appeal  
100 of 2019) [2023] KECA 802 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KECA 802 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 100 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
JUNE 30, 2023**

**BETWEEN**

**MARY KIPCHUMBA ..... APPELLANT**

**AND**

**BOG TAMBACH TEACHERS TRAINING COLLEGE ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kabarnet  
(E.M. Muriithi, J.) dated 23rd October, 2018 in HCCA No. 2 of 2018)*

**JUDGMENT**

1. This is an appeal from the High Court Judgment delivered on 23<sup>rd</sup> October, 2018 in which the respondent's appeal was allowed with no order as to costs. The facts in this appeal are as follows:
2. The appellant filed the suit against the respondent seeking compensation for injuries she sustained as a result of a road traffic accident in 2008. Judgment was entered in favour of the appellant. Aggrieved by the judgment, the respondent appealed to the High Court at Eldoret in HCCA No. 44 of 2008. The appeal was later withdrawn. After the appeal was withdrawn, the appellant pursued party and party costs.
3. The appellant filed her bill of costs dated 2<sup>nd</sup> May, 2017. The decree indicated that the court rates on the principal sum would be 8%. An issue of the applicable court rates arose. In a ruling dated 24<sup>th</sup> January, 2018 the trial court held that the applicable court interest rate was 14%. Aggrieved by the finding, the respondent lodged Kabarnet HCCA No. 2 of 2018.
4. In his judgment, the learned Judge held that Sections 26(2) and 27(2) of the Civil Procedure Act provide for interest on the principal sum awarded by the court and interest on costs of the suit respectively. The learned Judge also referred to the Chief Justice's Practice Notes on the rate of interest that the court may award under Section 26(1) of the Act. The court held that under Practice Note No. 1 of 1982, Section 26 enables the court to order interest to be paid at such rate as the court deems reasonable.



5. Guided by the decision in the cases of *Highway Furniture Mart Limited vs Permanent Secretary Office of the President & another* [2006] eKLR, *Later v Mbiyu* [1965] EA 592, and *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175, the court held that the Chief Justice's directions in the Practice Notes could only affect or guide the court's exercise of the power to order interest under Section 26 (1) of the Act and not the statutory provision of the rate of interest under Section 26(2) at 6% per annum. The court further determined that, the rate under Section 26(2) being statutorily underpinned could only be amended by an Act of Parliament, through a statute Law Miscellaneous amendment or a special legislation in that behalf, and not by a Practice Note made by the Chief Justice. That Section 26(2) of the Act applies to situations where the decree of the Court is silent, that is where court does not order any rate of interest, which provision has not been amended.
6. The court held that the amendment in 1985 only affected the interest on costs under Section 27(2) of the Act and not the provision on interest on the principal sum under Section 26 (2) of the Act. The court noted that the principal sum is almost always higher than the amount of costs payable so that the 14% interest on costs does not have the same escalation effect on the amount payable as on the principal sum. Section 27(2) of the Act on interest on costs was amended to the effect that, the words 6% per annum were substituted with the words 14% per annum. The court maintained that the provisions of Section 26(2) of the Act on interest on the principal sum have remained unchanged and interest is provided for at 6% per annum.
7. The court observed that, the judgment of 1<sup>st</sup> April, 2009 merely gave judgment in the various amounts for the respective suits "plus costs and interest" without indicating any rate of interest from the date of the decree to the date of payment. That had the trial court made provision for rate of interest on the principal sum, it would have been required to be guided by the Chief Justice's Practice Note on interest under Section 26(1) of the Act then set at 14% as observed in the *Highway Furniture Mart* (*supra*). Taking the circumstances of the case into consideration, the court held that there being no order on rate of interest by the court, Section 26(2) of the Act clearly stipulated the applicable rate of interest at 6% per annum. That notwithstanding, the interest on costs was separately provided for under Section 27(2) of the Act at 14% per annum.
8. As regards the power to remand a case to trial, the court relied on Section 78 of the Act which sets out the various powers of the Court on appeal, including the power to remand a case. The court proceeded to hold that, in view of the finding of application of the wrong percentage of interest, the matter shall be remanded to the trial court for reassessment of the decretal sum in accordance with the correct percentage of interest on the principal sum and costs.
9. The court further held that the trial court had power under the slip rule to correct errors on the decree, arising from an accidental slip. Section 99 of the Act provides for the amendment of judgments, decrees or orders, Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission; which may at any time be corrected by the court either of its own motion or on the application of any of the parties. The court noted that, it was not clear how the figure of 8% rate of interest was provided for in the standard form decree used by the court but in view of the clear terms of Section 26(2) of the Act, the rate must remain at 6% of the principal sum awarded by the court in the various related files.
10. As regards the payment of the decretal sum in instalments, the court stated that Order 21 Rule 12 provides for the court's power and discretion to order payment of decretal sums by instalment. The court considered this to be an appropriate case for the payment of decretal sum together with interest and costs on instalment taking into consideration the public nature of the appellant school, with exchequer funding requiring budget inclusion for any lawful payments. The court made a finding for



- the trial court to reassess the amounts payable on the basis of the rate of interest at 6% in accordance with Section 26(2) of the [Act](#) and to also determine the mode of payment of execution as appropriate.
11. Consequently, the appeal was allowed with no order as to costs; the matter was remanded to the trial court for calculation of the decretal sum, that is the judgment sum with interest thereon and interest on costs on the basis of 6% on the sums awarded by the judgment as stipulated in section 26(2) of the [Civil Procedure Act](#) and 14% on the costs, as provided by section 27(2) of the [Civil Procedure Act](#); and the appellant was restrained from executing the decrees of the trial court until such computation of the decretal sum had been done, or until further orders of the trial court.
  12. The appellant was dissatisfied with the said judgment leading to the present appeal in which seven grounds were raised to wit; that the learned Judge erred in law in: finding that the applicable court interest rate was 6%; disregarding the Practice Notice No. 1 of 1982; appearing to set aside Practice Notice No. 1 of 1982 when it was not an issue for determination before the court; not taking into account the principle of stare decisis; exceeding the scope of his jurisdiction; not appreciating that the increase in court interest rates have been progressive and the same is reflected in the practice of the court since 1982; not balancing the interest of both litigants in his judgment.
  13. Parties relied on their respective written submissions.
  14. The appellant submitted that the power of the court to award interest is provided for under Section 26(1) of the [Civil Procedure Act](#). Counsel also relied on the cases of [New Tyres Enterprises v Kenya Alliance](#) [1988] KLR 380 and [Abok James Odera t/a AJ Odera & Associates v John Patrick Macharia t/a Machira & Company Advocates](#) [2013] eKLR.
  15. Counsel contended that the learned Judge awarded interest at 6% instead of the 14% or 12% as provided for in Practice Notice No. 1 of 1982 and other decided cases. Counsel stated that in circumstances where courts have been uncertain on the applicable interest rates, they have relied on Practice Notice No. 1 of 1989. In [Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 Others](#) [2018] eKLR, the court awarded an interest rate of 12% from the date of filing the suit. In [Centre for Mathematics, Science and Technology Education in Africa v Apex Security Services Ltd](#) [2021] eKLR the court made a declaration that the interest rate payable on the decretal sum was 12% and not 6%. In [Silas Obengele v Kenya Ports Authority](#) [2004] eKLR the court stated that where the decree was silent on payment of further interest, the court shall be deemed to have ordered interest at 12%.
  16. Counsel submitted that the 2022 Practice Directions state that where a decree is silent with respect to the payment of interest, it shall be deemed to have ordered interest at 14%. Similarly, courts have ordered the payment of interest at 14% in the cases of [Alba Petroleum Ltd v Total Marketing Kenya Ltd](#) [2019] eKLR and [Norgen Enterprises Ltd v County Government of Vihiga & 2 Others](#) [2022] eKLR.
  17. Counsel faulted the learned Judge for finding the interest rate at 6% without taking into account Section 26. (See: [Highway Furniture Mart Ltd v PS Office of the President & another](#) (*supra*). He submitted that Section 26(2) was not applicable since the decree was not silent on the interest rate, but gave a lower rate of 8%. Counsel urged that the 6% interest rate be enhanced to 12%.
  18. On whether the learned Judge was correct to ignore the Chief Justice's practice directions on applicable interest rates, counsel maintained that the prevailing court interest rate as at June, 2006 was 14%. That be that as it may, Practice Notice No. 1 of 1982 states that the power to order payment of interest rate in the absence of a valid reason to either order a higher or lower rate should be 12%. Counsel urged this Court to interfere with the impugned judgment as the learned Judge misdirected himself in finding that the applicable interest rate was 6% instead of 14%. Counsel was of the view that the learned Judge



treated the decree as one which was silent on the interest rate and therefore acted on the wrong principle and arrived at an erroneous decision. He urged that the appeal be allowed.

19. Opposing the appeal, the respondent argued that courts have invariably applied either 12% or 14% interest on the principal sum at their discretion. Counsel stated that, the learned Judge analyzed in detail the history of the court interest rate and found that the correct applicable rate was 6%. As regards Practice Notice No. 1 of 1982, counsel maintained that no amendment had been made to Section 26(2) and therefore, the learned Judge correctly applied the law as provided.
20. Relying on the case of *Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another* counsel stated that the general presumption is that, court interest rate is simple and not compound unless the court specifically orders the rate and mode. He submitted that the appeal be dismissed.
21. This is a second appeal. We are alive to our duty as a second appellate court, to determine matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. In the case of *Stanley N. Muriithi & another v Bernard Munene Itbiga* [2016] eKLR the court held *inter alia* that:

“...on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
22. We have carefully considered the record, submissions by counsel authorities cited and the law. The issue for determination whether the applicable interest rate in this case was 6%, 12% or 14%.
23. The appellant’s main contention is the order of the court that the interest rate on the principal sum be applied at the rate of 6%. The appellant further contended that the order for interest rate at 6% was in disregard of Practice Note 1 of 1982 and also amounted to the setting aside of the said note.
24. The power of the court to award interest is derived from Section 26 of the *Civil Procedure Act* which provides that:

“(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.”
25. We note that courts have, over time, come up with several principles derived from the general rule in Section 26 of the *Civil Procedure Act* which have, over time acquired stable meanings. The following three principles emerge from the Section:
26. First, the trial court has wide discretion to award and fix the rate of interest provided that the discretion must be used judiciously. As a result of this discretion, an appellate court is enjoined to treat the



decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the trial court proceeded upon some erroneous principle or was plainly and obviously wrong. See: [New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd](#) (*supra*).

27. Second, the court has discretion to award and fix the rate of interest to cover: the period from the date the suit is filed to the date when the court gives its judgment; and the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.

28. Lastly, Section 26 of the [Act](#) is not applicable to the period before a suit is filed.

Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement where there is stipulation for the rate of interest, such as a contractual rate of interest, or where there is no stipulation, but interest is allowed by mercantile usage, which must be pleaded and proved, or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See: [Gulambussein v French Somaliland Shipping Company Limited](#) [1959] EA 25; [Highway Furniture Mart Limited v The Permanent Secretary & another](#) (*supra*); and [Mulla – The Code of Civil Procedure](#) (16<sup>th</sup> Ed.) Vol. 1 at p. 505.

29. Practice direction No. 1 of 1982 provides that:

“[Civil procedure act](#) (act 21) section 26

Interest- rate of interest- power of the court to order payment of interest- interest on principal sum of decree- rate to be applied in the absence of a valid reason to order either a higher or lower rate.

March 16, 1982, Simpson AG CJ gave the following practice direction. The [civil procedure act](#) (cap 21 laws of Kenya) section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable.

In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%.”

30. It follows therefore, that the award of interest is a matter that is left to the discretion of the trial court, and generally, an appellate court is enjoined to treat the decision of the trial court with respect, and refrain from interfering with the decision unless it is convinced that the trial court based the award on some erroneous principal or was plainly wrong.

31. In the present appeal, when the appellant filed her party and party bill of costs, the trial court held that the applicable interest rate was 14%. The respondent appealed against the decision and the High Court held that the applicable interest rate was 6%. The appellant’s counsel submitted that the applicable interest should have been 12%.

32. As stated earlier, the grant of an award of interest is an exercise of the court’s discretion, but that discretion must always be exercised within limits. It must not be capricious or based on whim. In the case of [Abok James Odera T/A as A.I Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates](#), (*supra*), the Court was confronted with an appeal where the learned judge had awarded 25% claimed by a party in the plaint. The court considered the propriety of that rate of interest and stated that the judge fell into error in awarding that rate when it had neither been provided for in the



agreement between the parties, nor in the documents filed before the court. The court expressed itself in the following manner:

“ Bearing the above principles in mind, we have no hesitation in finding that the learned trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% from 4th March, 1996 when the same had neither been provided for in the said agreement or justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary Judgment and or oral highlights in court at the time of the respondents request for the said summary Judgment.

We appreciate that section 26 (1) of the *Civil Procedure Act* Cap 21 Laws of Kenya tended to give the learned trial Judge a wide discretion with regard to the award of interest. It reads:  
- Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principal such adjudged from the date of the suit to the date of decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit....”

The above discretion notwithstanding it is now trite that the exercise of the judicial discretion donated by this section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason. Herein the learned trial Judge gave no reason as to why he awarded interest at the rate of 25% from the pre-claim period.”

33. The rate of 14% was suggested by the appellant who later chose 12% as provided for by the Chief Justice’s practice directions. The learned Judge observed that the trial court did not indicate the rate of interest to be applied. We find that the original decree did not indicate the applicable interest rate. Had the court specified the applicable rate of interest, then we would have been guided by practice direction 1 of 1982 which expressly states that; “in the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%.” In the present circumstances, no interest rate was ordered that would be deemed to have been a higher or lower interest rate. Therefore, there was no cause for the court to be called upon to consider if there are any valid reasons for awarding interest at a higher or lower rate than provided.
34. What then should the appropriate interest rate be? The appellant has suggested 12% as the current court rates while the respondent aligns with the judgment of the learned Judge that the applicable interest rate is 6%. In the circumstances of the present case, we rely on our rich jurisprudence and judicial practices to determine what the appropriate interest rate on liquidated damages is. The rate used by the courts, absent special or exceptional circumstances is 12% per annum from the date of filing suit until payment in full. See: Orix Oil (Kenya) Limited, (*supra*), *Autolog Kenya Limited v Navisat Telematics (Kenya) Limited* [2013] eKLR and *Permuga Auto Spares & another v Margaret Korir Tagi*[2016] eKLR.
35. From the foregoing, we find that the applicable interest rate in this case is 12% per annum.
36. Consequently, the appeal is merited and allowed with costs.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**



**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

