



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. 41 OF 2016

BETWEEN

PETER BARAZA RABADO.....APPLICANT

AND

NATION NEWSPAPERS LIMITED.....RESPONDENT

*(An application to determine which party is entitled to the interest earned
in a joint interest earning account opened pursuant to the order of the
Court in Civil Application Number 1 of 2007 filed at Nairobi)*

RULING OF THE COURT

Introduction

1. By a Notice of Motion dated 29th June, 2016, the Applicant is seeking *inter-alia* the following orders:-
 - a. That this Court be pleased to make a finding on who between the Applicant and the Respondent should have the interest earned in the Joint Account in the joint interest earning bank account opened pursuant to the orders of this Court in Civil Application Number 1 of 2007 filed at Nairobi.*
 - b. In the alternative this honorable Court be pleased to order the Respondent to pay interest at 6% per annum on a sum of Kshs. 1,200,000 from the date of the judgment of the Superior Court until the date of payment of the interest in full.*

2. The brief facts leading to the present application are that Kimaru, J. in a Judgment delivered on 15th November 2006 ordered the Respondent to pay the Applicant Kshs. 2,000,000 as general damages for defamation. The Respondent was aggrieved by this decision and appealed against it in Civil Appeal No. 71 of 2010. The Respondent also filed an application under Rule 5(2) (b) of this Court's Rules seeking a stay of execution of the said Judgment. This Court in its Ruling delivered on 16th March 2007 granted the Respondent a stay of execution of the Judgment of 15th November, 2006, on condition that the Respondent deposits the whole decretal amount in an interest bearing account in the joint names of the counsel on record for the parties. The decretal amount of Kshs. 2,000,000 was subsequently deposited at I & M Bank Limited in a joint account in the names of Mohammed Muigai Advocates & Chuma Mburu &

Co. Advocates, counsel for the parties.

3. On 27th April 2016 this Court rendered its Judgment in Civil Appeal No. 71 of 2010. In the Judgment the award of damages by Kimaru, J. was set aside and substituted with an award of Kshs. 1,200,000. The Appeal had therefore partly succeeded.

4. Following that Judgment, the Respondent paid to the Applicant's Advocates the sum of Kshs. 1,200,000 and according to the Applicant, refused to pay the interest earned in the joint account or any part thereof to the Applicant. This is what culminated in the present application.

5. The Application was supported by the Affidavit sworn on 29th June 2016 by learned counsel Mr. Chuma Mburu, counsel for the applicant. Counsel deposed that interest commensurate to the judgment of this Court was due to the applicant and that the applicant was entitled to interest on the sum of Kshs.1,200,000 until full payment at rates to be determined by this Court.

6. The Respondent opposed the application by way of a Replying Affidavit sworn on 30th September, 2016, by Mr. Sekou Owino, the Respondent's Head of Legal Department. Mr. Owino deposed that the power to award interest was at the discretion of the High Court pursuant to **Section 26** of the **Civil Procedure Act**; that the applicant did not pray for interest in the plaint before the High Court and his claim for award of interest where none was awarded by the High Court lacks any legal basis; that the amount deposited in the joint account of counsel for the parties remained the property of the Respondent and was deposited only as a condition for an order of stay of execution; that the only proprietary interest that the Applicant enjoys is in the decretal amount of Kshs. 1,200,000 which sum has already been paid to the Applicant through his advocates. The Respondent prayed that the interest earned be released to its advocates, Mohammed Muigai Advocates on its behalf.

Submissions by Counsel

7. When the application came up for hearing, learned Counsel, Mr. Chuma Mburu appeared for the applicant while learned Counsel, Mr. Gabriel Mwangi, appeared for the Respondent. Mr. Mburu submitted that the money deposited belonged to both parties until the Court determined otherwise; that because the appeal partly succeeded, the interest earned on the deposit was payable to the applicant; that if the appeal had succeeded, the Respondent would have been entitled to the entire amount and if it had not succeeded, the applicant would have been entitled to the entire amount. Accordingly, in counsel for the applicant's view, the applicant was entitled to 60% of the interest and the Respondent to 40% thereof.

8. In response, Mr. Mwangi submitted that the applicant was seeking interest in two forms; interest on the joint account and interest under **Section 26** of **Civil Procedure Act**. Counsel submitted that the interest earned in the joint account of counsel for the parties owes its existence to the conditional order for stay of execution and that upon determination of the appeal, the same is payable to the Respondent; that the applicant did not enjoy any proprietary interest on the conditional deposit and that the deposit together with the interest remained the property of the respondent. On the second form of interest, counsel submitted that the applicant did not pray for interest in the plaint and the same was not awarded; that if the applicant was aggrieved, he had the option of cross appealing on the issue of interest but failed to do so. Counsel argued that this motion is an afterthought and unmerited and urged the Court to find that the interest is due and payable to the Respondent.

Determination

9. We have considered the submissions by learned counsel, the application, grounds in support thereof both on the face of the application and in the supporting affidavit by the applicant, the replying affidavit and the law. Two issues fall for our determination in this application. First whether the Applicant is entitled to interest under **Section 26** of the **Civil Procedure Act** and , second, whether he is entitled to the interest earned in the joint account of counsel for the parties.

10. **Section 26** of the **Civil Procedure Act** provides as follows:-

“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”.

11. From that provision, it is clear that an award of interest is a matter that is left to the discretion of the trial judge, and generally, an appellate court is enjoined to treat the decision of a trial court with respect, and refrain from interfering with the decision unless it is satisfied that the trial judge based the award on some erroneous principle or was plainly wrong. (See ***Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR***).

In ***New Tyres Enterprises v Kenya Alliance Insurance [1988] KLR 380*** it was held that:

“The court, under section 26 (1) of the Civil Procedure Act has a wide measure of discretion on the question of interest”.

12. Accordingly, whether a party to a suit prays for interest or not, it is at the discretion of the trial court whether to award interest. In this case the Judge did not award the Applicant interest. The Respondent contends, correctly in our view, that if the Applicant was aggrieved with the decision of the learned Judge on the issue of interest, he should have appealed against it. Having failed to do so, this Court has no basis to interfere with the decision of the learned Judge on the issue of interest and we so hold. See also ***Section 34 (1) of Civil Procedure Act*** that provides that all questions relating to the execution discharge or satisfaction of the decree should be determined by the court executing the decree which in this matter should be the trial court.

13. On the second issue which is whether the Applicant is entitled to the interest earned in the joint account of counsel for the parties, we are guided by the case of ***Eastland Hotel Limited v Wafula & Simiyu & Company Advocates [2015] eKLR*** where this Court stated:

"It is our considered view that when an appeal is heard and determined, the effect of the judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. We find that the conditional stay of execution and the order directing the deposit of Kshs. 5,000,000, in a joint account lapsed with the delivery of the judgment of this Court on 24th October, 2014; a conditional deposit is discharged and becomes due and repayable upon fulfillment of the condition".

14. Accordingly, in the circumstances of this case, the application is allowed and the interest earned on Kshs. 2,000,000 in the joint account of counsel for the parties be shared in the ratio and percentage of the award as determined by this Court of Kshs. 1,200,000. The applicant is therefore entitled to interest earned in the joint account on Kshs. 1,200,000 while the respondent is entitled to interest earned on Kshs. 800,000 from the date of deposit until payment in full. Each party shall bear its own costs of the application.

Dated and delivered at Nakuru this 27th day of April, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR