



**Manyonge v Alpharama Limited (Civil Appeal 13 of 2017)  
[2024] KEHC 2660 (KLR) (Civ) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 13 OF 2017**

**AN ONGERI, J**

**MARCH 15, 2024**

**BETWEEN**

**PATRICK JUMA MANYONGE ..... APPELLANT**

**AND**

**ALPHARAMA LIMITED ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this application is the one dated 16/11/2023 brought under Section 1A, 1B, 3A, 91 and 99 of the Civil Procedure Act Cap 21 and Order 27 and 51 Rule of the Civil Procedure Rules and all other enabling provisions of the law seeking the following orders;
  - i. This court be pleased to review and correct the omissions and/or slip in its judgement delivered on 16<sup>th</sup> August 2023 and align its conclusion with paragraph 36 & 37 of its Judgement by also finding that Judgement was entered for the appellant against the respondent in the counterclaim for Kshs.535,529/= which was admitted by the respondent together with interest at Court rates from 10<sup>th</sup> December 2009 (being the date of delivery of raw hides and skins) or 23<sup>rd</sup> June 2012 (being the date of the appellants counterclaim) as well as awards costs before the trial Courts which were all omitted in the Courts judgement.
    - a. The costs of this application be provided for.
2. The application is based on the grounds on the face of it and supported by the affidavit of Joseph Makumi in which it is deposed as follows;
3. That by a judgement of this court delivered on 16<sup>th</sup> August 2023 allowing the appellant counterclaim for Kshs 535,529/ = which was admitted by the respondent, setting aside the lower Courts award of



- interest at 15% as the same was not agreed upon and further the court ordered each part to meet their own costs for the appeal.
4. That the Court however omitted to address itself on the award of interest either from 10<sup>th</sup> December 2009 (being the date of delivery of raw hides and skins) or 23<sup>rd</sup> June 2012 (being the date of the appellant's counterclaim) as well as awards costs before the trial Courts having only addressed itself on the disputed interest rate of 15% that had not been agreed upon.
  5. That the appellant only learnt of this omission on 4<sup>th</sup> September 2023 when he was issued with a decree which did not provide for the award of interest or costs before the trial Court where upon enquiry from the registry he was advised to follow up the issue with the judge during the hearing of its application for release of security dated 23<sup>rd</sup> August 2023.
  6. That the issue was thus raised on 16<sup>th</sup> November 2023 during the hearing of the appellant's application dated 23<sup>rd</sup> August 2023 where it became clear that the issue should have been raised by way of a formal application.
  7. That it is in the interest of justice that the judgement be corrected to reflect the true intention of this court.
  8. ■ THAT with the enactment of Article 159 of *the constitution* Justice should be administered without undue regard to technicalities more so where the finding of the Court is manifest in its judgement.
  9. I have considered the replying affidavit by the respondent in opposition to the application in which the Respondent stated that the application in a nutshell seeks the Court to review its Judgment and award interest at Court rates and costs.
  10. Further, that the court stated in its judgment as follows;
    - i. Judgment is entered in favour of the Appellant against the Respondent in Counterclaim for Kshs. 535,529/= which was admitted by the Respondent,
    - ii. There is no evidence that the parties agreed on the issue of interest to be charged.
    - iii. Each party to bear its own cost of this Appeal.
  11. That the Court has discretion to pronounce itself on award of costs and which discretion the Honourable Judge did exercise and cannot be subject of review.
  12. That on the issue of the claim for interest to be awarded, the Court considered the issue of claim for interest as placed in the Counterclaim and rightfully held that being a contractual claim the aspect of interest had not been mutually agreed upon.
  13. That the Appellant's application does not meet the test set out by the law for the Judgment to be reviewed and the same amounts to an abuse of Court process and should be dismissed with costs.
  14. The parties filed submissions as follows; the appellant/ applicant submitted that the court in its judgement of 16/8/2023 allowed the appellant's appeal, set aside the respondents judgement for Kshs 2,119,571/= and entered judgement for the appellant for Kshs 535,529/=.
  15. That the court further reversed the lower court's judgement on interest at 15% which was not agreed upon leaving interest at Court rate of 12% but the same was not factored in issuing a decree. The Court further omitted to make Orders on who was to pay costs in the Lower Court having only addressed itself to costs.



16. The appellant further submitted that the interest ought to have been 12% and in support cited *Nairobi Commercial & Tax Division Civil Suit No. E434 Of 2019 R. J. Varsani Enterprises Ltd vs Ville Holdings Ltd* where Justice A. Mabeya, FCI Arb held;

“20. I have looked at the agreement. The same does not specify an exact rate of interest and none of the parties has tendered evidence to prove what the CBK base rate was at the time of default. It follows therefore that this Court cannot rely on the parties’ submissions on as regards interest rates.

21. In *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR, the Court of Appeal of Kenya relying on the Lesotho case of *Boliba Multipurpose Cooperative Society vs. Ramathibeli Joseph Mpoko*, CCT 37 of 2007 where it was held that if no evidence is provided regarding the rate of interest, as claimed in the plaint the claim must then fail, held as follows: -

“We have evaluated the evidence on record. The respondent did not lead any evidence to prove its claim of interest at the rate of 26% per annum. There is no evidence on record proving the prevailing commercial rate of interest. The trial court did not give any reasons for awarding 20% rate of interest. There is no evidence on record to demonstrate 20% per annum was the prevailing commercial rate of interest. In the final analysis, this appeal is partially successful on the issue of rate of interest. Guided by case law, the respondent is entitled to the court rate of interest with effect from the date of filing suit”.

22. As none of the parties produced evidence to prove what the Central Bank of Kenya Base rate was at the time, interest can only be chargeable at Court rates as per Section 26(1) of the *Civil Procedure Act* and under the Practice Note No.1 of 1982 where the then Chief Justice Simpson Ag CJ issued the following practice direction: -

“The *Civil Procedure Act* Cap 21 Laws of Kenya Section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable. In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%”.

23. Whilst the defendant proposes 7% to 11% the plaintiff submitted for 14%. Both offered no evidence. Since the plaintiff is entitled to interest, the Court shall apply the conventional court rate of 12%. Interest shall therefore be chargeable at 12% on all delayed payments for the various days of delay as per the agreement until when final payment was made.”

17. The appellant further submitted that interest should have been awarded from 10/12/2009 being the date of delivery of raw hides and skins or 23/6/2012 being the date of the appellant’s counterclaim.



18. In support the appellant/applicant cited *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR where it was held that;

“ Guided by case law, the respondent is entitled to the court rate of interest with effect from the date of filing suit. The court rate of interest at the time of the impugned judgment was 14% per annum, which we hereby grant. ”

19. On costs the appellant/applicant submitted that it is not in issue that the court only addressed itself on costs before it and not costs below the trial court. It was argued that the appeal was fully heard reversing the lower court’s judgement and there’s thus no reason why the appellant should not be granted costs for defending the appellants counterclaim for Kshs. 2,119,571 and costs for his successful counterclaim which succeeded at Kshs. 535,529.

20. The sole issue for determination is whether the judgment dated 16/8/2023 should be reviewed.

21. The provisions for review are as follows; Section 80 of the [Civil Procedure Act](#) and Order 45 of which state as follows;

80. Review

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Application for review of decree or order [Order 45, rule 1]

1. Any person considering himself aggrieved—
  - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is hereby allowed,  
and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review. (emphasis added)

22. Upon perusal of the judgment, it is evident that the court held as follows;



- i. Judgment is entered in favour of the Appellant against the Respondent in Counterclaim for Kshs. 535,529/= which was admitted by the Respondent,
  - ii. There is no evidence that the parties agreed on the issue of interest to be charged.
  - iii. Each party to bear its own cost of this Appeal.
23. I find that the court having entered judgment on the counter-claim for ksh.535,529/= ought to have determined who is responsible for the costs.
  24. I find that there is an omission on the face of the record since there is no determination on the issue of costs and interest.
  25. In the case of *Salim Bin Ahmed Hanji & Co Ashur Ahmed Transporters v Simon Kimtai Kiror & another [2 018]* eKLR, the court held as follow;
 

“In my judgment on appeal by the appellant, I found in favour of the Respondent, now applicant, and made a finding that the appellants did not demonstrate that the awards of damages in the trial court were in any way excessive. I proceeded to dismiss the appeal with no orders as to costs.

    7. Upon reflection and reconsideration of this judgment, I must admit that my exercise of discretion in the matter of the costs was not supported by any logical arguments or findings. I gave no explanation for denying the successful party its costs.

I agree that the failure to award costs to the applicant was an error that I must move to correct.”
  26. Section 99 of the *Civil Procedure Act* empowers the court on application by a party or to move suo moto to rectify an error,
  27. Section 26 of the *Civil Procedure Act* on payment of money decrees 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.”
  28. I find that Section 27 of the *Civil Procedure Act* empowers a court to award costs of a suit, and the court has the power to determine by whom and out of which property such costs may be paid.
  29. That Section on award of costs stipulates that:
 

“

    1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for



the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

30. I allow the application dated 16/11/2023 as follows;

31. The judgment be and is hereby entered in favor of the appellant and against the respondent in the sum of ksh.535,529 plus costs and interest at court rates from the date of filing the counterclaim (23rd June 2012) until payment in full.

32. The Appellant is also awarded costs of the original suit. However, each party to bear its own costs of the appeal.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**A. N. ONGERI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

..... for the Appellant

..... for the Respondent

