



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, SICHALE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 43 OF 2015

BETWEEN

ALBA PETROLEUM LIMITED.....APPELLANT

AND

TOTAL MARKETING KENYA LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kimaru J.) delivered on 2nd June 2011

in

H.C.C.C. No. 503 of 1999)

JUDGMENT OF THE COURT

1. By a Plaintiff dated 29th April 1999 as re-re-amended and dated 24th January 2000, the respondent, **Total Marketing Kenya Limited**, filed suit against the appellant for the sum of Ksh. 14,778,257/70 being the value of 2,500 metric tons of petroleum products sold and supplied to the appellant, **Alba Petroleum Limited**, on 4th December 1991. A formal demand for the said sum of Ksh. 14,778,257/70 was made on 15th September 1998. The respondent claims interest on the said sum at the commercial rate of 26 per cent per annum with effect from 15th September 1998 until payment in full.

2. The appellant filed a re-re-amended defence denying owing the respondent the alleged sum of Ksh. 14,778,257/70 or any part thereof. Receipt of formal demand was acknowledged. The appellant pleaded lapse of limitation period under **Section 4 (1)** of the **Limitation of Actions Act, Cap 22 of the Laws of Kenya**. It is asserted the respondent's claim is time barred as the six-year limitation period for actions in contract has lapsed. The contended 2,500 metric ton of petroleum product was supplied on 4th December 1991 and the original plaint filed on 29th April 1999 which is allegedly outside the limitation period.

3. On its part, the respondent denied the limitation period had lapsed. It is averred the limitation period started to run on 31st December 1997 and not on 4th December 1991 because the claim and cause of action is premised on illegality, fraud and mistake which were discovered in 1997. In the defence it is asserted there was mistake on the part of the appellant who uplifted fuel products from the respondent and after taking delivery of the 2,500 metric tons of petroleum products from Kenya Shell Limited as arranged, the appellant illegally caused confusion in the respondent's accounting records which led to concealment of the debt. Having made a mistake and confusion of accounts, the appellant wrongfully, fraudulently and illegally took advantage of the mistake and failed or refused to pay for the said petroleum products or to reveal the mistake to the respondent. By reason of the said illegality, concealment and mistake, the respondent suffered loss of Ksh. 14,778,257/70 being the value of the 2,500 metric tons of petroleum products received by the appellant. Consequently, the appellant filed suit for payment of Ksh. 14,778, 257/70 being the value of 2,500 metric tons of petroleum products supplied.

4. The respondent in its reply to the re-re-amended defence reiterated the appellant caused, permitted or facilitated concealment of the debt in its accounting records.

5. Prior to the full hearing of the suit between the parties, the appellant by way of Chamber Summons dated 9th October 2001 filed an application to strike out the re-re-amended plaint dated 6th April 2001 on the ground that the respondent's claim was time-barred by the

limitation period. The appellant's contention was that the suit was time-barred in that the contract for supply of fuel was entered into in 1991 and the plaint was filed in 1999, which was eight (8) years after the cause of action arose and this offended **Section 4** of the **Limitation of Actions Act, Cap 22 of the Laws of Kenya**. The Section provides that an action founded on contract should be brought within six (6) years.

6. In opposing the Motion to strike out the suit, the respondent maintained the suit was competent because the time to bring the action began to run on 31st December 1997 when the respondent's auditors discovered that the fuel supplied to the appellant had not been paid for since 1991 – a fact that was known to the appellant who instead concealed the same by fraudulent intent. The respondent sought refuge and relief under **Section 26 (a) and (c) of the Limitation of Actions Act**. The Section provides:

“[26] Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:”

7. The Motion to strike out the suit for being time barred was heard by Mwera, J. (as he then was) who in a ruling delivered on 7th March 2001 dismissed the Motion and held as follows:

“Here it appears that the plaintiff made the mistake of not billing the defendant in 1991 in order to be paid. But on 31st December 1997, when the trading account of the litigant was being reconciled the plaintiff stumbled on this omission and on 15th September 1998, it demanded that the defendant pay for it.

In this court's view, that is when the time began to run (for 6 years) in respect of this action. The cause was filed on 29th April 1999 and that was competent. The law did not intend to allow what is properly owed under contract to be lost unless there was everything against suing for it.... In sum, this cause, on account of mistake/omissions discovered long after the time of contract, is competent and will proceed to trial....”

8. The respondent did not and has not proffered any appeal against the ruling delivered by Mwera, J. on 7th March 2001.

9. Pursuant to the ruling delivered on 7th March 2001, the suit between the parties proceeded to full hearing before Kimaru, J. Upon hearing the parties, in a judgment delivered on 2nd June 2011, the learned judge entered judgment in favour of the respondent against the appellant as follows:

“(a) Judgment be and is hereby entered for the respondent against the appellant for the sum of Ksh. 14,778,257/70 together with interest thereon at the prevailing commercial rate of 20% per annum from the date of filing suit.

(b) The appellant to pay the respondent's costs of the suit.”

10. Aggrieved, the appellant has lodged the instant appeal citing the following abridged grounds in its memorandum of appeal.

(i) The judge erred in failing to hold the respondent's action was time-barred under Section 4 of the Limitation of Actions Act.

(ii) The judge erred in failing to hold that in the absence of a prayer for relief from the consequences of mistake, the court had no jurisdiction to ignore the provisions of Section 4 of the Limitation of Actions Act.

(iii) The judge erred in failing to hold that under Section 26 (c) of the Limitation of Actions Act, the burden was on the respondent to show that despite the exercise of reasonable diligence, it could not have discovered the mistake.

(iv) The judge erred in awarding interest at the prevailing commercial rate of 20% per annum when there was no iota of evidence adduced to prove the prevailing commercial rate of interest.

11. At the hearing of this appeal, learned counsel **Mr. Samir Inamdar** appeared for the appellant while learned counsel **Mr. S. Amin** appeared for the respondent. Both parties filed written submissions and bundle of authorities.

12. Counsel for the appellant rehashed the background facts to the dispute between the parties. In its judgment, the trial court ruled out fraud

or illegality on the part of the appellant; the court held that failure by the respondent to invoice the appellant the sum of Ksh. 14,778,251.70 was occasioned by an accounting mistake on the part of the respondent and the liability of the appellant is to pay what is legitimately due.

13. In his submission, counsel for the appellant urged the mistake and error was committed and emanated from the respondent's own accounts department. It was urged the judgment of the trial court was erroneous because having rejected the allegations of fraud or illegality, the only option available to the judge was to consider if the alleged mistake on the part of the respondent was discoverable upon due diligence and if there was a prayer in the plaint pursuant to **Section 26 (c) of the Limitation of Actions Act** for relief from consequences of the mistake. Counsel cited the case of **David Sirongo Ole Tukai vs. Francis arap Muge & 2 others, [2014] eKLR** where it was held that a court will not grant a remedy which has not been applied for.

14. The central theme in the appellant's case is contestation that the trial judge erred in failing to hold that the respondent's claim was barred under **Section 4** of the **Limitation of Actions Act**. Counsel acknowledged the issue of limitation had been considered and a ruling delivered by Mwera, J. on 7th March 2001. However, it was urged the fact that no appeal was filed against the ruling is not fatal to the instant appeal; counsel urged the doctrine of *res judicata* is inapplicable in this matter and an appellate court can correct any interlocutory order on appeal from a final order. Counsel cited scholarly work by Dr. Lushington where he stated:

"We are not aware of any law...which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under penalty, if he does not so do, of forfeiting forever the benefit of consideration of the appellate court..."

15. Submitting on facts relevant to the limitation period, the appellant urged that the respondent knew before expiry of the limitation period that there was an issue regarding the 2,500 metric tons of petroleum products which the respondent caused on 4th December 1991 to be transferred to Kenya Shell on instructions of the appellant dated 3rd December 1991. It was urged that the erroneous entry was discovered by the respondent before expiry of the limitation period; that the respondent had conducted an in-depth analysis in 1996; the respondent's auditors had already picked up the error on 31st December 1996 well before expiry of the limitation period. Based on these facts, the appellant submitted that the respondent knew it had a cause of action before expiry of the limitation period. Consequently, the trial judge erred in failing to find the cause of action was time barred as the respondent failed to file suit within time.

16. The appellant contends the re-re-amended plaint does not have a prayer for relief from consequences of the respondent's mistake. To this extent, the appellant faults the trial judge for failing to hold that in the absence of a prayer for relief from the consequences of the alleged mistake, the court had no jurisdiction to ignore the provisions of **Section 4** of the **Limitation of Actions Act**. It was urged that the respondent seeks to escape from the requirements of **Section 4 (1) (a)** and **(e)** of the **Limitation of Actions Act** by invoking the provisions of **Section 26 (c)** of the Act on the ground of mistake. Counsel submitted that the trial court erred in failing to appreciate that **Section 26 (c)** cannot be invoked unless the mistake is the cause of action. Counsel cited Pearson, J. in **Phillips Higgins vs. Harper [1954] 1 All ER 116** where it is stated:

"As the statement of claim shows, the plaintiff's claim is to recover moneys due to her under a contract, and the cause of action is the same as if she had sued for each unpaid balance on its due date. By reason of mistake she failed to realize that the balance was due to her and by that mistake the right of action was concealed from her. But that is not sufficient. Probably provision (c) applies only where the mistake is an essential ingredient of the cause of action, so that the statement of claim set out or should set out, the mistake and its consequences and pray for relief from those consequences....In this case,the prayer is for an account to ascertain the sums still due and for payment of them when so ascertained. This action is not for relief from the consequences of a mistake within the meaning of Section 26. (Emphasis supplied)

17. To strengthen its submission grounded on the principle in **Phillips Higgins vs. Harper** (supra), the appellant cited the UK Supreme Court decision in **Test Claimants in the FII Group Litigation vs. Revenue and Customs Commissioners [2012] UKSC 19** and Malaysian case of **Tenaga Nasional Berhad vs. Kamarstone Sdn Bhd (Case No. 02-68 Tahun 2012A)**. In both cases, it was held a cause of action grounded on mistake can only be entertained when the action is for relief from the consequences of a mistake.

18. In summarizing the error on the part of the trial court, the appellant ground its submissions on the dicta in **Phillips Higgins vs. Harper** (supra) pointed that the re-amended plaint in this matter makes reference to mistake and the claim is for a definite liquidated sum but there is no prayer for relief from the consequences of the alleged mistake; that the respondent has failed to bring its case under **Section 26 (c)** of the **Limitation of Actions Act** because the foundation of the claim is contractual and not on consequences of the mistake; and there is no prayer in the plaint for relief from the consequences of the alleged mistake.

19. The final ground urged by the appellant is on the rate of interest awarded by the trial court. The court entered judgment for the sum of

Ksh. 14,778,257.70 and interest thereon at the prevailing commercial rate of 20% per annum from the date of filing suit. The appellant urges that there is no iota of evidence to support the finding that the prevailing commercial rate of interest was 20% per annum. It was submitted that in the absence of either an agreed contractual rate or any evidence to show the commercial rate of interest, the trial court erred in awarding 20% interest without evidence to prove this was the commercial rate of interest. In support, counsel cited the case of **Societe Internationale De Telecommunication Aeronautiques vs. Twiga Properties** where Ringera, J. expressed himself thus:

“I accept the defendant’s submission that the general principle of law is that interest on debt is only payable at court rates and as from the date of filing suit unless there is agreement to the contrary or a trade custom otherwise dictates. In this case, the plaintiff did not prove any agreement for the payment of interest at the rate of 24% per annum from 8th July or any trade custom in support of its claim. It is accordingly entitled to interest at court rates from the date of filing suit.”

20. Likewise, counsel cited **Kenya Commercial Bank Ltd vs. Thomas Wandera Oyalo [2005] eKLR** in which the High Court set aside an interest rate of 32% per annum, stating that it was incumbent upon the claimant to prove he was entitled to interest at the rate he asserted in the plaint. In declining to award interest at the rate of 32% the trial judge expressed himself as follows:

“I have already stated that the respondent should have led evidence to justify why he claims interest at a rate of 32% per annum. Since the respondent failed to prove that fact, then the trial court should have exercised its discretion to award interest under section 26 of the Civil Procedure Act.”

21. The respondent urged the instant appeal is misconceived; that the appellant at all times knew all aspects of the respondent’s claim as per the particulars supplied under **Order VI Rule 8 (6)** of the **Civil Procedure Rules**; that **Section 26 (c)** of the **Limitation of Actions Act** does not state which party’s mistake applies; it matters not by whom the mistake was committed, what is critical is that a mistake occurred.

22. On the limitation question, the respondent urged that the issue was considered on merit and determined by Mwera, J. in the ruling delivered on 7th March 2001. Relying on **Section 68** of the **Civil Procedure Act**, counsel submitted that “*where a party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.*” It was submitted that the ruling and decision by Mwera, J. was a preliminary decree and not merely an interlocutory order. It was urged that since the appellant did not appeal against the Mwera, J. ruling, this Court has no jurisdiction to re-open the limitation issue. Counsel submitted that the UK decision in **Phillips Higgins vs. Harper [1954] 1 All ER 116** is distinguishable to the extent that in this matter the issue of limitation had been conclusively determined by Mwera, J. It was urged that the assertion limitation period begun to run at the time the appellant obtained the petroleum products on 4th December 1991 is misleading since Mwera, J. determined time begun to run when the mistake was discovered on 31st December 1997.

23. Responding to the contention that no relief from the consequences of mistake was prayed for in the plaint, counsel cited paragraph 8 of the re-amended plaint which states as follows:

“....As a consequence of the aforesaid....mistake.....by means of which the said debt was concealed the plaintiff suffered loss in the sum of Ksh. 14,778,257/70 and therefore the plaintiff seeks relief therefrom by way of this suit.....”

24. In support of its submission that relief from consequences of mistake was prayed for in the plaint, the respondent asserted the prayers sought in the plaint are by themselves relief from the consequences of the proved mistake as set out in the pleadings.

25. On reasonable diligence, counsel submitted that the appellant requested the respondent to supply fuel through Kenya Shell as it had facilities for the appellant’s bunkering vessel to be hosted alongside the Kenya Shell terminal in order to take delivery of the AGO fuel; that instead of the transaction being recorded in the respondent’s accounting system as an outright sale to the appellant by the respondent, the entry was mistakenly and erroneously booked as a borrow/loan from Kenya Shell. This alleged borrow/loan to Kenya Shell was persistently showing as due and owing in the respondent’s accounts. However, after reconciliation carried out with Kenya Shell, it was discovered this was an outright sale or permanent exchange of AGO fuel to the appellant and for which the appellant had not paid. It was upon this discovery that an invoice was raised and demand made.

26. On the commercial rate of interest at 20% per annum awarded by the trial court, counsel for the appellant submitted that the trial judge had a wide discretion to award the rate of interest and this Court should not interfere with the exercise of discretion by the trial court. In support, the appellant cited the decisions in **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR** and **Shah vs. Guilders International Bank Limited [2003] eKLR**.

27. We have considered the grounds of appeal, submissions by counsel and the authorities cited. As was stated in **Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, we remind ourselves of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.

28. At the heart of this appeal is contestation on interpretation and application of **Sections 4 (1)** and **26 (c)** of the **Limitation of Actions Act**

(Cap 22 of the Laws of Kenya).

Section 4 (1) of the Limitation of Actions Act provides:

“4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(a) actions founded on contract;

(b).....

(c).....

(d).....

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.” (Emphasis supplied)

Section 26 (c) of the Limitation of Actions Act provides:

“Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

29. Concomitant to the contestation on limitation period is the ruling delivered by Mwera, J, on 7th March 2001. No appeal was preferred against the ruling. Whether this Court can re-open the limitation issue is a contested matter.

30. In Gathoni vs. Kenya Co-Operative Creameries Ltd. [1982] KLR 104, *Potter, JA* at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

31. In Iga vs. Makerere University [1972] EA it was held:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to **bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”**

32. A persuasive case relevant to the instant appeal is Santowels Limited vs. Stanbic Bank Kenya Limited [2018] eKLR. Excerpts of the relevant facts extending the contractual limitation period of six years is captured as follows in the judgment of the trial court:

“[27] There is no question, from the Further Amended Plaintiff, that the suit seeks to recover sums alleged to have been unlawfully charged as interest by the Bank between 1993 and 1997. Accordingly, it was the submission of the Defendant, as pleaded in paragraph 15 of the Further Amended Defence filed on 18 October 2016, that the suit was filed outside the six years limitation period. Counsel for the Plaintiff countered these arguments by relying on the Defendant’s letter dated 16 September 2003, (exhibited at page 109 of the Plaintiff’s Exhibit No. 3) which, he posited, opened up the issues and the period of limitation beyond the six year window ending 2003. He added that, since the Plaintiff’s accounts were running accounts, they were inseparable.

[31] Of particular note is the Defendant’s letter dated 10 September 2003, by which the Defendant intimated that:

“...We have noted that Santowels who were our customers have engaged your services to ascertain the accuracy of interest levied and paid by themselves for various facilities that were extended to them while banking with us. We wish to advise that given the volume of data that we have to go through and the manual nature of this exercise before reaching a substantive conclusion we therefore trust that you shall bear with us for a little while. Legally, claims of

this nature can only hold for the last seven years and to that extent therefore, we are only confining our **interest verification to the period 1997 up to and including 2000.**

We however remain committed to resolving the matter as soon as practically possible..."

[32] Apart from being an admission that the sums could not be ascertained without a verification exercise, the Defendant conceded that the period in issue extended to the year 2000. Secondly, the Defendant committed itself to an amicable resolution of the matter, and reaffirmed this by its letter dated 16 September 2003, by which it agreed to verification of their accounts for the entire period from 1997 up to and including 2000; and only reneged on this by its letter dated 30 October 2003.

[33] Thus, I would agree with Counsel for the Plaintiff that time began to run for purposes of Section 4(1) (a) and Section 4(3) of the Limitation of Actions Act from 16 September 2003. I am thus satisfied that the suit was filed within the prescribed time for it. The same would obtain in respect of the claim for accounts."

33. The Supreme Court in **Mawathe Julius Musili vs. Irshadali Sumra & others, Petition No. 16 of 2018** at paragraph 94 and 95 of its judgment observed that when no appeal is lodged against an interlocutory ruling by a trial court, the issue in dispute is settled by judicial decision.

34. In the instant matter, the appellant did not appeal against the ruling delivered by Mwera, J. on 7th March 2001 dismissing the application to strike out the suit as barred by the limitation period. In the absence of an appeal filed against the ruling of 7th March 2001, does this Court have jurisdiction to reopen the issue of limitation period under **Section 4** of the **Limitation of Actions Act**? Do we have jurisdiction to consider, review or set aside the findings and determination made vide the ruling of 7th March 2001? The instant appeal is vide a Notice of Appeal lodged against the judgment delivered on 2nd June 2011. Can the notice of appeal lodged in the instant appeal be used to appeal against the ruling by Mwera, J, delivered on 7th March 2001?

35. In **Nairobi City Council Versus Resley (2002) EA 494** this Court at page 494 stated.

"There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.

And later in the same decision:

"It is trite law that without a notice of appeal against particular orders we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr. Oduol's argument to the effect that the notice of appeal against the ruling of 11th April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002.

27. In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that Judgment. In the case of **John N. Liboyi versus the Board of Governors of St. John College Civil Application No. Nai 13 of 2009 (UR 92/2009)** to which we were referred, this Court held:

"The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule"

36. In **Nguruman Limited vs. Shompole Group Ranch & Another [2014] eKLR**, a five judge bench of this Court noted that there was no notice of appeal filed against the ruling of Ang'awa, J. delivered on 22nd December 2009. It was held in the absence of a notice of appeal against the ruling of Ang'awa, J. this Court lacked jurisdiction to grant any relief against the said ruling.

37. Guided by the decision of this Court in **Nguruman Limited vs. Shompole Group Ranch & Another [2014] eKLR**, and bound by the Supreme Court dicta in **Mawathe Julius Musili vs. Irshadali Sumra & Others, SC Petition No. 16 of 2018**, we find that the failure by the appellant to appeal against the ruling of Mwera, J. on the limitation period makes this Court lack jurisdiction to re-open, review and re-consider the issue of limitation as determined on merit by Mwera, J. in his ruling. The issue of the respondent's suit not being time-barred was conclusively determined by the ruling of 7th March 2001.

38. Notwithstanding the foregoing finding, we are inclined to consider the appellant's submission that the ruling delivered by Mwera, J. on 7th March 2001 was merely an interlocutory order that is appealable when the final judgment and decree was issued. Responding to and controverting the submission, the respondent urged the ruling of 7th March 2001 was a preliminary decree that determined the rights of the parties in so far as limitation period was concerned.

39. Comparatively, the Supreme Court of India in **Shankar vs. Chandrakant, AIR 1995 SC 1211** defined a preliminary decree as follows:

“A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of.

40. In the same Indian case of **Shankar vs. Chandrakant**, AIR 1995 SC 1211, it was expressed that “it is settled law that more than one final decree can be passed in a suit.” Likewise, it was expressed that the appealability of a preliminary decree does not affect its character as a final decree; the final decree merely carries into fulfillment the preliminary decree.

41. In further comparative analysis, in North Carolina -USA, it was expressed generally, that there is no right of immediate appeal from interlocutory orders and judgments. (See **Goldston vs. Am. Motors Corp**, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Rather, the party wishing to appeal the interlocutory order must wait until there has been a final judgment in the case before the interlocutory order may be appealed. The reason for this rule was articulated by the Supreme Court of North Carolina in **Veazey v. City of Durham**, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) as follows:

“There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer “right and justice . . . without sale, denial, or delay.”

42. However, in the comparative cases cited, there are exceptions. An interlocutory order is immediately appealable if it falls in one of the following general categories: (1) the order affects a substantial right; (2) the order is final as to some but not all of the parties or claims; (3) the order in effect determines the action and prevents a judgment from which appeal might be taken; (4) the order discontinues the action; (5) the order grants or refuses a new trial; (6) the order rules upon the court’s jurisdiction over the appellant’s person or property adversely to the appellant.

43. In the same comparative jurisdiction of North Carolina, orders denying dispositive motions based on the expiration of the statute of limitations are not immediately appealable. (See **Nello L. Teer Co. v. N.C. Dep’t of Transp.**, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006) (see also **Thompson v. Norfolk S. Ry. Co.**, 140 N.C. App. 115, 120-21, 535 S.E.2d 397, 401 (2000).

44. Going by the comparative analysis, it is debatable if this Court can reconsider the limitation period as determined by the ruling of 7th March 2001. It is plain that the ruling of 7th March 2001 was a determination of the trial court’s jurisdiction to entertain the respondent’s claim and cause of action; the ruling determined the substantive, not procedural right of the respondent to pursue its claim against the appellant; the ruling determined the appellant could not dispute the respondent’s claim on account of limitation. Taking all these into account, it is our considered view that the ruling of 7th March 2001 was immediately appealable and the failure to appeal against the same the limitation issue was conclusively determined as between the parties hereto. (See **Mawathe Julius Musili vs. Irshdali Sumra & Others**, SC Petition No. 16 of 2018).

45. A further ground urged by the appellant is that the trial court erred in entering judgment for the respondent when no relief founded on mistake was pleaded in the plaint. We have examined and analyzed paragraph 8 of the re-amended plaint as reproduced above. We are also cognizant of the dicta by Steyn, J. in **Associated Japanese Bank (International) Ltd v Credit du Nord SA** [1989] 1 WLR 255, 268 where it is stated:

“Logically, before one can turn to the rules as to mistake...one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary.”

46. The appellant cited the dicta in **Phillips Higgins vs. Harper** [1954] 1 All ER 116 to support its submissions that there must be a prayer for relief from the consequences of mistake before mistake can extend the limitation period. We have analyzed this case and observe that the UK House of Lords in **Deutsche Morgan Grenfell Group Plc (Respondents) v. Her Majesty’s Commissioners of Inland Revenue and another** (Appellants) [2006] UKHL 49 held that a limitation period in a claim for mistake starts to run when the mistake is discovered.

47. In the instant case, Mwera, J. in his ruling determined that the mistake by the respondent was discovered on 31st December 1997 and the limitation period started to run from this date. If we were to accept the appellant’s submission that in the instant case the mistake was discovered in 1996, it would follow the plaint filed in this matter on 29th April 1999 would still be within time.

48. On recovery of monies paid or goods received by mistake, we are persuaded by the reasoning of Neuberger, J. in **Nuridin & Peacock plc vs. D D B Ramsden & Co Ltd** [1999]1 WLR 1249, 1272 where he expressed:

"For the issue of recoverability to turn upon a nice analysis as to the precise nature of the mistake of law appears to me to be almost as undesirable as it is for recoverability to turn upon whether the mistake made by the payer was one of fact or law."

49. Persuaded by the foregoing dicta, **Section 26 (c)** of the **Limitation of Actions Act** does not specify which party must have committed the mistake. It suffices that the court is satisfied a mistake of fact or law exists and time begins to run when the mistake is discovered.

50. The final issue for our determination is the contention that the trial court erred in awarding interest at the rate of 20% per annum. Judgment was entered against the appellant "for Ksh. 14,778,257/70 together with interest thereon at the prevailing commercial rate of 20% per annum from the date of filing suit." It is the appellant's contention that no evidence was tabled before the trial court to prove that 20% was the prevailing commercial rate of interest. We note in the re-re-amended plaint, the respondent prayed for interest at the rate of 26% per annum. The appellant submitted that when a party claims a specific rate of interest, it is incumbent upon such a party to prove it is entitled to the specific rate of interest as claimed. It is urged in the instant appeal, no iota of evidence was led to prove 20% as the prevailing commercial rate of interest.

51. The respondent urged that award of interest and the rate thereof is at the discretion of the trial court. Being a discretionary matter, unless it can be demonstrated that the discretion was not judiciously exercised, this Court should not interfere with the rate of interest of 20% per annum, as awarded by the trial judge.

52. We have considered the rival submissions on the 20% per annum rate of interest. In awarding interest at the rate of 20% per annum, the trial court did not give any reason. Likewise, the trial court did not state why it did not award interest at the rate of 26% per annum as claimed in the re-re-amended plaint.

53. **Section 26 (1)** of the **Civil Procedure Act** (Cap 21, Laws of Kenya) vests courts with discretionary power to award interest on pecuniary judgments. This power, as with all discretionary powers, is to be exercised cautiously, judicially and in the interest of justice. The aforementioned section reads: -

"(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 (emphasis added) 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."

54. It is trite award of interest and the rate thereof is at the discretion of the trial court. In **Mbogo & Another vs. Shah [1968] EA 98**, it was expressed:

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

55. In **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1970) EA 469** it was stated:

"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."

56. Counsel for the respondent cited dicta in **Societe Internationale De Telecommunication Aeronautiques vs. Twiga Properties** where the general principle was properly enunciated to be that interest on debt is only payable at court rates and as from the date of filing suit unless there is agreement to the contrary or a trade custom otherwise dictates. We are also persuaded by the dicta in **Kenya Commercial Bank Limited vs. Thomas Wandera Oyalo**, (supra) where it was held that it is incumbent upon a claimant to prove he is entitled to interest at the rate he asserts in the plaint.

57. Comparatively, in the Lesotho case of **Boliba Multipurpose Cooperative Society vs. Ramathibeli Joseph Mpoko, CCT 37 of 2007**, it was held that if no evidence is provided regarding the rate of interest as claimed in the plaint, the claim must fail. In declining to award interest rate as claimed in the Plaint, the court expressed itself thus:

"The plaintiff claims interest at commercial rate. The plaintiff had not proffered evidence (in light of the fluctuation of the commercial interest rates over the years) which would enable the court to properly assess interest at commercial rate....."

58. We have evaluated the evidence on record. The respondent did not lead any evidence to prove its claim of interest at the rate of 26% per annum. There is no evidence on record proving the prevailing commercial rate of interest. The trial court did not give any reasons for awarding 20% rate of interest. There is no evidence on record to demonstrate 20% per annum was the prevailing commercial rate of interest. In the final analysis, this appeal is partially successful on the issue of rate of interest. Guided by case law, the respondent is entitled to the court rate of interest with effect from the date of filing suit. The court rate of interest at the time of the impugned judgment was 14% per annum, which we hereby grant.

59. The upshot is we hereby affirm and uphold the judgment of the trial court dated 3rd June 2011 that entered judgment in favour of the respondent in the sum of Ksh. 14,778,257/70. However, we hereby vary the said judgment and set aside interest awarded at the rate of 20% per annum and substitute it with an order that interest of the said sum of Ksh. 14,778,257/70 be at court rates with effect from the date of filing suit on 29th April 1999. We further order that, the monies deposited and held in the joint account of counsel for the parties in this matter be and is hereby released to the respondent. The accrued interest on the sum deposited shall be taken into account in computing the interest due at court rates.

60. Each party is to bear its own costs in this appeal. It is so ordered.

Dated and delivered at Nairobi this 22nd day of March, 2019

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR