**FINEJET LIMITED ……..…….. PLAINTIFF**

**VERSUS**

**FIVE FORTY AVIATION LIMITED ……. DEFENDANT**

**R U L I N G**

1. The Defendant\\\'s Application before this court is dated 16 July 2012 and is by way of Notice of Motion brought under the provisions of **sections 1 A, 1B and 3 A** of the *Civil Procedure Act* as well as under **Order 21 Rule 8 (4)** *Civil Procedure Rules*. The Application requires this court to give an interpretation of its Order issued herein on 14 February 2012. In the application, the Defendant raised two issues: firstly, what interest rate should be applicable to the judgement sum and the applicable period thereof and secondly, what conversion rate should be adopted and the date thereof from US Dollars to Kenya Shillings. It also requested this court to hold a further enquiry as to the just and equitable rate of interest that ought to apply to the decretal sum before any formal conversion is made. The Defendant detailed the following grounds in support of the Application:

**“(a) THAT there is a lacuna in the judgment of the court in respect of the rate of interest to apply;**

**(b) THAT the interest rate of 12% per annum on a United States Dollar judgment is excessive;**

**(c) THAT the decretal sum should be converted from United States Dollars into Kenya Shillings at judgment, for interest accrual purposes;**

**(d) THAT it is in the interest of justice that the Orders sought by the Defendant/Applicant be granted; and**

**(e) Further and other reasons to be adduced at the hearing”.**

2. The Notice of Motion was supported by the Affidavit of **Gilbert Josiah Mungu** who is the Defendant\\\'s advocate on record in this matter. In his Supporting Affidavit dated 16 July 2012, Mr. Mungu detailed that judgement had been entered for the Plaintiff against the Defendant in this suit in the sum of US$656,304.49 together with interest and costs. He noted that the costs in the suit had been taxed and an award given in Kenya Shillings. He had got around to the fact that the court had not determined the 2 issues raised on the face of the Notice of Motion. He stated that the Plaintiff herein was making attempts at having a Decree drawn and Warrants of Execution issued. In fact, the rate of interest had been omitted in the draft Decree which had been sent to his firm for approval and which he had objected to. The two salient points raised by the deponent in the Supporting Affidavit was that he believed that the Plaintiff, having opted for judgement in foreign currency, committed itself to whatever rate of interest that obtains in the context of that currency. He also believed that the Plaintiff would be entitled to interest during the period at a rate at which someone could reasonably have borrowed US dollars at simple, not compound interest.

3. The Application first came before me by way of mention on the 18 July 2012. Mr. Gakuo appearing for the Plaintiff submitted that the rate of interest used was the Court rate. He noted that when the Plaintiff filed its application for Summary Judgement it had attached the applicable exchange rate to the affidavit in support of application. At that time the Kenya shilling stood at Shs 103 to the US dollar. It now stood at Shs 83. It was his opinion that this was not an issue that needed to come back before this court. Mr. Mungu for the Defendant however, drew his learned friend's attention to **section 26** of the Civil Procedure Act in relation to questions of interest. He observed that the Plaintiff had never specified the interest rate in its Plaint and could not now blame the Defendant for querying the same. He maintained that there were alternate rates of interest other than Court rates pertaining to a non-shilling judgement. Referring to the Order of this Court as to the Defendant putting up security for stay of execution pending appeal, Mr. Mungu admitted that the date of the 15th May 2012, by which the security had been ordered to be put up, had now passed and the Plaintiff was now free to execute its Decree. However, it first had to perfect it, which included detailing the interest on the Plaint sum.

4. In response, Mr. Gakuo for the Plaintiff indicated that the main issue here was that the Defendant had come before Court asking for its indulgence as to a stay. For over 90 days, it had enjoyed such indulgence without ever coming before Court to seek clarification on the rate of interest applicable. He mentioned that, at the time, the Court made the order, there was no problem with conversion rates. Even now the Defendant was free to pay in US dollars. He noted that the Plaintiff had intimated before the Deputy Registrar at the taxation of the Plaintiff\\\'s Bill of costs, that the interest rate should be at commercial rates as it could only be higher, not lower, than the applicable court rate. No interest rate had been suggested. As far as the Plaintiff was concerned, this application by the Defendant only went to raise an issue which will further delay the matter. Mr. Gakuo submitted that if the Defendant was to deposit the amount of the judgement sum in court, then these further issues such as interest could be dealt with. At that, I ruled that I would hear further arguments on both sides relating solely to the questions of the interest rate applicable and the pertinent dollar/shilling conversion rate.

5. Thereafter, on the 20 July 2012 Mr. Mungu appeared before me on behalf of the Defendant and Mr. Adhoul appeared for the Plaintiff. Mr. Mungu noted that there had been no response filed to the Defendant\\\'s application by the Plaintiff, neither Grounds of Opposition nor a Replying Affidavit. He proposed that he should proceed with the application ex parte. Mr. Adhuol responded by saying that the application before court seeks the interpretation of the Court\\\'s Order and sought no order as against the Plaintiff. He thus saw no reason why the Defendant should have filed documentation in response to the application. The Defendant, in turn, would eagerly want to know the interest rate and the conversion rate as per the Court\\\'s Order. The Defendant could only await the court\\\'s interpretation of the law. Mr. Adhoul noted that **Order 51 Rule 14 (1)** was expressed not in mandatory terms which gave the Plaintiff the option of whether to file documentation in response. What in fact the Plaintiff had sought to do was to file a list of authorities to assist the court in interpreting its own Order.

6. On these points, both Plaintiff and the Defendant submitted one authority each. The Plaintiff submitted the case of **Milangos v George Frank (Textiles) Ltd (No 2) 3 All ER 599** while the Defendant put forward the case of **Charles Thys v Herman Steyn** *HCCC No. 1508 of 1984* as per **Ojwang Ag. J.** (as he was then) for the court's consideration. Both cases are of persuasive value. The problem that I had with the **Milangos** case was that it involved a contract between parties in Switzerland and consideration therefore was express in Swiss francs. **Bristow J.** spent a fair amount of time in his Judgement looking at the proper law of the contract and ended up by determining that the interest as regards the decretal sum should be at a rate at which a party could reasonably have borrowed Swiss francs in Switzerland. However, the learned judge held as follows:

**"The plaintiff should be treated mutatis mutandis as if he had been awarded judgement in sterling and was therefore entitled to simple interest on the judgement sum at a rate at which a person could reasonably have borrowed in Swiss francs in Switzerland."**

7.In the **Charles Thys** case, **Ojwang Ag. J.** made a number of comments which I found pertinent to the matter before me. Although dealing with the facts of the case before him, I was interested to note the learned Judge's opening comments as follows:

**"It is obvious that the judgement-creditor is seeking to make the most, on the basis of the said decretal amount of US dollars 439,587 as at 20 June 1989, while the judgement-debtor, who must be moved by the very same economic considerations as the former, is seeking to keep his payment obligation as low as can be. Counsel are no doubt driven by the preoccupations of their clients, as they make their eloquent submissions."**

Later on in his judgement the learned Judge detailed two quotations from the English case of **Tate & Lyle Food and Distribution Ltd v. Greater London Council & anor. (1981) 3 All ER 716** as per **Forbes J.** The first quote reads as follows:

**"the guide to interest in commercial cases was, therefore, the rate at which a Plaintiff with the general attributes of the actual Plaintiff could have borrowed the money wrongfully withheld, and not the earning capacity of the money if the Plaintiff had invested it during the time he was kept out of it….."**

**Forbes J's** second observation was even more useful:

**"I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principles now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld ….. But at the cost to the Plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money."**

8. It must be said that **Ojwang Ag J.** was also referred to the **Milangos** case before arriving at his conclusion with regard to quantifying interest in accordance with the law of the country in which the contract was made or indeed the currency chosen by the parties. **Ojwang Ag. J.** propounded what he saw the principle to be adopted by courts as follows:

**"I think the above-stated principle represents the common sense position that should be taken to guide legal practice in this country. The** *lex fori* **is a country whose legal system is being invoked in the resolution of a dispute. Consequently it is the substantive law as well as the adjectival law of the***lex fori* **that will govern the mode of resolution of the dispute in question. Now if such resolution of the dispute will invariably translate into a financial award, it must be accepted as a general principle that the currency of the financial award will be the local currency, and in the case of Kenya, this will be the Kenya Shilling. The rationale of this principle is that the judicial process will limit itself to re-dressing a wrong, or remedying a breach of contract, and the like; but it is the responsibility of a party who obtains an award in Kenya Shillings to arrange with his bank to have the money exchanged for other currencies, in accordance with banking practice."**

9. Having enunciated what he saw as the principles involved in the matter, the learned Ag. Judge then got to the meat of his Ruling by asking himself a number of questions which I consider worth detailing as follows, as these are the sort of questions that I should be asking myself:

**"The foregoing case review is to be taken together with the vital question, what was the original prayer of the judgement-creditor? What was the intent in the judgement of 1989? Was there a specific requirement that payment to the judgement-creditor had to be calculated always in dollars, and the interest thereon computed on the basis of dollar rates?"**

The prayer in the Plaint herein was for an amount to be paid in US dollars. Counsel indeed confirmed that the consideration in the contract between the parties being the sale/purchase of aviation fuel was

expressed in US dollars. This was not surprising in view of the fact that the Plaintiff was supplying fuel to the Defendant at destinations all over Kenya and indeed in southern Sudan. Reference was also a made to the Platts' index involving worldwide prices in relation to oil and petroleum products, invariably expressed in US dollars. The Plaintiff herein had not indicated that it wanted payment in the US dollar current equivalent in Kenya Shillings. Further, the Plaintiff had only sought "interest" on the amount claimed not specifying either the rate of interest or that it should be paid at court rates. Neither counsel herein have urged me to find as to a particular rate of interest or that the same should be at court rates. As I understand it, local commercial banks do quote differing rates of interest for borrowing in local currency or in a currency off-shore. Kenyans can borrow from local banks in US dollars but such borrowing always tends to be at a lower rate for US dollars than for Kenya Shillings. It seems to me that the fairest way that I can find in fixing the interest rate in this matter is to direct that the judgement amount do attract a rate of interest that a local commercial bank would charge a customer for borrowing in US dollars at the date of my entering judgement being 14 February 2012. Consequently and in accordance with **Ojwang J's** guideline in his said judgement, I direct that the rate of interest to which the Plaintiff will be entitled on the judgement amount of US dollars 656,304.49 will be the rate of the US dollar LIBOR rate pertaining as at the 14th February 2012.

10. Of course, in entering judgement, I also intended that interest should be charged as regards the costs of the suit. These had been expressed and taxed in Kenya Shillings. Accordingly interest on those costs will be at court rates. Finally, the Notice of Motion has requested that I should direct as to what conversion rate should be adopted as at 14 February 2012 as between the United States dollar to the Kenya Shilling. As I have already stated above, the judgement amount has been detailed in US dollars. The Plaintiff did not pray for the judgement sum to be paid in Kenya Shillings. In my opinion, it is the prerogative and indeed the responsibility of the Plaintiff who has obtained an award in US dollars to arrange with its bank to have the same converted into Kenya Shillings if it should so wish. However it may be that the Plaintiff in this matter may wish to choose to be paid in Kenya Shillings, in which case I would have thought that the pertinent conversion rate would be the mid-rate as declared by the Central Bank of Kenya as at the date of judgement – 14 February 2012. In view of the fact that both counsel were I n agreement when they appeared before me on 18 July 2012 that this was, as it were, a mutual reference to court, I make no order as to costs of the application.

**DATED and delivered at Nairobi this 23rd day of July 2012.**

**J. B. HAVELOCK**
**JUDGE**

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