



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 622 OF 2001**

**M.A BAYUSUF & SONS LIMITED.....PLAINTIFF**

**-VERSUS-**

**EXPRESS KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHINA ROAD AND BRIDGES CORPORATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Application before the Court is the 1<sup>st</sup> Defendant's Notice of Motion dated 12<sup>th</sup> May 2015 and filed on even date. It is expressed to be brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 21 Rule 22 and Order 45 Rule 1 (1) of the Civil Procedure Rules.

2. The 1<sup>st</sup> Defendant sought for one main order that this Court do review its ruling of 17<sup>th</sup> July, 2013 awarding interest at 12% per annum on the principal sum of US\$ 62,500/=.

**THE 1<sup>ST</sup> DEFENDANT'S CASE**

3. The application is based on the grounds set out therein and is supported by the Affidavit sworn on **12<sup>th</sup> May, 2015** by ALEX MICHAEL MWAU, the Claims Officer of the 1<sup>st</sup> Defendant Company.

4. The Judgment in this matter was delivered on **19<sup>th</sup> January, 2009** in favour of the Plaintiff against the 1<sup>st</sup> Defendant for US\$ 62, 500 together with costs. The 1<sup>st</sup> Defendant avers that they paid the said principal sum by instalments with the last payment having been made on 11<sup>th</sup> February, 2010.

5. On 17<sup>th</sup> July, 2013, Honourable Justice Havelock (as he then was) delivered a ruling in respect of settling the terms of the decree whereby he awarded interest at 12% per annum from the date of filing the suit until payment in full. It is this ruling that the 1<sup>st</sup> Defendant seeks to review. Following the said ruling, Bealine Kenya auctioneers came to the 1<sup>st</sup> Defendant Company with an attachment of Kshs. 10,250,365/=

and proclaimed its goods. It is the 1<sup>st</sup> Defendant's case that it is not clear how the interest rates were worked out and that the same appear to be exaggerated.

6. The deponent avers that the interest in US dollars is always much lower than that in Kenya shillings and that the said interest rates are usually pegged to the Libor rate which is an international rate. It is the 1<sup>st</sup> Defendant's assertion that on reading Justice Havelock's ruling, there appears to have been no mention of the distinction between interest rates on US Dollars and Kenya shillings. According to the 1<sup>st</sup> Defendant, the interest rate in US dollars is between 3% to 5% per annum on lending and borrowing. It is therefore the 1<sup>st</sup> Defendant's case that the claim herein being for US Dollars the interest rate should not have been assessed at 12% per annum but at a lower figure.

### **THE PLAINTIFF'S CASE**

7. In opposition to the application, the Plaintiff filed a Replying affidavit sworn on **15<sup>th</sup> May, 2015** by **John Maina Ngechu**, an Advocate of the High Court of Kenya. The Plaintiff does not dispute the fact that the 1<sup>st</sup> Defendant paid the principal sum of the decree by way of instalments. However, on the issue of interest, it is the Plaintiff's position that they informed the 1<sup>st</sup> Defendant to settle the same through various letters to which there was no response. It is therefore the Plaintiff's case that the issue being raised by the 1<sup>st</sup> Defendant with regard to interest is not in good faith as execution has already taken place.

8. In the circumstances, it is the Plaintiff's case that the current application lacks merit and the same should be dismissed.

### **LEGAL ANALYSIS**

9. I have considered the application, the affidavits in support and opposition thereto as well as oral submissions by Counsel. Having done so, I take the following view of the matter.

10. The applicable law for review is **Order 45** of the **Civil Procedure Rules 2010** which provides as follows:

#### **45(1) Any person considering himself aggrieved –**

***a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***b. By a decree or order from which no appeal is hereby, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.***

*Emphasis supplied*

11. With regard to whether or not the present application was brought without unreasonable delay, it is the 1<sup>st</sup> Defendant's case that they did not file the present application earlier as the Court file herein had been unavailable for quite a long time and hence their advocates were unable to get the decree of the ruling. On the other hand, Counsel for the Plaintiff submitted that the Court file had always been available. It was therefore Counsel's submission that the present application had been filed after a long delay. On this issue, it is the Court's view that the 1<sup>st</sup> Defendant did not adduce any evidence to the effect that this Court file had not been available or that it was even lost at any given time. The present application was filed on 12<sup>th</sup> May 2015, almost 2 years after the ruling under review was delivered. Indeed a long period has lapsed since the said ruling was delivered and the 1<sup>st</sup> Defendant having failed to

offer a sufficient explanation for the said delay, this Court can only conclude that the present application was filed after an unreasonable delay. The submission that the 1<sup>st</sup> Defendant did not come to Court earlier since the decree was issued this year on 29<sup>th</sup> April 2015 is not convincing. It is clear that what is under review is the ruling of 17<sup>th</sup> July 2013 and not the said Decree.

12. Counsel for the 1<sup>st</sup> Defendant also submitted that the Court had no jurisdiction to enter into the issue of interest as the same was not granted in the Judgment in this matter and that at the time of making the ruling under review, the entire decree had been paid in full. With regard to whether or not the Judge had jurisdiction to award interest, this Court's answer is in the affirmative. The Judge had discretion to award interest under **section 26 of the Civil Procedure Act**, which discretion was justly exercised as can be deduced from the ruling. Besides, what the Judge in effect did through his ruling dated **17<sup>th</sup> July, 2013** was to interpret and clarify the Judgment of this Court with regard to interest as delivered by Justice Warsame (as he then was). In any case, the 1<sup>st</sup> Defendant did not raise an objection to the Judge's jurisdiction before the delivery of the ruling under review and they cannot be heard to object to the same at this point. It cannot be said that the jurisdiction issue is a new fact that came to the attention of the 1<sup>st</sup> Defendant after the delivery of the ruling and that they could not have discovered the same after exercising due diligence before the delivery of the said ruling. In other words, the issue of jurisdiction is more of a ground for appeal than review.

13. Turning to the merit of the application, Counsel for the 1<sup>st</sup> Defendant reiterated the 1<sup>st</sup> Defendant's application by submitting that the Court in granting the interest at 12% failed to take into account that the decree in this matter was a 'dollar' decree where normally the interests were much lower. It was her submission that the maximum interest rate to be awarded should have been between 3-5%. In response, Counsel for the Plaintiff submitted that the present application was a disguised appeal. It was Counsel's submission that the Judge gave his reasons for awarding interest at 12% per annum and that the issue of interest in dollars or Kenya shillings was never canvassed at all. Counsel further submitted that there was no error that was self-evident that could warrant a review.

14. An order for review may be granted where the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. From the foregoing submissions by the 1<sup>st</sup> Defendant and also after perusing the ruling under review, it does not appear to this Court that there was any apparent error on the face of the record. The issue of a 'dollar decree' as raised by the 1<sup>st</sup> Defendant and that the interest rate should have been between 3-5% does not seem to have been canvassed at all before the Court. Even so, it is obvious that the Judge was aware that the Decree was in dollars. In addition, the 1<sup>st</sup> Defendant has not pleaded discovery of new evidence with regard to the issues they are now raising with regard to the interest rate. These issues appear to have been within their knowledge and they should have raised the same at the earliest opportunity or at the hearing of the application leading to the ruling of 17<sup>th</sup> July, 2013.

15. In summary, the Judge exercised his discretion in awarding the interest rate at 12% and in the event that such discretion was not exercised within the law or that the subsequent ruling was wrong then that should be a ground for appeal and not review.

16. Of interest to this court, however is the allegation that the attachment in the execution of the decree appears to have taken into account interest even after the principal sum was paid. If that allegation is correct, then the same should be corrected through proper calculation of the interest by the Deputy Registrar.

## **DISPOSITION**

17. In view of the foregoing, the upshot of this court's ruling is that the 1<sup>st</sup> Defendant's Notice of Motion dated **12<sup>th</sup> May 2015** and filed on even date is not merited and the same is hereby dismissed with costs to the Plaintiff.

18. There shall be a stay of execution for 21 (twenty one) days pending the recalculation of the interests

by the Deputy Registrar as stated in paragraph 16 above.

19. The matter shall be mentioned before the Deputy Registrar on 25th September 2015 for the purpose of interest recalculation.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for Plaintiff

No appearance for Defendants

Teresia – Court Clerk