



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 447 OF 1998**

**CALEDONIA SUPERMARKET LTD.....PLAINTIFF**

**VERSUS**

**THE KENYA NATIONAL EXAMINATION COUNCIL.....DEFENDANT**

**RULING OF THE COURT**

1. On 10<sup>th</sup> April, 2017 this court delivered a Judgment in favour of the Plaintiff against the Defendant as follows:

(a) Kshs. 6,633,833.00.

(b) Interest on (a) above at 16% p.a. with effect from 3<sup>rd</sup> September, 1998 until payment of the decree herein in full.

(c) Costs shall be for the Plaintiff.

2. In the process of execution of the decree above by the Plaintiff there arose a disagreement as concerns the final decretal amount. The Plaintiff on 12<sup>th</sup> May, 2017 secured a decretal order for Kshs. 124,003,283.00 having interpreted the said Judgment to have awarded compound interest rather than simple interest. The Plaintiff then sought to execute the said decree through a proclamation of attachment against the Defendant. Parties disagreed on the nature of interest applicable, and by consent referred this matter to the trial court to clarify the nature of interest applicable. Parties also agreed to suspend the process of execution pending the determination of the issue of interest. They also filed submissions on the same.

**Submissions**

3. The Defendant filed its submissions on 7<sup>th</sup> July, 2017. The Defendant giving the brief history of the application submitted that the Plaintiff/Judgment Creditor's advocates unilaterally extracted a decree of the Judgment of the court delivered on the 10<sup>th</sup> April, 2017 in which the interest component was calculated on compound basis and which resulted in a decretal sum of Kshs. 124,000,000/= made up of a principal sum of Kshs. 6,633,833/= (as per the Judgment) and interest of Kshs.. 117,367,000/= for the period between 3<sup>rd</sup> September, 1998 to 12<sup>th</sup> April, 2017, the date of the decree. The Defendant submitted that the decree was issued after the Plaintiff prepared a draft decree and submitted it to the Registrar without following Order 21 rule 8(2) of the Civil Procedure Rules, 2010 which requires a party to prepare a draft decree and submit it for approval or amendment to the other party before submitting it to the

Registrar. The Defendant submitted that the Plaintiff also worked out a schedule of the interest it thought was due and accompanied it with the draft decree for approval by the Registrar and which the Registrar adopted wholesale without regard to the Judgment.

4. It is the Defendant's submission that by failing to send to the Defendant the draft decree for its approval or amendment, and by the Registrar proceeding to approve the draft decree as drawn by the Plaintiff without the Defendant's involvement, the parties were denied the opportunity to exhaust the process of settling the terms of the decree as is provided for under rule 8(4) of Order 21 CPR, 2010. The Defendant's case is that to the extent that the Plaintiff did not adhere to the provisions of the law as set down, the said decree was irregular and so follows the consequent levying of execution of the warrants issued pursuant to the said decree. The Defendant construes the interest applicable on the Judgment to be on simple basis calculations rather than on compound basis calculations amounting to Kshs. 19,757,011.60. The difference in the workings of the Plaintiff and the Defendant using the simple and the compound formulae basis respectively is a sum of Kshs. 97,609,988.60 which by any standards the Defendant states is a colossal amount. As to whether it is simple or compound interest that is applicable to the award the Defendant submits that the Judge simply and on the basis of a plain reading of paragraph 27 of the Judgment awarded 16% interest. The Defendant cited the case of **Anab Hussein Arab vs. Small Enterprises Finance Company Limited [2005] eKLR** where the parties referred a Judgment back to the court under rule 8(4) CPR, 2010 for interpretation as to whether simple or compound interest formula was applicable in working out the decretal sum. The Judge in Ruling that simple interest was applicable had this to say:

**"I have considered the submissions of counsels and my Ruling is simply this, that the words of the Judgment are very clear. There was no compound interest awarded to say so would be to impose words that were not in the Judgment. The rate of interest awarded in that Judgment was 27% per annum. Had the court intended to award compound interest it would have stated so. The Plaintiff's submission that the court ordered restitution to the Plaintiff and therefore it was indicative that the court accepted the Plaintiff's claim for unjust enrichment; I think at this stage in time has no bearing. A final Judgment having been passed, short of an appeal being filed, it remains as delivered."**

5. The Defendant submitted that the rule was adopted in **Park Projects Limited vs. Halifax (City) [1981], 48 N.S.R. (2d)**, where the court held that in the absence of an agreement, express or implied of compound interest, the mortgagee is entitled only to simple interest and any stipulation for compound interest must be strictly construed. The Defendant also cited the Court of Appeal in **Bank of Nova Scotia vs. Dunphy Leasing Enterprises Limited [1991], 83 Alta. L.R. 92d) 289, [1992] 1 E.E.R. 577 (c.a.), AFF'D [1994] is.c.cr. 552, 18 Alta. L.R. (3d)2**, wherein it was reiterated that:

**"...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."**

6. From the foregoing, the Defendant's case is that the Judgment delivered on the 10<sup>th</sup> April, 2017 awarding the Plaintiff a sum of Kshs. 6,633,833/= together with interest at 16% per annum cannot be construed to have provided for the said interest to be worked out on compound basis as to be so construed the Judge needed to have expressly provided for the interest to be compounded. Accordingly, the Defendant submitted, the decree issued on the 13<sup>th</sup> April, 2017 is invalid first in that the wrong procedure was followed in its extraction and secondly that the decretal sum borne in it is wrong for erroneous workings. Further, that the execution proceedings flowing from it are unlawful and that therefore the Defendant should not bear the costs of the execution proceedings that were wrongly initiated.

7. The Defendant argues further that the court could not have intended to allow application of the interest rate of 16% on compound basis. The Defendant gives the following as its reasons for so arguing:

(a) The Plaintiff in its prayers in the Amended Plaint of 3<sup>rd</sup> September, 2002 at paragraph 4, 6 and 7 prayed for costs of the suit, special damages and general damages, aggravated and or exemplary

damages, all with interest at 19% p.a.

(b) The Plaintiff's witness (PW2) did not lead any evidence to show that she deserved an order for interest on compound basis. In answer to cross examination on how he calculated the interest, PW1 stated that he had received instructions "*only to compute interest*" (see paragraph 6 of the Judgment). There was no reason given as to why he used compound interest as opposed to simple interest.

(c) The Plaintiff's submissions did not also seek that interest be compounded.

8. The Defendant submitted that there is no basis for holding that the use of the phrase "*commercial rates*" at paragraph 26 of the Judgment equates the term "*commercial*" to compound interest. If this were so, nothing could have been easier than for the Judge to include the word "*compound*" in the award at paragraph 27, which immediately followed paragraph 26.

9. To buttress the argument that the formula applicable for the working out of interest is simple interest the Defendant cited the case of **Nalinkumr M. Shah vs. Mumias Sugar Company Limited [2010] eKLR** where the Plaintiff claimed compound interest in two instances. In the first instance the court allowed and stated as follows at page 29/30 of the Judgment:

**"I have already found that the court has power under Common Law to award interest including compound interest for late payment of debt. This indeed is the Plaintiff's claim ... In his testimony the General Manager Paresh Meghji Shah stated that if the Plaintiff had been paid the said sum of Kshs. 3,381,182.50 he would have placed the same with his bank on a fixed deposit on roll-over terms and earned interest thereon during the said period calculated on the basis of compound interest by reference to prevailing commercial rates."**

10. The Defendant submitted that it is not everyone who claims compound interest who gets it. Rather the claimant must lead evidence upon which the court will exercise its equitable discretion. It is thus the Defendant's submission that the Plaintiff did not adduce evidence that the court can consider in order to decide whether the Plaintiff's claim meets the criteria for which compound interest can be given.

11. The Defendant's case is that the Plaintiff's claim was for special damages and general damages for which interest is ordinarily awarded from the date of filing suit and the date of Judgment respectively. The Plaintiff had no trading relationship with the Defendant as would invite a finding similar to those in the cases referred to herein. The Defendant is itself a statutory body established under The Kenya National Examinations Council Act Cap 225A Laws of Kenya and which under Part III of the said Act is shown to be publicly funded. The Defendant submitted that all these facts in addition to other arguments above dictate against an exercise of discretion granting the Plaintiff interest on the special and general damages on compound basis. The Defendant submitted that this court ought to declare that the award made to the Plaintiff on the 10<sup>th</sup> April, 2017 was to be calculated on the basis of simple interest and hence declare the decree issued on 13<sup>th</sup> April, 2017 to have been issued in error and to order the said decree cancelled and in its place be issued a new one based on workings using simple interest formula on the principal amount.

12. The Defendant also urged the court to find that since the decree issued on the 13<sup>th</sup> April, 2017 was issued based on erroneous workings, the execution levied pursuant thereto was illegal and that the Defendant is not liable to pay the auctioneers fees or any fees thereon.

13. The Plaintiff filed its submission on 30<sup>th</sup> June, 2017. In rebuttal to the Defendant's submissions the Plaintiff revisited its pleadings, noting that it filed its amended Plaint dated 3<sup>rd</sup> September 2002 on the 17<sup>th</sup> of September, 2002. The Amended Plaint sought *inter alia* damages, costs at 19% per annum from the date of the suit, special damages as set out in the Plaint and general, aggravated or exemplary damages also at 19% per annum. The Defendants never filed an amended Statement of Defence. The Plaintiff submits that the Court of Appeal in **Civil Appeal No. 184 of 1999** issued an interlocutory Judgment in favour of the Plaintiff herein on the 22<sup>nd</sup> December 2000. The Court of Appeal had found

that the Plaintiff's tenancy was illegally terminated and therefore the Plaintiff was entitled to recover damages from the Respondents for the loss and damage that occurred. The Plaintiff submitted that it called as its first witness, Mr. John Ndung'u George, an accountant of 8 years. The witness produced a report on computations of interest accrued as at September 2014. The said report was prepared by G. W. Joseph & Company C.P.A. The Plaintiff submitted that the said report was not challenged by a contradictory report of any other accountant. That report at page 3 tabulated interest at **16% compounded monthly**. The Plaintiff submitted that this court in its Judgment at paragraph 26 agreed with it and stated that the loss in the present case is commercial loss which should attract interest at commercial rates. The Plaintiff submitted that through the evidence placed before the court it was clear that the rate of interest is compound. This is justified by the nature of the Plaintiff's business as a supermarket.

14. The Plaintiff submitted that according to Black's Law Dictionary, 10<sup>th</sup> Edition, Compound and Simple Interests are defined as follows:

**Compound interest.** Interest paid on both the principal and the previously accumulated interest.

**Simple interest.** Interest paid on the principal only and not on accumulated interest. This interest accrues only on the principal balance regardless of how often interest is paid. – Also termed straight-line interest.

15. The Plaintiff submitted that while there is no definition of the term Commercial Interest, the term commercial has several definitions as an adjective *of, relating to, or involving the buying and selling of goods; mercantile, employed in trade, of, relating to, or involving the ability of a product or business to make profit*. The Plaintiff relied on these definitions, as it was engaged in the business of supermarket. The Plaintiff submitted that it carried out a commercial enterprise and would have re-invested its profits from its trade back into its business. The Plaintiff quoted Justice Gikonyo in **FEROZ NURALJI HIRJI VS. HOUSING FINANCE COMPANY OF KENYA LTD & ANOTHER [2015] eKLR** where the learned Judge stated that:

**“...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...”**

16. The Plaintiff urged the court to take judicial notice, as a matter of general or local notoriety, that commercial institutions do not charge simple interest on sums owed. The Plaintiff prayed for a declaration that the rate of interest termed as commercial interest in the Judgment of 10<sup>th</sup> April 2017 is in fact compound interest, based on the nature of the Plaintiff's business, as submitted by PW1 being an expert witness and captured in the Decree dated 13<sup>th</sup> April 2017; a declaration that the execution proceedings by the Plaintiff and its agents pursuant to the Decree dated 13<sup>th</sup> April 2017 was just, legal and proper; that the Defendant/Judgment Debtor bear the Auctioneer costs; and that the Defendant bears costs of the Application dated 22<sup>nd</sup> May 2017.

### **Determination**

17. I have carefully considered the submissions of the parties on the nature of the interest applicable. It is also easier for me to determine the issue because I am the person who heard the matter. Therefore the clarification sought herein is perfectly in order.

18. At paragraph 26 of the Judgment I found that the Plaintiffs' loss should be compensated with interest. The interest herein referred to is that kind of interest which will enable the Plaintiff to recoup the loss which the Plaintiff endured through the years 1998 to 2017 due to the unlawful acts of the Defendant. The Plaintiff was carrying out a business of supermarket. That business was unlawfully

destroyed by the Defendant 19 years ago. This court found that the Plaintiff was entitled to Kshs. 6,633,833/= with interest that must be deemed to fully compensate the Plaintiff for his loss. In **Park Projects Limited vs. Halifax (City) (1981), 48, N.S.R. (2d)**, the court stated that in the absence of an agreement, express or implied for compound interest, the mortgagee is entitled to simple interest and any stipulation for compound interest must be strictly considered. That is correct. However, where a matter is determined by court, the court is under duty to uphold justice, and can order any regime of interest which the court must have intended to meet the ends of justice. In order to meet the intended ends of justice the interest ordered by this court can only be expressed to be compound interest. A brief mental calculation on simple interest brings the sums to about Kshs. 19,000,000/=. This is not the kind of money to compensate the Plaintiff for loss of a supermarket business for 19 years. If that were so it would mean that the Plaintiff were making about Kshs. 1,000,000/= per year. On the other hand if the said amount were expressed in compound interest the Plaintiff would have earned about Kshs. 6,000,000/= per year for the said 19 years. The cardinal rule is that interest should be calculated using the normal method (simple interest) and not compound interest unless there is a good reason for employing the compound interest. In my view, the matter at hand is not a simple loss. It is a loss of business of a supermarket for 19 years, pursuant to illegal actions of the Defendant. Any attempt at addressing that loss must be realistic.

19. The concept of interest allows an aggrieved party a compensation which attempts to ameliorate the loss or pain. The decision therefore whether that interest should be compounded or simple must address the said loss, and also compensate for it. I had observed in the Judgment that the matter was commercial and would attract interest at commercial rates. That commercial rate was to be compounded in order to achieve the objective of the interest rate levied. The Defendant's case is that the court did not specifically express that the rate was compounded. On the other hand the Plaintiff perceived the same to be compounded rate of interest. The parties then sought for this clarification. The court has power under Common Law to award interest including compound interest for late payment of debt. Again the court has jurisdiction to award compound interest where a claimant is seeking restitution. The nature of things and 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. What form the loss takes, the court will decide on each case. It is a matter to be decided by court.

20. Justice Havelock in **Veleo (K) Ltd vs. Barclays Bank Of Kenya Ltd [2013] eKLR** cited the Canadian case of **Bank of America Canada vs. Mutual Trust Company [2002] 2 SCR 601**, where the Supreme Court of Canada held that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it. The Supreme Court of Canada went on to hold *inter alia*:

**“...Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent... Where ... there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid...”**

21. The parties in this matter sought for the clarification on the nature of the interest awarded. Although there was no express word “*compound*”, the Judgment in this matter was made, and remains valid, and

makes sense only with the emphasis that the interest rate of 16% per annum awarded to the Plaintiff shall be compounded.

22. In that regard, therefore, save for the procedure of the preparation of a decree under Order 21 rule 8(2) of the Civil Procedure Rules, the Plaintiff was right to prepare the final decree on the basis of compound interest, and the execution process which was suspended herein based on compounded interest was proper and lawful.

23. The costs of this application shall be for the Plaintiff.

That is the Ruling of the court.

**E. K. O. OGOLA**

**JUDGE**

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of September, 2017.**

**LADY JUSTICE G. NZIOKA**

**JUDGE**