REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.1483 OF 2000

VELEO (K) LTD……..……..PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD……DEFENDANT

R U L I N G

1. On 18th September, 2013, the parties in the suit sought the intervention/interpretation of the Court on the issue of computation of interest in the Decree and award issued by this Court vide its Judgment dated 20th December, 2012. It is the Defendant's contention that the interest on the award should be calculated on a simple basis whilst the Plaintiff seeks to have the same computed on a compounded basis. Both parties have filed submissions with regard to the issue, with the Plaintiff's dated 10th September, 2013 and the Defendant's dated 27th September, 2013.
2. In its submissions, the Plaintiff reiterated that the money deposited with Defendant, amounting to USD 130,000, was applied in the Defendant's banking trade, negligently mishandled and thereby, causing it to miss an opportunity to invest the money. It is the Plaintiff's contention that this Court has the power and discretion to award compound interest where the interests of justice require. Further, it is submitted that with regard to trade usage and practice of the Defendant, interest was computed on a compounded basis and as such, an award based on simple calculation would be contrary to its normal trade usage and practice. The Plaintiff also relied on the case of **Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34** in which the English House of Lords held that the Court had the jurisdiction to award compound interest on a claim for a restitutionary remedy for the use of money paid under a mistake. It also relied on the cases of **National Bank of Greece SA v Pinios Shipping Co. No. 1 [1990] 1 AC 637** as regards to custom and trade usage with regards to calculation of compounded interest as part of a bank's practice and **Bank of America Canada v Mutual Trust Co. [2002] 2 SCR 601** on value and differences in compound and simple interest computation. It is the Plaintiff's contention that the rate of interest was compounded, given that the Court awarded commercial rates as opposed to Court rates, the latter of which would have therefore implied simple interest.
3. In rebuttal, the Defendant submitted that the Plaintiff did not claim for a compounded rate of interest, and as such, the applicable rate was simple interest. It is further contended that, in as far as the Court's discretion in awarding interest is unfettered, it is however limited to awarding simple interest. The Plaintiff contends that the Defendant has to specifically plead and prove that the interest rate should be compounded, and made reference to **Anab Hussein Arab v Small Enterprises Finance Co. Ltd HCCC No. 500 of 2000** and **Anthony Francis Wareham t/a A.F Wareham & Others v Kenya Post Office Savings Bank Civil Appeal Nos. 5 & 48 of 2002**.
4. **Section 26 (1)** of the *Civil Procedure Act* empowers the Courts with the discretionary power to

award interest on pecuniary judgments. This power, as with all discretionary powers of the Court, is to be exercised cautiously, judicially and in the interest of justice. The aforementioned section reads:-

> **"(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*** (emphasis added) **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."**

This Court when determining the matter, in its judgment dated 20th December, 2012 awarded interest on the award of USD 130,000 (or its equivalent in Kenya shillings at the rate prevailing on the date of payment) and pegged it at 18% per annum. The point of contention, however, arises on how the 18% is to be computed – whether as simple or compound interest. The aforementioned section only provides for interest on pecuniary judgments, but does not state the method of computation of the interest, whether simple or compound.

5. In ***The Law of Interest in Canada*** **(Scarborough: Thomson Canada Ltd., 1992)** at p. 37, the author states;

> **"… Canadian law contains a presumption that interest is simple unless expressly stated".**

This rule is also stated succinctly in **Park Projects Ltd v Halifax (City) (1981), 48 N.S.R. (2d).** As correctly stated by the respondent, in the absence of an agreement, express or implied, for compound interest, the mortgagee is entitled only to simple interest and any stipulation for compound interest must be strictly construed. This was the position adopted by the Court of Appeal in **Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd. (1991), 83 Alta. L.R. (2d) 289, [1992] 1 W.W.R. 577 (C.A.), aff'd [1994] 1 S.C.R. 552, 18 Alta. L.R. (3d) 2,** wherein it was reiterated that:

> **"…interest should be calculated using the nominal rate method (simple interest) and not the effective rate method (compound interest) unless there is a good reason for importing the reinvestment principle into the contract."**

6. As I have observed, **Section 26 (1)** of the *Civil Procedure Act* does not provide for a method of computing interest. It only gives the Courts the discretionary power to award interest on pecuniary judgments, and as such, and as was held in **Bank of America Canada v Mutual Trust Co.** (supra), in my opinion, compound interest will only be awarded in circumstances warranting it and in the interest of fairness. In paragraph 35 of its submissions, the Plaintiff submits that it missed an opportunity to invest the money that had been withheld by the Defendant, and thus the interest rate ought to be calculated on a compounded interest basis. This was reiterated in **Sempra Metals Ltd v Inland Revenue Commissioners** (supra) in which it was held that compound interest would be awarded in the exercise of the Court's equitable jurisdiction. In **Pacific Playground Holdings Ltd v Endeavour Developments Ltd. (2002), 28 C.P.C. (5th) 85, 2002 BCSC 1491**, Wilson, J in quoting with approval the ruling of Major, J in **Bank of America Canada v Mutual Trust Co.** held:

> **"[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also** (emphasis added)."

7. Does the allegation, therefore, that the Plaintiff missed an opportunity to invest the monies held by

the Defendant, warrant and indeed form a basis for which the interest rate on the judgment award should be calculated on a compound interest basis? Are there circumstances here that would warrant the Court to exercise its discretionary equitable jurisdiction to award compound interest? (see Lord Hope of Graighead's opinion in **Sempra Metals Ltd v Inland Revenue Commissioners**). The Defendant, a licensed bank under the *Banking Act, Cap 488 of the Laws of Kenya*, undertakes banking business, which includes the lending of money to its customers. There is no agreement as between the Plaintiff and Defendant as to how the rate of interest would be calculated in the event that there was default by the Defendant. The agreement only stipulated and provided for a rate of interest, compounded at 26% per annum. In this connection, I find that the Defendant's quoted (by the Plaintiff) letter of 5th May 1998 of relevance. The second sentence of the first paragraph thereof reads:

> **"Interest being charged at 12% per annum above the Bank's base rate currently 26% for the time being, will continue to accrue at the ruling rate compounded with monthly rests, until the date is completely repaid."**

It was not anticipated that a situation would arise whereby the Defendant would have to repay the Plaintiff for monies withheld in its accounts. As such it would only seem logical, (in the absence of any agreement, express or otherwise), that the rate of interest applicable would be simple interest. However, the circumstances here are that there was no provision as to the calculation of the rate of interest applicable. The Plaintiff, as a result, has invoked the Court's discretion in applying an equitable remedy to ameliorate the issue. As was held in **Pacific Playground Holdings Ltd v Endeavour Developments Ltd** (supra), the Plaintiff was indeed denied the opportunity to invest the money withheld by the Defendant, and therefore missed opportunities. I was also impressed by the finding in **Bank of America Canada v Mutual Trust Co. [2002] 2 SCR 601**, where Major, J of the Supreme Court of Canada held that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it, regardless of the wording of the Act. The learned judge went on to hold *inter alia*:

> **"Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent…… Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid."**

8. Accordingly, I would find that there was no express provision as to the method of calculating interest rate on the pecuniary judgment in this case. However, the Defendant, having withheld the amount for a period of over twelve (12) years, it could be presumed to have applied the same to its business, and therefore gained significantly from the same. The opportunities lost by the Plaintiff in this instance would only be adequately compensated by applying a rate that would reflect the time value component to interest. The upshot is that I would uphold the trade and usage norm as practised by banks in Kenya. I see no reason why the Plaintiff herein should not enjoy the same method of calculation of interest as would have been employed and calculated payable by it, if it had been in default. As the Defendant bank has proved to be the party in default, I see no reason why it should complain that the calculation of interest that it would have expected cannot be

reciprocated as a result of its default. Accordingly, the interest rate for the Decree purposes herein, is to be calculated on a compound interest basis**,** at the rate of 18% per annum, compounded with monthly rests until paid in full.

DATED and delivered at Nairobi this 30th day of October, 2013.

J. B. HAVELOCK

JUDGE