



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 641 OF 2009**

**ESLON PLASTICS OF (K) LIMITED ..... PLAINTIFF**

**VERSUS**

**NATIONAL WATER CONSERVATION**

**AND PIPELINE CORPORATION..... DEFENDANT**

**RULING**

**INTRODUCTION**

**A claim for interest**

[1] The point of discussion and determination herein is whether the Plaintiff is entitled to interest in accordance with the terms of the contract between the parties. There are other strands of issues will be preceding the ultimate decision on the major issue I have formulated above.

**Background and facts**

[2] The parties herein executed a Contract Agreement (hereinafter the Contract) on 9<sup>th</sup> May, 2005 for supply of goods and services for a consideration of Kshs. 14,665,960 only. The Plaintiff supplied the goods and services, for which it incurred a debt of Kshs. 10,500,295.18. The Defendant did not pay the said sum of money, hence this case. Subsequently, the defence was struck out as a result of the Defendant's non-compliance with the directions of the court given on 4.2.2012. Then, on 26.3.2013 judgment was entered for the Plaintiff and against the Defendant as prayed for in the plaint. The plaint sought judgment for:

- 1) The sum of Kshs. 10,500,295.18;
- 2) Interest thereon at contractual/commercial rates until payment in full; and
- 3) Costs of the suit.

[3] But somehow the interest payable became a hotly contested issue and the Plaintiff called one witness one Samwel Kama Gacheru, a manager with the Plaintiff's company who reinforced the position taken by the Plaintiff that interest was payable in accordance with and in terms of the Special Conditions of Contract referred to in the Contract. The Contract and the Special

Conditions of Contract were all produced in court. The Plaintiff filed submissions and in the interest of justice, the court also allowed the Defendant to file submissions on the issue of interest.

### **Plaintiff's case**

[4] According to the Plaintiff, the Contract in its Clause 2 incorporated the Special Conditions of Contract as one of the documents which constituted the integral part of the Contract between the parties herein. Clause 2 of the Contract provides the following:

**2. The following documents shall constitute the Contract between the Corporation and the supplier, and each shall be read and construed as an integral part of the Contract:**

- (a) This Contract Agreement**
- (b) Special Conditions of Contract**
- (e) General Conditions of Contract**
- (d) Technical Requirements...**
- (e) ...**
- (f) ...**

[5] The Special Conditions of Contract governed the interest payable as it was inconsistent with the Contract. And Paragraph GCC 15.5 of the GCC was accordingly amended by the Special Conditions of Contract by providing that the payment-delay period is 120 days and if payment is not made within the said period, the Plaintiff would be entitled to interest at the rate of two points above the normal lending rates of Kenya Commercial Bank (hereafter KCB). Paragraph GCC 15.5 of the contract provides as follows:-

**“The payment delay period after which the corporation shall pay interest to the supplier shall be 120 days. The interest rate that shall be applied is two points above the Kenya Commercial Bank normal lending rates.”**

[6] According to the Plaintiff, it charged interest pursuant to the said paragraph GCC 15.5 of the Special Conditions of Contract and calculated the interest accrued on the sum owing on the basis of the base lending rates that were provided by KCB in their letter dated 26/4/2013 from Kenya Commercial Bank which lists down the bank's base lending rate from the year 2004-2013 as follows:

- 1) 01/01/2004 – 10%
- 2) 01/02/2005 – 12%
- 3) 01/08/2008 – 13.5%
- 4) 01/10/2008 – 15%
- 5) 01/06/2010 – 13.5%
- 6) 01/07/2011 – 15%
- 7) 19/10/2011 – 19%

- 8) 21/01/2011 – 24%
- 9) 01/06/2011 – 22%
- 10) 01/01/2012 – 19%
- 11) 01/01/2013 – 17%

[7] Both the calculations and statements of the interest accrued, and the letter by KCB on the applicable lending rates were produced.

[8] According to the Plaintiff, the Contract herein is valid and enforceable for it meets the following requirements:

- i. **There is offer and acceptance;**
- ii. **Parties had the intention to create legal relation;**
- iii. **There consideration was lawful;**
- iv. **Parties had capacity to enter into a contract;**
- v. **Parties consented to the contract;**
- vi. **The object of the Contract was lawful; and**
- vii. **The Contract was capable of performance.**

[9] Therefore, the Plaintiff was of the view that, the Contract being valid and enforceable, the court should find and hold that the parties herein are bound by the terms of their Contract Agreement. The Plaintiff relied on the statement by the court in the case **JOHN EDWARD OUKO VS NATIONAL INDUSTRIAL CREDIT BANK LTD [2013] eKLR** quoting the case of **NATION BANK OF KENYA LTD v PIPEPLASTIC SMAKOLIT (K) LTD AND ANOHER (2001) KLR** that:-

**“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.**

[10] Accordingly, the Defendant urged the court to allow it the interest as calculated and further interest on the same rate until payment in full.

#### **The Defendant’s submissions**

[11] The Defendant fastened a legal quarrel on the enforceability of the above paragraph GCC 15.5 as well as the basis of the calculations of interest at the rate provided in the paragraph. The Defendant termed paragraph GCC 15.5 as an unconscionable contract in the sense of the definition it obtained from the free online legal dictionary, thus:-

**“Unconscionable contract is one that is unjust or unduly one-sided in favour of the party who has the superior bargaining power. The adjective unconscionable implies an affront to fairness and decency. An unconscionable contract is one that no mentally competent person would accept and that no fair and honest person would enter into. Courts find that unconscionable contracts usually result from the exploitation of consumers.”**

[12] According to the Defendant, there is no explanation and/or calculation or a rate of interest which the Plaintiff used to calculate or to demonstrate how the amount of interest being claimed was arrived at. As such, the Defendant submitted, the said amount of interest is illegal, unconscionable and fraudulent. The defendant urged further that the Plaintiff is not and has never been a financial institution authorized to charge interest. To support its said position, the Defendant cited the case of the **NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC**

**SAMKOLIT (K) LIMITED C.A. NAIROBI CIVIL APPEAL NO 95 OF 1999** where the Court of Appeal held that:-

**“...a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved.”**

[13] The Defendant did not end submissions there. It cited yet another case being **AJAY INDRVADAN SHAH VS GUILDERS INTERNATIONAL BANK LTD CIVIL APPEAL NO.135/2001 [2002] 1 EA 269** where the Court of Appeal held that the provisions of Section 26(1) of the Civil Procedure Act are applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest, then the Court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way that either the agreed rate is illegal or unconscionable or fraudulent. The following judicial authorities were cited by the Defendant:-

**1) HIGH COURT AT EMBU CIVIL APPEAL 71 OF 2011, DANSON MURIUKI KIHARA –VS- AMOS KATHUA GATUINGO H.I. ONG’UNDI J 6/11/2012** where the court found interest of 50% per month although agreed on was unreasonable, unconscionable and oppressive; no man in his senses and not under delusion would agree to such interest rate.

**2) ANJELINE AKINYI OTIENO v MALABA MALAKISI FARMERS CO-OP UNION LTD [1998] eKLR** where the Court of Appeal held and declared an agreement entered into by the parties in blatant flout of the law to be an illegality through statute, and interest charged at the rate of about 284% per annum *obviously manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance it.* Indeed, the court found that *it was farcical and ridiculous beyond all reason.*

[14] On the basis of the foregoing, the Defendant urged the court to find the Plaintiff’s claim on interest to be unreasonable and one which it cannot conscientiously countenance; and dismiss it.

## **COURT’S RENDITION**

### **Issues**

[15] As I stated earlier in the opening part of this ruling, the issue for determination is whether the Plaintiff is entitled to interest at the rate provided in paragraph GCC 15.5 of the Special Conditions of Contract. That means I will have to determine whether the said paragraph GCC 15.5 is unconscionable or illegal.

[16] I will start from the beginning. The Contract herein has not been challenged per se. It is a valid contract for:

- i. There is offer and acceptance;**
- ii. Parties had the intention to create legal relation;**
- iii. There was consideration and was lawful;**
- iv. Parties had capacity to enter into a contract;**
- v. Parties consented to the contract;**
- vi. The object of the Contract was lawful;**
- vii. The Contract was capable of performance; and**
- viii. It was duly signed and executed by the parties.**

[18] By dint of Clause 2 of the Contract, the Special Conditions of Contract are incorporated as an integral part of the Contract. The said Clause 2 of the Contract provides as follows:

**2. The following documents shall constitute the Contract between the Corporation and the supplier, and each shall be read and construed as an integral part of the Contract:**

- (a) This Contract Agreement**
- (b) Special Conditions of Contract**
- (e) General Conditions of Contract**
- (d) Technical Requirements...**
- (e) ...**
- (f) ...**

[19] The Special Conditions of Contract prevailed over, supplemented and or amended the General Conditions of Contract (hereafter GCC). This provision is in the Special Conditions of Contract and is quite important especially in light of Clause 3 of the Contract which places the Special Conditions of Contract in priority over all other Contract documents save the Contract itself. On that basis, I find and hold that paragraph GCC 15.5 in the Special Conditions of Contract governed the rate of interest to be charged as well as the time the interest will be chargeable.

[20] Paragraph GCC 15.5 clearly provided that interest will be at the rate of two points above the normal lending rates of KCB. The rates keep on changing from time to time and only two points would be added to the particular prevailing or normal lending rate by KCB. KCB provided its base lending rate during each material time relative to this case. For the avoidance of doubt, I think the term base lending rate is sufficient and should be taken to refer to normal lending rate used in the GCC 15.5. The letter by KCB was obtained in accordance with paragraph GCC 15.5 and it is upon that letter that interest now being demanded by the Plaintiff was calculated.

[21] The question then becomes: is the Special Conditions of Contract illegal and or unconscionable contract? A good beginning point would be to see whether the terms in the Special Conditions of Contract are inconsistent with the Contract or the law. Clause 3 of the Contract is relevant and it provides as follows:

**3. This Contract shall prevail over all other Contract documents. In the event of any discrepancy or inconsistency within the Contract documents, then the documents shall prevail in the order listed above.**

[22] There is not any discrepancy or inconsistency between the Contract and the Special Conditions of Contract on rate of interest. The Special Conditions of Contract governed the interest charged and the rate applicable. Secondly, I do not think also there is anything illegal in parties agreeing on interest as a penalty for default on the terms of a contract. The contract in question is one for supply of goods and services and is not one for money-lending or what is commonly known as shylock-kind-of arrangement. The charge of interest is not; therefore, on the basis of money-lending and so the argument that the Plaintiff does not have statutory authorization to charge interest for it is not a bank does not apply. A charge of interest as a penalty for default by a party in a contract is supported in law. Take the perfect analogy from the long standing principle that a person is entitled to interest where such person has been deprived of a liquidated amount or specific goods through the wrongful act of another person. From this formulation of the law, the entitlement of interest is in the default which leads to deprivation of liquidated sum or specific goods delivered; that is the legal justification for a provision of interest in a default clause in a contract for supply of goods and services. Accordingly, a provision for interest as a penalty for default of the terms of the contract does not make the contract illegal. As such, paragraph GCC 15.5 is not illegal. See a work of this court in **NBI HC MISC APP NO 394 OF 2008 KAGWIMI KANG'ETHE & CO ADVOCATES V PENELOPE COMBOS & ANOTHER** where it

analyzed other cases such as **PREM LATA v PETER MUSA MBIYU [1965] E.A 592 and High Court of Uganda, PAN AFRICAN INSURANCE COMPANY (U) LTD. v INTERNATIONAL AIR TRANSPORT ASSOC. (HCT-00-CC-CS-0667 OF 2003).**

[23] Except, even where a contract or provision of interest is lawful as is the case here, it is a different thing altogether if a party is claiming that the contract or the provision of interest was unconscionable, unreasonable or oppressive, and different principles apply. I would still, therefore, determine whether paragraph GCC 15.5 of the Special Conditions of Contract was unconscionable, unreasonable or oppressive as claimed.

[24] According to Black's Law Dictionary, Ninth Edition unconscionable contract is defined in the following terms:-

*“Traditionally, a bargain is said to be unconscionable in an action at law if it was such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other;...”*

[25] Case law has also given deviant prescriptions of an unconscionable, unreasonable and oppressive agreement for interest. See for instance the case of the **DANSON MURIUKI KIHARA v AMOS KATHUA GATUINGO [2012] eKLR** where the Court found a provision for interest of 50% per month which equals 600% per annum to be unconscionable because no man in his senses and not under delusion would agree to such as interest rate. The Court noted that even banks which are authorized to charge interest do not charge those kinds of rates. And no honest or fair man would make such an offer to a friend. The rate was, therefore, so unreasonable and oppressive to the Respondent, even though they had agreed to it. See also the case of **ANJELINE AKINYI OTIENO v MALABA MALAKISI FARMERS CO-OP UNION LTD [1998] eKLR** where the Court of Appeal found a charge of interest at the rate of about 284% per annum to be obviously manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance it. Indeed, court found that it was farcical and ridiculous beyond all reason.

[26] The charge of interest in the case before me was at two points higher than the normal lending rate by KCB and it was charged at the agreed rate per annum. The lending rates are regulated by the Central Bank of Kenya and an increase by two points is not so unreasonable or oppressive or unconscionable in the sense of the law or farcical and ridiculous beyond all reason. The cases cited by the Defendant were hopelessly in cry for court's intervention and classic of unconscionable and oppressive bargain. The threshold is high and the party challenging a charge of interest on the ground of being unconscionable or oppressive must show that the bargain was so heinous that, in the plain eye sight of court, it is farcical and ridiculous beyond all reason. Unconscionability or extreme unfairness of a contract should be discernible from the plain sight of the bargain that no any fair or honest person would make such offer or demand from another; it is unconscionable, oppressive and unreasonable. That cannot be said to be the case in the contract in issue herein; the agreed rate of interest was not or obviously manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance it. The rate of two points above the base lending rate by KCB is within acceptable limits in ordinary course of transaction among parties.

## **Conclusion**

[27] Applying the test above, and going by the case of **AJAY INDRVADAN SHAH v GUILDERS INTERNATIONAL BANK LTD CIVIL APPEAL NO.135/2001 [2002] 1 EA 269** the Court should not interfere with the agreed interest rate between the parties unless it has been shown in the usual way that the agreed rate is illegal or unconscionable or fraudulent or unreasonable or oppressive. The agreement to pay interest in default of payment of the contract price by the Defendant is not illegal as claimed by the Defendant. The parties agreed under paragraph GCC 15.5 of the Special Conditions of Contract that interest on default of payment will

be two points above the lending rate by KCB which is also not unconscionable or fraudulent or unreasonable or oppressive. This court cannot re-write the contract for the parties and those parties are bound by and should be committed to the terms of their contract. Accordingly, I find and hold that the Plaintiff is entitled to interest as agreed upon in paragraph GCC 15.5 of the Special Conditions of Contract. I award the Plaintiff the sum of Kshs. 7,647,945.13 as interest as at 30.4.2013 and further interest to be calculated on the basis of paragraph GCC 15.5 until payment in full. Costs of the case also go to the Plaintiff as the successful party and because the same has not been objected to. In any event, it had been granted already in the judgment entered on 26.3.2013.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of June 2014**

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**F. GIKONYO**

**JUDGE**