



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Case 108 of 2010**

**TEXPLAST INDUSTRIES LTD .....PLAINITFF**

**VERSUS**

**CHEMELIL SUGAR CO LTD .....DEFENDANT**

**RULING**

The Notice of Motion dated 8th December 2011 by the plaintiff prays for:-

- a) **Judgment be entered for the plaintiff against the defendant as prayed for the plaint.**
- b) **The defendant be given credit for the sum of Kshs. 8, 720,339.90 paid to the plaintiff in settlement of the debt owing to the plaintiff.**
- c) **Costs.**

The affidavit of one **Bipin N. Shah** supports the said applications. During the hearing of the application counsel for the applicant conceded, with approval of the respondents counsel that the applicant had already received the sum of Kshs. 8,720,339.90. He further contented that the only outstanding amount is the sum of Kshs. 10,948.95 as well as interest.

The respondent on the other hand has filed a replying affidavit dated 29th March 2012 sworn by one **E. K. Ngala**. From the same the respondent confirmed the payments of the sum of Kshs. 8,731,288.85 and further that the sum of Kshs. 109,48.95 was equally paid vide a cheque number 019383 dated 8th March 2012.

The defendant further argued that the issue of interest on the outstanding amount was never agreed upon. The interest of 3% charged by the plaintiff / applicant was unilateral and was never agreed upon.

After listening to the parties as well as perusing the affidavits evidence it is not in dispute that the substantial sum of Kshs. 8,731,288.85 has already been paid to the respondent. Equally I do not have any contrary evidence to deny that the sum of Kshs. 10948.95 was not paid to the applicant.

However the issue that needs determination is whether the applicant is entitled to the 3% interest. The invoices attached to the application shows reads:-

**“We have lien over goods supplied until they are fully paid for. Interest of 3% per month will be charged on all overdue accounts”**

This is a document generated by the applicant. I have not been shown any written contract.

It would appear even from annexure BPN 4 of Mr. Shahs supporting affidavit that at the time the respondent admitted the sum of Kshs. 8,731,288.85 the issue of interest was not raised.

In the premises I think this is an issue that ought to go for trial. Further oral or documentary evidence ought to be availed.

I shall therefore allow the application on the following terms:-

- a) **Judgment be entered against the defendant for the sum of Kshs. 8,731,288.85.**
- b) **Credit be given to the defendant for the sum of Kshs. 8,720,339.90**
- c) **If there is any other outstanding sum the same should be proved by way of oral or documentary evidence.**
- d) **The issue regarding whether or not interest should be charged shall await a full trial.**
- e) **The costs of this application shall await the determination of the suit.**

**Dated, signed and delivered at Kisumu this 28<sup>th</sup> day of January 2013**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

..... Advocate for the Plaintiff

.....Advocate for the Defendant

*HKC/aao*