



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Case 56 of 2000**

**ISAAC ADUVAGAH.....PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK LIMITED.....DEFENDANT**

**JUDGEMENT**

The Plaintiff presented a plaint dated 1<sup>st</sup> March 2000 seeking the following reliefs:

- a) General damages and costs as per paragraph 7 of the plaint
- b) The sum of Kshs. 3,917,756.80 as per paragraphs 8,9,10 and 11 of the plaint.
- c) General damages as per paragraph 13 of the plaint
- d) Costs of the suit
- e) Interest

The Plaintiff averred that he offered to purchase property known as Kakamega Town Block/111/103 from the Defendant through its agents Lloyd Masika. That he obtained a copy of the valuation report from the agents which indicated that that the property was a leasehold interest for a term of 50 years from 1998. That based on that representation he offered to purchase at Kshs. 2,700,000/= and his offer was accepted by the Defendant. That he paid the purchase price of Kshs. 2,700,000/= together with accrued interest of Kshs. 25,491.65 and was provided with completion documents. That when he lodged the documents for transfer the lease transfer could not be registered because the lease had expired on 1<sup>st</sup> August 1997. The Plaintiff averred that the Defendant's was in fundamental breach of the contract dated 22<sup>nd</sup> February 1999. The Plaintiff averred that he had taken possession and established a school and that he will suffer relocation costs. The Plaintiff further pleaded interest at the rate of 33% on monies paid to the Defendant towards the purchase price making a total of Kshs. 842,627.20. He also claimed refund of purchase price of Kshs. 2,700,000/= and forfeiture sum of Kshs. 270,000.

The Defendant filed a Defence but an Application was made by the Plaintiff to strike out the defence. In a ruling delivered by Justice Nambuye on 23<sup>rd</sup> February 2007, she struck out the Defence with costs to the Plaintiff. The Honourable Judge also entered summary judgment in the sum of Kshs. 2,725,491.65. The issue of general damages and interest payable was to be dealt with by way of formal proof and the Plaintiff was to take a date for formal proof.

The case came for formal proof on 9<sup>th</sup> April 2008. Both parties were represented by counsel. The Plaintiff gave his testimony as PW1. He confirmed having been paid Kshs. 2,725,491.65 of the preliminary decree. He was claiming interest on the said sum. There was a clause No. 5 that provided for 8% above the base lending rate published by the Defendant or Barclays Bank from time to time. He produced the sale agreement dated 22.2.1999 as P Ex. 1. He applied for Base lending rates from the Defendant and received reports through letter dated 30.3.2005 which was produced as P Ex. 2 and letter dated 8/4/2008 produced as P. Ex. 3. He stated that he was claiming 17,779,637/66. That he engaged a professional to assess the interest. He referred to report prepared by IRAC which was marked as P MFI 4. He produced expense receipts and fee note of IRAC as P Ex 5 (a), (b) and (c). Total amount paid to IRAC was Kshs. 37,200. He was awarded the refund and was asking the court to pay him special interest at agreed rates as per the agreement. He also claimed costs of the suit. He said that he has not given back the house.

On cross examination by counsel for the Defendant he stated that he had not provided Law Society Conditions of sale. That the agreement does not provide for payment of interest in the event of breach. That interest applies to the bank. He concurred that the price was fair value in relation to what he was to do there. He paid the entire purchase price and got possession of the land. He got possession in July 1999. It was two acres with a two bedroom house. He has not paid any rent to the bank. IRAC had not factored that he was using the property.

PW2 was Wilfred Abincha Onono. He gave testimony that he works with Interest Rates Advisory Centre (IRAC) as a Managing Consultant. He is a member of the Institute of Certified Public Accountants since 1978. At IRAC they are financial consultants in respect of interest rates. They calculate and assess interest in respect of loans, debts etc. They have been in practice since 2001. They were instructed by the Plaintiff to compute interest in respect of sums he was claiming from the Defendant. He read the ruling of Justice Nambuye and also used clause 5 of the sale agreement to base his calculations. The period is from 1998 to 8<sup>th</sup> April 2008. Interest is the cost of money retained and or taken from the borrower. It was based 8 compounded monthly. This is the practice. The refund was made in July 2008. Shs. 17,467,378/37 was due as at 31/03.2008. He confirmed that they charged Kshs. 37,200 and they were paid. He produced a cash receipt for Kshs. 10,000 issued by IRAC to the Plaintiff as P Ex. 6. The Plaintiff is to pay IRAC 5% of the amount awarded. He produced his report dated 8/4/2008 as P Ex. 4. On cross-examination he stated that he did not know what arrangements they had on the house. He did not look at clause 4. He did not know that he was to return the property. There was an agreement on rent then he could have factored in. The Plaintiff closed his case and parties agreed to file written submissions.

I have considered the submissions of the parties and the evidence on record. The following issues arise for determination. Firstly, whether the Defendant was bound to pay interest to the Plaintiff on the basis of clause 5 of the sale agreement or any other clause in the sale agreement. Secondly, whether the Plaintiff had established basis for award of interest sought as damages. Lastly, who should bear costs of this suit.

The first issue touches on the case of the Plaintiff as put forward during formal proof. The Plaintiff gave testimony that on the basis of clause 5 he is entitled to interest based on the base lending rate plus 8 per centum of rates published by the Defendant. He produced in evidence rates advised by the Defendant through letters dated 8/4/2008 and 30/3/2005 exhibits 2 and 3 respectively. Based on those rates he sought professional opinion from IRAC and they prepared a report advising him that the interest due was Kshs. 17,779,637.66. The sum of Kshs. 2,725,491.65 was refunded in the month of July 2007. The balance after this refund is shown as Kshs. 14,802,864.99. It is apposite to advert to clause 5 to appreciate the contextual argument of the Plaintiff. It provides as follows:

**“Interest Rate shall mean Eight (8) per cent above the base rate as may be published by Standard Chartered Bank Kenya Limited from time to time and if no rate is so published then Eight (8) per cent above the base rate as may be published by Barclays Bank of Kenya from time to time.”**

The clause defines what the interest rate in the contract is. The phrase Interest Rate is used at clause 10 of the sale agreement. It provides as follows:

**“If for any cause or reason whatsoever attributable solely to the default of the purchaser the**

**transaction shall not be completed on the Completion Date then the Purchaser shall pay to the Vendor interest on the balance of the purchase price or such as thereof remaining unpaid at the Interest Rate herein prescribed to be computed from the Completion Date until the date of payment of the purchase price in full both days being inclusive.”**

It is the purchaser to pay to the Vendor interest at the prescribed rate. The advocate for the Plaintiff contends that the clause is ambiguous and should be construed *contra proferentum*. I do not find any ambiguity in the clause. There is no other clause in the sale agreement where the phrase Interest Rate has been used. I therefore do not find that clause 5 of the sale agreement provides a springboard to the Plaintiff to claim interest rates on the basis of base lending rate + 8 per centum.

Having failed to establish a basis for award of interest on the basis of clause 5 I next consider whether the Plaintiff is entitled to interest at all and if so on what basis. The claim of the Plaintiff is based on misrepresentation that the lease was for a term of 50 years beginning from 1998. Given that the defence was struck out this averment is unchallenged. The Plaintiff feels that because he was denied the use of his money from 1999 he should be compensated by an award of interest. The sum of interest pleaded in paragraph 10 of the plaint was Kshs. 842,627.20/=. The report adduced in evidence as exhibit 4 is for a sum of Kshs. 17,779,637.66. This report is of little evidential value because it is based on contractual rates that have no basis. The only thing that we pick from the evidence of PW2 is that interest is compensation for denial of money due. The denial of money from 1999 to the year 2007 was established. The Defendant paid back the money on 31<sup>st</sup> July 2007. I am persuaded that as a matter of principle that interest is due. The question is on what rate. Counsel for the Plaintiff has referred to the case of *New Tyre Enterprises Ltd v. Kenya Alliance Insurance Company Ltd. [2002] KLR 1*. The Court of Appeal observed that the award of interest to any period prior to filing suit is a matter of substantive law. Where a party has been deprived of land or movable property and receives a monetary award in compensation for the loss, the usual practice is to award interest from date of such deprivation, The Court of Appeal was making reference to deprivation of land or other movable. The general Principle on recovery of debts is that interest is due from date of filing suit unless there is a contract or trade usage to the contrary.

In this case there is no evidence of trade usage or custom established. The foundation of claiming interest based on contract collapsed. The claim of the Plaintiff according to his evidence on formal proof was based on contract. I am guided by the Court of Appeal decision in *Habib Zurich Finance (K) limited vs. Muthoga and another [2002] 1 EA 81* in holding that general damages would not be recoverable for breach of contract. Though the Plaintiff gave evidence and report was introduced into evidence showing interest loss of Kshs. 17,779,637.66 the plaint was never amended to plead this sum. Guided by the Court of Appeal case of *Siree v Lake Turkana El Molo Lodges Ltd [2000] 2 EA 521* I would reject the sum of Kshs. 17,779,637.66 as having no basis in the plaint. The sum of Kshs. 32,700/= been fees paid to IRAC was not pleaded even though evidence was adduced. It was held by the court of Appeal in *Galaxy Paints Co Ltd v Falcon Guards Ltd [2002] EA 385* that issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination unless pleadings were amended.

What remains is to consider the measure of damages that the Plaintiff is entitled to? The Plaintiff chose to quantify his damage from perspective of interest that could be earned on the money. Opportunity cost of the money in other words. The money has been returned after 7 years. Taking into account the discretion vested in the court by virtue of section 26(1) of the Civil Procedure Act and the fact that the Plaintiff was in possession of the property and was not paying any rent to the Defendant I am inclined to treat the claim as a simple debt recovery and to award interest at court rates on the sum of Kshs. 2,725,491.65 from the date of filing suit until date of payment. Other claims are dismissed. The Plaintiff will have costs of the suit. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF AGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Omusundi for Plaintiff

Mr. Khaya h/b for Mr. Odere for Defendant