



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 699 OF 2012

PATMOSE TECHNICAL SERVICES (K) LIMITED.....PLAINTIFF

VERSUS

RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Plaintiff's Complaint dated 29th October 2012 and filed on 5th November 2012, on or around May 2009, the Defendant placed an invitation to tender for the supply of suspension lamps hooks (75-150mm), tiestraps, composite insulators, stay rods and steady cross member (hereinafter referred to as "the goods") for its use in electrification works.
2. Upon qualifying in the tender, the Plaintiff supplied the Defendant with the said goods vide Purchase Order Number 000160 dated 20th May 2009. The Plaintiff invoiced the Defendant a total sum of Kshs 14,640,012/=. Its claim against the Defendant was for a sum of Kshs 23,087,098.38 being the total value of the goods supplied in the sum of Kshs 14,640,012/= together with interest thereon at the rate of 18% per annum from the date of the last invoice became due (6th June 2009) to 19th September 2012. This was in addition to further interest on invoice prices from 20th September 2012 until payment in full.
3. The Plaintiff therefore sought judgment against the Defendant for:-
 - a. **Kshs 23,087,098.38**
 - b. **Interest on the value of the goods supplied in the sum of Kshs 14,640,012/= at the rate of 18% per annum from 20th September 2012 until payment in full.**
 - c. **Costs of the suit together with interest thereon at court rates from the date of filing suit until payment in full.**
4. On 11th December 2012, the Defendant filed its Defence of even date in which it denied that it owed the Plaintiff the sum of Kshs 23,087,098.38 or any lesser or greater sum.
5. When the matter came up for hearing on 24th July 2014, counsel for the Plaintiff informed the court that on 18th March 2014, the Defendant paid the Plaintiff the principal sum of Kshs

14,640,012/= as a result of which the only thing that was left for determination by the court was that of interest.

6. As parties were unable to agree on the rate of interest that was chargeable herein, the court directed them to file their written submissions. The Plaintiff's written submissions were dated 8th September 2014 and filed on 9th September 2014. The Defendant's written submissions were dated and filed on 2nd October 2014.

THE PLAINTIFF'S CASE

7. Sameet Patel (hereinafter referred to as "PW 1") was the only witness who testified on behalf of the Plaintiff herein. By the time suit was filed, the Plaintiff contended that had been already 3 years and 75 days since they had supplied the Defendants with the goods and 4 years and 9 months from the time of the supply to the date the Defendant paid it the principal sum of Kshs 14,640,012/=. In settling the aforesaid sum, the Plaintiff averred that the Defendant had acknowledged being indebted to it.
8. According to the Plaintiff, the only issue that was remaining for determination by the court what the rate of interest to be charged was on the sum of Kshs 14,0640,012/= before the aforesaid part payment and the interest to be charged on the unpaid monies until balance in full settlement of the outstanding monies.

THE DEFENDANT'S CASE

9. Its case was that interest ought to be paid at the court rate of 14% per annum as the Plaintiff did not provide any evidence that would justify interest being charged at 18% per annum. It did not call any witness in this case.

LEGAL ANALYSIS

10. It appeared to the court that the issues for its determination were as follows:-

- a. **What was the applicable rate of interest payable herein?**
- b. **On what amount would interest be payable?**
- c. **What was the date from which interest would be payable?**
- d. **Until when would interest accrue?**

11. The Plaintiff contended that during the time it supplied the Defendant with the goods, interest rate fluctuated between 18%-24%. It argued that it was entitled to interest at the rate of 18% per annum which was the prevailing market rate as it was charged the said interest when it borrowed money to operate its supply business. It was its contention that it operated an overdraft to sustain or operate the business of supplies and that if it did not receive payments on time, interest would continue to accrue on interest that had accrued on the principal amount until payment in full.

12. During cross-examination, Sameet Patel (hereinafter referred to as "PW 1") admitted that he did not have any documentary evidence that would show that the Plaintiff was being charged 18% per annum by Bank of Baroda, where it said it had taken an overdraft from.

13. Both parties referred the court to Section 26 (1) of the Civil Procedure Rules, 2010 which provides as follows:-

“ Where in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rates as the court deems reasonable to be paid on the principal sum adjudged from the date of 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.”

14. The discretionary powers of the court to fix the rate of interest were not in dispute. Indeed, the Plaintiff referred the court to the cases of Jane Wanjiru Gitau vs Kenya Power & Lighting Company Limited [2006] eKLR and Civil Appeal No 135 of 2001 Ajay Indravan Singh vs Guilders International Bank Limited (unreported) where the court’s discretion of determining the applicable rate of interest as provided in Section 26 (1) of the Civil Procedure Rules was reiterated. The Defendant placed reliance on the case of Autolog Kenya Limited vs Navista Telematics (Kenya) Limited [2013] eKLR in this regard.
15. The point of departure was the rate of the interest that was applicable herein. The Plaintiff was adamant that it was entitled to interest at 18% per annum. It relied on the case of Tate & Lyle Food and Distribution Limited vs Greater London Council & Another (1981) 3 ALL ER 717 where the court held as follows:-

“...the guide to interest in commercial cases was, therefore, the rate at which a Plaintiff with the general attributes of the actual Plaintiff could have borrowed the money wrongfully withheld, and not the earning capacity of the money if the Plaintiff had invested it during the time he was kept out of it”

16. On the other hand, the Defendant argued in the absence of any valid reason, the rate of interest was 12% as was pointed out by Mabeya J in the case of Autolog Kenya Limited vs Navista Telematics (Kenya) Limited (Supra) when he referred to the Practise Note No 1 of 1982 in which the then Acting Chief Justice Simpson directed as follows:-

“...In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%”

17. It is trite law that the party who alleges a fact or assertion must prove it. As was rightly submitted by the Defendant, the Plaintiff was under a duty to discharge its burden of proof. The court perused copies of the invoices that formed the basis of the Plaintiff’s claim but did not find the same to have indicated any contractual provisions between the Plaintiff and the Defendant that the Defendant was contractually liable to pay the monies at the rate of 18% per annum or at all.
18. There was also no evidence that was presented by the Plaintiff to demonstrate that it had borrowed monies from Bank of Baroda or that the Defendant was aware of the source of its borrowings to operate its supplies business that would have attracted interest at the rate of 18% per annum in the event the monies remained unpaid.
19. Had the Plaintiff shown that the Defendant had delayed its payments despite having had knowledge that it had borrowed monies that were attracting interest at the rate of 18% per annum, the court would definitely have been inclined to agree with its argument that it was entitled to the rate of interest at 18% per annum.
20. The facts herein were therefore distinguishable from those in the case of Civil Appeal No 135 of 2001 Ajay Indravan Singh vs Guilders International Bank Limited (Supra) in which the lending institution therein had agreed with the borrower that commercial interest rate or the prevailing commercial rate would be charged. The case was thus not of any assistance to the Plaintiff.
21. Additionally, compound interest that had been claimed by the Plaintiff was a special damage that had to be specifically proven, which it did not do. A claim for compound interest is compensatory and is not intended to be punitive as had been observed in the case of Michael Mubea Kamau vs Robert Wanjika Machua [2001] eKLR that was relied upon by the Defendant herein. Appreciably, as was stated in Halsbury’s Laws of England (4th Edition) Volume 37 Paragraph 549, that was relied upon by the Plaintiff, an award on interest should be realistic.
22. Consequently, in the absence of any such documentary evidence that the Plaintiff had borrowed the monies to enable it supply the Defendant with the goods, the court was not satisfied that the Plaintiff was entitled to interest at the rate of 18% per annum. It was more persuaded by the Defendant’s submissions that the rate of interest was that of court rates. It was therefore the finding of this court that the rate of interest that was applicable herein was the court rate.

23. As regards issue (ii) hereinabove, the Plaintiff submitted that it was entitled to interest on the sum of Kshs 14,0640,012/= which the Defendant paid it on 17th March 2014 and further to the sum of Kshs 13,428,625.47 which was the outstanding balance of interest as at 8th September 2014.
24. This is not a position that this court would accept to be the correct position in law as it would amount to unjust enrichment on the part of the Plaintiff. Interest had already been factored in the sum of Kshs 23,087,098.38 which was inclusive of the sum of Kshs 14,640,012/=. Interest could not therefore be payable separately on the sum of Kshs 14,640,012/= with effect from 20th September 2012 as had been prayed in the Plaint. It was thus the finding and holding of the court that the Plaintiff was only entitled to interest on the sum of Kshs 14,640, 012/=.
25. In respect to issue (iii) hereinabove, the Plaintiff computed interest for various periods. It submitted that the total sum that the Defendant owed it had been Kshs 23,087,098.38. It had attracted interest in the sum of Kshs 3,920,314.45 for the period from 20th September 2009 to 17th March 2014 thereby giving a total sum of Kshs 27,007,412.83. It contended that when the Defendant paid the principal sum of Kshs 14,640,012/=:, the balance of interest as at 18th March 2014 was Kshs 12,367,400.83.
26. As can be seen from hereinabove, the court has discretion to award interest on the principal sum on such rates and rests that it would deem reasonable or fit to grant depending on the circumstances of each case. These periods, until payment in full, are :-
- a. **From any period before the institution of the suit;**
 - b. **From the date of the filing of the suit; and**
 - c. **From the date of decree**
27. The general principle of awarding interest is that it ought to be from the date of filing suit. This is a position that was held in the case of **Isaac Aduvagah vs Standard Chartered Bank Limited [2012] eKLR** that was relied upon by the Defendant. There must be justification why such interest should be granted from the period before the institution of the suit. One such justification would be that there was an obligation on a party to have paid interest at the time they entered into a contract that provided for such payment of interest.
28. It is abundantly clear that in the present case, interest could either have been chargeable from the date when the demand of the monies was made or from the date of filing suit. However, the court could only have awarded the Plaintiff interest with effect from 6th June 2009 when it issued the Defendant with the last invoice if there had been a contractual obligation on the part of the Defendant to pay such interest.
29. However, as the Plaintiff did not present any evidence to the court to show that there was contractual obligation on the part of the Defendant to pay it interest on the amounts that were due to it, the period when interest would have started accruing could not have been from before the suit was instituted. The court finds that the interest could only have accrued from the date of filing the suit herein.
30. Under issue No (iv) hereinabove, the pertinent question that arises is, until when would interest accrue? Notably, the Plaintiff did not furnish the court with any case law in which it had been held that interest would be payable after the principal sum had been paid as it had contended.
31. On the other hand, it is clear from Section 26 (1) of the Civil Procedure Rules that the court can only award interest on a principal sum which in this case was Kshs 14,640, 012/= till payment of the principal sum. Having acknowledged receipt of payment of the principal sum of Kshs 14,640,012/= on 17th March 2014, interest was only payable until 17th March 2014.
32. The court was thus not persuaded by the Plaintiff's submission that interest continued to accrue even after the said principal sum was paid. As was correctly submitted by the Defendant, interest ceased to run from the date the principal amount was paid. This is a position that had been well settled as seen in the **Halsbury's Laws of England (4th Edition) Vol 32 Paragraph 114** in which it was stipulated as follows:-

“If the principal amount is merged in a judgment or discharged by payment or if the

amount due is tendered (emphasis court), **interest ceases to run.”**

33. Accordingly, having carefully considered the evidence, written submissions and case law in support of the parties' respective cases, the court finds that the Plaintiff was entitled to interest at court rates from the date of filing suit until 17th March 2014 when the principal sum of Kshs 14,640,000/= was paid to it.
34. The basis of this finding was that the Plaintiff was entitled to be compensated for the period it was kept out of its monies and not to be compensated for interest that would have accrued from the interest on the principal sum. Once the principal sum was paid, the Plaintiff was no longer being kept out its monies or losing anything else other than interest on that principal sum.

DISPOSITION

35. For the foregoing reasons, judgment is hereby entered in favour of the Plaintiff against the Defendant for interest that accrued on the sum of Kshs 14,640,000/= at court rates from the date of filing suit until 17th March 2014.
36. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th day of December 2014

J. KAMAU

JUDGE