



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 385 OF 2016

BAYLEM LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT

RULING

1. The parties to this dispute entered a consent judgment on the principal sum and have also agreed that it attracts interest at 10% per annum from the date of default to the date of payment. The singular task left for Court is to determine whether the interest ought to be compounded or simple interest.

2. Supporting compound interest, Counsel for the Plaintiff submits that as the subject contract is a public procurement, regard should be given to section 48 of the Public Procurement and Disposal Act, 2005 (now repealed) which obligated a procuring entity to pay interest on overdue sums under contract for procurement at prevailing commercial rates.

3. In addition, it is argued that compound interest is pleaded and that on account of trade usage and customs such interest is deserved. The Court is asked to find that the Defendant delayed and stalled payment for long and took 4 years to pay the principal even after the consent judgment.

4. Urging its corner further, the Plaintiff stated that it completed the project with borrowed money while on the other hand the Defendant has been generating an income from it.

5. The Defendant retorts that compound interest was not pleaded and that it has paid the debt without undue delay.

6. The place to start is the Plaintiff. What is it that the Plaintiff pleaded in respect to interest remembering that parties are bound their pleadings?

7. In regard to the principal sum of Kshs.110,000,000/= for which the consent judgment was entered, the Plaintiff pleads:-

“(b) Interest on (a) above at the commercial rate of 20% from the date of default to 31st August 2016 and thereafter at the commercial rate of 14% until payment in full.”

8. As a basis for this plea on interest, the Plaintiff had averred that the Defendant, was through various letters, made aware that its failure to pay would have implications on the Plaintiff's finances as it would be unable to service a loan it had taken from Kenya Commercial Bank for purposes of the project. And in particular that interest and interest penalties were accruing. It must be kept in mind that the Defendant did not file Defence and this averment is therefore unchallenged.

9. The argument by the Plaintiff in support for compound interest is threefold. One, that statute provides for it. Two, trade usage and custom is on its side. Lastly, the circumstances of the case including the conduct of the Defendant entitles it to that relief.

10. Let me begin with the proposition pegged on trade usage and custom. The law is that mercantile usage must both be pleaded and proved (see Highway Furniture Mart Limited v Permanent Secretary & another EALR [2006]2 EA 94 eKLR and reiterated in Barclays Bank (K) Limited v William Mwangi Nguruki [2014] eKLR. In this matter, the Plaintiff has not pleaded any mercantile custom or usage and the argument is not available to it.

11. On statute, the contract which gave rise to the claim was entered on 31st July 2015. It is not disputed that the Defendant is a County Government and therefore a public body. As a public body it was subject to the law on public procurement in matters of public procurement of goods and services. At the date of the contract the statute governing public procurement was the Public Procurement and Disposal Act (No. 3 of 2005) (the repealed Act) which was repealed on 7th January 2016 with the commencement of the Public Procurement and Asset Disposal Act (No.33 of 2015).

12. The law prevailing then and which is applicable to this dispute is the repealed Act. Section 48 of that Act explicitly provides:-

“The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement—

(a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and

(b) the interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.”

13. The statute does not define the phrase “commercial bank rates”. But in Black's Law Dictionary, Tenth Edition, interest rate is said to mean:-

“The percentage that a borrower of money must pay to the lender in return for the use of the money, is expressed as a percentage of the principal payable for a one year period.”

14. Commercial bank rate is therefore the percentage that a bank charges a borrower as a return for the use of money borrowed. The rate is the percentage charged and not the manner in which the percentage is charged. The rate can be either be applied on simple or compound basis. Reference to the commercial rate is a prescription on the method of computing interest. This Court is unable to construe section 48 as providing that interest on overdue amounts is compound interest.

15. In addition, and this is where the Plaintiff's claim for compound interest fails, a party seeking compound interest as opposed to simple interest must plead and then prove it. Not so long ago, on 28th September 2020, this Court in Midrock Water Drilling Co Limited v National Water Conservation and Pipeline Corporation [2020] eKLR held;

“15. Drawing from those arguments I understand the law to be that a Court would normally award interest on a simple interest basis unless circumstances warrant application of compound interest. Yet so as to bring its case within consideration for compound interest, a party must plead it. So that not only must the circumstances be deserving of heightened interest but it must be expressly sought for in pleadings.”

Because the Court's order on interest would ordinarily be computed on simple interest, a party seeking compound computation must put the Defendant on notice, through pleadings, that it will be seeking extraordinary interest. In that way then Defendant has an opportunity to confront that claim.

16. Compound interest was not sought and I therefore order that the method of computation applicable on the agreed interest shall be simple interest. Each party shall bear its own costs on these proceedings.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Adunga holding brief for Arwa for the Plaintiff.

No appearance for the Defendant.