



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 355 OF 2010

SEDGWICK KENYA INSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

KENOL KOBIL PETROLEUM LIMITED.....1ST DEFENDANT

KENYA OIL COMPANY LIMITED.....2ND DEFENDANT

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **18 December 2017**. It was filed under **Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act**, and **Order 45 Rule 1** of the **Civil Procedure Rules** for orders that the Judgment delivered herein on **19 February 2016** be varied, reviewed and/or amended with regard to the rate of interest awarded to the Plaintiff; and that the costs of the application be provided for. The application is premised on the grounds that there is an error apparent on the face of the record in the said Judgment; and that there is ambiguity as to the date from when the interest ought to accrue. It was supported by the affidavit of **Sammy Kiragu** annexed thereto, sworn on **18 December 2017**.

[2] It was the averment of **Mr. Kiragu** that the Plaintiff filed the instant suit by way of a Plaint dated **13 May 2010** seeking to recover from the Defendants a sum of **USD 62,507.66** being unpaid premium under 2 insurance policies for the period commencing **16 April 2005** and ending **15 April 2006**; and the period commencing **1 February 2007** to **12 July 2007**. The case was heard and Judgment delivered on **19 February 2016**, whereupon judgment was entered in favour of the Plaintiff against the Defendants jointly and severally for the sum of **USD 62,507.66** together with interest and costs.

[3] It was further averred that thereafter, the Decree was drawn and the decretal sum settled on **20 April 2016**; and the costs of the suit were subsequently paid on **27 September 2016**. What has been outstanding is the aspect of interest, which was erroneously reflected as having been awarded at 65% per annum. It was averred by the Plaintiff that although the parties engaged in negotiations with a view of settling the aspect of interest no agreement has been reached, basically on account of the error, and on the ambiguity as to the duration thereof. The Plaintiff indicated its willingness to accept interest at court rates from the date of filing of suit to date of payment, namely **20 April 2016**, as opposed to the year **2007** when the cause of action arose. In addition to copies of the Plaint, the Judgment and the Decree, the Plaintiff annexed to the Supporting Affidavit copies of correspondence exchanged between the parties evidencing, inter alia, the payment of the decretal sum together with costs.

[4] In the Replying Affidavit sworn on behalf of the Defendants by **Mary Mutungi**, it was conceded that there was indeed an error on the face of the record in connection with the interest rate of 65% and urged that the same be corrected under **Section 99** of the **Civil Procedure Act**. The Defendant however opposed the proposal that interest be paid from the date of filing suit, contending that such interest ought to be payable from the date of Judgment, since the Plaint was silent on the effective date that interest would be payable.

[5] **Mr. Mburu** for the Plaintiff in his submissions made herein on **6 March 2018** argued that, though the Plaintiff had been deprived of the money from **2007**, it had sought interest effective from the date of filing of the suit; and that the Court has the discretion under **Section 26** of the **Civil Procedure Act**, to award interest from the date of the suit. He relied on the cases of **Prem Lata vs. Peter Musa Mbiyu [1965] EA 92**; **Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Others [2014] eKLR** and **Autolog Kenya Limited vs. Navisat Telematics (Kenya) Limited [2013] eKLR**.

[6] On behalf of the Defendants, **Ms. Effendy** reiterated the averments in the Replying Affidavit filed by the 1st Defendant/Respondent and conceded that there was indeed a clerical error in the Judgment which ought to be corrected under **the Slip Rule**. She was however opposed to the proposal by the Plaintiff that interest be paid from the date of filing of the suit. She submitted that the discretion of the Court in awarding interest must be judiciously exercised, and is dependent on the circumstances of each case. She also urged the Court to take into

account that the decretal amount was paid quickly, notwithstanding the clerical error. She relied on **Practice Note No. 1 of 1982, High Court of Kenya [1982] KLR 485; Banque Du Congo Belge S.A vs. M. Mario Sibilia, C. A 22 of 1934;** and **Judicial Hints on Civil Procedure** by **Kuloba** at page 92.

[7] Having perused the pleadings, the proceedings and the Judgment of the Court dated **19 September 2016**, there can be no doubt that the rate of interest of 65% was clearly a typographical error. This is because, no such rate was pleaded in the Plaint dated **13 May 2010**. Further, it needs to be said that around the time of this Judgment, it came to my attention that there was a malware that was detected in my Secretary's desktop computer; which had the effect of tampering with or inserting random figures in files processed by that computer. Accordingly, and there being no disputation that this was a typographical error, I would proceed to correct the same under **the Slip Rule** to reflect the correct intention of the Court in connection with that Judgment.

[8] Indeed, in the case of **Vallabhdas Karsandas Raniga vs. Mansukhalal Jivraj & others [1965] EA 700** in which it was sought to amend a judgment to include a refund of the monies paid by the Appellant, the East African Court of Appeal held that;

“A slip order will only be made where the court is fully satisfied that it is giving effect to the intentions of the court at the time when the judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

[9] Clearly, it was not the intention of the Court to award the Plaintiff interest at 65%, which it did not ask for in the first place. That would have been unconscionable. Moreover, a look at the Plaint does show that no specific rate was pleaded by the Plaintiff.

[10] As for the effective date of payment, again, no specific plea was made in the Plaint in that regard. The Plaintiff simply prayed for **“...Interest and costs thereon till payment in full...”** Hence, vide its Supporting Affidavit filed herein on **1 March 2018**, the Plaintiff asked to be paid interest from the date of filing suit, namely, **26 May 2010**. On the other hand, the Defendants were content to pay interest from the date of Judgment.

[11] Thus, having considered the rival arguments in this regard as well as the authorities that were cited by Learned Counsel, I would agree that, in principle, the Court has the discretion to award pre-judgment and even pre-suit interest if this is warranted. **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, is explicit that:

"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 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."

[12] The rationale for the above provision was well explained in the case of **Lata vs. Mbiyu [1965] EA 592** that an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money or specific goods through the wrongful act of a defendant. Hence, in **Dipak Emporium vs. Bond's Clothing [1973] EA 553**, it was held that:

"The court's right to award interest is based on Section 26(1) of the Civil Procedure Act which states that 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 prior to 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 payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

[13] And in **Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya Limited [2015] eKLR, Odunga, J.** had occasion to summarize the three instances provided for in **Section 26(2) of the Civil Procedure Act** in which interest is awardable thus:

[a] Interest adjudged on the principal sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any;

[b] Interest on the principal sum adjudged from the date of filing the suit to the date of the decree, where, the court decides at its discretion, the rate of interest to be awarded; and

[c] Interest on the aggregate sum so adjudged from the date of decree to date of payment in full.

[14] There is no gainsaying therefore that pre-action or pre-judgment interest have to be pleaded and justification shown for awardability during the trial for the Court to have some basis for making such an award. This was the holding in the case of **Sempra Metals Ltd vs. Inland Revenue Commissioners and Another [2007] 3 WLR 354** in which it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by

the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

[15] Similarly, in **Kawoko Estate Coffee Factory Limited vs. Zassa Civil Appeal No. 32 of 1969 UR** the court was of the view that undue delay in bringing an action may be a good ground for refusing interest on money wrongly withheld, and that failure to prosecute a suit with diligence might well have the same result; and therefore that the trial court would be best placed to consider all these matters in exercising its discretion in respect of the interest payable. I therefore take the view that whereas pre-action or even pre-judgment interest is awardable, the same would only payable if expressly claimed and justification made in that regard at the trial; and that in the circumstances hereof, there having been no such express claim, there would be no basis for awarding interest from the date of filing of the suit.

[16] In the result I would allow the Notice of Motion dated **18 December 2017** and grant the following orders:

[a] That the Judgment that was delivered herein on **19 February 2016** be and is hereby reviewed and amended with regard to the rate of interest awarded to the Plaintiff by replacing the rate of 65% with the Court rate of interest being 12% per annum.

[b] That the interest due as above is payable from the date of Judgment till the date of payment of the principal sum, being **20 April 2016**.

[c] That, granted the nature of the application, there be no order as to costs.

[d] That a copy of this Ruling be served on the National Council for Law Reporting for appropriate corrective action.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2018

OLGA SEWE

JUDGE