



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Mutiso & another (Civil Appeal 34 of 2019)
[2024] KEHC 1815 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 34 OF 2019
TM MATHEKA, J
FEBRUARY 23, 2024**

BETWEEN

CLIFFORD OMONDI OTIENO APPELLANT

AND

GEOFFREY MUTHIANI MUTISO 1ST RESPONDENT

EMMANUEL MULAMA MASETE 2ND RESPONDENT

RULING

1. What is before me is the application dated 12th October 2022. It is brought under section 50 rule (sic) Sections ,1A, 2A & 3A of the [Civil Procedure Act](#) and the applicant seeks orders set out as hereunder;
 - a. That the judgment delivered by this court on 13/11/2020 did not set aside the lower court orders in Makindu PMCC 270 of 2017 accrual of interest on the assessed damages.
 - b. The appellant is bound to settle the assessed damages plus costs and interest until payment in full.
 - c. That the costs of this application be borne by the Appellant/Respondent herein.
2. The applicant was the plaintiff/Applicant in Makindu PMCC 270 of 2017 where judgment was delivered in his favour, on 28th March 2019, in his favour; liability at 100% and general damages of Ksh 2,545,681/= plus costs and interest. The 1st Respondent filed an appeal against the orders of the subordinate court. By a judgment delivered on 13th November 2020 this court (Ong'udi J) allowed the appeal to the extent that the applicant would bear liability at 10% bringing the total award to Ksh 2, 291,112/90. The Judgment states at paragraph 55 '...the judgment of the lower court is set aside and substituted with one for Ksh 2, 291,112/90 plus costs in favour of the 1st Respondent (the applicant



herein). The 1st Respondent gets half the costs for the appeal. Both Judgments are annexed to the applicant's affidavit in support of the application, sworn on the same day.

3. It is evident that issue here is whether this court in its judgment of 13th November 2020 set aside the order of the subordinate court that the damages were payable together with interest.
4. The applicant's position is that the damages as assessed was to accrue interest from the date of judgment in the lower court on 28th March 2019 until payment in full. He argues that there was no appeal on the issue of interest and hence this court did not set aside the lower court orders awarding interest from the date of judgment until payment in full.
5. He contends that that efforts to proceed with execution in the lower court have been objected by the appellant hence the need for this court to confirm whether or not it set aside the orders of the lower court on accrual of interest.
6. The application is opposed by the 1st respondent through his replying affidavit sworn on 8th December 2022. It is his position that he has complied with this court's Judgment upon his successful appeal and has settled the decretal sum plus the costs awarded which were taxed. Evidence of payment is annexed to the affidavit in reply.
7. He depones that despite settling the sum and paying the auctioneers an extra sum of Ksh 90,000/=, the plaintiff /applicant has continued harassing him through auctioneers and demanding huge and exorbitant sums of money which are excessive and unexplained. That on 5th July 2022, the plaintiff filed a notice to show cause (NTSC) in the trial court seeking the sum of Ksh 1,885,963.94/=. A notice is exhibited as COO8 and the NTSC as COO9.
8. He deponed that after responding to the NTSC, the plaintiff/applicant filed another replying affidavit alleging that the pending decretal sum was Ksh 825,347.23/=. The affidavit is exhibited as COO10.
9. He deponed that the plaintiff/applicant is taking advantage through his Advocates and wants to unjustly enrich himself by demanding exorbitant sums of money not awarded by this court and alleging the same to be interest. That the plaintiff has a different interpretation of this court's judgment hence the back and forth despite receiving the entire decretal sum. Correspondences are exhibited as COO11.
10. He deponed that the plaintiff/Applicant's non-disclosure of material facts, suppression of facts and misrepresentation of facts are an attempt to extort from him.
11. The parties elected to canvass the application through written submissions and appropriate directions were given.

Submissions by the Plaintiff/Applicant

12. The applicant began by pointing out his own errors in the application, the heading where he had placed himself as the appellant, and the provisions of the law where he now cites order 51 rule 1 of the CPR as one of the provisions relied upon. He submitted that what he was seeking were orders of interpretation and clarification of the judgment of this court with respect to the issue of interest as awarded by the subordinate court. He argues that this court did not mention the issue of costs and interest as it was not contested in the appeal.
13. He submitted that if this court wanted to set aside the orders of the lower court awarding interest and costs to the plaintiff, it would have expressly said so in its judgment. He relied on the case of Galaxy Paints Co. Ltd –vs- Falcon Guards Ltd (2002) E.A 385 where it was observed that; “parties are bound by their pleadings and the court will not grant a relief which has not been sought.”



14. He submitted that the appellant has refused to settle the costs of the lower court and the interest that accrued on the award by the subordinate court which he claims amounts to Ksh 825, 347.23 He submitted that the NTSC was suspended so that this court can interpret its judgment of 30th November 2020.
15. He submitted that fees paid to the auctioneers, upon attachment, is not part payment of the decretal amount and cannot be off set as such.
16. He submitted that if the appellant's interpretation was to be correct, it would mean that the lower court had erred in awarding costs and interest yet he won the case and costs follow the event.

Submissions by the 1st Respondent/Appellant

17. The 1st respondent submitted that the court in its judgment was clear that it set aside the Judgment of the subordinate court and substituted it with its own. He argued that to 'set aside' a judgment decree, award or any proceedings is to cancel, annul or revoke them at the instance of a party unjustly or irregularly affected by them. That the judgment was 'substituted with' meaning that it was literally replaced with another.
18. He submitted that the appeal succeeded and that it why this court in exercising its appellate jurisdiction set aside the trial court's decision and made its own orders. He contended that the applicant was not awarded any interest and it is only this court that can make a final interpretation of its judgment. He relied on Beth Muthoni Njau & Another –vs- City Finance Bank Ltd [2018] e KLR where the Court of Appeal held that;

From the judgment it is evident that the learned judges considered the appeal before rendering their judgment. The learned judges stated thus: -

“In the result, the judgment of Shs. 66 million in favour of the deceased is set aside and substituted for a judgment of Shs. 66 million less set-off of Shs. 24 million (net Shs. 42 million) ...in summary therefore, judgment is entered for the respondent for a net of Shs. 42 million with half costs of the appeal and half of the costs of the suit.”

From the above we do not find any errors of law that need to be corrected. If at all the learned judges intended to award the applicants interest nothing would have been easier than for them to say as much in the judgment. Having failed to do so, we cannot review the judgment and award the applicants interest which was denied by the learned judges in their own wisdom. There is, therefore, no basis or justification for re-opening the sound and comprehensive decision of this court in order to award interest to the applicants herein. There was no error apparent on the face of the judgment established by the applicants to clearly show that a significant injustice has occurred. It was within the powers of the court to award or not to award interest and in its wisdom did address the issue in the circumstances of the dispute and in the best interest of the

parties. The court exercised its discretion properly and judiciously and in the absence of the criteria set for our interference, we cannot unilaterally fault the court in the manner it reached its decision.

19. He also relied on Mary Anyango –vs- South Nyanza Sugar Company Ltd (2021) eKLR where it was held:

“When the High Court entered judgment for the appellant, it set aside the decision of the lower court. I do agree with the judgment debtor's view that once the appeal was allowed



and the decision of the trial court was replaced with this court's judgment, that became the decree of the subordinate court and it is that decree that will be executed against the judgment debtor."

20. The appellant submitted that the award of interest is a matter falling within the discretion of the court. That the applicant is misguided for claiming from a court decision that was annulled in total.
21. He contended that the grant of stay orders on 8th October 2019 meant that the judgment, decree and all consequential orders of the trial court were stopped pending the determination of the appeal. That it would be unreasonable for the applicant to allege that the stay order only applied to parts of the judgment. He relied on Michael Ntouthi Mitheu –vs- Abraham Kivondo Musau [2021] e KLR where the court held that;

“In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the status quo would remain as it were before the judgment.”
22. He contends that the court had the discretion with respect award of interest as provided for under section 26(1) of the *Civil Procedure Act*.
23. He submitted that the applicant has frustrated him and should therefore get the costs of this application. He urged the court to dismiss the application.
24. I have carefully considered the application, the affidavits, annexures, submissions and the record, and the issue for determination is whether there is any merit in the application merited.

Analysis and Determination

25. I have made reference to the judgment of the subordinate court and this court hereinabove. It is not in dispute that the subordinate court awarded the plaintiff both costs and interest in its judgment, and the judgment on appeal did not award any interest to the plaintiff. It is also not in dispute that in its judgment the court on appeal stated “The judgment of the lower court is set aside and substituted with one for Ksh 2,291, 112/90 plus costs in favour of the 1st Respondent. The 1st Respondent gets half of the costs of this appeal.”
26. In the subordinate court, after delivery of the judgment on 28th March 2019, the trial court granted stay of execution for 45 days. Pursuant to an application filed on 14/06/2019, this court granted a temporary stay of execution pending the hearing and determination of the application. On 8th October 2019, the application was determined and conditional stay of execution was granted pending the hearing and determination of the appeal. The existence of the stay orders during the pendency of the appeal meant that the trial court judgment and all its consequential orders had been halted. It goes without saying that no interest could have accrued during the periods of stay.
27. In the appeal, the appellant made it clear that he was appealing against the entire ruling(sic) of the subordinate court. Order 42 Rule 1(2) of the Civil Procedure Rules provides that;

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”



28. On the other hand, Order 42 Rule 4 provides that;

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule.

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

29. The import of the above provisions is that any ground of objection that an appellant intends to rely on must be set forth concisely and be numbered. On the other hand, the hands of this court are not tied by the listed grounds save that a party would need to be heard on any new ground raised by the court.

30. In this case this court did not raise any new ground of appeal for determination but set out the issues for determination. With respect

to interest this court appears to have simply exercised its discretion which is in line with

31. The court of appeal decision in *Beth Muthoni Njau* (supra); the Court declined the application and stated that; “It was within the powers of the court to award or not to award interest and in its wisdom did address the issue in the circumstances of the dispute and in the best interest of the parties.”

32. A subsequent attempt to appeal the ruling at the Supreme Court in *Beth Muthoni Njau & Another v City Finance Bank Limited* [2019] e KLR Civil Application no 18 of 2019 was unsuccessful. In dismissing the application for extension of time for appeal, the Supreme Court stated;”

“

“(e) We thus note that the substantive appeal before the Court of Appeal delivered on 16th June 2017 is not the subject of the intended appeal and so it remains unchallenged. The Ruling sought to be appealed was one of review of that Judgment on the question of interest on the decretal sum awarded to the Respondent.

(f) It is obvious to us that such a matter cannot be the basis for an appeal as of right under Article 163(4)(a) of *the Constitution* and because no certification has been granted on the basis of the matter being one of great public importance, it means that any extension of time to file an appeal is a waste of this Court’s time.

(g) It follows therefore that whatever the reasons for delay, once we have accepted the Respondent’s point on the law applicable to the intended appeal, it means that the Application before us is misconceived and the Applicants, represented by Counsel, ought to have known that it was also a non-starter.”

33. From the foregoing, it is evident that the Court of Appeal has delivered itself on the issue. That the issue of awarding interest is discretionary and the court would not be faulted for not doing so. In my view, this court (Ong’udi J) made a clear decision. It does not appear to me to be an error on the face of the judgment. It appears to be a substantive decision not to award interest. This would not be the right forum to challenge that decision. There is the risk of me appearing to sit on appeal of the judgment



of a court of similar jurisdiction. I cannot do that. On the substantive issue the applicant would have to deal with it in the Superior Court.

34. Ultimately, I find that the judge clearly stated that the Judgment of the subordinate court was substituted with the Judgment on appeal. Costs were awarded. No interest was awarded. There is nothing to interpret or clarify. The words speak for themselves.
35. I find that the application does not have merit. The same is dismissed with costs to the 1st respondent.

Dated and signed this 23rd day of February 2024

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Mumbua T Matheka

Judge

Delivered via email this 23rd day of February 2024

CA Nelima

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RULING HCCA 34 OF 2019 Page 4 of 4

