



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 245 OF 2013**

**FARAM E. A. LIMITED.....PLAINTIFF**

**-VERSUS-**

**ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE PRINCIPAL SECRETARY MINISTRY OF HEALTH.....2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR NATIONAL BLOOD TRANSFUSION SERVICES.....3<sup>RD</sup> DEFENDANT**

**RULING**

[1]The Plaintiff's Notice of Motion dated **17<sup>th</sup> November, 2015** and filed on **18<sup>th</sup> November, 2015** is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 13 Rule 2** of the **Civil Procedure Rules, 2010**. The Plaintiff seeks the following orders:-

**1) That Judgment be entered for the Plaintiff against the defendants jointly and severally for the sum of Kshs. 17,367,755.00 with interest thereon at commercial bank rates of 15% from the date of filing suit.**

**2) That the defendants to pay to the Plaintiff the costs of this case.**

[2]The application is based on the grounds set out therein and is supported by the Affidavit of **ERASTRUS MOMANYI MORURI**, the Director of the Plaintiff company, and sworn on **17<sup>th</sup> November, 2015**. The background to the present application is that following an application to have the Defendants' Defence struck out, the Court entered judgment for the Plaintiff against the Defendants jointly and severally for the sum of **Kshs. 17,367,755.00** with interest at Court rates from the date of filing the suit. It is the Plaintiff's assertion that having supplied goods to the Defendants, they were entitled under **Section 48** of the **Public Procurement and Disposal Act, 2005** to be paid interest on the decretal sum at the prevailing commercial bank rates. The Plaintiff claimed for commercial interest rates of 25% with effect from **13 July 2012**. However, in its Ruling dated **30<sup>th</sup> July, 2015** the Court held that the issue of interest rate was a triable issue since the Defendant was of the contention that the interest payable was at 15%.

[3] It is the Plaintiff's case that there is a clear admission by the Defendants in their filed submissions dated **16<sup>th</sup> October, 2014** that they were willing to pay 15% commercial interest compounded every month, a rate they are willing to accept to facilitate the expeditious and timely disposal of the case. The

Plaintiff therefore urged the Court to grant the application as sought to finally determine the case, granted the admission aforementioned.

[4] In response to the application, the 1<sup>st</sup> Defendant filed Grounds of Opposition dated **30<sup>th</sup> June, 2016** on **6<sup>th</sup> July, 2016**. In essence, the Defendant denied any admission on the issue of commercial interest rate of 15% either in pleadings or otherwise.

[5] The application proceeded by way of written submissions. The Plaintiff filed its submissions dated **11<sup>th</sup> May, 2016** on **12<sup>th</sup> May, 2016** while the Defendant filed its submissions dated **30<sup>th</sup> June, 2016** on **6<sup>th</sup> July, 2016**. I have considered the pleadings herein as well as the written submissions by Counsel in support and opposition to the application and note that in the Ruling dated **30<sup>th</sup> July, 2015** the Court declined to grant the Plaintiff interest at commercial rates of 25% compounded every month as was prayed in the Plaintiff, for the reason that that rate was disputed and that the Plaintiff did not substantiate how it came up with the rate of 25%. The result was thus:

**"...the court allowed the Plaintiff's Notice of Motion application dated 8<sup>th</sup> September 2014 and filed on 11th September 2014 in the following terms:**

**(a) Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally for the sum of Kshs. 17,367,755/= together with interest [at] court rates from the date of filing suit.**

**(b) Parties to comply with the Practice Directions Kenya Gazette Notice No. 5179 of 28th July 2014 and thereafter take a hearing date for Case Management Conference at the Registry.**

**(c) Costs shall be in the cause..."**

[6] The purport of the foregoing, to my mind, is that a decision had been taken that interest be paid at court rates, but at the same time liberty was granted to the Plaintiff to have the same varied to 25%, or such other rate as the Court would determine, if the Plaintiff could justify the same. Thus, the matter was to proceed to trial only on the contested issue of rate of 25% compound interest. The Plaintiff then sought to obtain judgment on admission on interest at 15%, on the basis of the Defendants written submissions filed herein **on 21 October 2014** and the findings of the court in the Ruling dated **30 July 2015**. The Plaintiff has expressed its willingness to be paid interest at the aforesaid rate at 15% as admitted by the Defendant in final resolution of the case.

[7] I have considered the respective positions taken by the disputants herein and note that, though the Defendant denied any admission of the said commercial interest rate of 15% in its Grounds of Opposition, it is manifest in its submissions on the present application that they had admitted to the commercial interest rate of **15%**. Their only contention at the time was that they did not concede to the interest being compounded monthly. The written submissions by the Defendant filed, which were filed on **21 October 2014**, read as follows in part:

**"...We filed grounds of opposition dated 25<sup>th</sup> September 2014, however this is a matter that we have no defence against save for the overdue amount claimed in interest at a commercial rate of 15% instead of 25% compounded every month..."**

[8] Again, in their written submissions filed in respect of the instant application on **6 July 2016**, the Respondents reiterated this position thus:

**"While it is commendable that the Plaintiff in the interest of justice and expeditious resolution of this case is willing to concede to be paid interest at a rate of 15% as admitted by the Defendants, it would be unfair to the Defendant if the interest due to the Plaintiff were compounded monthly."**

[9]In view of the foregoing, I have no hesitation in finding as I do, that the Defendant has unequivocally conceded to paying interest at 15% and that the only question to resolve, is whether it should be compounded or not. It is now trite that interest is awarded at the discretion of the court. This is the legal position as expressed in **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, which stipulates 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."**

[10]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 act of a defendant. In exercising its discretion, the Court must of necessity consider the peculiar circumstances of each case, including the terms of engagement between the parties as expressed in their contract. In this regard, the Court of Appeal had the following to say with regard to **Section 26(1)** aforementioned in the case of **Shah vs Guilders International Bank Limited [2003] KLR 8:**

**"...we further understand these provisions to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent..."**

[11]A perusal of the record shows that the Plaintiff claimed interest on the sum claimed at commercial bank rates at monthly rests with effect from **13 July 2012** until payment in full. It is also evident in the court ruling of **30 July 2015** that the court was satisfied that the Plaintiff had taken a borrowing from the bank to service the subject contract. It made specific findings that the letter dated **10 November 2008**, which contained the terms of the facility, included an element of compound interest at the rate of 19.5%.

[12]In the case of **Nalinkumar M. Shah vs. Mumias Sugar co. Ltd [2010] eKLR** the court held thus:

**"Whereas I recognize that the court has jurisdiction to award compound interest where a claimant is seeking restitution of money or interest by way of damages for breach of contract to pay a debt ... the court should retain the discretion to make such an award."**

[13]The court, in the aforementioned case, relied on the English 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..."**

[14]There is no dispute that the Plaintiff has, for quite a while, been kept out of the funds due to it for goods supplied and delivered, and that it is therefore entitled to compensation. It is also not in dispute that the Plaintiff took a loan from the Bank for purposes of financing the importation of medical and laboratory equipment which it later supplied to the 3<sup>rd</sup> Defendant in June 2012. The interest rate provided for by the Bank was to be calculated on daily loan balances and payable monthly in arrears.(see the letter

*dated 10<sup>th</sup> November, 2008 attached to the Plaintiff's application and marked as EMM2).* It is also noteworthy that the contract was made pursuant to the provisions of the Public Procurement and Disposal Act, 2005, which provided for the payment of interest at prevailing commercial bank rates. The Court in exercising its discretion under **section 26** of the **Civil Procedure Act** is satisfied and finds that the Plaintiff is entitled to judgment for compound interest at the conceded rate of 15% from the date of filing of this suit together with costs of the suit.

In the result, the Plaintiff's Notice of Motion dated **17<sup>th</sup> November, 2015** and filed on **18<sup>th</sup> November, 2015** is hereby allowed as prayed with costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2016.**

.....

**OLGA SEWE**

**JUDGE**