

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 15 of 2008

BROOKSIDE DAIRY LTD..... PLAINTIFF

VERSUS

TESCO CORPORATION LTD.....DEFENDANT

RULING

On 8th October 2008, this court dismissed the defendant's application which sought to set aside the interlocutory judgment entered in favour of the plaintiff for the liquidated sum of Kshs.3,656,263.50. At page 6 of its ruling, this court noted as follows:

“As regard whether the defendant should pay the plaintiff the sum of Kshs.3,448,830.13 or Kshs.3,656,265.50 in full and final settlement of the claim, it was clear from the statements annexed to the replying affidavit of Peter Kuria that the defendant owed the plaintiff the sum of Kshs.3,656,265/50. The defendant did not place before the court any evidence to support its assertion that the sum owed to the plaintiff was the lesser figure of Kshs.3,448,830/50. The plaintiff supplied sufficient proof that it was indeed owed the said sum of Kshs.3,656,263.50. The plaintiff conceded that the defendant had already settled the sum of Kshs.3,448,830.13. The plaintiff is therefore entitled to be paid the difference of Kshs.207,433.50.”

The court ordered the defendant to pay the said amount together with the costs of the suit.

The defendant was aggrieved by the decision of the court and on 7th November 2008 made an application to review the said ruling of this court. On 27th January 2009, the parties herein recorded the following consent in settlement of the application:

“By consent the defendant's application dated 7th November 2008 be allowed in terms of prayer 3. The parties to agree on costs and interests in default the same be determined by the court. Mention on 18th February 2009 for the purposes of recording further consent or the giving of further directions.”

Prayer 3 of the said defendant's application reviewed and set aside the order of this court which had entered judgment in favour of the plaintiff for the sum of Kshs.3,656,263/65. Instead, the parties agreed by consent that judgment be entered in favour of the plaintiff for the sum of Kshs.3,448,830.13. Despite several mentions, the parties were unable to agree who was entitled to be paid costs of the suit.

On 24th June 2009, the plaintiff filed a notice of motion pursuant to provision of **Sections 26 & 27** of the **Civil Procedure Act** seeking the determination by this court of who was liable to pay interest and costs of the suit. According to the plaintiff, the defendant had refused to pay interest on the principal amount (for the period the sum remained unpaid) and had further refused to pay the cost of the suit. The plaintiff sought the court's order to compel the defendant to pay the said outstanding sums. The grounds in support of the motion are on the face of the application. The application is supported by the annexed affidavit of Peter Kuria, the credit manager of the plaintiff.

The application is opposed. Parker Muktar, the director of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff was not entitled to be paid the costs of the suit on essentially two grounds: firstly, on the ground that on 9th November 2007, the

plaintiff had agreed to be paid the sum of Kshs.3,448,830.13 in full and final settlement of the debt. Secondly, the defendant was of the view that the plaintiff filed the present suit before it had ascertained that indeed the cheques which were deposited with it, once banked, would be paid. He deponed that by filing suit when the defendant had made effort to pay the debt, the plaintiff was in the circumstances, not entitled to be paid costs.

At the hearing of the application, I heard oral arguments made by Mr. Kabaiko for the plaintiff and Miss Migiro for the defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the rival submission made by counsel for the parties to this application. The issues for determination by this court are twofold: Firstly, whether the plaintiff established sufficient grounds to entitle the court order the defendant to pay it costs of the suit. Secondly, whether the plaintiff established that it is entitled to be paid interest at court rates. Under the proviso of **Section 27(1)** of the **Civil Procedure Act**, in normal circumstances, costs will follow the event unless for good reason the court shall order otherwise. In the present application, it was clear that by the time the plaintiff filed the present suit on 16th January 2008, the plaintiff had not paid the principal sum. The principal sum was subsequently paid on 29th May 2008. This was after the defendant had given instructions to the plaintiff to re-bank the three cheques equivalent to the principal sum that had been dishonoured on 21st January 2008. The defendant's contention that it had paid the principal sum before the plaintiff filed suit does not therefore hold water. The principal sum was paid four months after the present suit had been filed. The plaintiff is therefore entitled to be paid costs of the suit calculated at the amount that was agreed by consent by the plaintiff and the defendant. The plaintiff is entitled to be paid costs as the principal sum was paid after the suit was filed. The said amount shall be paid at higher scale.

As regard interest, I hold that the plaintiff is entitled to be paid interest at court rates from 16th January 2008 (the date the suit was filed) to 29th May 2008 (the date the principal sum was paid). In the premises therefore, the plaintiff's notice of motion dated 24th June 2009 succeeds. It is hereby allowed with costs to the plaintiff. The plaintiff shall be paid costs of the suit plus interest as directed by the court.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2009.

L. KIMARU

JUDGE