**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 3471 OF 1995**

**EAST AFRICAN PORTLAND CEMENT CO. LTD……..…….PLAINTIFF**

**VS**

**CONSOLIDATED BANK OF KENYA LTD……..…1ST DEFENDANT**

**NYAMASENO INVESTMENT CO. LTD ……2ND DEFENDANT**

**RULING**

The notice of motion by which this application was preferred is brought under SS.3A, 99 and 100 of the Civil Procedure Act. It is dated 13th October 2003 and was filed in court on the same day. The application prays for orders that the court do give directions on the commercial rate of interest applicable to the sum of Ksh.4,103,441.30 awarded to the plaintiff in the judgment of the court given on 28th March, 2003; that the plaintiff be at liberty to apply for such other orders and/or directions as this court may deem fit; and that the costs of this application be provided for.

The application is based on the grounds that this court struck out the 1st defendant's defence and entered judgment against it as prayed, and the plaintiff had prayed for judgment for Ksh, 4,103,441.30 together with interest at commercial rates; that in the interest of justice a decree should conform with the judgment of the court, and therefore for the purpose of drawing the decree it is necessary for the court to specify the commercial rates that should be applied. Without the court's directions on the applicable commercial interest rate, the plaintiff is unable to extract a decree, and will therefore stand to suffer loss of the fruits of the full judgment if the applicable interest rate is not determined.

In a supporting affidavit sworn and filed by JINARO KIPKEMOI KIBET, an advocate of the High Court having the conduct of this case on behalf of the plaintiff, Mr Kibet avers that on 28th March, 2003, this court struck out the defence of the 1st defendant and entered judgment against it as prayed in the plaint. The prayer in the plaint was for the sum of Ksh. 4,103,441.30 together with interest at commercial rates, and it is necessary for the court to specify the rate of interest to assist in the drawing of the decree. To the affidavit is attached a copy of a letter from the Standard Chartered Bank showing its base lending rated since 1998.

The first defendant/respondent opposes the application by filing grounds of opposition in which it states that the court is *functus officio* in that the prayer for interest is discretionary and was part of the pleadings and the court declined to award interest when it entered summary judgment, and that the court cannot re-open a matter which has been dealt with in full. The third ground of opposition is that the application for summary judgment left the issue of interest to the court otherwise it should have limited itself to the principal to put the issue of interest to trial which it did not, barring the plaintiff to claim the same once

the application was spent. And the final ground is that the omission of interest in the judgment was neither a mistake nor accidental. It was a deliberate action by the court since the application did not leave any issue for determination later as it was exhaustive.

In the oral submission, Mr Kibet for the applicant argued that all that the application sought was the court's direction as to the exact rate of interest to be applied on the decretal sum. The judgment of the court awarded the principal sum and interest as prayed, and the problem is that the prayer in the plaint is for interest at bank overdraft rates and does not define the rate. He also contended that this court and the Court of Appeal have in the past awarded a rate of 25% and urged the court to exercise its discretion and award a similar figure of 25% so that a decree can be drawn. He referred the court to some three authorities.

On his part, Mr Kirudi for the respondent argued that at the time of judgment, the court exercised its discretion and now the court is *functus officio* and cannot reopen he issue. At that time, the applicant knew that evidence would be required to justify any rate above the court rate which is 12%, and that cannot be done later. The applicant therefore abandoned the issue of interest at the time of summary judgment, and there is no error or mistake. Having abandoned the issue of interest and failed to reserve the right to prove the rate at that time, it is now too late to do so.The letter from the Standard Chartered Bank showing their base lending rates as of July, 1998 is evidence which calls for cross examination, and it shows that this is an afterthought on the part of the applicant.

On the authorities referred to by Mr Kibet, Mr Kirundi submitted that these cannot apply to the circumstances of this case since the issue is whether the court should reopen its own judgment and her fresh evidence on the rate of interest but not whether the court has power to award interest at commercial rates. He submitted that the court should not be more than 12%. This figure is conceded by the application itself through the letter from the bank which suggests that the latest rate applicable is 11.5%. He thereupon requested the court to dismiss the application with costs.

In his reply, Mr Kibet submitted that Justice Mbaluto had already granted the prayer for interest at overdraft rates. All that is needed now is for the court to say what rate that is and all evidence has been placed before the court. The issue is entirely at the discretion of the court and the court is not *functus officio* until judgment is expressed by decree. He urged the court to facilitate that expression.

From the submissions of counsel, the court is of the view that there are three main issues to be determined. These are whether the court is *functus officio* , and if not, whether the applicant abandoned the issue of commercial interest rates at the time of summary judgment and, if not, what rate of interest the court should award.

On the issue of functus officio , Mr Kirundi submitted that at the time of judgment, the court exercised its discretion and thereafter became *functus officio* and cannot reopen the issue. Mr Kibet submitted that the court does not become *functus officio* unless and until judgment is expressed by a decree, and a decree has not yet issued in this case None of the counsel cited any authority on this point. If Mr Kirundi's submission were to hold sway, the court becomes *functus offi cio* upon signing judgment. However, that is not the case, both a case in law and in practice. O.XLIV rule 1 (1) is a case in point. The order is entitled **"REVIEW"** and the marginal note reads**"application for review of judgment**." The salient part thereof reads-

> **"any person considering himself aggrieved by a decree or order…and who… desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

From this rule alone, it is patently clear that the court's jurisdiction does not end upon the signing of the judgment. There may well be matters upon which it retains a residual power to adjudicate. One such matter is the jurisdiction to review, and this can be exercised long after judgment has been entered. And even though this application is based upon sections 3A, 99 and 100 of the Civil Procedure Act, it is inherently in the nature of a review. I am inclined to agree with counsel for the applicant that the court

does not become *functus officio* until its judgment is expressed by a decree, and no decree has been extracted in this suit. If I am wrong in so thinking, then section 100 provides a cure by empowering the court, at any time, to amend any defect or error in any proceeding in a suit…for the purpose of determining the real question or issue raised by or depending on the proceeding. There is an issue raised by the proceedings in this case, and the issue is what is the interest at bank overdraft rates?

Having found that the court is not *functus officio* , the next point is whether the applicant abandoned the issue of commercial interest rates at the time of summary judgment. On the face of the record, there is nothing to suggest that the applicant abandoned that issue. The last word in the proceedings was that of Justice Mbaluto when he entered judgment "in favour of the plaintiff against the 1st defendant as prayed in the plait." As observed earlier, the prayer in the plaint was for interest at bank overdraft rates. It is my humble view that having granted judgment as prayed in the plaint, there was and there still is an obligation on the court to determine what the bank overdraft rate is.

The final question then is what is the bank overdraft rate in the context of the plaint? Counsel for the applicant referred the court to some two authorities but none of them is of assistance to the court. In Kenindia Assurance Company Limited V Alpha Knits Limted & Anor. Civil Appeal NO 330 of 2001, Mr Fraser is recorded as having that there was a triable issue on the interest awarded at 25% p.a. Hon. Waki, J.A. said-

**"I see no unreasonableness in awarding interest as pleaded at the rate of 25% p.a."**

This suggests that the rate of 25% p.a. had been pleaded in the plaint, but in the case before this court, no such specific figure was pleaded. The judgment of Hon. Kwach, J.A. in the same appeal does not refer to the rate of interest. That case is therefore distinguishable from the present one.

The other case that the court was referred to is that of Transnational Bank Ltd V Milligan Properties Ltd. & 2 Ors . Civil Case No l420 of 2000, in which summary judgment was entered and the learned judge awarded different rates of interest against the three defendants, but the rates ranged from 20% to 25% p.a. It is not clear from the ruling whether these rates had been pleaded, or how else the court arrived at them.In the application before this court, the plaintiff pleaded for commercial rates, without pleading a definite figure. The court granted the prayer as prayed without specifying any rate. The applicant is therefore entitled to interest at commercial rates. Commercial rates are known to be above court rates. Court rates stand at 12%. In order to be awarded a commercial rate, the applicant should get a rate above 12%. But there is no guide as to how the court in Civil Case No 420 of 2000 arrived at figures between 20% and 25% per annum. For lack of such guidance, and after a lot of soul searching, this court orders that counsel do address the court and make oral submissions on the commercial rates, including Central Bank rates, prevailing at the time when the contract was made, when the suit was filed and at the present moment. It is so ordered.

Costs in the cause.

Dated and delivered at Nairobi this 2nd day of April, 2004

**L Njagi**

**Judge**