Mbonika v Ooko & another (Cause 220 of 2014)
[2023] KEELRC 529 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 529 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 220 OF 2014

BOM MANANI, J

MARCH 2, 2023

BETWEEN

SAIDA RASHID MBONIKA ..... CLAIMANT

AND

G4S SECURITY LIMITED ..... 1ST RESPONDENT

DOMINIC OOKO ..... 2ND RESPONDENT

RULING

1. The application before me seeks to compel the Respondents to pay to the claimant interest earned on the sum of Ksh. 2,500,000.00 deposited on a joint interest earning account as security for the performance of the court's decree that was the subject of an appeal. In the claimant's view, since the parties recorded a consent directing that such interest be released to her, the Respondents are obligated to pay to the claimant not just the principal sum as decreed by the Court of Appeal and costs as decreed by the trial court but the interest on the deposited sum as well.

2. The application is opposed. According to the respondents, there was no award of interest on the principal sum either by the trial or the appellate court. As such the insistence on the interest earned on the joint account by the claimant is misguided.

Background to the Dispute on Interest

3. On April 28, 2018, the trial court entered judgment in the cause in favour of the claimant for the sum of Ksh. 5,928,000.00 plus costs of the suit. There was no order for interest.

4. The Respondents were dissatisfied with the judgment. Consequently, they filed Civil Appeal number 195 of 2019 before the Court of Appeal. It appears that there was Cross Appeal number 197 of 2019 also filed. The two appeals were consolidated.

5. Meanwhile, on June 27, 2018 the parties entered into a consent by which security for the performance of the decree by the trial court was furnished. The consent provided as follows:-

    a. The application for stay of execution dated 2May 5, 2017 be allowed on condition that the 1st respondent will provide a sum of Ksh. 2.5 million as security for the appeal.

    b. The sum of Ksh.2.5 million provided as security be deposited into a joint interest bearing account in the names of the advocates for the claimant and for the 1st respondent within 45 days of filing this consent.

    c. The sums will be held in the joint account pending the hearing and determination of the appeal by the Court of Appeal.

6. On February 4, 2022, the Court of Appeal delivered its decision partially allowing the Respondents' appeal. As a result, the compensatory award to the Claimant was stepped down from Ksh. 5,928,000.00 to Ksh. 2,964,000.00. The Cross Appeal was dismissed. The court ordered the parties to bear their costs. Again, there was no mention of interest on the award.

7. On March 3, 2022, the parties filed a consent whose terms were, in part, as follows:-

    a. The claimant's party and party costs be and are hereby assessed at Ksh. 450,000.00.

    b. The decretal sum of Ksh. 3,414,000.00 does comprise the judgment amount of Ksh. 2,964,000.00 and the party to party costs mentioned in 1 above.

    c. The sum of Ksh. 2,500,000.00 that was deposited in a joint account in the names of the firm of Onyony & Company Advocates and Hamilton Harrison & Mathews Advocates together with the interest accrued thereon be released to the Claimant's advocates, Onyony and Company Advocates whose bank account details are as follows:-

    d. The Respondents to pay the Claimant the balance of the decretal sum within 45 days from the date of filing this consent.

8. It is these consents that the claimant relies on to argue that interest on the amount deposited on the joint account is due to her in addition to the sum of Ksh. 3,414,000.00 comprising the principal sum and costs as awarded by the two courts. In the claimant's view, since the consent between the parties required the Respondents to release the interest on the sum of Ksh. 2,500,000.00 to her, the said interest is not part of the principal sum and costs computed at Ksh. 3,414,000.00. The accrued interest was to be paid in addition to this aforesaid sum.

9. In order to determine ownership of the amount earned in accrued interest on the joint account, it is important to consider the implications of the trial court's judgment on the postponed settlement of the judgment sum. The court did not award the claimant interest. That simply means that the respondent was not obligated to factor interest into delayed settlement of the decree.

10. Put differently, one needs to ask whether the respondents would have been obligated to pay to the claimant the sum of Ksh. 2,964,000.00 ordered by the Court of Appeal together with interest had the requirement of opening the joint account never arisen. Having regard to the judgment of the trial court, the answer to this question is in the negative.

11. The purpose of opening the joint account, in my humble view, was to merely provide security for the performance of the trial court's decree by requiring the respondents to cede exclusive control of the funds offered as security and put them on an account over which both parties had control. This requirement did not change the trial court's decree to the extent that it did not grant the claimant

interest on the judgment amount. If the respondents had held onto the security in question up to the time the Court of Appeal rendered its decision, they would not have been condemned to pay interest on the sum decreed by the Court of Appeal.

12. In my view therefore, any interest earned on the security deposited by the respondents was the property of the respondents. The Respondents were free to apply the interest as they pleased.

13. The respondents assert that they opted to apply the interest on the joint account (which was otherwise due to them) to settle part of what was due to the claimant in terms of the Court of Appeal judgment. On my part, I think that the directions by the parties to the bank that the interest on the account should be released to the claimant's Advocates ought to be understood in this context.

14. The fact that the consent states that the amount on the joint account together with interest was to be released to the claimant, in my respectful view, did not mean that the decretal sum due to the claimant had been earning interest and that the claimant would be entitled to receive the principal sum awarded, costs and interest as separate elements of the court's decree. Such interpretation would distort the import of the trial court's decision.

15. In terms of the Court of Appeal judgment, the respondents were, in my respectful view, obligated to pay to the claimant the sum of Ksh. 2,964,000.00 without interest. In addition, the Respondents were obligated to pay costs of the trial court as ordered by the trial court which, according to the consent dated March 3, 2022, were agreed at Ksh. 450,000.00. The total payments due to the claimant, in my view, were Ksh. 3,414,000.00.

16. That the foregoing is the position and is what the parties understood it to be can also be inferred from the terms of their own consent dated March 3, 2022. Clause two (2) of the consent reads as follow:-

'' The decretal sum of Ksh. 3,414,000.00 does comprise the judgment amount of Ksh. 2,964,000.00 and the party to party costs mentioned in 1 above''.

17. This clause of the consent acknowledges that at the time of recording the agreement between the parties the ''decretal sum'' stood at Ksh. 3,414,000.00. The term ''decretal sum'' denotes all the amounts that are due and payable under a decree or court judgment.

18. If the parties had intended that the interest earned on the deposit on the joint account be factored into the amount due under the decree of the Court of Appeal, nothing would have prevented them from expressly saying as much. In that case, clause two (2) of the consent of March 3, 2022 between the parties would have depicted the ''decretal sum'' as comprising the principal sum of Ksh. 2,964,000.00, costs of Ksh. 450,000.00 and accrued interest of Ksh. 466,408.60 all totaling Ksh. 3,880,,408.60.

19. After ascertaining the ''decretal sum'' under clause two (2) of their consent, the parties proceeded to proclaim at clause three (3) of the same consent that the sum of Ksh. 2,500,000.00 held on their joint account together with accrued interest would be released to the applicant's Advocates in part settlement of the decree. At clause four (4) the parties then indicated that upon the payments in clause three (3) of the consent, the balance of the ''decretal sum'' shall be paid within 45 days thereafter. By reference to the balance of the ''decretal sum'' in clause four (4) of the consent, I understand the parties to be referring to the balance of Ksh. 3,414,000.00 as ascertained in clause two (2) of their consent after the payments under clause three (3) of the consent. It cannot have been the intention of the parties that there was some other money that was payable outside the figure indicated by agreement under clause two (2) of the consent as the ''decretal sum''.

20. The respondents had placed security of Ksh. 2,500,000.00 on a joint account with the claimant which had earned interest that belonged to the respondents. As indicated earlier, the interest did not belong

to the claimant because the trial court judgment did not award her interest. The Respondents elected to release the total amount on the account, now standing at Ksh. 2,966,408.60 to the claimant.

21. In terms of the Court of Appeal judgment and the consent between the parties dated March 3, 2022, the obligation of the Respondents to the claimant after releasing the above sum, in my respectful view, was to pay her the difference between the amounts now released and the decreed sum of Ksh. 3,414,000.00. This approximates Ksh. 447,593.00.

22. In their affidavit dated January 19, 2023, the Respondents indicate that they remitted Ksh. 447,692.00 to the claimant's Advocates on September 7, 2022. The claimant does not deny receiving this amount. In terms of my earlier analysis, this last payment discharged the respondents from their obligation under the decrees of both the trial and appellate court. The payment of Ksh. 447,692.00, in my humble view, settled the matter fully.

23. Before I make the final orders, I should perhaps comment on some of the decisions relied on by the applicant to advance her case. In the case of *Margaret Wanjiru Wandia v Metumi Power Company Limited* [2021] eKLR, the court ordered that interest on the purchase price for easement rights be paid to the vendor. This money had been placed on an escrow account pending the vendor perfecting her title to the properties over which the easement was to be registered.

24. In my view, the facts in the *Margaret Wanjiru* case (supra) are materially different from the facts in the case before me. In that case, the parties were nearing conclusion of a transaction over easement rights over the suit land when the purchaser realized that the vendor's title to the land was imperfect. As a result, it was agreed that the purchase price be placed on an escrow account pending the vendor perfecting title to the land.

25. The *Margaret Wanjiru* case represents a case in the law of equity where the doctrine of conversion would treat the interests of the parties as converted even as they work towards completing the transaction in question. As has been stated oftentimes, in such case equity considers as done that which ought to have been done.

26. In effect, pending the process of perfection of title, equity considers the interest of the vendor in the transaction as converted into the purchase price and those of the purchaser as converted into the easement that is pending registration. Consequently, it was sensible for the court to hold that the interest on the money, in the circumstances of that case, belonged to the vendor.

27. The consent in the *Margaret Wanjiru* case was interpreted in the context of the peculiar circumstances of that case. Those facts are not similar to the facts in the dispute before me. Just like in the Margaret Wanjiru case, the consent between the parties before me if interpreted in the context of the circumstances of the case cannot yield the conclusion that the interest on the security should go to the claimant in addition to the sum of Ksh. 3,414,000.00.

28. In *APA Insurance Co. Ltd v Esther Kavindu Mwongo & another* [2020] eKLR, the primary judgment and the subsequent declaratory judgment that was the subject of appeal had both decreed interest on the principal amount that had been awarded. Therefore, unlike in the case before me the consequence of postponed settlement of the decrees in the aforesaid suits was that Apa Insurance Company Ltd had to make provision for interest for the delayed payment whether or not the parties had placed the funds on a joint account.

29. The case of *Joseph Gitau Nganga v Mary Ngaguthi Munga (Suing as personal representative of Damson Nderitu Munga (Deceased)* [2021] eKLR presents a somewhat comparable scenario with the case of *APA Insurance Co. Ltd* (supra) above to the extent that the appellate court's decree had a provision for interest on the principal sum awarded. Beyond this, I am afraid to observe that the learned Judge did

not, in my respectful view, provide cogent legal grounds to justify the back application of the order on interest. I will therefore respectfully elect to look at the issue from a perspective other than that of the learned Judge.

30. Finally regarding the decision by the Court of Appeal in *Peter Baraza Rabado v Nation Newspapers Limited* [2017] eKLR, it is correct as counsel for the applicant mentions that the court directed that the interest accrued on the joint account be shared between the parties proportionally in accordance with the court's decision on the principal sum. However, it is noteworthy that whilst in the case before the Court of Appeal the parties had not fixed what they perceived as the ''decretal sum'', in the case before me the parties have through their own agreement as expressed in the consent dated March 3, 2022 fixed this amount at Ksh 3,414,000.00.

31. Therefore, the two scenarios (the one before the Court of Appeal in the *Peter Baraza* case and the one before me) are distinct and the decision of the Court of Appeal aforesaid cannot be relied on to resolve the dispute before me. Importantly, it is worth commenting that even as it rendered its decision, the Court of Appeal was alive to the fact that circumstances of cases would differ. And hence its expression as follows:-

> ''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.'' Emphasis added by underlining.

Disposition

32. For the above reasons, it is my view that the application dated December 6, 2022 is lacking in merit. Consequently, it is dismissed but without an order as to costs.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondents

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI