REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCCIAL AND ADMIRALTY DIVISION

CIVIL SUIT N0. 509 OF 2013

VIMALVELJI SHAH……...……..…… PLAINTIFF

VERSUS

CHEMAAFRICA LTD.....DEFENDANT

RULING

Whether interest is payable

[1] The Court entered judgment on admission for the principal sum on 18th of December 2014 against the Defendant. The court reserved the question on whether interest is payable upon the principal sum for trial. See the exact orders of the court below:

> **The upshot is that I allow prayer 1 of the application and enter judgment on admission in the sum of Kshs. 17,000,000 with costs thereon. The issue of interest will be tried between the parties in such manner as the court will direct on hearing the parties thereto. And as I promised, I hereby sustain the defence but strictly only for the trial of the issue of interest payable herein. It is so ordered.**

[2] The issue of interest was to be tried between the parties in such manner as the court will direct on hearing the parties thereto. On that basis the defence was sustained strictly on the issue of the interest payable herein.

[3] The Plaintiff argued that the applicable rate of interest is a matter of fact to be construed as from the agreement between parties herein. The Plaintiff cited the Central Bank Act, Chapter 491 Laws of Kenya which provides as follows at Section 36(3) and (4):

> **3) The Bank may determine the general terms and conditions under which it extends credit to specified banks and specified microfinance banks, and in particular, the Bank shall determine and announce the rates of interest or return it shall charge for granting loans or advances to specified banks and specified microfinance banks in accordance with this section, and may determine different rates of interest or return for different classes of transactions or maturities.**
>
> **4) The Bank shall publish the lowest rate of interest it charges on loans to banks and microfinance banks, and that rate shall be known as the central bank rate.**

[4] They argued that the practice among banking/financial institutions has been to set their loan interest rates based on the base lending rate published by the Central Bank of Kenya (CBK).Though banks have the liberty to set the said interest rates independently, they usually refer to the CBK rate and set their rates slightly higher around the same figure.As at 2012, the common prevailing interest rate was 24% as bench marked from the Central Bank of Kenya's base lending rate. This was the rate the parties herein have always used in previous transactions and also purposed to use in the present transaction.

[5] They made further submissions that the Plaintiff and the Defendant herein had an oral agreement implied by conduct that the applicable interest rate would be 24% compounded annually as that was the prevailing interest rate as at the fiscal year 2011/2012 when the loan of Kshs. 17,000,000/= was issued to the Defendant. In fact, parties have always conducted business previously using this rate and the Defendant is well aware of the same.The same is evidenced by the various communications made to the Defendant through letters, invoices sent out as well as statements of account touching on accrued interest and the amount owing. In all these communications, the defendant has never raised any objection and as such it is to be construed that it has all along been in agreement with the rate.Therefore, the plaintiff humbly submitted that the defendant is estopped by its conduct from turning back and disowning an agreement which it has been party to right from the onset.

[6] The Plaintiff posit that the loan of Kshs. 17,000,000/-, subject matter of the suit was given purely on business terms and not pegged on any long standing friendship as alleged by the Defendant.The plaintiff had the option to trade with the said principal amount from which he would have made way much more than he is expecting from the defendant. However out of humanitarian goodwill and intent, he opted to loan the Defendant the money to be repaid at 24% compound interest per annum as agreed.In light of the above, Section 44 A of the Banking Act, Chapter 488 of the Laws of Kenya can be construed in the circumstances at handto mean that a debtor is entitled to the principal owing, interest agreed between parties and the expenses incurred in recovery of the amounts owed. The section states;

> **"44A (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).**
>
> **(2) The maximum amount referred to in subsection (1) is the sum of the following –**
>
> **(a) the principal owing when the loan becomes non-performing.**
>
> **(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and**
>
> **(c) expenses incurred in the recovery of any amounts owed by the debtor.**
>
> **(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing"**
>
> **(4) This section shall not apply to limit any interest under a court order accruing after the order is made.**

[7] According to the Plaintiff, from the above legal provision is clear thatthe applicable 24% interest rate is not in any way unfair and does not vitiate the loan agreement. It is not outrageous

and unconscionable to warrant the agreement being set aside by this honourable court.

[8] They also cited Section 26(1)of the Civil Procedure Act, Chapter 21 Laws of Kenya which sheds more light on matters to do with interest. See the case of ***SHAH vs. GUILDERS INTERNATIONAL BANK LIMITED [2003} KLR 8*** as quoted in ***NATIONAL BANK OF KENYA LTD vs. PETER NYAKUNDI & ANOTHER (2006) eKLR*** where application ofSection 26 of CPR was discussed.

[9] They also relied on the case of ***FINA BANK LTD vs. SPARES AND INDUSTRIES LTD [2000]1EA. 52***as quoted in ***SAMMY JAPHETH KAVUKUvs. EQUITY BANK LTD & ANOTHER (2014) e KLR,***where Mary Kasango J stated that:

> **"...The function of court is to enforce what is agreed between parties and not what the court thinks ought to have been fairly agreed between parties..."**

And also literary work by **Sweet & Maxwell, 2nd Edition book on Estoppel** defines Estoppel by conduct as; a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation or denial.This is aimed at preventing inconsistency or fraud. The Plaintiff beseeched this Honourable Court to uphold the reasoning by Gikonyo J in ***ELSON PLASTICS OF KENYA LTD vs. NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION [2014] eKLR*** and ensure that justice is served by applying the agreed interest rate of 24% per annum which is not outrageous or unconscionable to warrant the agreement being set aside by this honourable court. The court should also apply the Overriding Objective principles as set out under ***Section 1A and 1B of the Civil Procedure Act of*** Kenya and determine this matter in a just manner and proportionate way.

The Defendant says it should not pay interest

[10] The Defendant submitted that there was never any agreement entered into between the parties as to the accrual of interest or agreed rate of interest on the friendly loan advance to it in 2012. The said sum was to be repaid within the same year. It is not, therefore, correct for the Plaintiff to allege existence of an oral agreement implied by conduct that the applicable interest rate would be 24% compounded annually. The Plaintiff has not adduced any evidence of the said previous transactions neither has it adduced evidence of the implied contract. It is worth pointing out that the issue of interest is **only** mentioned in the Plaintiff's letter of 9th September, 2013, this cannot in any way constitute an agreement. The letters from the Defendant to the Plaintiff dated 25th April, 2013 and 3rd October, 2012 (document 1 and 2 in the Plaintiff's bundle of documents) refer only to the principal amount of Kshs. 17,000,000/=. There was therefore no agreement by conduct or otherwise on the issue of interest. See the case of ***HIGHWAY FURNITURE MART LIMITED vs. PERMANENT SECRETARY OFFICE OF THE PRESIDENT & ANOTHER (2006) eKLR.***

[11] The Defendant urged the court to find that the Plaintiff; 1) has not pleaded the issue of an agreement on interest in its Plaint; 2) has not demonstrated any of the above elements; and 3) is not a bank and cannot purport to rely on sections relating to banks in the Central bank of Kenya act or the Banking Act. Therefore, the Plaintiff is not entitled to interest before the filing of the suit.

DETERMINATION

Interest antecedent to the suit

[12] The issue at hand is:-

> **a) Whether interest antecedent to the suit is claimable in this case. To arrive at a decision thereto, invariably, the Court shall determine;**

i) Whether there was a verbal agreement on the rate of interest of 24% compound interest; and or

ii) Whether an agreement to pay interest can be implied from the course of dealings between parties.

[13] The law on interest antecedent to the suit is as was captured in the case of ***HIGHWAY FURNITURE MART LIMITED vs. PERMANENT SECRETARY OFFICE OF THE PRESIDENT & ANOTHER (2006) eKLR***, where the Court of Appeal stated:-

> **"...the authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealings between parties."**

[14] I should state from the outset that the Plaintiff is not a bank or a financial institution within meaning of the law. He is an individual. Whereas parties in their contracts may agree on a rate of interest based on the bank rates, their transactions are not governed by the Central Bank of Kenya Act or Banking Act or Acts of Parliament on Microfinance or financial institutions. Their relationship is governed by the terms and conditions in their agreements. I will proceed on that basis. I now resort to the facts of this case.

[15] The Plaintiff made the following three significant submissions.

a) That the rate which the parties herein have always used in all previous transactions was 24% compound interest and that the parties also purposed to use the same rate in the present transaction.

b) That the Plaintiff and the Defendant herein had an oral agreement implied by conduct that the applicable interest rate would be 24% compounded annually as that was the prevailing interest rate as at the fiscal year 2011/2012 when the loan of Kshs. 17,000,000/= was advanced to the Defendant.

c) That the Defendant was aware of the interest rate applicable and he did not object to the interest rate all. This is evidenced by the various communications made to the Defendant through letters, invoices sent out as well as statements of account touching on accrued interest and the amount owing. Therefore, the communications constitute the agreement of the parties on the rate of interest. Therefore, the defendant is estopped by its conduct from turning back and disowning an agreement which it has been party to right from the onset.

Alleged verbal or implied agreement from course of dealings of parties

[16] The Plaintiff pleaded at paragraph 5 of its plaint that the principal sum continued to accrue interest at the rate of 24% per annum. The Plaintiff submitted that there existed an oral agreement that interest will be charged at 24% per annum. I have perused the entire proceeding and documents produced in court and I am not able to see any communication that shows that the alleged verbal agreement on interest rate existed. Other than the general averment in paragraph 5 of the plaint and a letter dated 9th September 2013 written by the Plaintiff, there is nothing else to show that there was any agreement that interest will be at 24% per annum. Can the court imply any form of agreement on interest from the course of dealings between the parties?

[17] The Plaintiff submitted that they had previous dealings of similar nature and interest charged was 24% per annum. The Plaintiff argued that the, therefore, purposed to use the same interest rate on the present debt. Again, such allegation must be supported by evidence. I have perused the documents presented by the Plaintiff and I do not see any evidence of previous dealings from which the court can imply intention to use similar interest rate in their present dealing. The letter dated 9th September 2013 was not even responded to by the Defendant. In the absence of evidence of previous dealings or communication between the parties, the court is completely unable to infer or imply any agreement that the interest rate was to be 24% per annum. I find and hold that there was no agreement between the parties on interest antecedent to the suit. But what does the law say of such situation?

Award of interest by court

[18] The above notwithstanding, the Plaintiff prayed for interest at 16% on the principal sum until payment in full. As I have found that there was no agreement between the parties on interest antecedent to the suit, Section 26(1)of the Civil Procedure Act, Chapter 21 Laws of Kenya will apply. The section states 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".**

See the case of ***NATIONAL BANK OF KENYA LTD vs. PETER NYAKUNDI & ANOTHER (2006) eKLR*** where application of Section 26 of CPR was discussed by the Court of Appeal as follows:

> **"...This provision [read section 26 of CPR] is understood 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..." [Addition mine]**

[19] There was no agreement on the interest rate applicable and so section 26 of the CPR applies in this case. However, there is no doubt that the Plaintiff was denied its money by the Defendant including investment it may have employed the money into. Therefore, it is entitled to interest as fair compensation from the date of filing suit. Communication from the Defendant shows clearly that the Defendant had no intention of repaying the loan. These matters were discussed in my ruling where judgment on admission was granted. In the circumstances of the case, I award interest at 12% per annum from the date the principal debt was advanceduntil payment in full. It is so ordered.

Dated, signed and delivered in court at Nairobi this 22nd day of June 2015.

F. GIKONYO

JUDGE