



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 579 OF 2009

**KENYA ROADS BOARD.....PLAINTIFF/
RESPONDENT**

- VERSUS -

**NATIONAL BANK OF KENYA LTD.....DEFENDANT/
APPLICANT**

R U L I N G

1. Before the court is a **Notice of Motion** dated **12th March 2012** brought under cited provisions of the law. The application seeks the following orders namely:-
 1. That the Honourable court be pleased to certify this application as urgent and service be dispensed with in the first instance and the same be heard *ex-parte* due to its urgent nature.
 2. That the Honourable court be pleased to order stay of execution of its decree issued on 1st February 2012 and all supplemental orders pending the hearing and determination of this application.
 3. That the Honourable court be pleased to order stay of Taxation proceedings on the Plaintiff's Bill of Costs dated 13th February 2012 pending the hearing and determination of this application.
 4. That the Honourable Court be pleased to order the draft Decree annexed hereto to be settled by a Judge.
 5. That the costs of this application be borne by the Plaintiff.
2. The parties have somehow managed to narrow down the issues in dispute such that the only remaining issue to be determined by this court relates to the applicable interest rate, which is disputed.
3. The brief history of this matter is that this court on **13th December 2011** I delivered a Ruling in favour of the Plaintiff, as follows:-
 - (a) Kshs.28,885,756.00.
 - (b) Interests on (a) at commercial rates from February 2008 until payment in full.
 - (c) Costs of this suit.
 - (d) Any other orders the court may deem just and appropriate.

4. The Defendant never appealed against the said Ruling, but was alarmed by the contents of the extracted Decree which the Defendant contested and which the Defendant sought to stay in these proceedings, together with a stay of all consequential orders including a stay of taxation.

5. The parties have now narrowed down the issues and the issue to determine is the interest rate applicable in terms of order (b) above. To that extent the Applicant has annexed a Draft Decree for settlement by this court. The Applicant's Draft Decree is annexed as "**COR 7**" which puts interest at a sum of **Kshs.7,799,154.00** although the rate adopted is not stated, but from submissions on the issue I figure that the rate adopted was **7% per annum**. This is in direct opposition with the Decree of this court dated **1st February 2012** apparently secured by the Plaintiff without the participation of the Defendant in which the applied interest rate adopted is **15% per annum** bringing the sum of interest to **Kshs.17,331,453.60**.

6. The Defendant/Applicant alleges that the said Decree dated **1st February 2012** was unprocedurally and unlawfully secured against the wishes of the Defendant who did not have the opportunity to participate in its draft and adoption as required under **Order 21 Rule 8 (2)** of the **Civil Procedure Rules**.

7. From the outset, Mr. Agwara, counsel for the Plaintiff, has urged this court to reject this application on the basis that there already exists a Decree of this court dated **1st February 2012**. Mr. Agwara has submitted that the said Decree is in force and that the application before the court has not sought either to vary or set it aside, and that approving the Draft Decree will amount to having two Decrees on record. I am indeed tempted to accept this submission. There is a lawful Decree dated **1st February 2012**. It has not been varied or set aside. Besides, there is no prayer to vary or set it aside. The only prayer is that it be stayed. The issue then is, stay for what purpose, and until when? Clearly, the Applicant did not include an important gradient to this application. Had circumstances not changed radically in this matter, I would not have gone beyond the Decree of this court dated **1st February 2012**.

What then are these radical changes I have referred to above? These changes relate to the prayers in this application, all of which have been abandoned or agreed upon, and the parties have submitted to this court that the only issue they want this court to determine is the issue of applicable commercial rate of interest. This submission implies that the parties have consciously departed from the decree dated **1st February 2012** and are seeking a fresh intervention of this court on the matter. That being so in my finding, I herewith discharge and set aside the decree of this dated **1st February 2012**.

8. The issue for this court is now to determine the commercial rate referred to in the Ruling of **13th December 2012**. I have looked at the correspondences of the parties in relation to this matter. Initially, the Plaintiff had drafted a Decree based on a commercial rate of interest of **20% per annum**. The Defendant rejected this rate, and preferred a rate of **15% per annum** based on simple calculation. In the cause of negotiations the Plaintiff accepted the Defendant's proposal of **15% per annum** on simple rates. This was the basis upon which the decree of **1st February 2012** was drawn. By their letter dated **9th January 2012**, the Defendant's advocates wrote to the Plaintiff's advocates stating in part as follows:-

"We return herewith a copy of the Draft Decree endorsed with rejection.

The average commercial rate applicable for the period in question is 15% per annum, and the calculation ought to be without compounding of interest.

Please submit a revised draft. On our part, we are calculating the interest and will revert to you with our version of the decree".

By their letter of **18th January 2012** the Plaintiff's advocates accepted the terms proposed by the Defendant's advocates and applied the commercial interest rate of **15% per annum** calculated at '*simple interest*'. This communication appeared to have closed this chapter, and the Plaintiff's advocates prepared an amended Decree which they forwarded to the Defendant on **23rd January 2012** for approval or further

comments. The Defendant neither approved or commented on the same causing the Plaintiff to write to the Deputy Registrar on **31st January 2012** to approve the amended Draft Decree which the Deputy Registrar did on **1st February 2012**.

On **3rd February 2012**, the Defendant's advocates wrote to their counterparts saying that they did not understand their counterpart's reference to "*commercial interest rate*". They asked whether their counterparts were referring to a deposit rate or a lending rate, and which particular bank's rate was applicable. By their letter of **26th February 2012** the Defendant's advocates stated that the applicable commercial rate to be applied was the rate their client had applied on the Plaintiff deposits, meaning a deposit rate, and went ahead to state that the deposit rate at the relevant period between **2008** and **2010** ranged between **5 – 9%**. In their submissions the Defendant urged the court to adopt a rate of either **6% per annum** or **7% per annum**.

9. In response the Plaintiff submitted that the parties had agreed on the applicable rate of interest at **15%** and are now estopped from asserting the contrary. They submitted that by their conduct and words, the Defendant had made to the Plaintiff a clear and unequivocal representation of fact with the intention that it should be acted upon and the Plaintiff did indeed act upon that representation. I have looked at the doctrine of '*estoppel*'. Halsbury's Laws of England renders itself as follows on estoppel:-

"Estoppel by conduct, otherwise known as *estoppel in pais*, arises where a person has by words or conduct made to another clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person understand that a certain representation of fact was intended to be acted upon and the other person has acted upon such representation and thereby altered his position. The *estoppel* arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. Estoppel by conduct is generally regarded as a rule of substantive law . . ."

In the case of **FIRST ASSURANCE LTD. – VS- SEASCAPES LTD.** It was held as follows on the issue of *estoppels*:-

"Related to that question of *estoppel*. Mr. Gautama for the Respondent submitted before us that two letters in which the appellant stated that they were on cover with effect from 31st May 1997 raised an *estoppel* against the appellant. But for there to be an *estoppel* there has to be a representation which is acted upon by the opposite side to its detriment."

I have considered the doctrine of *estoppel*. As is already stated, for there to be an *estoppel*, there has to be a representation which is acted upon by the opposite side to its detriment. I am not particularly persuaded that the doctrine of *estoppel*, properly speaking, applies to the matter at hand. The submission that the Plaintiff may have suffered or will suffer detriment is not clearly discernable. At best, it is arguable. Because there was never an agreed interest rate applicable *a priori* it cannot be clearly stated that because the Defendant has now moved from the **15% interest per annum** to **7% per annum** then the Plaintiff has automatically suffered detriment. In my view, the applicability of the doctrine of *estoppel* is at best arguable, and I reject it.

10. In my view, a better submission by the Plaintiff is based on pure agreement which has been concluded. The Plaintiff counsel Mr. Agwara submitted that the parties had agreed on the rate of interest, and this court should not disturb that agreement. It should be that simple. There is documented communication to that effect which have not been challenged, though such communication had not amounted to a final Decree. In fact, to be fair to the Defendant, they stated in their last communication, having agreed on **15% per annum**, that they would revert with the final draft. However they did not do this. The issue then, is whether the Defendant having reached that far in that agreement, could still be entitled to change its mind? In my view the answer is yes, firstly because the Defendant reserved the right to come back with the final draft Decree, and secondly, the Defendant's advocates had a right to further consult their client before the final Draft Decree. This is what appears to have taken place, as the next

communication from the Defendant's advocates starts with the words "*our instructions*", "*we are further instructed*" etc. I hold that the Defendant cannot be bound to the alleged agreement of interest at **15% per annum** and that they were entitled to change their mind on the same at any time before a final Draft Decree was reached.

11. How then do we resolve the issue at hand? Was the rate applicable a lending rate, or was it a deposit rate? Firstly, it must be noted that the principle judgement sum of **Kshs.28,885,756.00** was a sum which the Plaintiff deposited with the Defendant's bank. This money was withdrawn from the account without the authority of the Plaintiff in circumstances which this court found to have been fraudulent, and the court directed the Defendant to refund the said sum. The Defendant has indeed refunded to the Plaintiff the said principle sum of **Kshs.28,885,756.00**. The Defendant counsel Mr. Onyango has submitted that the applicable rate for deposit during the relevant period was between **5% - 9% per annum**, and has proposed **7% per annum** to be applied. The Plaintiff on its part has not disputed the fact that the applicable interest is a deposit rate and not a lending rate. Rather, the Plaintiff submitted that the money having unlawfully been removed from the control of the Plaintiff, the Plaintiff lost the use thereof. The inference is that if the Plaintiff could not access its money, then the Defendant was trading with that money for the entire duration of the loss and the Defendant should pay interest at the lending rate rather than at the deposit rate. I am persuaded by this submission. As long as the Plaintiff's money was accessible to the Plaintiff the Plaintiff was free to withdraw it and invest in other securities. There was no guarantee that the money would remain in that account for that long. The Plaintiff lost investment opportunity during the time it could not access the money. The insistence by the Defendant that the rate applicable is that of deposit rate implies that the Defendant was sure that the Plaintiff would never have had to withdraw the said money for other investment purposes, either within the Defendant bank or with other banks, or even for investment in other non-finance securities or real property. This reasoning, however does not detract from the fact that the contract between the parties was to be compensated by interest based on "*deposit rate*" rather than "*lending rate*". The peculiar circumstance of the loss of the money in this account does not in any way affect or change the contractual nature of that account.

It has been submitted, without any challenge from the Plaintiff, that the applicable rate during the relevant period was between **5% - 9% per annum**. Under **Section 26** of the **Civil Procedure Act**, I have the discretion to determine the interest rate in this matter. While I hold that the applicable rate was the deposit rate, which is agreed to have been between **5% - 9%** I am free to adopt the maximum range and at that same time allow extra punitive rates to compensate the Plaintiff for the lost opportunities during the relevant period.

12. Mr. Agwara has urged me to apply the principle established in **SHAH – VS – GUIDERS INTERNATIONAL BANK LTD.** which set interest at **14%** and that I should award more than **14%** in this matter. I decline. To do that will remove the relevant account from expressly being a deposit interest account to a lending interest account, and this will totally change the character of the transaction.

In the exercise of my discretion under **Section 26** of the **Civil Procedure Act**, I have decided to award interest at the highest range during the relevant period on deposit rate, and additional punitive rate of **3% per annum**.

13. In the upshot, I rule that the interest on commercial rates referred to at prayer (b) of the Plaint filed in court on **10th August 2009**, and awarded by this court to the Plaintiff vide this court's ruling dated **13th December 2011** shall be **12% per annum** on simple rate from **February 2008** until payment in full.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI
THIS 24TH DAY OF JULY 2012**

E. K. O. OGOLA

JUDGE

PRESENT:

Agwara for the Plaintiff

Onyango for the Defendant

Teresia – Court Clerk