



**Shah & another v High Grove Holdings Limited & 2 others (Civil Case 202 of 2019)  
[2023] KEHC 17310 (KLR) (Commercial & Admiralty) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17310 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
CIVIL CASE 202 OF 2019  
DO CHEPKWONY, J  
APRIL 28, 2023**

**BETWEEN**

**SUNDIP AMRITLAL SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**DEEPAL SUNDIP SHAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HIGH GROVE HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**I & M BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**TAIBJEE AND BHALIA ADVOCATES LLP ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. For determination are the only pending issues in the application dated January 12, 2023 on;
  - a. Whether the 2<sup>nd</sup> Defendant should be allowed to charge interests at the rate of 14% on legal costs payable by consent to it; and,
  - b. Whether the 2<sup>nd</sup> Defendant/Applicant should be awarded costs of the application.
2. On February 6, 2023, this Court adopted a consent s between counsel for the parties herein in which the Notice of Motion application dated December 7, 2022 was compromised in its entirety while the Notice of Motion application dated January 12, 2023 was compromised only with regard to prayer No (1) leaving the issue of interest and costs of the application to be determined by the court. The court then proceeded to direct the parties to canvass the two issues by way of written submissions, and as the record reflects, both parties complied with the 2<sup>nd</sup> Defendant filing a set of submission dated February 15, 2023 while those of the Plaintiff/Respondent are dated February 13, 2023.



3. In its submissions, the 2<sup>nd</sup> Defendant submitted that it executed a consent dated January 14, 2022 with the Plaintiffs which expressly provided for payment of Kshs 750,000/= to them as pending costs within seven (7) days of the execution of the consent Clause (g). However, the Plaintiffs defaulted in payment prompting the filing of the application dated January 12, 2023 in which they have sought to enforce the terms of the said consent. Therefore, since the Plaintiff was contractually bound to make the payments, they are as well bound to pay the interests thereon by virtue of Section 27(2) of the [Civil Procedure Act](#).
4. According to the 2<sup>nd</sup> Defendant, a party deprived of money must be compensated in interest for missing an opportunity to invest the monies held by the other party. Further, in support of this line of argument reliance was placed on the case of [RJ Varsani Enterprises Ltd -vs- Pentoville Holdings Ltd \[2021\]eKLR](#) interest was awarded on account of delayed payments and granted interest on costs at 14% Per annum. The court was also referred to Section 26(2) of the [Civil Procedure Act](#) which connotes that interest is to accrue starting from the date of Judgment where a decree is silent on the same.
5. The Plaintiffs on the other hand submitted that part of the consent order was that they would pay the 2<sup>nd</sup> Defendant's legal costs of Kshs 1,500,000/=, the first deposit of Kshs 750,000/= having been paid on December 7, 2021, the second deposit of Kshs 750,000/= was to be made within seven days of executing the consent and this would be the final settlement on the matter. That in seeking to be awarded interest at the rate of 14%, it is tantamount to amending the terms of the consent order. That in any event, the balance of Kshs 750,000/= was paid on January 12, 2023 and the same was duly accepted by the 2<sup>nd</sup> Defendant's advocates.
6. It is also the Plaintiff's case that the Defendant now seeks to unilaterally vary the terms of the consent by seeking to be awarded interest without taking into consideration that a consent order can only be set aside on account of fraud, collusion or if the same is contrary to public policy. The Plaintiffs thus crave for the dismissal of the request to award costs as requested by the 2<sup>nd</sup> Defendant. In support of their case, the Plaintiffs have placed reliance on the cases of [SMN -vs- ZMS & 3 Others \[2017\]eKLR](#), [Board of Trustees National Social Security Fund -vs- Michael Mwalo \[2015\]eKLR](#), [Kericho Guest House Enterprises Limited -vs- Kenya Breweries Limited \[2018\]eKLR](#) and [Jasbir Sign Rai & 3 Others -vs- Tarlochan Sign Rai & 4 Others \[2014\]eKLR](#).

### **Analysis and Determination**

7. Having considered the submissions by both parties, in an application wherein parties are battling on whether interest should be awarded on pecuniary Order/Judgment just as the consent order herein dated January 14, 2022 and adopted as an order of this court on June 6, 2022, the guiding legal provision is Section 26 of the [Civil Procedure Act](#) which provides as follows:-

- ' (1) 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 (emphasis added) 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.'
- 2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date



of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.'

8. It then follows that from the above provision, the award of interest is an exercise of a court's discretion which, like other discretion has to be exercised judiciously. Accordingly, in pursuance of Section 26(1) (Supra), the Court has discretionary power to award interests for the period from the date of filing the suit to the date of the judgment as well as the period from the date of Judgment to the date of payment of the sum adjudged as due or such other date as the court may direct.
  9. This court has taken into account the submissions by both parties on the foregoing. And in as much as this Court agrees that an unimpeached compromise represents the end of disputes in a suit as the Respondent has argued, that does not necessarily mean that where parties have entered into a consent to settle a proceeding, no costs should be awarded. However, the same can be a relevant factor for consideration in awarding costs.
  10. In this Court's view, settlement of disputes by consent is not an automatic disentitlement of costs without reference to the context dated January 14, 2022, in that particular case. In that view, the terms of the consent in so far as payment of legal costs was concerned, the balance of Kshs 750,000/= was to be paid within seven (7) days of execution of the consent. Since the consent is not specific on the date of its execution, this Court shall presume that it was executed on the date on its face which is January 14, 2022, and the Plaintiffs were enjoined in terms of the consent to make the payments on or before February 22, 2022.
  11. It is however a common ground that the Plaintiffs made the payment almost about a year later on January 12, 2023 in breach of their commitment in the consent. It follows that the Plaintiffs wrongfully withheld the legal costs balance for the period starting from February 22, 2022 to January 12, 2023 and the 2<sup>nd</sup> Defendant is entitled to award of interests a compensation for being kept away from its money.
  12. The court is also under discretion to determine the rate of the interests and where the same is not expressly or impliedly provided for in the agreement by the parties, or otherwise by an Act of Parliament, then it would be reasonable to award interests since compound interest.
  13. In the circumstances of the present case, this Court is therefore persuaded that the 2<sup>nd</sup> Defendant has shown circumstances to warrant the award of interest to be computed at the rate of 14% from February 22, 2022 to January 12, 2023.
  14. As to whether the 2<sup>nd</sup> Defendant was entitled to cost of the Application vis-à-vis the consent order, it is this Court's view that the nature of settlement in the consent may determine the course of the events, thus the place of costs in the suit/application. Accordingly, in the present case, the 2<sup>nd</sup> Defendant was the successful party, the Plaintiffs having conceded that they had not paid the legal fees balance on the dates stipulated in the consent.
  15. Generally, in line with the provisions Section 27 of the *Civil Procedure Act*, costs follow the event, so that the 2<sup>nd</sup> Defendant/Applicant having been the successful party in the application dated January 12, 2023 should ordinarily be awarded costs unless its conduct is such that it would be denied the costs. None of the deviant factors are present in this case, hence the court proceed to award the 2<sup>nd</sup> Defendant costs of the Application.
  16. In the end, the upshot of this court's is that the 2<sup>nd</sup> Defendant's prayer for interest and costs is allowed. Accordingly, the 2<sup>nd</sup> Defendant/Applicant is awarded interest to be computed at the rate of 14% from February 22, 2022 to January 12, 2023 together with costs of the application dated January 12, 2023.
- It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Githui counsel for Plaintiff/Respondent

No appearance for and by Defendant/Applicant

Court Assistant – Mwenda/Sakina

