



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 60 OF 2014

OFFICE TECHNOLOGIES LIMITED ::::::::::: PLAINTIFF/APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. On 11th July 2014, this court delivered a Ruling on an application for summary Judgement in the sum of Kshs.220,440,000. The court allowed the application and entered judgement for the Plaintiff for the above sum of money with interest as from 14th March 2013, until payment in full. However, the court delayed the determination on the rate of interest applicable pending the submission of the parties on the issue. The parties have since filed written submissions. The Plaintiff did that on 25th September 2014 and the Defendant did the same on 25th July 2014.

2. The Plaintiff has submitted that money was borrowed to secure the goods which were supplied to the Defendant, and that the said borrowing was at a rate of 21.5% per annum, and that a default rate was 10% per annum over and above the said 21.5%. It is not expressly clear that the Plaintiff secured a loan to effect the supply of the said goods. What is clear, however, is that the kind of money required to make the said supply was a huge amount which no entity would have on the ready, and which only a bank can give. So, it is objective to infer that the Plaintiff borrowed money from a bank to effect the contract. The finance facilities which were renewed by Eco-bank on 25th October 2012 are not expressly stated to be for the IEBC supply tender. It is a financial facility for the Plaintiff in its various businesses, and cannot thereby be deemed to apply solely for the IEBC tender. Again, there is no evidence that the Plaintiff had defaulted in repaying the loan under that facility. There is no letter from the bank making any demand at all. Therefore, the submissions that the default rate of 10% per annum automatically applied is faulty, and has not been proved. A commercial rate of interest is any rate that the bank and the borrower may agree upon, it does not have to be higher than the court rates. This rate, however, is determinable from the practice of banking. It can also be determined from the contracts of the parties. However, the contract between the Plaintiff and the Defendant does not provide a rate of interest. It only states at the Special Conditions section at paragraph 9 that payment shall be made within 30 days after submissions of an invoice. The inference is that any delay in payment after the said 30 days of invoice should attract some penalty. Indeed in their letter of demand dated 17th October 2013 the Plaintiff demanded an interest of Kshs.41,586,340/= except that did not indicate how they arrived on the same.

3. There is no doubt that some interest is due to the Plaintiff. The Plaintiff has quoted Section 48 of the Public Procurement and Disposal Act 2005 which provides for payment of interest on amounts due, in accordance with prevailing commercial rate. In my view, the transaction does not identify any applicable rate of interest. The rate of interest given by the Eco-bank in their letter of offer is not exactly applicable as that offer referred to several other business of the Plaintiff and was not reducable to the IEBC tender.

4. On their part the Defendants have submitted that the applicable rate must be court rates, and that any other rate which is not court rates, and which is not in a contract, must be strictly proved as per the decision in **AUTOLOG KENYA LTD – VS – NAVISAT TELEMATICS KENYA) LIMITED [2013] eKLR**.

5. As I have earlier herein noted, I do not doubt that the financing herein by the Plaintiff must have been, at least partly, borrowed. Also, the Defendant failed to pay the sum due in time. It is also clear that if the Defendant had paid the sum due on time, there would be no issue of interest applying.

6. In my view, and subject to any agreement by contracting parties, any rate of interest above the court rates is a commercial rate. The Plaintiff has urged the adoption of a commercial rate of interest, but has failed to provide the court with a prevailing commercial rate of interest except the one under the Ecobank letter of offer. For my stated views on that letter of offer, I am not satisfied that it provides me with the kind of guide on prevailing commercial rate of interest. And also, as I said earlier, there is no evidence that the Plaintiff had defaulted under that letter of offer to warrant a default penalty of 10% per annum over and above the said rate of 21.5% per annum. Further, in my view, the Defendant is being penalised to pay interest not because the Plaintiff has breached any terms in the letter of offer for financial facility between it and the bank, but that the Defendant is being penalised because it failed to pay the sum due 30 days after invoice. Under the circumstances, the commercial rate adopted by this court is not that which helps the Plaintiff to restore its relationship with its bankers. The commercial rate adopted must be that which merely penalises the Defendant for failure to pay the sum due with 30 days after services of invoice. In my view, and in the current circumstances considered, I put that rate at 15% per annum.

7. In the upshot, the applicable interest rate pursuant to Order (b) of my Ruling dated 11th July 2014 herein shall be 15% per annum. Costs of this determination shall be in the cause.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Nyaburi holding brief for Gitunga for Plaintiff/Applicant

E.L. Lubulela for Defendant/Respondent

Irene – Court Clerk