**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 558 OF 2013**

**KITALE MAIN MILLERS LTD ::::::::::::::::::::::::::::::::::::::::::::::::PLAINTIFF**

**-VERSUS-**

**AGRICULTURAL DEVELOPMENT CORPORATION :::::: DEFENDANT**

# R U L I N G

1. The application before the Court is the Notice of Motion dated **15th September, 2014** and filed in Court on **17th September 2014**. It is expressed to be brought under Section 3A, 26 (i) and 34 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules.
2. The application is based on the grounds stated therein and is supported by the affidavit of **JOHN W, WANJOHI,** Advocate of the High Court of Kenya, sworn on **15th September 2014**. The application is also supported by the further affidavit of JOHN KAMAU NJAU, the managing director of the Plaintiff Company sworn on **18th December 2014.**
3. The main prayer remaining for determination is prayer 3 seeking award of interest at Court rates. Prayers 1 and 2 have been overtaken by events.

## THE BACKGROUND OF THE APPLICATION

4. This Court recorded a Consent on **12th March 2014** between the parties in this matter. In the said Consent, Judgment was entered in favour of the Plaintiff against the Defendant for the sum of **Kshs. 13,970,545/=**. The decretal sum was to be liquidated in monthly instalments of **Kshs. 2,000,000/=** per month commencing **30th day of April 2014** and thereafter on each subsequent 30th day of the month for a period of three months. The cost of the suit was agreed at **Kshs. 365, 308/=** to be paid to the Plaintiff's Advocates.
5. It is not in dispute that the decretal amount of **Kshs. 13,970,545/=** as well as the Plaintiff's Advocates costs of **Kshs. 365, 308/=** has since been settled by the Defendant. The Plaintiff has now approached this Court for orders that interest on the decretal amount of **Kshs. 13,970,545/=** be awarded at Court rates from 30th December 2012.

## THE PLAINTIFF'S CASE

6. The Plaintiff's contention is that they have suffered loss at the hands of the Defendant, this being a commercial transaction. It is therefore the Plaintiff's case that interest should be charged on the

decretal amount at Court rates from the date of the last supply which was on 30th December, 2012. This is also the date the Plaintiff was expecting to be paid.

7. It is averred for the Plaintiff that from the local purchase orders, the agreed credit duration was ninety (90) days from the date of supply. However, the Defendant defaulted in payments. It is therefore the Plaintiff's case that they are justified to be compensated with interests to run from 30th December 2012.
8. In his further affidavit, the Plaintiff's Managing Director avers that due to the Defendant's default in paying them, the Plaintiff was inconvenienced and embarrassed when it could not pay the farmers. The deponent further avers that the Plaintiff has asked for interest at Court rates of 12% from December 2012 to October 2014 which the Defendant has refused to pay. It is the deponent's position that the Plaintiff has a right to be paid the said interest for the inconvenience and withholding of their payments by the Defendant.

**THE DEFENDANT'S CASE**

9. The application is opposed. The Defendant filed a Replying affidavit sworn by the acting corporation Secretary, **ANTHONY ADEMBA**, on **23rd October 2014** and filed in Court on the same day.
10. The deponent avers that the Consent order of 12th March 2014 was made in good faith with a view of disposing off the suit in its entirety. It is therefore the deponent's position that the issue of interest is an afterthought on the part of the Plaintiff. The deponent further avers that the defendant has completed payment of the decretal sum of Kshs. 13,970,545/= the last and final instalment having been made on 17th October 2014. He also avers that the costs of the suit have already been settled.
11. It is the Defendant's case that there is no evidence that the Plaintiff has suffered serious financial setbacks as alleged to warrant issuance of execution proceedings or an award of interest on the principal sum. It is further the Defendant's case that the current application seeks to amend the consent order but the basic parameters for granting such orders have not been met. It is on that basis that the Defendant urges this Court to decline the Plaintiff's application.

**ANALYSIS**

12. I have considered the application, the affidavits in support and in opposition to the application. I have also considered the written submissions by Counsel. Having done so, I take the following view of the matter.
13. In the consent order, at paragraph 6, it was stated that the matter would be mentioned on **2nd July 2014** to record further orders or a possible review for of the monthly instalments. The matter was mentioned on **2nd July 2014** whereby the Parties confirmed that there was compliance with the orders of **12th March 2014**. The parties requested for a further mention date on **29th September 2014**. However, before the said date, the Plaintiff filed the current application seeking for interest in the decretal sum. Therefore the mention date of **29th September 2014** was vacated.
14. Counsel for the Plaintiff has submitted that in the said Consent, parties reserved **paragraphs 4 and 6** of the Consent for further orders or further directions. It is Counsel's submission that the only issue that was left to discuss or argue was the interest only. On the Defendant's part, it is Counsel's submission that the belated claim for interest is an attempt to re-open the Consent Orders of **12th March 2014**.
15. I have looked at paragraphs 4 and 6 of the Consent which provided that the matter would be mentioned for further orders or further directions. This essentially means that the Court had discretion to rule on any other matter incidental to the said Consent. On that note, the Parties were at liberty to raise any issue relating to the Consent.
16. I have noted the various authorities cited by Counsel for the Defendant to the effect that a consent judgment can only be set aside or varied on grounds of fraud, misrepresentation or collision. **See National Bank of Kenya Vs James Orengo [2005]**. However, in the current case the circumstances are different. The Plaintiff does not seek to vary or set aside the Consent order of

**12th March 2014**. As earlier stated, the Consent provided that the matter would be mentioned for further orders or further directions. It is my view that this issue of interest can be determined under ambit of further orders.

17. Section 26 (1) of the Civil Procedure Act which deals with interest provides as follows:-

> ***"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 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."***

From the above provision, it is clear that this Court has discretion to order interest to be paid at such rate as it deems reasonable. The Plaintiff's money became due on or about 30th December 2012 when it last supplied goods to the Defendant. However, the Defendant defaulted in making payment within the ninety (90) days period indicated in the Local purchase order. The Plaintiff started receiving payments in April 2014 after the consent order was recorded. Therefore the Plaintiff lost the opportunity to use the said money at that time for investment purposes or otherwise which amounts to financial loss. In that case, the Plaintiff is entitled to interest on the decretal amount.

18. This was a matter which was settled amicably by the parties. I will adopt that spirit of consent and award interest at 10% per annum, a littler lower than the common court rates of 12% per annum from the date of filing the suit on 18th December 2013 to the date the last instalment was paid being 17th October 2014, based on reducing balance since the debt was paid in instalment.

19. In the upshot, the Plaintiff's Notice of Motion dated **15th September, 2014** and filed in Court on **17th September 2014** is hereby allowed to the extent that interest will be awarded on the decretal amount at 10% per annum from the date of filing the suit on 18th December 2013 to the date the last instalment was paid, based on reducing balance since debt was paid in instalment. There will be no order as to costs.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Kimani for Wanjohi for the Plaintiff

Mr. Gichuru for the Defendant

Teresia – Court Clerk