



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, JA (In Chambers)

CIVIL APPEAL NO. 192 OF 2006

BETWEEN

TRACOM LIMITED.....1ST APPELLANT

JOSEPH MACHARIA.....2ND APPELLANT

AND

HASSAN MOHAMED ADAN.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Apondi, J) delivered on 15th July day of Nakuru, 2003

in

H.C.C.C. NO. 508 OF 1999)

RULING

1. The settling of the terms of the order was the matter that was brought before me as a single judge late last year before, regrettably, the court file went missing. I have now addressed it. The background to the matter is simple. In its judgment dated 6th November 2009, this court allowed the appeal against the High Court judgment (by Muga Apondi J) dated 15th July 2013 to the extent that the award for future medical expenses was reduced from the figure of Shs.1,250,000/= to Shs.880,000/=. The award of 900,000/= for loss of earnings was set aside as it was neither properly pleaded nor strictly proved. The total amount of Shs.3,393,350/= in the impugned judgment was reduced to a sum of Ksh.2,123,350/= less 25% contribution. It came to Shs.1,592,512.50. That amount was to carry interest at court rates. **The court did not however state the date from which interest would start to accrue.** Counsel for the parties could not agree on what the date should be, hence the settling of the terms of the order.

2. On 30th November 2015, **Mr. Mukite Musangi** for the appellants and **Mr. Amanyah Cohen** for the respondents appeared before me. Mr. Musangi held the view that the date from which interest would start to accrue could not be retrospective because there was a new decree by this court replacing the High Court decree and damages as assessed by this court could not therefore be paid with interest applied before this court's decree. The new decree by this court was for Shs.1,592,512.50 while the High Court decree was 2,545,013/= being 75% of the full award of Shs.3,393,350/=. Mr. Musangi contended that the

sum of Shs.880,000/= related to future medical expenses and expressed the view that there is no justification in applying interest from the date of the institution of the suit. He contended that interest ought to apply from the date of assessment of the damages by this court. This is even more so because, he urged, the damages are general and not special in nature.

3. **Mr. Amany Cohen** referred us to the plaint and the prayers in it and contended that the amount of Shs.880,000/= as damages was special in nature and interest should be applied from the date of filing suit. He indicated that the contest was with regard to items 1 and 4 of the draft order.

4. I have perused the judgment of this court and the draft order prepared by counsel for the respondent which counsel for the appellant declined to approve.

5. The draft order contains five (5) paragraphs as follows –

“IT IS HEREBY ORDERED THAT

1. The appeal is hereby allowed to the extent that the award for future medical expenses is reduced from Shs.1,250,000/= to Shs.880,000/= and this amount shall attract interest from the date of the filing of the suit till payment in full.

2. The award of Shs.900,000/= in respect of loss of earning is hereby set aside as it was neither properly pleaded nor strictly proved.

3. The total amount of Shs.3,393,350/= is reduced to a sum of Shs.2,123,350/= less 25% contribution thus leaving a balance of Shs.1,592,512.50

4. The sum of Shs.1,592,512.50 shall carry interest at court rates from the date of the High Court judgment until payment.

5. The respondent shall get half the costs of this appeal and of the superior court.”

6. The judgment of this court dated 6th November 2009 from which the paragraph which contains the draft order is extracted states in the last decision of the court –

“In conclusion, we allow the appeal to the extent that the award for future medical expenses is reduced from the figure of Shs.1,250,000/= to Ksh.880,000/=. The award for Shs.900,000/= in respect of loss of earning is set aside as it was neither properly pleaded not strictly proved. The total amount of Ksh.3,393,350/= is reduced to a sum of Shs.2,123,350/= less 25% contribution which comes to Ksh.1, 592,512.50. That amount will carry interest at court rates. The respondent will get half the costs of this appeal and of the superior court. To that extent, the appeal succeeds and those are the orders of the court.

Dated and delivered at Nakuru this 6th day of November 2009.”

7. As is apparent, the court did not specify the date from which interest would be applied to the damages it assessed on 6th November 2009. Ideally, and pursuant to rule 34 (2) (d) of the Court of Appeal Rules, the judge who presided in the Bench that heard and determined the appeal shall have settled the form of the order as the parties have failed to agree on items 1 and 4 thereof. In absence of the presiding judge, such judge who sat at the hearing of the appeal as the presiding judge would direct may also settle the terms of the order. In absence of the presiding judge and any of the other judges who sat on the Bench, the order may be settled by such judge as the President of the court may direct. This seems to be what happened as the only judge remaining who sat in the appeal (The Hon. Mr. Justice Waki JA) is out of this station and perhaps that is why the President directed that the matter of settlement of the order be placed before me. I proceeded to hear the matter of settlement of the form of the order on the basis that it was properly before me and I had jurisdiction to do so.

8. The contentious items in the draft order are two, that is to say item No.1 and item No.4. As regards item No.1, the award of Shs.880,000/= relates to future medical expenses. Would there be reason or rhythm in giving interest on that sum from the date of the filing of the suit when clearly it relates to an expense to be incurred in the future?

9. To arrive at the figure of Shs.880,000/=, this court took the view that the respondent whose “health problem was getting progressively less” would need medication for 22 years and proceeded to take a multiplier of 22 years as fair and to multiply the sum of Shs.40,000/= representing yearly medical expenses with the multiplier of 22 to get shs.880,000/=. If one were to apply interest on the sum of Shs.880,000/= from the date of filing the suit, the result would distort the award by inflating it. Moreover, the general principle is that interest is awardable to a plaintiff for being kept out of money which ought to have been paid to him. The court has general discretionary power to award interest. A plaintiff who has paid medical expenses would be entitled to interest on such medical expenses from the date when the medical expenses were paid. See **Jefford and Another v. Gee** [1970] 2QB 130.

10. In this case, damages were assessed by this court on 6th November 2009. That is the date, in my view, from which interest should be applied to the sum of Shs.880,000/=. I so find and hold. That disposes of item No.1 in the draft order. As regards item No.4, which reflects payment of Shs.1,592,512.50, the bulk of which is in respect of general damages, the same principle should apply although there is an element of expense incurred before the determination of the appeal which resulted in the diminution of the figure of Shs.3,393,350/= to Shs.2,123,350/= less 25% contribution to bring it to Shs.1,592,512.50.

11. Accordingly, the draft order in item 1 shall show that interest at court rates shall run from 6th November 2009. As regards item 4 of the draft order, the same date shall apply so that the sum of Shs.1,592,512.50 shall carry interest from the date of assessment on 6th November 2009.

12. There shall be no order as to costs with regard to the appearance relating to this determination.

Dated and delivered at Nairobi this 4th day of November, 2016.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR