



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 53 OF 2016

PETER WANJAMA.....PLAINTIFF

-VERSUS-

KENYA BREWERIES LIMITED.....DEFENDANT

**R U L I N G**

1. This is a ruling on the defendant's application dated 3/7/2020. The same was brought under **section 3A of the Civil Procedure Act, Order 22 (1) (a) and Order 51 of the Civil Procedure Rules**.
2. The application sought for an order that the defendant be allowed to pay into Court the sum of Kshs. 23,677,032/42 being payment of the decree in this suit and that following the payment, the court do find that the applicant has satisfied the decree in this suit.
3. The application is premised on the grounds set out in its body and the supporting affidavit of **Victor Njenga** sworn on 3/7/2020. These are; that an order was issued on 2/10/2014 directing this matter to be determined through arbitration upon which an award was made on 23/10/2015; that in the award, the plaintiff was awarded a total sum of Kshs. 20,471,180/- together with interest of 14% per annum. The arbitral award was adopted as a decree of the court on 15/5/2019, subject to the general damages set aside on 16/2/2017.
4. The defendant contended that it had been able ready and willing to pay sums awarded. It had made offers since March 2020 to the defendant's advocates to pay the sum of Kshs. 23,677,032/42, being the award plus simple interest accrued but the plaintiff has declined the payment and has instead insisted on the interest being compounded. That since the plaintiff was not awarded nor did he plead for compound interest, the award did not reflect the same.
5. Further, that since the award was silent on interest, the presumption accepted by the courts is that only simple interest is payable. That due to the plaintiff's conduct, the interest has continued to accumulate to the applicant's detriment. It was therefore in the interest of justice that the amount be deposited in court and the award be deemed as settled.
6. In a strenuous opposition to the application, the plaintiff filed a replying affidavit sworn by **Munene Ng'atia Ng'ang'a** on 2/12/2020. It was contended that in his ruling of 16/02/2017, **Ochieng J** had dealt with the issue of compound interest as such the present motion is *res judicata*. That the failure of the defendant to include the issue of compound interest in its application dated 9/11/2015 to set aside the arbitral award does not permit it to burden the Court with motions meant to rectify its omissions. That the said application was only successful in setting aside the award for general damages and varying the costs of the reference.
7. The plaintiff further contended that, the Arbitration Act provides that either simple or compound interest can be awarded.
8. The Court has considered the depositions of the parties and the submissions on record. The issue is whether the interest due on the arbitral award should be simple interest or compound interest
9. In the award published on 23/10/2015, the tribunal awarded interest on the award at 12% per annum. However, the award did not specify whether it was simple interest or compound interest.
10. In his ruling of 16/2/2017, **Ochieng J.** observed that: -

**“The applicant also asked the court to hold that the respondent was not entitled to compound interest.**

**I refrain from making any determination on that matter because it was not part of the issues raised in the application dated 9/11/2015. That was an application for setting aside two aspects of the arbitral award, namely the award for General Damages and the Costs of the Reference.”**

11. It is clear from the foregoing that, the applicant raised the issue but **Ochieng J** declined to rule on it. He declined to do so because it had not been formally raised in the application before him.

12. **Section 7 of the Civil Procedure Act** provides for the doctrine of *res judicata*. It provides: -

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

13. The question for determination is whether the issue of interest was raised and determined in the application dated 9/11/2015. That was an application to set aside two aspects of the arbitral award, general damages and costs of the reference. The question is, can the issue of interest be then said to be *res judicata*?

14. Explanation numbers 4 and 5 of **section 7** aforesaid provides: -

**“4) Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section be deemed to have been refused”.**

15. The defendant had made an application attacking the award. It chose to only attack two aspects thereof. The issue of interest was in the award. It chose not to include it.

16. In my view, since the defendant knew that it was aggrieved with the issue of interest being compounded, it should have specifically raised it in the application that came before **Ochieng J**. It only raised it in the submissions which the Judge declined to entertain.

17. In view of the foregoing, I am of the view and so hold that the issue is *res judicata* by dint of **Explanation 4 of section 7 of the Civil Procedure Rules**. In any event, Ochieng J having expressly declined to deal with the issue, it was open for the defendant to appeal against that decision.

18. In the circumstances, I find that the application has no merit and I dismiss the same with costs.

It is so ordered.

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**A. MABEYA, FCI Arb**

**JUDGE**