



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 48 OF 2019

BETWEEN

ROYAL MEDIA SERVICES LIMITED.....PLAINTIFF

AND

ATTORNEY GENERAL..... DEFENDANT

RULING

Introduction and background

1. The substance of the plaintiff's claim against the defendant is for Kshs. 104,895,667/= together with, "interest thereon at the rate of 19% per annum compounded daily and debited monthly as from 21/11/2005 till payment in full." The gravamen on the claim is outlined at paragraph 9 of the plaint dated 5th February 2019 as follows:

Having performed its obligations and rendered services as requested by the plaintiff demanded for payment of the invoice amount being Kshs. 120,015,827/= and which CKRC paid Kshs. 15,120,160/= before it was dissolved on 25/12/2005 thereby leaving a balance of Kshs. 104,895,667/= unpaid and which the plaintiff now claims together with interest at the rate of 19% per annum compounded daily and debited monthly as from 21/11/2005 until payment in full (as signed orders for the services stated) from government (Ministry of Justice then the Treasury) who both took over the assets and liabilities of the commission.

2. On 9th March 2020, the court referred the claim for mediation. The mediation was successful and by a mediation agreement dated 27th February 2020, the defendant agreed to pay the plaintiff the principal sum of Kshs. 104,895,667/= The parties were unable to agree on the issue of interest and it was left to the court for determination. In addition, the plaintiff filed a Notice of Motion dated 7th April 2020 seeking an order that, "the issue of interest outstanding be determined as a matter of urgency and priority as ordered by the court by way of submissions." The parties agreed and indeed filed written submissions in support of their respective positions to assist the court in determining the issue of interest.

Plaintiff's submissions

3. The plaintiff submitted that it pleaded its terms and conditions of business including the interest rate claimed. It submitted that the defendant, in its statement of defence, did not deny the interest rate of 19% per annum compounded daily and debited monthly. Consequently, the interest rate pleaded by the defendant was deemed admitted. The plaintiff contended that the defendant ought to have expressly pleaded grounds upon which the rate of interest can be vitiated by the court.

4. The plaintiff further submitted that the interest was contractual and the court could not vary or in effect re-write the agreement between the parties. Counsel referred to **section 26** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and the case of **Red Gems Investment Group Ltd v Irene Chepkoech Chumo ML HCCA No. 12 of 2019 [2019] eKLR** to support its case. Counsel further submitted that from evidence, including previous proceedings between the parties, the debt was not disputed and that the State was adamant in settling hence it was entitled to interest as claimed.

Defendant's submissions

5. The defendant relied on **section 26** of the **Civil Procedure Act** and submitted that the award of interest is circumscribed by two principles duly established in terms of time when interest is awarded and rate applicable. That the court may only award interest from the day of filing

suit to the day of judgment and judgment date until payment; and in terms of the rate, a reasonable rate but otherwise not exceeding 14% percent per annum, being the court rates duly set by the Chief Justice. Counsel further submitted that a claim for interest for period before the filing of the suit and at a rate other than the prescribed court rate does not fall within the purview of the court's discretion under the **section 26** aforesaid. The defendant therefore contended that a claim for interest otherwise not covered by or contemplated by **section 26** of the **Civil Procedure Act** must be specifically pleaded and proved as special damages. Counsel relied on the case of **Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others KBU HCCA No. 32 of 2016 [2018] eKLR** to support this proposition.

6. Applying the principles elucidated to the plaintiff's claim, counsel for the defendant submitted that the period for which the claim for interest pertains is indicated as 21st November 2005, which extends far beyond the date of filing suit, which in this case is 5th February 2019 and the rate of interest claimed being, '19% p.a. compounded daily, debited monthly', goes beyond the court rate prescribed by the **Civil Procedure Act**. Counsel urged that that the claim of interest was therefore a matter of substantive law claimed on the basis of a stipulation in the contract, mercantile usage, statutory right or in the course of dealing and as such ought to have been pleaded and proved.

7. The defendant submitted that the plaintiff has neither pleaded nor proved the claim or interest to the required standard. It maintained that not only does the plaintiff's claim for interest fail to satisfy the burden of proof for balance of probability but also that the Plaintiff has failed to invoke the discretion of the court for award of interest under Section 26 of the Civil Procedure Act and is therefore not entitled to any interest as prayed or at all.

Determination

8. The power of the court to award interest in civil cases is to be found in **section 26** of the **Civil Procedure Act** as follows:

26.(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 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.

9. Under **section 26(1)** aforesaid, the Court has discretion to award and fix the rate of interest covers two stages: First, the period from the date the suit is filed to the date when the Court gives its judgment and second, the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix. Interest for the period prior to filing suit is determined by substantive law either under the contract or by custom and usage (See **Gulamhussein v French Somaliland Shipping Company Limited [1959] EA 25**, **Highway Furniture Mart Limited v The Permanent Secretary & Another EALR [2006] 2 EA 94** and **Jane Wanjiku Wambu v Anthony Kigamba Hato and 3 Others (Supra)**).

10. The plaintiff submitted that by failing to specifically deny its averment on interest at paragraph 9 of the plaint, which I have set out above, the claim was deemed to be admitted. I have read the statement of defence and as I understand, the substance of the statement of defence was that the defendant was not liable for a contract entered into by the Chairperson of the defunct Constitution Review Commission and that the liability incurred was contrary to the law. This was a substantial defence and had the case gone for trial, the plaintiff would have to prove not only the contract but also the terms thereof. Eventually, the principal sum was settled after mediation and the parties agreed that the issue of interest be left for determination by the court. This means that the issue was contested and that the plaintiff has to prove its entitlement to interest as claimed.

11. Whether the plaintiff is entitled to '19% p.a. compounded daily, debited monthly' is a matter of substantive law since the plaintiff averred it was part of the signed orders supporting the principal amount settled in mediation. The plaintiff's claim is particularized at paragraph. 6 of the witness statement of Dr Samuel Kamau Macharia dated 5th February 2019. The statement outlines each order comprising the claim for Kshs. 104,895,667.00. The statement does not state or even claim interest as stated in the plaint. I have also examined each order annexed to the statement in support of the claim including the booking sheets and invoices and there is no mention of the 19% p.a. interest rate as claimed. The first time the claim for interest appears in the documents is the Notice to the Attorney General dated 27th July 2006 where the plaintiff demanded of the said Kshs. 104,895,667.00 together with interest accruing at, "19% compounded daily and debited monthly until the entire amount is paid."

12. From analysis of the witness statement and documents, I find and hold that the plaintiff has not established or proved that the interest rate pleaded in the plaint was grounded on any agreement between the parties. I therefore reject that aspect of the claim and find that the plaintiff is not entitled to interest prior to filing of the suit.

13. The purpose of the award of interest is to compensate the party who had been denied the use of its money and under **section 26** of the **Civil Procedure Act**, I do not see any reason why the plaintiff should not be awarded interest at court rates from the date of filing suit until payment in full and I so award.

Disposition

14. In conclusion, I now enter final judgment for the plaintiff against the defendant on the following terms:

(a) Kshs. 104,895,667.

(b) Interest of (a) above at 12% per annum from the date of filing suit, that is, 5th February 2019 until payment in full.

(c) Costs of the suit.

DATED and DELIVERED at NAIROBI this 12th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Orege instructed by Orege J. Associates Advocates for the plaintiff.

Mr Kihara instructed by the Office of the Attorney General for the defendant.