



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 31 OF 2018

SUPINDER SINGH SAGOO.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **10 July 2020** was brought by the Plaintiff, **Supinder Singh Sagoo**, pursuant to **Section 99** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**, for orders that:

[a] Spent

[b] The Court be pleased to determine the interest chargeable on **Kshs. 49,353/=** provided for in Order [b] of the Judgment dated **20 February 2020**;

[c] That the costs of the application be provided for.

[2] The application was premised on the grounds that Judgment herein was entered on **20 February 2020**; that the Court omitted the issue of interest on the award of **Kshs. 49,353/=** contained in Order [b] of the said Judgment; and that there has been no agreement between the parties herein on the issue; and in particular whether the interest is chargeable in accordance with the fixed deposit rate applicable before the filing of this suit or at court rates. Thus, it was the contention of the Plaintiff that it is necessary to have the issue of interest on that sum determined to enable the parties bring this dispute to a close.

[3] In support of the application, the Plaintiff relied on his affidavit, sworn on **10 July 2020**, in which he averred that, on **30 April 2020**, he wrote a letter to the Defendant requesting them to pay the decretal amount of **Kshs. 49,353/=** with interest at 6% quarterly, being the agreed rate payable on the fixed deposit before the filing of this suit; but that the Defendant declined to pay at that rate. He therefore averred that there has been no agreement between the parties on whether the interest chargeable ought to be in accordance with the rate payable under the fixed deposit agreement or at court rates. He annexed a copy of that letter as an exhibit to the Supporting Affidavit.

[4] In the Replying Affidavit, sworn by the Defendant's Credit Manager, **Mr. Joseph Barngetuny**, it was averred that, although the Court, in its Judgment, did not grant interest on the sum of **Kshs. 49,353/=**, the Bank, upon advice from its lawyers on record, is willing to consider paying interest on the said sum. It is however opposed to the methodology adopted by the Plaintiff in working out the interest due. **Mr. Barngetuny** further averred that, whereas the interest rate applicable to the FDR contract when last renewed was at 6% per annum, that contract lapsed after **June 2001**; and therefore that the Plaintiff's calculation, on the basis of that rate, is erroneous. The Defendant urged the Court to rely instead on its own calculation as per the document marked **Annexure LM-1** to the Replying Affidavit.

[5] The Plaintiff filed a Further Affidavit with the leave of the Court and refuted some of the averments made by the Defendant in the Replying Affidavit. For instance, he denied that the FDR contract provided for an annual interest rate of 6%. The Plaintiff relied on **Annexure "SSS2"** to his Further Affidavit to demonstrate that the rate of 6% was applied on a quarterly basis and that the funds would be automatically rolled over without the need for negotiations. The Plaintiff also impugned the proposal by the Defendant, contending that it was neither presented on the Bank's official letterhead nor stamped and signed, as is usually the case with bank documents. He therefore urged the Court to go by the computation done by his advocate.

[6] Pursuant to the directions made herein on **21 October 2020**, the application was urged by way of written submissions. Thus, in the written submissions filed herein by **Mrs. Chumba** on behalf of the Plaintiff, she proposed the following issues for determination:

[a] Whether, in the circumstances, the interest rate should be based on the last applied Fixed Deposit Rate;

[b] Whether the rate of 6% per quarter and the calculations done by the Plaintiff are correct and justifiable; and,

[c] Whether the Plaintiff is entitled to interest prior to the filing of this suit.

[7] Counsel relied on **Section 26** of the **Civil Procedure Act** and **Kabarnet HCCA No. 2 of 2018: B.O.G. Tambach Teachers Training College vs. Mary Kipchumba**, to support her submission that the Plaintiff herein is entitled to interest for the period of over 21 years that the Defendant deprived him of the use of the subject funds. She further submitted that, in the circumstances hereof, the applicable rate is that which the parties had agreed on for purposes of the Fixed Deposit Account, namely 6% payable quarterly. Consequently, counsel urged the Court to reject the proposal by the Defendant for a per annum payment as it was not envisaged in the FDR dated **16 April 2001**.

[8] Counsel urged the Court to make a determination on interest on the basis of the contractual documents acknowledged by the parties; and not the contentious computation presented subsequently by the Defendant. She relied on **Milimani Commercial and Tax Division HCCA No. 12 of 2019: Red Gems Investment Group Ltd vs. Irene Chepkoech Chumo** to support her submission that courts cannot rewrite contracts for parties; and that the Court can only interfere in the case of fraudulent or unconscionable contracts. Accordingly, **Mrs. Chumba** urged the Court to find that interest on the subject funds is due at 6% on a quarterly basis from **1 June 1999**, when the Defendant failed to approve the Plaintiff's overdraft facility.

[9] On their part, counsel for the Defendant, **M/s Manani Lilan Mwetich & Co. Advocates** suggested the following issues for determination:

[a] Whether the FDR contract was renewed after **June 2001**;

[b] Whether the interest on the principal amount should be computed annually or quarterly;

[c] Whether the Defendant's Annexure LM-1 on computation of interest is authentic; and,

[d] Whether the Plaintiff is entitled to interest on the principal sum from **20 July 2020**.

[10] **Mr. Manani**, counsel for the Defendant drew the Court's attention to paragraphs 8-13 of the Replying Affidavit and reiterated the Defendant's assertion that the FDR contract lapsed in **2001**. He therefore submitted that any interest due on the sum of **Kshs. 49,353/=** that was adjudged due to the Plaintiff cannot earn interest at the rate or on terms applicable to the FDR contract. He explained that upon the lapse of the FDR contract, the normal banking rates of interest would automatically apply; and that it was in that light that the Defendant worked on the computation annexed to its Replying Affidavit. He urged the Court to dismiss the contention by the Plaintiff that the FDR would be rolled over automatically on the same terms as no proof was given in support of that assertion.

[11] As to the authenticity of the Defendant's **Annexure LM-1**, **Mr. Manani** took the posturing that the dispute before the Court is not the document on computation of interest but the method of computation; and therefore that it does not matter on what document the computation is done. In his view, what matters is the computation methodology. He also urged the Court to find that it would be unjust to require the Defendant to pay interest on the principal sum from **20 July 2020**, for the reason that the Defendant has already paid the decretal sum. Thus, counsel urged the Court to allow the application, but only to the extent that the interest due be calculated at 6% annually; which would yield an amount of **Kshs. 132,896.42** only.

[12] I have given due consideration to the application, the affidavits filed in respect thereof, as well as the written submissions filed on behalf of the parties by their counsel. The application has been necessitated by the fact that the Judgment of the Court dated **20 February 2020** was silent on whether interest is due on the sum of **Kshs. 49,353/=** that was awarded therein. Here is a replication of the final orders made by the Court in the said in the said Judgment:

[a] That the Defendant do pay the Plaintiff general damages for breach of contract in the sum of **Kshs. 100,000/=** together with interest thereon from the date hereof till payment in full;

[b] That the Defendant to refund to the Plaintiff the sum of **Kshs. 49,353/=** being the overpayment in respect of the overdraft account;

[c] That a permanent injunction be and is hereby issued to restrain the Defendant, its agents or servants from selling, disposing, alienating or in any other way dealing with the parcel of land known as **Eldoret Municipality Block 23(Kingongo)/351**;

[d] That the Defendant be and is hereby ordered to forthwith discharge the charge registered against the Plaintiff's parcel of land known as **Eldoret Municipality Block 23(Kingongo)/351**;

[e] That costs of the suit be borne by the Defendant.

[13] Hence, the instant application is confined to the issue of interest in respect of Order [b] above. Accordingly, the application has been brought under the slip rule, as provided for in **Section 99** of the **Civil Procedure Act**, on the ground that the omission was an inadvertent error on the part of the Court. That provisions states that:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

[14] In the case of Vallabhdas Karsandas Raniga vs. Mansukhalal Jivraj & others [1965] EA 700 in which it was sought to amend a judgment to include a refund of the monies paid by the appellant, the East African Court of Appeal held that;

“A slip order will only be made where the court is fully satisfied that it is giving effect to the intentions of the court at the time when the judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

[15] Needless to say that the rationale for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money that is rightfully due to it through the wrong act of a defendant. Thus, in Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR the point was made thus:

"The justification for an award of interest on the principal sum is to compensate a Plaintiff for the deprivation of any money, or specific goods though the wrong act of a defendant."

[16] Likewise, in Lata vs. Mbiyu [1965] EA 392 it was held that:

“The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court’s discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

[17] Accordingly, Section 26(1) of the Civil Procedure Act, provides that:

"Where and in so far as a decree is for 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 prior to 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 payment or to such earlier date as the court thinks fit."

[18] And, in connection with the aforesaid provision, the Court of Appeal had occasion to express itself thus in Ajay Indravadan Shah vs. Guilders International Bank Ltd [2003] eKLR:

"This section, 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 due or such earlier date as the Court may, in its discretion, fix.

We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

[19] Accordingly, the issue for determination herein is whether, in the circumstances, interest is due, and if so, at what rate and for what duration? The Plaintiff has pitched a claim to interest on the sum of **Kshs. 49,353/=** at 6% on a quarterly basis from **July 2001 to July 2020** in the total sum of **Kshs. 4,734,168/=**. A detailed computation thereof is to be found in the document marked **Annexure "SSS-A"** to the Plaintiff's Supplementary Affidavit sworn on **11 August 2020**. As has been pointed out hereinabove, **Mrs. Chumba's** reasoning was that the said sum was the balance of what was due to the Plaintiff on the basis of FDRs invested by the Plaintiff with the Defendant; and therefore that the applicable terms have to be the terms governing the FDR account.

[20] The Defendant, on the other hand, proposed that interest be applied at the rate of 6% but on an annual basis. The main reason for this proposal was that the FDR had lapsed and therefore that it would amount to unjust enrichment to award the Plaintiff the sum of **Kshs. 4,734,168/=** from **July 2001 to July 2020**. Counsel for the Defendant also pointed out that the sums awarded in the Judgment dated **20 February 2020** had been settled by the time the letter dated **20 July 2020 (Annexure LM3)** to the Defendant's Replying Affidavit) was written.

[21] It is therefore manifest that the proposal by **Mrs. Chumba** for interest in the sum of **Kshs. 4,734,168/=** from **July 2001 to July 2020** on the sum of **Kshs. 49,353/=** is premised on faulty reasoning. First and foremost, the Court, in its Judgment dated **20 February 2020**, had made a finding of fact that the Defendant retained the discretion, pursuant to the contract between the parties, to not renew the overdraft facility for which some of the FDR's were offered as security. There is also no dispute that as **31 May 1999** when the overdraft facility lapsed, the Plaintiff's account was in arrears; and therefore that the Defendant had the right to liquidate the FDRs in recovery of the outstanding sums. Additionally, Paragraph 2 of the Letter of Offer governing the facility stated that:

“The Bank reserves the right to set-off or combine all or any accounts of the borrower in their own right whatever their nature. The right to consolidate all securities held on any account, as security for all liabilities is also held.”

[22] If, then, the Defendant was already in default as of **31 May 1999** when the overdraft facility expired and remained in default until **25 June 2001**, when an attempt was made by the Defendant to realize the Plaintiff’s securities, on what basis would he claim interest on the FDRs? To claim interest, as the Plaintiff has done, would presuppose that the Defendant had no right to liquidate the FDRs. Moreover, the amount in question was but a fraction of only one of the FDRs; thus confirming the Bank’s contention that the terms of the FDRs had indeed lapsed and therefore cannot be used as the basis for calculating interest for purposes of **Section 26** of the **Civil Procedure Act**. Additionally, it was precisely for the Defendant’s tardiness in liquidating the FDRs that the Court awarded the Plaintiff general damages in the sum of **Kshs. 100,000/=** as compensation for its loss.

[23] There is another reason why the Plaintiff’s reasoning is flawed. In **Sempra Metals Ltd vs. Inland Revenue Commissioners and Another** [2007] 3 WLR 354, it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

[24] Similarly, in **Dipak Emporium vs. Bond's Clothing** [1973] EA 553, it was held that:

"The court's right to award interest is based on Section 26(1) of the Civil Procedure Act which states that 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 prior to 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 payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

[25] Having offered the FDRs as security for the overdraft facility; and the Court having found that the Plaintiff’s overdraft account was in arrears, it can hardly be said that the Plaintiff lost an opportunity to invest the sum of **Kshs. 49,353/=**. In any case, that balance was not ascertained until **20 February 2020** when the Court made its determination. It is also noteworthy that, in his Complaint, the Plaintiff claimed the aforesaid sum under Prayer [b] thereof on the basis of its being **“...the overpayment in respect of the overdraft account...”** Accordingly, the question of the Plaintiff being paid pre-judgment interest would not arise. Thus, my considered view is that, whereas the Plaintiff is entitled to interest on the sum of **Kshs. 49,353/=**, in all fairness, the same can only be paid at court rates from the date of Judgment till the date when the said sum was paid by the Bank.

[26] In the result, the Plaintiff’s application dated **10 July 2020** is hereby allowed but only to the extent aforestated, and orders granted in the following terms:

[a] That the interest chargeable on the sum of **Kshs. 49,353/=** provided for in Order [b] of the Judgment dated **20 February 2020** be and is hereby fixed at the court rate of 14% per annum from the date of Judgment till the date when the said sum of **Kshs. 49,353/=** was paid by the Defendant;

[b] That each party shall bear own costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 24TH DAY OF FEBRUARY, 2021

OLGA SEWE

JUDGE