REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 112 OF 2013

PUTHUCODE KRISHNAIYER SESHADRI……..……1ST PLAINTIFF

PREMA SESHADRI…….....…2ND DEFENDANT

VERSUS

THOMAS GICHANA NYAKAMBI MAOSA T/A

MAOSA AND COMPANY ADVOCATES ……..….DEFENDANT

RULING NO.2

1. On 24th September 2015 the Court upheld the decision made by the learned trial Judge, when he awarded to the plaintiff the sum of Kshs. 21,840,000/-.

2. However, the court set aside the decision to award interest on that principal sum. Thereafter, the court invited the parties to address the question regarding the rate of interest, together with the date from when such interest would start accruing on the principal sum.

3. The plaintiff made submissions on the issue. However, even though the defendant was given more time to provide his own submissions, he failed to do so.

4. According to the plaintiffs, the applicable rate of interest is that which flows directly from the agreed Terms and Conditions of sale. Therefore, the plaintiffs urged the court to compensate them by awarding *"bank interest and other charges they have incurred in servicing their borrowing and any consequential loss of any potential returns on investment of their monies?.*

5. Posing there for a moment, I find that the aforegoing submissions contains 2 distinct arguments, which are not necessarily consistent with each other.

6. On the one hand, there is reference to the Terms and Conditions of the Contract.

7. If the contract specified the applicable rate of interest, the plaintiffs should simply have pointed out the relevant provision.

8. Secondly, the plaintiffs needed to demonstrate to the court that the specified provision in the contract stipulated that the applicable rate would be one which required the seller or the defendant to pay interest at bank rates, together with other charges which the plaintiffs had incurred in servicing their borrowing.

9. I am afraid that the plaintiffs have not presented to the court, the contract whose provisions stipulate what is now being stated in the written submissions.

10. I also add that the plaintiffs have failed to show that there was any contractual provision that they would be compensated for any consequential loss of any potential returns on investment of their monies.

11. Whilst a contractual term specifies how compensation would be calculable, a general claim for compensation is ordinarily a claim for general damages.

12. A contractual claim may or may not be commensurate with the need to provide compensation: and it is enforced by the court whether it offers less or more than a sum which would otherwise be deemed sufficient to compensate a claimant for the losses he had suffered.

13. When the plaintiff asked the court to hold that the defendant was liable to reimburse the plaintiffs for the money which had been entrusted to him, but which the defendant had converted to his personal use, I find that that submission was an attempt to re-open the case in relation to the principal sum which has already been awarded.

14. Similarly, the fact that land prices in Nairobi city appreciate quite easily, so that the land in question could now be valued at much more than Kshs. 21,000,000/-, should have been a factor in determining the principal sum to be awarded to the plaintiff.

15. The trial court did also take into account the element of fraud. Therefore, that cannot be a factor when the court was determining the question of the interest to be imposed on the principal sum.

16. The following is the basis upon which the liability was determined;

> **"Quite clearly the Defendant gave his professional undertaking dated 19/9/2012, to pay to the plaintiffs the sum of Kshs. 21,840,000/- in reimbursement of the sums paid to him as stakeholder in the aborted transaction. As a result I have no hesitation in entering judgement for the plaintiffs in the amount of Kshs. 21,840,000/- against the Defendant, together with costs of the suit.**
>
> **As regards interest to be awarded on the judgement sum, I will invite further submissions on the point from counsel for the plaintiffs?.**

17. In the light of the foregoing, the court had already awarded to the plaintiffs the primary remedy deemed to be appropriate. Therefore, it cannot now be the time for the plaintiffs to seek *"recompense?;*

> **"for the bank interest and other bank charges they have incurred in servicing their borrowing and any consequential loss of any potential returns on investment of their monies?.**

18. The only outstanding issue is on interest; and not on any other claims.

19. This is therefore, also, not the opportunity for the plaintiffs to canvass the arguments based on claims for "*money had and Received?.*

20. If the plaintiffs had intended to prove their case in that respect, it should have already been done before the learned trial Judge.

21. In this case the plaintiffs asserted that the interest should be based on the rates stipulated in clauses 1.1.4 and 10.2 of the Agreement for Sale dated 13th November 2011.

22. The Agreement in issue was between **AGGREY CHRISTOPHER ACKELLO OGUTU and ANNA BERTA BRIGITE HILEN,** *(who were the vendors)* and **PUTHUCODE KRISHNAIYER SESHARDI** and **PREMA SESHADRI,** *(who were the purchasers).*

23. Clause 10.2 of the said Agreement stipulated that if the vendors defaulted, the purchasers would issue a 21 days' notice. If there was no compliance with the notice, the purchasers could rescind the Agreement.

24. When the Agreement had been rescinded, the vendors were required to return all monies paid by the purchasers.

25. The money would be repaid together with interest as specified in the Agreement.

26. Clause 1.1.4 of the Agreement defined the *"Interest Rate?* as being;

> **"the per annum rate of three per cent (3%) above the base lending rate as published by Barclays Bank of Kenya Limited from time to time?.**

27. Of course, the defendant was not a party to the Sale Agreement, and so he could not be directly bound by its terms.

28. Nonetheless, the plaintiffs submitted that the terms would be binding upon the defendant because they were the retainers.

29. There is no doubt that by virtue of the fact that the plaintiffs had given instructions to the defendants, to act as their advocates, that constituted a retainer.

30. Once an advocate is retained by a client, he acquires the requisite authority to bind his client when he deals with third parties within the limits of the authority bestowed upon him.

31. However, the advocate does not become either a party to the transaction between his client and a third party, nor does he become bound by the terms of the contract between his client and the third party.

32. I find no basis in law or in fact for holding that the defendants are liable to pay interest on the basis of the terms of the Sale Agreement, as they were not party to that Agreement.

33. In any event, the plaintiffs did not adduce evidence to demonstrate the rates of interest which Barclays Bank of Kenya Limited published from time to time.

34. Therefore, even if the defendants had been found liable to pay interest in terms of the Sale Agreement, I would have held that the plaintiffs did not tender evidence to prove the actual rates published by Barclays Bank of Kenya Limited.

35. In the circumstances, I find that the interest payable by the defendants is at Court Rates, of 14% per annum. The said interest will be on the principal amount of Kshs. 21,840,000/- from 13th of November 2011, until payment in full.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **December** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Stanley Kihiko for the 1st Plaintiff

Stanley Kihiko for the 2nd Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.