



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E434 OF 2019

R. J. VARSANI ENTERPRISES LTDPLAINTIFF

VERSUS

PENTOVILLE HOLDINGS LTDDEFENDANT

J U D G M E N T

1. By a plaint dated 2/12/2019, the plaintiff claimed from the defendant a sum of Kshs. 34,072,284.52 together with interest thereon at the Kenya Banks base rate as published by the Central Bank of Kenya from 25/7/2019 until payment in full.

2. The Defendant entered appearance on 19/12/2019 and filed a statement of defence which was however missing from the record. Subsequently, the parties agreed that the matter be determined by way of submissions. The parties filed their submissions which the Court has carefully considered.

3. Later when it occurred that since the defendant had paid the amount claimed in total, the Court should only consider the question of interest, if any, payable.

4. It was submitted by the plaintiff that the defendant did not comply with the agreement for payment between them. That the various attempts by the Plaintiff for settlement fell on deaf ears. That at the time of filing the suit, the defendant had defaulted in the total sum of Kshs. 34,072,284.52. That after the suit was filed, the defendant paid the claimed sum as follows: -

a) Kshs. 8,035,143/- on 18/12/2019;

b) Kshs. 8,035,143/- on 27/12/2019;

c) Kshs. 18,000,000/- on 10/02/2021

5. That in the premises, the plaintiff is entitled to interest in the amount claimed.

6. The defendant on the other hand contested the claimed amount and averred that there was no balance payable on the Plaintiff and that the Kshs. 18,000,000/- was not due and owing to the plaintiff at the time of filing the suit. That this is due to the fact that the suit was filed prematurely.

7. The issues for determination before this honourable Court are as follows: -

a) Whether the suit was filed prematurely

b) Whether interest is payable on the claimed amount

8. It was the defendant's submission that the plaintiff's action was irresponsibly premature and in breach of Clause 6 of the agreement between the parties. That it goes against the exhaustion doctrine. They relied on the case of **Proto Energy Limited v Hashi Energy Limited [2019] eKLR** where the Court dismissed the plaintiff's suit for being premature as the ADR alternatives provided for in the Agreement between the parties had not been explored and/or exhausted.

9. In the present case, **Clause 6** of the Agreement states as follows:

“6. DISPUTE RESOLUTION

All claims and disputes whatsoever arising under this Deed shall be in the first instance resolved amicably through conciliation between the parties led by the Parties’ Advocates. Should the conciliation efforts fail to achieve a resolution, the aggrieved party shall be entitled to seek any other remedy available in law.” (Emphasis added)

10. The plaintiff contended that on several occasions, it tried to resolve the matter through various notices and correspondences (pages 8-12 of the plaintiff’s list of documents). That however, the defendant never complied. The defendant on the other hand submitted that it tried to organize with the plaintiff for convenient dates for a conciliation meeting (between 4th and 6th December, 2019) but the plaintiff filed this suit on 2/12/2019) before any conciliation could be attempted.

11. It is not clear from the correspondence produced, whether the defendant actually proposed the alleged dates. On record however, are notices by the plaintiff trying to have the matter settled amicably. He who alleges must prove it was upon the defendant to produce the evidence of the alleged correspondence which the plaintiff failed to heed to. That evidence lacking the defendant has not proved that the suit was filed prematurely. In this regard, I find that the suit was not premature as contended by the defendant.

Whether interest is payable on the claimed amount

12. The plaintiff contends that on default of the defendant to pay the sums as agreed in the Agreement, the plaintiff is entitled to interest on every delayed payment as per Clause 2 of the Agreement.

13. **Clause 2** of the Agreement provides: -

“2. DEFAULT

It is hereby expressly agreed by the parties that in the event that PHL does not pay any amount due and payable on the due date and the same delays, the amount shall attract interest at the Kenya Bank’s Rate as published by the Central Bank of Kenya.”

14. The Court has already found that the claimed amount has since been paid in full. The same was however, paid during the pendency of this suit. The last instalment of Kshs. 18,000,000/- was paid on 10/02/2021.

15. The Plaintiff’s claim in regard to the interest of those delayed payments is: -

- i) On Kshs. 10,000,000/- - Kshs. 7,671.25
- ii) On Kshs. 8,035,142.51 - Kshs. 30,819.75
- iii) On Kshs. 8,035,142.52 - Kshs. 261,967.65
- iv) On Kshs. 8,035,142.51 - Kshs. 194,164.25

v) And, on Kshs. 18,000,000 at 14% from 25/07/2019 till payment in full on 10/02/2021.

16. It is the plaintiff’s submission that interest is payable at 14% being the Central Bank of Kenya Commercial Bank’s base rate during the period of default. The defendant submits that the interest was 7% and later on revised to 11% during the period of default.

17. The parties are bound by their Agreement and the provisions of Clause 2 apply. Under the contract the defendant is required to pay interest on the defaulted amount from time of default until payment in full which is noted as 10/02/2021.

18. The plaintiff relied on the case of **National Bank of Kenya Ltd v Pipe Plastic Sankolit (K) Ltd & Another [2001] Eklr**, where the Court of Appeal held that a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.

19. Further, in **Danson Muriuki Kihara v Johnson Kabungo [2017] eKLR** where the Court relied on the case of **National Bank (supra)** and **Ajay Indravadan Shah vs Guilders International Bank Ltd Civil Appeal No. 135/2001 [2002] 1 EA 269** stated: -

“It is apparent from the authorities that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent.”

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 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. This will be undertaken by the Deputy Registrar of this Court. The dates of default are known as set out in the submissions of the plaintiff.

24. As to costs, the plaintiff has proved its case and as such the defendant shall be liable to costs and interest on costs at 14% in accordance with **section 27(2) of the Civil Procedure Act**.

It is so decreed.

DATED and DELIVERED at Nairobi this 25th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE