



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 691 OF 2010 (O.S.)

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION ... PLAINTIFF

VERSUS

EVANS A. ONGICHO ADVOCATE

C/O ONGICHO-ONGICHO & CO. ADVOCATES DEFENDANT

RULING

On 19th April, 2011 the plaintiff filed an application seeking judgment against the defendant in the sum of **Kshs.5 million** together with interest thereon at the prevailing commercial rate from 10th May, 2010 until payment in full. The plaintiff also sought the costs of the application as well as the suit in its entirety. The plaintiff's claim was based on a professional undertaking that had been given to the plaintiff by the defendant. The defendant undertook to pay to the plaintiff a sum of Kshs.5 million within 45 days of release of an original title and discharge of charge in respect of a certain parcel of land that had been charged to the plaintiff by Nuru Chemists Ltd, the defendant's client, to secure a loan. The plaintiff forwarded to the defendant the said documents on 25th March, 2010. However, the defendant did not honour his professional undertaking until 5th October 2011, well after the 45 days period.

On 7th December, 2011 when **Mr. Matheka** for the applicant and **Mr. Munyi** for the respondent appeared before this court they stated that the defendant had settled the principal sum and the only outstanding issues in respect of the application were interest on the said sum of Kshs.5 million and costs of the application as well as suit. They asked for a period of 30 days to amicably sort out the two issues. The matter was subsequently mentioned on 26th January and 27th February, 2012 . Counsel were unable to resolve the aforesaid issues and it was agreed by consent that submissions be filed to enable the court make a determination thereon. This ruling is therefore limited to the issue of interest and costs.

I have carefully perused the submissions filed by the parties herein. The professional undertaking that was issued by the defendant to the plaintiff on 4th March, 2010 categorically stated that the defendant will hold the documents requested for to the plaintiff's order, returnable on demand, pending payment of Kshs.5 million. The payment was to be made within 45 days from the date of receipt of documents. The defendant further undertook that if the 45 days lapsed after release of the documents and the said sum remained unpaid it would forthwith return to the plaintiff the documents. The defendant would further be liable and responsible for full compliance with the undertaking, terms and conditions and would indemnify the plaintiff in all aspects on account of any claim, loss and damage which the plaintiff may suffer by reason of the breach.

As at 15th October, 2010 when the plaintiff commenced these proceedings the defendant had failed to honour his undertaking. The plaintiff had to pay court filing fees in an effort to enforce the undertaking. The plaintiff now asserts that the defendant, having honoured the undertaking after 18 months, the outstanding interest amounts to **Kshs.1,395,200.11**. If the defendant had honoured his professional undertaking within the agreed period of 45 days interest would not have accrued. The plaintiff annexed to his submissions a schedule showing how the sum of Kshs.1,395,200.11 was arrived at.

In his submissions, the defendant has advanced various factual reasons to explain the background of the transaction between the plaintiff and his client, Nuru Chemists Limited. The defendant has also explained the pain he has so far undergone to honour the undertaking after his client failed to put him in funds. However, that explanation is not relevant for purposes of determining the issues of interest and costs.

Under **Section 27** of the **Civil Procedure Act** the costs of and incidentals to all suits are in the discretion of the court and the court has full power to determine by whom such costs are to be paid. Ordinarily, costs follow the event unless the court for good reason orders otherwise.

With regard to interest, **Section 26** of the **Civil Procedure Act** stipulates that where a decree is for payment of money the court may order interest as 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. Where a decree is silent in respect to the payment of further interest the court is deemed to have ordered interest at 6% per annum.

In the originating summons the plaintiff prayed for the costs of the suit together with interest at court rates from the date of taxation until payment in full. If the undertaking had been honoured in time this suit would have been unnecessary but because of the defendant's failure to honour his undertaking the plaintiff was forced to file this suit. In the circumstances, there can be no good reason for denying the plaintiff interest they could have earned had the outstanding sum been paid within the agreed period of time as well as the costs of this suit. Consequently, I order that the defendant bears the costs of the suit and pays interest at court rates, being 14% per annum, from 10th May, 2010 until payment in full. If the costs are not agreed upon the same shall be taxed by the taxing officer.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex/Muriithi – Court Clerks

Mr. Matheka for Plaintiff

Mr. Munyi for Defendant