



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 259 of 2012

AUTOLOG KENYA LIMITED.....PLAINTIFF

VERSUS

NAVISAT TELEMATICS (KENYA) LIMITED..... DEFENDANT

RULING

1. Before me for determination is a Notice of Motion dated 7th June, 2012 by the Plaintiff seeking summary Judgment against the Defendant for Kshs.3,500,000/- together with interest and costs. The same is brought under Order 36 Rule 1 of the Civil Procedure Rules. The grounds upon which the application was brought were set out in the body of the application and the Supporting Affidavit of Erastus Momanyi Moruri sworn on 7th June, 2012.

2. It was contended by the Plaintiff that its claim was as per the witness statement and Complaint. That by an agreement in writing dated 3rd August, 2009 the Defendant has appointed the Plaintiff to be its agent for purposes of selling Navisat's Electronic Cargo Tracking System ("ECTS") in Kenya. That by a cheque No.000038 dated 5th August, 2009 drawn by Diamedic Products Ltd, the Plaintiff paid to the Defendant Kshs.5,000,000/- as deposit for the supply by the Defendant of the said ECTS. That the Defendant failed to supply the said ECTS and by a letter dated 7th June, 2010, the Plaintiff demanded the refund of the entire sum of Kshs.5million of which the Defendant only paid Kshs.1,500,000/- and there was a balance of Kshs.3,500,000/- due and owing from the Defendant. The Plaintiff claimed interest on the said sum at the rate of 15% per month on monthly basis. The Plaintiff contended that the Defendant was truly indebted to the Plaintiff as claimed and that there was no defence to the Plaintiff's claim.

3. On 18th September, 2012 the parties entered a consent judgment whereby judgment was entered for the said sum of Kshs.3,500,000/- together with costs on a higher scale. The parties reserved the issue of interest which they were to address the court on. Parties appeared before me on 20th March, 2013 and submitted on the issue of interest.

4. Mr. Kiugu, learned Counsel for the Plaintiff submitted that the monies were paid on 11th August, 2009, that the Plaintiff has been borrowing monies from banks which attract interest, that the court has a discretion on the rate of interest to be applied. That since the application was not opposed by way of a Replying Affidavit the issue was not in dispute and the rate of interest of 15% per month on monthly rests should be allowed as prayed.

5. Mr. Wetangula, learned Counsel appearing for the Defendant submitted that the question of interest must be proved if it is different from court rate, that the Plaintiff had not produced any evidence to prove the rate of interest claimed. He therefore urged the court to apply the interest at court rate.

6. Section 26(1) of the Civil Procedure Act provides:-

“26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the 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.”

Under practice Note No.1 of 1982, the then Chief Justice Simpson Ag CJ issued the following practice direction:-

“The Civil Procedure Act Cap 21 Laws of Kenya Section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable.

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

7. It is clear that under Section 26 aforesaid the award of interest and the rate thereof is in the discretion of the court. That section read together with the practice note No.1 of 1982 above leads to a conclusion that the court has to consider if there are any valid reasons for awarding interest at a higher or lower rate than provided.

8. In the present case, there are two reasons advanced by Mr. Kiugu. The first reason is that the Plaintiff had paid the amount claimed on 11/08/09 and has been borrowing money from banks which money attracts interest. Mr. Kiugu did not produce any evidence of such borrowing. In my view, if a party intends to rely on a borrowing to claim interest other than as provided by law, he must show that the debtor knew that the money paid to him or value of the goods supplied was obtained from borrowing and the rate of interest of such borrowing. This must be notified the debtor well before he accepts the amount paid or the goods as the case may be. There being no evidence of any such borrowing and interest thereon Mr. Kiugu's argument fails.

9. The second ground upon which Mr. Kiugu advanced his client's claim is on the basis that the claim was undefended. I have seen the application. It is brought under Order 36(1) of the Civil Procedure Rules. It is true that unless an application under that order is opposed by way of Replying Affidavit the claim should be allowed. However, I have looked at the rate of interest claimed. It is 15% per month from 18th August, 2009 until payment in full. That will translate the rate of interest to 180% per annum. That to my mind is an astronomical figure. The same will be unconscionable. In the case of **Mohammed –vs- Athaman Shamte (1960) EA 1062** the court held that where the contractual rate of interest is unconscionable, even if the suit is not defended the court has the inherent jurisdiction to re-open the issue.

10. In view of the foregoing, my view is that unless the rate of interest is contractual, interest for the period before the date of filing of suit should not be awarded. Further, in that case the rate of interest should be 12% from the date of filing suit. In the instant suit, the rate of 15% per month was not contractual. I hold the view that the same is unconscionable. I am not satisfied that it is reasonable. In the circumstances, I award interest on the decretal sum at the rate of 12% per annum from the date of filing suit until payment in full. The costs of the application to the Plaintiff in any event.

It is so ordered.

DATED and DELIVERED at Nairobi this 19th day of April, 2013

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A. MABEYA
JUDGE