



**Mwita v Woodventure (K) Limited & another (Civil Appeal  
58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 628 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 58 OF 2017  
PO KIAGE, J MOHAMMED & M NGUGI, JJA  
JULY 8, 2022**

**BETWEEN**

**MOHERAI IRESA MWITA ..... APPELLANT**

**AND**

**WOODVENTURE (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AUTO SELECTION (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya  
at Migori (Mrima J) dated 21st March, 2017 in Migori HCCA No. 1 of 2016)*

**JUDGMENT**

**JUDGMENT OF MUMBI NGUGI JA**

1. This appeal arises from a decision of the High Court of Kenya sitting in Migori (Mrima J) which allowed an appeal by the respondents. At the centre of the dispute was a hire purchase agreement entered into between the appellant and the 1<sup>st</sup> respondent, Woodventure (K) Limited, for the purchase of an unregistered second-hand Mitsubishi Canter Model FE53, Chassis No. FE53CEV560731, Engine No. 4D 33 H97905 at a total agreed purchase price of Kshs. 1,610,000. The appellant made an initial deposit payment of Kshs. 600,000 by way of a bankers cheque drawn in favour of the 2<sup>nd</sup> respondent, Auto Selection (K) Limited. The balance was to be liquidated by way of monthly instalment payments.
2. Pursuant to the agreement, the appellant took possession of the vehicle from the respondents' business premises in Mombasa and took it to Isebania where he intended to carry on transport business. At the time he took possession, the respondents had not delivered the registration numbers of the motor vehicle. They did not deliver the registration numbers, ostensibly on the basis that the appellant had not paid a sum of Kshs 50,000 which was a condition precedent to the delivery of the vehicle's number plates. The appellant then, through his Advocates, wrote to the respondents terminating the agreement



- on the basis that they had breached a fundamental term of the agreement. He also demanded a refund of the amount that he had paid to the respondents.
3. Thereafter, he filed Kisii High Court Civil Case No. 296 of 2010 which was transferred to the Migori Chief Magistrate's Court as MigoriCMCCNo. 363 of 2014. The appellant sought judgment against the respondents jointly and severally for a declaration that the respondents had breached the hire purchase agreement, a refund of the Kshs. 600,000 that he had paid towards the purchase of the vehicle with interest, loss of expected earnings, cost of security, interest and costs of the suit.
  4. In their defence and counterclaim, the respondents prayed for judgment against the appellant for the balance of the agreed purchase price, interest and costs.
  5. In its decision, the trial court found in favour of the appellant and dismissed the counter claim. It entered judgment in favour of the appellant for the sum of Kshs. 600,000 with interest thereon from the date of the hire purchase agreement, the 7<sup>th</sup> of May 2009; security costs at Kshs. 5,000 per month for the period that the motor vehicle was in the custody of the appellant; and costs of the suit.
  6. The respondents were aggrieved by the decision of the trial court and filed an appeal in the High Court at Migori. In his decision, Mrima J found that the respondents had breached the terms of the hire purchase agreement and upheld the trial court's dismissal of their counterclaim. He also found in favour of the appellant with regard to the refund of the deposit that he had paid and directed that it be refunded to him with interest from the date of filing suit, not from the date of the hire purchase agreement as the trial court had ordered. The first appellate court found the claim for security costs unmerited and allowed the respondents' appeal thereon.
  7. Not surprisingly, the appellant was dissatisfied with the decision and he filed the present appeal in which he raises three grounds of appeal in his memorandum of appeal dated 29<sup>th</sup> May, 2017. In his first and second grounds of appeal, he avers that the first appellate court erred in its evaluation of the evidence adduced in the lower court as regards cost of security thereby arriving at the wrong conclusion that the costs of security at Ksh.5,000 per month had not been proved. His third ground is to the effect that the first appellate court erred when it ordered that interest on the deposit should be paid from the date of filing of the suit instead of from the 7<sup>th</sup> May 2009, the date of the hire purchase agreement, as had been ordered by the trial court.
  8. At the plenary hearing of the appeal, Mr. Odero, holding brief for Mr. Kerario Marwa, appeared for the appellant while Ms. Miheso appeared for the respondents. The appellant did not file submissions but Mr. Odero argued the appeal orally. While combining grounds 1 and 2 of the appeal, he submitted that the first appellate court had erred in law given the facts on record in finding and holding that the appellant did not prove the payment of Kshs. 5,000.00 per month as cost for security. He referred this Court to the testimony of the second plaintiff witness in support. On the third ground of appeal, Mr. Odero submitted that it was an error of law for the first appellate court to have held that the award of interest should have run from the date of filing suit. His submission was that the interest should have run from the 7<sup>th</sup> of May 2009, the date of the hire purchase agreement, the day on which the sum was paid to the 1<sup>st</sup> respondent.
  9. In her submissions, Ms. Miheso, relying on the submissions dated 15<sup>th</sup> October 2021, noted that as this was a second appeal, this Court's jurisdiction was confined to matters of law. Regarding the appellant's first and second grounds of appeal, the respondents submitted that the appellant did not discharge the duty imposed on him under section 107 of the *Evidence Act*. He had utterly failed to adduce any evidence to prove his claim of security costs of Kshs.5,000 per month for the period the vehicle was in his custody as pleaded in his plaint. They further submitted that it is trite law that special damages



must be specifically pleaded and strictly proved. Reliance for this submission being placed on the case of *Hann v Singh* Civil Appeal No. 42 of 1983(1985) KLR 716. Their case was that the first appellate court had properly applied itself to the law and had evaluated the evidence before it in finding that the award for security costs had been erroneous.

10. Regarding the decision of the first appellate court that interest on the payment made by the appellant should run from the date of filing suit instead of from 7<sup>th</sup> May 2009 as awarded by the lower court, the respondents submitted that under section 26(1) of the *Civil Procedure Act*, the court has discretion to award and fix the rate of interests to cover two stages. The first is the period from the date the suit is filed to the date when the court gives its judgment; while the second is 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. The respondents cite the case of *Mukisa Biscuits Manufacturing Company Limited V West End Distributors Limited* {1970} EA 469.
11. According to the respondents, while the appellant was claiming interest from 7<sup>th</sup> May 2009, such interest is only claimable where the rate of interest is stipulated in the agreement or where there is no stipulation but interest is allowed by mercantile usage, which must be pleaded and proved, or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. In the respondents' view, the appellant would only be entitled to interest prior to filing the suit if there was a substantive law permitting him to recovery the interest. There was no law or contractual agreement in this case that would allow the appellant to recover interest prior to the date of filing suit. The first appellate court therefore exercised its discretion judiciously when it awarded interest from the date of filing of the suit.
12. This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Itbiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.”
13. A cursory glance at the grounds of appeal in the appellant's memorandum of appeal shows that they relate primarily to questions of fact. The appellant was aggrieved by the finding of the first appellate court that he was not entitled to security costs. The third ground, which raises the question whether the interest on the payment made to the 1<sup>st</sup> respondent should run from the date of filing suit, not from the date of the hire purchase agreement between the appellant and the 1<sup>st</sup> respondent, is a matter of law.
14. The appellant's claim for cost of security was a claim for special damages. The law is that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. Without entering into an analysis of the evidence before the trial court, I observe that in his evidence, the appellant stated that he paid Kshs. 5,000 for security of the motor vehicle. He did not, however, lead any evidence whatsoever in support of this claim. There was nothing placed before the trial court that would have supported the claim for special damages. In



*Supermarine Handling Services Ltd vs Kenya Revenue Authority* [2010] eKLR, this Court observed as follows:

“The plaintiff’s case is founded mainly, on special damages which must not only be specifically pleaded but also strictly proved. The degree of certainty and the circumstances particularly of proof required depend on the circumstances and the nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716.”

15. The appellant’s claim for security costs at Kshs. 5,000 per month was a prayer for special damages. He had a responsibility, then, to not only specifically plead the amount, but to also prove it. The first appellate court, in my view, properly found that he had failed to establish his claim. There is therefore no basis for interfering with its decision in this regard.

16. The appellant is dissatisfied with the finding of the first appellate court that the trial court erred in awarding interest from the date of the hire purchase agreement, the 7<sup>th</sup> of May 2009. The question of interest is governed by section 26 (1) of the *Civil Procedure Act* which provides that:

“26. Where and in so far as a decree is for the payment of money, the court may,  
(1) 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”.

17. In *Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Limited (No 2)* [1970] E.A, 469 at 475, Spry V.P stated as follows:

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.”

18. In the present case, I am satisfied that the first appellate court was correct in its finding that the appellant was only entitled to interest from the date of filing suit. Further, that the trial court was in error when it awarded interest from the date of the hire purchase agreement, the 7<sup>th</sup> of May 2009.

19. I therefore find that the appeal is without merit, and I would dismiss it with costs to the respondents.

**DATED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF JULY, 2022**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

**JUDGMENT OF KIAGE, JA**



1. I have read in draft the judgment of my sister Mumbi Ngugi, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.
2. The final orders shall be as she proposes, J. Mohammed, JA being also agreed.

**DATED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF JULY, 2022**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

**CONCURRING JUDGMENT OF J. MOHAMMED, JA**

I have had the benefit of reading in draft, the judgment of my sister, Mumbi Ngugi, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF JULY, 2022**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

