IN THE COURT OF APEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPEAL NO. 17 OF 2015

BETWEEN

ANDREW PETER NGIRICHI……1ST APPELLANT

PURITY WANGUI KURIAH……..2ND APPELLANT

AND

WANJE MASHA WANJE……RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa, (Kasango, J.) dated 5th March 2015

in

HCCC NO. 638 of 2011)

****

JUDGMENT OF THE COURT

This appeal arises from the judgment and decree of the High Court at Mombasa, ***(Kasango, J.),*** dated 5th March 2015 in which the learned judge awarded ***the respondent***, ***Wanje Masha Wanje*** as against the ***1st appellant, Andrew Peter Ngirichi, Kshs 8,203, 089*** with interest at court rates from 3rd June 2011. While the 1st appellant is aggrieved by that award, ***the 2nd appellant***, ***Purity Wangui Kuriah,*** who was a defendant in the suit with the 1st appellant, is aggrieved by the fact that the learned judge dismissed the suit against her but declined to award her costs.

The background to the appeal is a business venture gone sour between the 1st appellant and the respondent. In a plaint dated 14th December 2011 and amended on 28th August 2012, the respondent prayed, as against the two appellants who are husband and wife, for a declaration that the motor vehicles Registration Nos. ***KBQ 002A, KBP 203Y, KBP 204Y, KBP 205 Y*** and ***KBP 963H***, registered in the names of the appellants were purchased solely by the respondent, and ought to have been registered in the name of a company known as ***Tarasha Tours & Car Hire Ltd***. In addition the respondent prayed for account of the earnings from the said motor vehicles, an order for payment to him by the appellants of the value of the motor vehicles or such other amount that the court may find to be due to him, and an injunction prohibiting the appellants from selling, transferring or otherwise dealing with the motor

vehicles.

The above reliefs were sought against the pleadings that in June 2011 the respondent and the 1st appellant had incorporated ***Tarasha Tours & Car Hire Ltd ("the Company")*** to offer car hire, tours and transport services. To boost its fleet of vehicles, the two purchased in Dubai, United Arab Emirates, the 5 motor vehicles, which they agreed would be registered in the name of the company. The purchase price of the cars amounting to ***Kshs 12 million***, the customs duty therefor of Kshs ***2,401,592.00***, and all the expenses to, in, and from Dubai were however paid exclusively by the respondent. Fraudulently and in breach of trust, the 1st appellant subsequently registered the motor vehicles in his name and transferred some of them to the 2nd appellant, thus compelling the respondent to institute the proceedings in the High Court.

By a joint defence dated 30th January 2012, the appellants admitted incorporation of the company but denied that it had resolved to purchase or had purchased any motor vehicles. The motor vehicles in dispute, it was pleaded, were purchased by the 1st appellant and were therefore his property. While the visit to Dubai was admitted, it was contended by the appellants that both the respondent and the 1st appellant were in Dubai on their own separate businesses and not to purchase motor vehicles for the company.

From the pleadings and upon hearing evidence and submissions from counsel for the parties, the learned judge isolated for determination three issues upon which the suit would turn, as follows:

i. ***whether the respondent's claim was vitiated by lack of authority from the company;***

ii. ***who between the respondent and the 1st appellant purchased the 5 motor vehicles; and***

iii. ***what were the appropriate orders in the suit.***

As we have already noted, save for the dismissal of the claim against the 2nd appellant, the learned judge resolved the above issues substantially in favour of the respondent, thus precipitating this appeal.

The Memorandum of Appeal dated 16th March 2015 raises14 grounds of appeal that are prolix, repetitive and argumentative, contrary to the dictates of ***rule 86(1)*** of the Rules of this Court. That the memorandum of appeal did not comply with the rules was underlined by the appellants' written submissions, in which the issues in the appeal somehow shrunk to only four, namely whether the learned judge erred by:

i. ***sustaining the respondent's suit in the absence of a resolution by the company;***

ii. ***holding that the 5 motor vehicles were purchased by the respondent;***

iii. ***awarding the respondent interest from a date before the filing of the suit or judgment; and***

iv. ***denying the 2nd respondent costs even after dismissing the respondent's suit against her.***

These, we agree, are the real issues at the heart of the appeal and are the concise grounds that ought to have been set forth in the memorandum of appeal as required by rule 86(1).

As regards the first issue in the appeal, ***Mr. Paul Buti,*** learned counsel for the appellants, submitted that for all intents and purposes the respondent's suit in the High Court was brought on behalf of the company, as he had pleaded that the 5 motor vehicles were intended to be registered in the name of the company. However, there was no written resolution by the company to purchase the 5 motor vehicles as mandatorily required by its Articles of Association. Counsel contended that having found as a fact that there was no written resolution by the company to purchase the motor vehicles, the learned judge erred by concluding that the respondent's pleading that he and the 1st appellant, as directors of the company, had resolved to purchase vehicles for the company, meant merely a decision reached between the two rather

than a formal resolution of the company. It was submitted that the learned judge had erred further by basing her said conclusion on the respondent's alleged "relative inexperience in commerce", which was speculative and unsupported by evidence.

Relying on ***MACAURA V. NORTHERN ASSURANCE CO LTD (1925) AC 615***, and ***THE MARITIME TRADER (1981) 2 LLOYDS, 153*** it was submitted that the respondent, as a shareholder of the company had no legal or equitable property in the assets of the company and therefore had no capacity to sue for the property of the company.

On who, between the 1st appellant and the respondent had purchased the 5 motor vehicles, Mr. Buti submitted that the onus was upon the respondent to adduce evidence of purchase of the motor vehicles, which he had failed to do. It was contended that the respondent's evidence was contradictory and could not stand scrutiny because he alleged to have purchased the vehicles on 3rd June 2011 with money that he had withdrawn from his bank account, yet the evidence on record indicated that he had withdrawn Kshs 4,000,000 on 13th June, 2011, ten days after the alleged purchase of the motor vehicles.

As regards the other evidence adduced by the respondent regarding the cash withdraws that he had made from his bank accounts, it was submitted that there was no nexus established between those cash withdrawals and the purchase of the motor vehicles. The appellants further contended that there was no evidence on record to show the purchase of the motor vehicles by the respondent at a cost of Kshs 12 million or even of the Kshs 8,203,098 that he was awarded by the High Court.

On the other hand, it was submitted, the 1st appellant had adduced sufficient evidence to prove that he had purchased the motor vehicles himself for a total cost of ***Kshs 6,303,168;*** that he had produced invoices for the 5 motor vehicles in his own name; and that those invoices proved that he had purchased the vehicles from ***Ramna International Motors, Dubai***.

The appellants concluded this ground of appeal with the argument that, by requiring the 1st appellant to prove that he had purchased the motor vehicles from his Euro Account, the learned judge had erred by shifting the burden of proof to him contrary to ***section 108*** of the ***Evidence Act***. Lastly it was contended that the learned judge had also erred by heavily relying on the demeanor of the witnesses, which cannot be a substitute for, or absolve a party from the obligation to adduce evidence in proof of his or her case.

As regards failure to award costs to the 2nd appellant, learned counsel submitted that having dismissed the suit against the 2nd appellant, the learned judge ought to have awarded her costs of the suit. It was argued that under the proviso to ***section 27*** of the ***Civil Procedure Act***, costs follow the event, unless the judge orders otherwise, for good reason. In this instance, it was contended that the learned judge gave no reasons why she could not award costs to the 2nd appellant, which amounted to injudicious exercise of discretion justifying our interference.

Lastly it was submitted that the learned judge erred by awarding the respondent interest from 3rd June 2011, which was a date before the filling of the suit on 14th December 2011. Learned counsel submitted that the amount that the respondent was entitled to was not determined until the date of the judgment and therefore it was misdirection on the part of the court to award interest from a date before the date of judgment.

For the respondent, ***Mr. Daniel Koech,*** learned counsel, opposed the appeal and submitted that the judgment of the High Court was sound and unimpeachable. As regards the lack of resolution of the company, counsel argued that that nothing turned on the issue because the company was not claiming the cars and neither was the respondent claiming them for the company. In counsel's view, all that the respondent wanted was return of the motor vehicles to himself or payment of their purchase price to him as he is the one who had paid for them. It was further submitted that the intended purchase of the motor vehicles for the company had failed and that in any event the company had not itself purchased the motor vehicles.

On whether the respondent had proved his case on a balance of probabilities, it was submitted that the respondent had adduced sufficient evidence, which satisfied the learned judge that he had, at around the time the motor vehicles were purchased, withdrawn from his bank account at ***Barclays Bank, Bamburi Branch*** on separate dates Kshs 2 million and Kshs 4 million which he gave to the 1st appellant to purchase the five motor vehicles. Counsel further submitted that the 1st appellant had admitted in cross-examination that the money for the purchase of the motor vehicles and payment of duty had come from the respondent and that with such concession, the learned judge was entitled to find that the respondent had proved his case. Mr. Koech further contended that the respondent had adduced consistent and credible evidence to show that he had paid the duty for the five motor vehicles from his bank account and had even paid for the installation of the motor vehicles' security systems.

As regards the evidence that was adduced to prove that it was the 1st appellant who had purchase the motor vehicles, it was submitted that the 1st appellant had only produced invoices in his name, which were not synonymous with evidence of payment for the vehicles by him. Despite testifying that he had paid for the motor vehicles from his Euro Account, it was argued, the 1st appellant failed to produce any evidence in support of that assertion.

Turning to the failure to award costs of the suit to the 2nd appellant, it was submitted that the learned judge had properly exercised her discretion because the respondent had a legitimate grievance against the 2nd respondent, in whose name the 1st appellant had transferred some of the motor vehicles. We were urged to take into account all the circumstances of the case and find that the learned judge had not erred by declining to award costs to the 2nd appellant, even though she had dismissed the suit against her.

Lastly on interest, it was contend that award of interest, including interest ante-dating the date of the filing of the suit, is at the discretion of the court and that the learned judge had judiciously exercised her discretion. We were accordingly urged to find the appeal unmeritorious and dismiss the same with costs.

We have duly considered the respective submissions by parties. In an appeal like the one before us arising from a judgment of the High Court in the exercise of its original jurisdiction, we are obliged to re-evaluate the entire evidence and come to our own independent conclusions. While reappraising the evidence, we are however required to bear in mind that as an appellate court, we do not have the advantage that the trial court had of seeing and hearing the witnesses testify, and that when it comes to conclusions on evidence based on an estimate of the credibility of witnesses, we must defer to the conclusions of the trial judge who had the opportunity of observing the demeanor of those witnesses. (***PETERS V. SUNDAY POST LTD [1958] EA 424*** and ***SELLE & ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] EA 123).***

The first ground of appeal relates to the effect, on the proceedings in the High Court, of lack of a resolution from the company. From the outset, we must point out the total lack of clarity in the submissions both in the High Court and in this Court and even in the judgment of the trial court, whether the resolution in question was the resolution of the company to purchase the 5 motor vehicles or whether it was a resolution of the company to allow the respondent to institute proceedings on behalf of and for the benefit of the company. A lot of time was taken on evidence and arguments whether the company had passed a resolution to purchase the 5 motor vehicles. A finding that the company had not passed such a resolution goes only to the strength of the appellant's case; it does not raise issues of *locus standi* or render the suit incompetent, and is not a ground for striking out or summarily dismissing the suit as the appellants have contended all along. On the other hand, a finding that the respondent's suit was filed in the name of the company or on its behalf and for its benefit without the necessary resolution, implicates the competence of the suit. Regrettably these two resolutions were treated in the High Court and in the submissions before this Court as though they were one and the same thing, or as though they were interchangeable. We shall accordingly address the issue of lack of a resolution to institute the suit first, and consider the issue of lack of resolution to purchase the motor vehicles in the context of whether the respondent had proved on a balance of probabilities that he was the one who purchased the motor vehicles.

A holistic rather than selective consideration of the pleadings leaves no doubt in our minds that this was not a suit brought in the name of the company, to enforce its rights and for its benefit. True, the pleadings could have been drafted in a more precise and elegant manner, but a consideration of the same in context makes it clear enough that the respondent was claiming that having contributed the money to purchase the 5 motor vehicles for the company, and the appellants having registered the motor vehicles in their names instead, he was entitled to payment by the appellants of the purchase price which he had paid for the vehicles. In the relevant prayer of the amended plaint dated 28th August 2012, the respondent prayed for:

> ***"(d) An order that the defendants do pay to the plaintiff the monetary value of the motor vehicles or such other amount as may be found to be due from the defendants to the plaintiff."***

In prayer "***(a)"*** the respondent had sought declarations that he had solely purchased the motor vehicles, that the same were wrongfully registered in the names of the appellants, and that the vehicles ***ought*** to have been registered in the name of the company. In view of the explicit prayer in ***"(d)"*** above for payment of the purchase price to him, stating that the motor vehicles ought to have been registered in the name of the company does not constitute this a suit by the company or a suit on its behalf for the registration of the vehicles in its name.

We would accordingly agree with the respondent that in the circumstances of this appeal, no resolution was necessary from the company before the respondent could institute the suit in his own name against the appellants in whose names the motor vehicles, which he claimed to have purchased, were registered. All that we understand the respondent to have been saying was that he was the beneficial owner of the 5 motor vehicles registered in the names of the appellants, having provided the purchase price, and the initial agreement to register them in the name of the company having fallen through. From the evidence on record, at no time were the motor vehicles registered in the name of the company so as to constitute them its property.

While we therefore agree with the appellants on the statement of the law as expounded in ***MACAURA V. NORTHERN ASSURANCE CO. LTD, (supra)*** and ***THE MARITIME TRADER, (supra)***, it has no application on the facts of this appeal. Accordingly, we hold that the first ground of appeal is devoid of merit and must fail.

The second ground of appeal is whether the respondent proved on a balance of probabilities that he provided the purchase price for the 5 motor vehicles. Before the trial court, both the respondent and the 1st appellant claimed to have each exclusively provided the money for the purchase of the 5 vehicles. The learned judge was therefore called upon to consider the rival claims and evidence and determine which of the parties had provided the purchase price, bearing in mind that the burden of proof was on the respondent to satisfy her on a balance of probabilities, the genuineness of his claim.

The respondent's evidence was that on 3rd June 2011 he travelled to Dubai in the company of the 1st appellant and the latter's son to purchase the motor vehicles. Before going to Dubai, he had withdrawn from his bank account Kshs 2 million. In Dubai, they bought three Toyota Motor Vehicles but had to cut their trip short after the 1st appellant's wife, the 2nd appellant, was arrested in Nairobi. After the 1st appellant had sorted out the 2nd appellant's problems with the law, the respondent and the 1st appellant took an ***RwandaAir*** flight back to Dubai. On this second time, the respondent testified that he had withdrawn Kshs 4 million from his account for purchase of more cars. In Dubai, they bought with that money a Range Rover and a Toyota Platz.

The respondent testified further that he subsequently and alone, paid the entire duty for the vehicles and left it to the 1st appellant to sort out registration of the motor vehicles in the name of the company. He was however shocked to find out later that the 1st appellant had registered the motor vehicles in his own name and had transferred some of the vehicles to the 2nd appellant.

Although the respondent claimed that he had paid all the expenses for the trips to Dubai, it is common

ground that there was no evidence adduced to that effect. Indeed in our view, the matter is a non-issue since the respondent did not seek any refund of money expended on the trips.

The respondent however, produced in evidence a statement from his ***Account No. 0165206894, Barclays Bank, Bamburi Branch***, which showed cash withdrawal of Kshs 2 million on 3rd June 2011, the date he alleges they made the first trip to Dubai. He also produced a statement from the same bank account showing cash withdrawal of Kshs ***4 million*** on 13th June 2011. The same statement also shows payment of ***Kshs 229,174.65*** to RwandaAir, Mombasa Sales Office.

The other relevant evidence adduced by the respondent were three bankers cheques totaling ***Kshs 2,400, 392*** drawn on his said Bank Account No 0165206894 on 16th July 2011 for Kshs ***800,130, Kshs 800, 132*** and ***Kshs 800,130***. The beneficiary of those three cheques is indicated as the ***Commissioner of Customs Services, Account A. P. Ngirichi***. Copies of the bankers cheques were produced as well as the bank statement indicating that the respondent's account was debited for those amounts.

The last pieces of evidence on payments to the Commissioner of Customs Services were copies of request for a bankers cheque and a copy of the bankers cheque itself. The request for bankers cheque was made on 12th July 2011 by the respondent from his ***Account No. 1101837810***, ***Kenya Commercial Bank, Mtwapa Branch***. It was for Kshs ***768,328.00*** in favour of the Commissioner of Customs Services. The bankers cheque ***No. 035944*** was issued on the same date in favour of the Commissioner of Customs, "***ACCT ANDREW PETER NGIRICHI".***

The respondent also produced evidence that he was responsible for fitting three of the motor vehicles, namely ***KBP 203Y***, ***KBP 205Y*** and ***KBQ 963H*** with Anti Theft Devices and the certificates of installation were issued in his name on 30th August 2011. Lastly the respondent produced copies of photographs taken with the 1st appellant, his son and the respondent in Dubai with the cars.

To rebut the above evidence and prove that he is the one who paid for the 5 motor vehicles, the 1st appellant produced copies of invoices from Ramna International Motors, Dubai; Import Declaration Forms; and Motor Vehicle Inspection Reports. Invoice Nos. 3452, 3453 and 3454 were all for Toyota motor vehicles and were dated 4th June 2011 while Invoice No. 3455 was for a Range Rover motor vehicle and was dated 21st June 2011. It was the 1st appellant's evidence therefore that he had personally paid the purchase price of the 5 motor vehicles and customs duty. Although he testified that he had purchased the motor vehicles from money withdrawn from his Euro Account, he did not present any evidence relating to any such account, his explanation being that he needed to give 14 days notice to obtain statements from that account.

From the above evidence, can it be concluded that the learned judge had erred in finding that the respondent had proved on a balance of probabilities that he had paid the purchase price and the customs duty for the 5 motor vehicles? Having carefully re-evaluated the evidence, we are satisfied that the learned judge did not err at all as claimed by the appellants.

First, we do not think that it was sheer coincidence that the respondent and the 1st appellant happened to be in Dubai in early June 2011 at the same time and on different missions. The respondent's bank statements support his testimony that he withdrew Kshs 2 million for the purchase of the motor vehicles in Dubai. Some of the photos produced in evidence clearly show the respondent and the 1st appellant posing with the cars outside offices that bear the name ***Ramna International Motors***. This is the firm that shortly thereafter sent invoices for the vehicles in the name of the 1st appellant. The respondent's evidence of two trips to Dubai when they purchased first 3 motor vehicles and subsequently 2 motor vehicles is supported by the evidence of withdrawal in cash of Kshs 4 million from his account prior to the second trip and the evidence of the payment that was made to RwandaAir, the airliner he testified they used to fly to Dubai.

More compelling however are the invoices produced by the 1st appellant, which strongly support the

respondent's testimony that the five vehicles were bought at two different times. In our view, that is why the invoices of the three Toyotas, namely Invoice Nos. 3452, 3453 and 3454 were dated 4th June 2011, a day after the respondent testified they made the first trip to Dubai, while the Invoice No. 3455 for the Range Rover Motor Vehicle was dated 21st June 2011, which coincides with the second trip to Dubai.

There is also convincing evidence that the duty of Kshs 2,400,392 for the Range Rover was paid by the respondent in three cheques of Kshs 800,130, Kshs 800, 132 and Kshs 800,130, as well as the duty for the other motor vehicles amounting to Kshs 768,328. That the 1st respondent was not a truthful witness was poignantly brought home in his testimony regarding the three cheques from the respondent totaling to Kshs 2,400,392. In his witness statement dated 30th January 2012, the 1st appellant explained that the amount of Kshs 2,400,392 paid by the respondent was part payment for 500 ordinary shares that he was selling to the respondent in ***East African Coast Solutions Ltd***. However, barely two moths later in an affidavit that he swore on 22nd March 2012, the 1st appellant deposed that the Kshs 2,400,392 was lent to him as an individual and that he had used the same to pay duty for the Range Rover. When confronted with the contradictions during cross-examination on 30th July 2014, he eventually admitted that he had received Kshs 3.4 million from the respondent (which included the Kshs 2,400,392 that paid for duty for the Range Rover) and Kshs 768,000 which was used to pay duty for the other motor vehicles.

As against the evidence adduced by the respondent, all that the 1st appellant produced as evidence that he had purchased the motor vehicles himself were invoices. As this Court stated in ***GREAT LAKES TRANSPORT CO. (U) LTD V. KENYA REVENUE AUTHORITY, (2009) KLR 720***, an invoice is not evidence of payment because its is given in cases where an order for supply of goods has been made but payment is not yet made. While the respondent produced credible evidence regarding the relevant withdrawals from his bank accounts, the 1st appellant did not offer any tangible evidence to rebut that of the respondent. The explanation that he needed 14 days to obtain his bank statements sounds rather lame and hollow when it is remembered that before he testified, the hearing of the defence case had been adjourned three times at his behest.

The trial judge was not at all impressed by the 1st appellant as a witness. She expressed herself thus:

> ***"I had opportunity to observe both the plaintiff and the 1st defendant as they testified. The plaintiff impressed me as being honest and sincere witness. There was no guile about him. The opposite, however was the case in respect of the 1st defendant. He impressed me as an untruthful witness and indeed his evidence showed inconsistencies which brought out his lies."***

This is a finding on the demeanor and credibility of a witness by the trial court which this Court cannot interfere with unless it is demonstrated that the finding was not supported by evidence or was otherwise plainly wrong.

Taking into account all the foregoing, we are satisfied that the learned judge did not base her decision merely on the demeanor of the witnesses as claimed by the appellants, but on the evidence that was adduced by the two parties. The judge was justified to express her views on the credibility of the 1st appellant and properly concluded, in our view, that the respondent had proved his case on a balance of probabilities. In light of the evidence that was adduced regarding the purchase of the motor vehicles, the lack of a resolution by the company to purchase the 5 vehicles cannot lead to the conclusion that the respondent did not prove on a balance of probabilities that he paid the purchase for the 5 motor vehicles. The ground of appeal similarly fails.

On the failure to award costs to the 2nd appellant after the dismissal of the suit against her, we note that the five motor vehicles were initially registered in the name of the 1st appellant who subsequently transferred some of them to the 2nd appellant. Thus the certificate of registration of KBQ 002A indicates that the vehicle was first registered in Kenya on 27th July 2011 in the name of the 1st appellant. A copy of the records from the Registrar of Motor Vehicles dated 28th November 2011 shows however that as of

that date the same vehicle was registered in the name of the 2nd appellant, as owner. Motor vehicles Registration Nos. KBP 203Y and KBP 205 Y were first registered on 14th July 2011 in the name of the 1st appellant. The records from the Registrar of Motor Vehicles show that as of 28th November 2011, the two vehicles were registered in the name of the 2nd appellant.

When the respondent first filed his suit, he prayed for return of the motor vehicles to him and that explains the reason why the 2nd appellant, in whose name some of the vehicles had already been transferred, was made a party. However before the suit could be heard and determined, most of the vehicles had already been sold and transferred to third parties, thus compelling the respondent to amend his plaint and seek payment of the purchase price of the motor vehicles instead of their return. The respondent had legitimate grounds to make the 2nd appellant a party to the suit and did not deserve to pay costs to the 2nd appellant merely because by some form of delay, the appellants were able to transfer the motor vehicles to third parties, thus defeating the respondent's initial claim for the return of the motor vehicles. The 2nd appellant was not entirely blameless which is reason enough for the refusal to award her costs.

Taking into account the history of this matter and all the evidence on record, we are not persuaded that the learned judge exercised her discretion injudiciously by declining to award costs to the 2nd appellant, in whose name some of the vehicles purchased by the respondent had been registered prior to being transferred yet again to third parties who were not before the court. As Crabbe, JA stated in ***KOHLI V. POPATLAL (1964) EA, 219***):

> ***"Having regard to the above authorities it seems to me that where a discretion as to costs has been exercised by a judge, his decision is unimpeachable on appeal unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case, or nonexistent."***

The last issue in this appeal relates to the date from which interest was payable on the amount of money that the High Court found to be due to the respondent. Under section 26(1) of the Civil Procedure Act, the Court has a wide discretion regarding interest. (See ***OMEGA ENTERPRISES KENYA LTD V. SIRIKWA HOTEL LTD & OTHERS CA NO. 235 OF 2001).***

In ***SHAH V. GUILDERS INTERNATIONAL BANK LTD, [2003] KLR 8*** this Court stated as follows regarding that provision:

> ***"This section (26), in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:***
>
> ***(1) the period before the suit is filed;***
>
> ***(2) the period from the date the suit is filed to the date when the court gives its judgment; and***
>
> ***(3) from the date of judgment to the date of payment of the sum adjudged."***

In principle therefore there is nothing that would prevent the court, in a deserving case from awarding interest from a date before the filing of the suit. (See ***MUMIAS SUGAR CO LTD V. NALINKUMAR M. SHAH, CA NO. 21 OF 2011 (MSA).*** In this case however, we agree with the appellants that the actual amount due and owing from them was not determined until the date of judgment on 5th March 2015. In the circumstances, interest ought to have been awarded with effect from that date.

Ultimately, save for the order that we make that the amount awarded to the respondent shall attract interest with effect from the date of the judgment of the High Court, this appeal is devoid of merit and the same is hereby dismissed. The respondent shall have costs in this Court and in the High Court. It is so

ordered.

Dated and delivered at Malindi this 17th day of July 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.