



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI, MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 241 OF 2005

AGEM LIMITED.....PLAINTIFF

Versus

CHARTERHOUSE BANK LIMITED.....DEFENDANT

RULING

1. On 6th April 2018, this Court made the following orders:-

“There shall be judgment for the Defendant against the Plaintiff for the sum of US\$37,873.30 with interest thereon from 1st October 2004 at contracted rates until payment in full”.

2. The Court’s order on interest was made upon the following observation in paragraph 68 of the decision:-

“68. On the Counterclaim, Charterhouse triumphs only to the extent that it has proved indebtedness of US\$ 34,843.70 with interest thereon. The Claim for interest is in the nature of a claim for interest antecedent to the suit. This had been pleaded by Charterhouse as required by law (see Highway Furniture Mart Limited v. Permanent Secretary Office of the President & another [2006] eKLR). As to the rate applicable reference will have to be made to the contract between the parties which comprised of the Letter of Offer and the Charge Document. The Charge Document provides that the rate of interest would be that charged by the Bank from time to time. Although the debt would have accrued interest from 18th August 2004 when Agem became aware of the demand, Charterhouse sought that interest runs from 8th September 2004. I see no reason to grant more than what was asked”.

3. Although the judgment sum of US\$37,873.30 has since been paid, the parties are unable to agree on the rate of interest applicable and turn to Court to break the impasse. In a Notice of Motion dated 29th October 2018, Agem seeks the following orders:-

2. THAT this Honourable Court be pleased to review its judgment delivered on the 6th April, 2018 and the extracted decree with the intent that this Honourable Court stipulates that the applicable dollar interest rate on the Defendant’s judgment on its counterclaim in the amount of US\$ 37,873.30 be assessed at the then average prevailing Intercontinental Exchange London Interbank Offered Rate (LIBOR) rate of 2% or such other interest rate value as this Honourable Court may determine a the reasonable dollar interest rate.

3. THAT this Honourable Court be pleased to review its judgment delivered on 6th April, 2018 with the intent that this Honourable Court stipulates that S44A(2) and (4) apply to the decretal sum under the “contracted’ rate.

4. Agem argues that notwithstanding numerous requests, Charterhouse has been unable to produce any contract/instrument/document to back its claim of interest at 16.75%. It is asserted by Agem that the rate sought by the Bank is oppressive and without justification. Agem submits that as the facility was dollar denominated then the interest rate applicable should be LIBOR rates.

5. Charterhouse takes the view that there is a fuss about nothing because the decision of the Court was clear that the contracted rate of interest was the rate of interest that would be charged by the Bank from time to time (see paragraph 68 of the decision reproduced above). It is argued that the claim for commercial interest rate was not challenged. In addition, that from the time the facility was recalled, a loan account was created in Kenya shillings and LIBOR rates would not be applicable. Finally, the judgement provided that the Bank’s claim could be converted to local currency at the rate applicable at the time of payment or of enforcement of the judgment.

6. It is a common fact that the contract documents did not fix a specific rate of interest on the facility. As observed in the judgment, the

Charge document which provided for interest on the facility prescribed the rate as that to be charged by the Bank from time to time. Yet this type of provision is not unusual because it is acknowledged in commercial practice that parties may choose not to fix the rate of interest at a specified rate but to allow it vary with the market rates or at the discretion of the Bank. Of course with the rider that the variation must be within the dictates of the law.

7. During the hearing, the Bank did not produce any evidence of the rates it was charging from time to time. Look at, for example, the demand letter of 8th February 2005, by the advocates for the Bank. A Demand for US\$ 522,911.70 is made,

“..which amount is subject to interest on (sic) at our client’s prevailing rates from time to time applicable to outstanding and overdue payments until payment in full ”.

The parties are now able to appreciate why the Court, in its judgment, was unable to give a specific rate as there was no evidence of the movement of the Bank interest rates over the period when the interest ought to be charged.

8. Sadly, the difficulty persisted after the judgment. Even in the face of a challenge by Agem to prove that the claimed 16.75% was the rate charged by the Bank, none was forthcoming from the Bank. Indeed even the reply filed by the Bank to the current application does not provide any proof of the rates charged from time to time.

9. Against this backdrop is the argument by Agem that the rate of interest be pegged on the then average prevailing Intercontinental Exchange London Interbank Offered Rate ((LIBOR) merited? This Court is told that there is precedent that the applicable rate to a dollar denominated decree is the prevailing International Dollar Interest Rate mirroring the LIBOR rate. In this regard the Court has referred to the decision of Hon. Waweru J. in Skylink Aero management Kenya Limited vs. Aviatrend Limited.

10. In that decision the Judge holds:-

“I will therefore enter judgment for the Plaintiff in the sum of US Dollars 186,000/00 or its equivalent in Kenya shillings, the rate of conversion being the exchange rate applicable at the time of payment. Regarding interest, I will award the same from the date of filing suit at 3% per annum if the principal sum shall be paid in US Dollars and at court rates if it shall be paid in Kenya shillings. The claim for general damages is dismissed for want of proof”.

11. The *Black’s Law Dictionary, 10th Edition* defines LIBOR being the London Interbank Offered Rate as:-

“A daily compilation by the British Bankers Association or the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year. These daily rates are used as the underlying interest rates for derivative contracts in currencies other than the euro”.

Banks sometimes borrow from other Banks on a short time basis and LIBOR is the interest rate at which major international Banks lend to each other. The Applicant does not tell this Court that LIBOR is the rate of interest applicable when a borrower (which is not a Bank) borrows from a Bank. It would seem that in much a similar way as our Central Bank Rate (CBR) is the underlying basis for fixing interest rate on local facilities, Libor can be used as a reference rate to foreign currency denominated facilities.

12. The facility granted to Agem and which is the subject of the decree was a foreign denominated guarantee. Yet the charge document which came after the letter of offer denominates the facility granted to Agem in local currency being Kshs.37,000,000/=. It is this charge document that reserves the interest chargeable as being at the rate of interest charged by the Bank from time to time. It seems to this Court that although the guarantee to the beneficiary was in foreign currency, by dint of the charge, the Bank was entitled to call for payment of the facility in local currency in the event the beneficiaries invoked the guarantee. The truth nevertheless is that the Bank made the call up in foreign currency and its counterclaim was in fact for a dollar sum.

13. Yet, in so far as the Contract that provided for a charge of interest expressed the debt in local currency, the Court is inclined to deem the facility granted as one in local currency for purposes of charging interest. In reaching this decision I bear in mind that as between AGEM and the Bank it is the Charge document that constituted the contract. The Bank would therefore be justified in holding the position that once the guarantee to shell was settled, it could demand repayment of the amount from Agem in local currency.

14. As to the rate applicable, the Bank has not been helpful and has not provided the rates it had charged local currency facilities from time to time. In the absence of such information and so as to strike a balance between the two parties, I will take close to a mean of the rates proposed by the parties as the rate to be applied. I confess that this may not have any legal or scientific backing but this Court is duty-bound to do the best it can in the circumstances of the case to bring a just end to the matter.

15. The second limb of the Motion is less controversial because the Bank conceded that Section 44A (2) and (4) of the Banking Act should apply to the debt.

16. The upshot is that the judgment delivered herein on 6th April, 2018 is hereby reviewed to clarify that:-

a) The applicable rate of interest on the sum of US\$ 37,873.30 shall be 10% p.a.

b) The provisions of Section 44A (2) and (4) shall apply to the decretal sum in respect to the interest to be charged.

17. Only to that extent does the Notice of Motion dated 29th October 2018 succeed. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of February, 2019.

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F. TUIYOTT

JUDGE

Present -

Owino h/b Kiplagat for Plaintiff

N/a for Defendant

Nixon – Court Assistant