



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 45 'A' OF 2013

MIDROCK WATER DRILLING

CO. LIMITED.....DECREE HOLDER/RESPONDENT

VERSUS

NATIONAL WATER CONSERVATION AND

PIPELINE CORPORATION.....JUDGMENT DEBTOR/APPLICANT

RULING

1. I had on several occasions asked counsel in this matter to midwife a settlement that did not require the decision of this Court. It was clear to me then and even more clearer now that what was touted as outstanding controversies attract fair ready and straightforward answers.

2. A dispute arose between Midrock Water Drilling Company Limited (**Midrock or the Plaintiff**) and National Water Conservation and Pipeline Corporation (**NWC**) in respect to a contract entered between the two in which Midrock was to carry out certain works including construction of a dam and boreholes. That dispute was compromised through a written consent which was adopted as an order of this Court on 5th July 2016. For the purposes of resolving the matters at hand two items in the consent stand out. Parties agreed that the amount due at the date of the consent would be Kshs.194,219,651.24 all inclusive and that it will be paid within 60 days from the date (5th July 2016) of Consent Judgment by the Court failing which the money would attract an interest of 2% above the competitive commercial bank interest rate as stipulated in table 2 of the contract document (**Annex 6 – Table 2**).

3. Following that consent was another dated 14th December 2019 in the following terms:-

1. THAT the Decree Holder and the Judgment Debtor each to appoint an accountant to determine the interest payable to the Decree Holder pursuant to the Consent Judgment entered on the 6th July 2016. If the two independent accountants do not agree in their independent reports they shall appoint another accountant to act as an umpire and who shall produce his own report which shall be the final report.

2. THAT the costs for the accountants shall be paid as shall be directed by the Honorable Court upon filing of the reports.

3. THAT all the equipment attached and carried away by the Agents of the Decree Holder (Igare Auctioneers) pursuant to the Warrants of attachment dated 3rd July 2019 shall be released to the Judgment Debtor upon payment of the reasonable and verifiable storage fees BUT the said equipment shall not be sold, vandalised, cannibalised and or disposed of in any manner by the Judgment Debtor until this matter is determined and the final orders of the Court are issued.

4. THAT upon finalisation of the Accounts' Reports on interest the said reports shall be submitted to the Honourable Court within 45 days from the date of this Consent for adoption and direction.

5. THAT the above and is hereby adopted as an order of this Honourable Court.

4. Although this Court is asked to determine the Notice of Motion dated 6th August 2019, the Court, on reading the application and giving regard to the consents and submissions filed, sees the following issues are requiring resolution:-

i. Is the Defendant protected by the Government Proceedings Act so as to render the execution levied against it unlawful?

ii. Was the defaulted sum to attract simple or compound interest?

5. Section 21 of the Government Proceedings Act provides:-

“21. Satisfaction of orders against the Government

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

6. NWC invokes Sub-section 4 as granting it protection against execution and in addition cites Order 29 Rule 2(2) (c) of the Civil Procedure Rules which reads:-

“(2) No order against the Government may be made under—

(c) Order 23 (Attachment of debts)”

7. Yet despite all effort at legal reengineering by counsel for NWC, this Court is persuaded that the holding of Onguto J in **Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others [2015] eKLR** applies here. The Judge stated:-

“Foremost though, it is important to point out that it would not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependant on Government funding but it is not government or servant of or agent of Government for the purposes of the Government Proceeding Act. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body.”

8. Before transiting current status, the National Water Harvesting and Storage Authority (NWHSA), National Water Corporation was established under Section 3 of the State Corporations Act which provides-

“3. Establishment of state corporations by the President

(1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.

(2) A state corporation established under this section shall—

(a) have perpetual succession;

(b) in its corporate name be capable of suing and being sued;

(c) subject to this Act, be capable of holding and alienating movable and immovable property.”

9. As a corporation capable of suing and being sued in its own name and capable of holding and alienating movable and immovable property, NWC was neither a State Department nor Agent of the Government within the contemplation of the Government Proceedings Act.

10. Turning to the question of interest chargeable, there is no contest that the State Corporation defaulted on the terms of the consent of 6th July 2016. It is also common ground that default would attract interest at 2% above the competitive Commercial Bank interest rate as per the terms of the consent. At divergence is whether the interest to be applied is simple or compound interest.

11. Pitching for compound interest, the Plaintiff cites the decisions of Havelock J in **Veleo (K) Ltd v Barclays** and of Gikonyo J in **Feroz Nuralji Hirji v Housing Finance Compnay of Kenya Ltd & Another**.

12. In the former, Havelock J stated:-

“As I have observed, Section 26 (1) of the Civil Procedure Act does not provide for a method of computing interest. It only gives the Courts the discretionary power to award interest on pecuniary judgments, and as such, and as was held in *Bank of America Canada v Mutual Trust Co.* (supra), in my opinion, compound interest will only be awarded in circumstances warranting it and in the interest of fairness. In paragraph 35 of its submissions, the Plaintiff submits that it missed an opportunity to invest the money that had been withheld by the Defendant, and thus the interest rate ought to be calculated on a compounded interest basis. This was reiterated in *Sempra Metals Ltd v Inland Revenue Commissioners* (supra) in which it was held that compound interest would be awarded in the exercise of the Court’s equitable jurisdiction.”

13. In **Feroz Nuralji Hirji** (supra) Gikonyo J observes:-

“[11] I should state again that our law on award of interest, does not provide for the method of calculating the interest awarded by the court. The Judgment in favour of the Plaintiff on 29th November 2010 did not also provide whether the interest was simple or compound interest. And critical analysis of the law and the judicial decisions on this subject in Kenya, there is no prohibition to interest on the principal sum being calculated as compound interest. However, I would state that courts have always proceeded on a presumption that interest awarded by the court should be simple interest unless otherwise ordered by the court. To me the “unless” aspect which is pronounced in the decisions I have encountered portend that a court may order interest to be compounded where circumstances allow. It is, therefore, permitted in law to order a post-judgment equitable relief that interest to be calculated on a compound basis where fairness concerns dictate it. The compounded interest acts as recompense to the Plaintiff. In this case, interest at the rate of 26% p.a. was from 19/1/2000 until the day the amount shall be fully paid. It is now over 15 years since the interest became due and payable. Also it is now about 5 years since the judgment was entered into in favour of the Plaintiff. To date, the 1st Defendant has not settled the decretal sum. The judgment sum has been withheld from the Plaintiff for the period I have mentioned. It would be reasonably presumed that the Plaintiff would have applied these sums in investments. Therefore, by computing the award at simple interest, the Plaintiff would not be adequately compensated with regards to the time value component as well as the deprivation of the use of its money for such long period of time. Interest should not be viewed as a punishment but rather as a fair recompense to a person who has been deprived of his money or property by another. I note also that, interest agreed in the agreement was a compound interest which is also supported by the trade usage and custom norm within the banking industry. There is absolutely no reason why this court should not award interest on the basis of compound interest.”

14. At the other end, the Defendant takes the position that simple interest would usually apply unless specifically provided for. Counsel cites a Canadian decision of **Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd (1991) 83 Alta. LR (2d) 289; [1992] 1 WWR 557 CA** in which the Court held:-

“...interest should be calculated using the nominal rate method (simple interest) and not the effective rate method (compound interest) unless there is a good reason for importing the reinvestment principle into the contract.”

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.

16. In the matter before Court, the Plaintiff does not expressly seek compound interest in the pleadings nor provides for it in the Plaintiff. In the end I have to agree with the Defendant that only simple interest is deserved. This Court’s finding is further fortified by the provisions of Clause 60.8 of the original contract which reads:-

“TIME FOR PAYMENT

The amount due to the Contractor under any Interim Payment Certificate or Final Payment Certificate issued pursuant to this Clause or to any other term of the Contract, shall, subject to Clause 47, be paid by the National Water Conservation and Pipeline Corporation (NWPC) to the Contractor as follows:-

i. In the case of Interim Payment Certificate, within the time stated in the Appendix to Form Of Bid, after the Engineer has signed the Interim Payment Certificate.

ii. In the case of the Final Payment Certificate pursuant to Clause 60:13, within the time stated in the Appendix to form Of Bid, after the Engineer has signed the Final Payment Certificate.

iii. In the event of the failure of the National Water Conservation and Pipeline Corporation (NWCPC) to make payment within the times stated, the National Water Conservation and Pipeline Corporation (NWCPC) shall make payment to the Contractor of simple interest at a rate equal to three percentage points above the average Base Lending Rate obtained from the Central Bank of Kenya. The provisions of this sub-clause are without prejudice to the Contractor's entitlements under Clause 69 or otherwise."

17. The parties had, between themselves, accepted that simple interest would apply for late payment.

18. So the Court's answers the two questions is follows;

18.1 The execution against the Defendant was lawful.

18.2 The interest to be charged is simple interest or at a nominal rate

Dated, Signed and Delivered in Court at Nairobi this 28th Day of September 2020

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

Muga for the Applicant.

Wangira for the Respondent.