

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1950 of 1998

TRADE WINGS LIMITED

PLAINTIFF

versus

KENYA NATIONAL TRADING CORPORATION LIMITED

DEFENDANT

R U L I N G

On the 24th May 2004, the parties recorded a consent in the following terms:-

" By consent, the court do determine the rate of interest payable by the Defendant on the principal sum admitted by the Defendant and the date from which such interest shall run"

and a consent order was entered accordingly.

Submitting pursuant to this consent order, Mr. M. Billing for the Plaintiff while conceding that the rate of 42% per annum claimed in the plaint dated 8th September 1998 would be exorbitant in the current prevailing economic circumstances, urged that a rate of between 25% and 30% p.a. would be reasonable as the judgment entered herein arose from a commercial transaction. In support of this argument, he cited the Court of Appeal decisions in Ndiuco Ltd. v Nairobi City Commission (now Nairobi City Council) (Civil Appeal No. 40 of 1995) (unreported) and Shah v Guilders International Bank Ltd [2002] 1 EA 269.

In his response, Mr. T. A. K. Rutto for the Defendant urged (*inter alia*) that in the absence of any agreement between the parties as to payment of interest, interest should be payable at such rate as would be just, fair and not punitive which, in Mr. Rutto's opinion, would be the court rate of 14%. Mr. Rutto further contended that no interest should be payable for the period of two years when the court file was missing but offered no reasonable grounds for this plea.

Though the respective submissions of learned counsel were helpful, neither of the parties have placed any evidence whatsoever before me as to how I ought to exercise my discretion under section 26 of the Civil Procedure Act in determining the rate of interest payable by the Defendant notwithstanding that both parties are agreed that interest is payable. To assist the court in making this determination, the Defendant has not shown any mitigating factors that ought to be taken into account, including evidence of payment of the admitted principal sum or part thereof or of why the court file could not have been reconstructed earlier. Mr. Billing, on his part, has not justified the Plaintiff's claim for interest at a rate of between 25% and 30% p.a. other than by stating that the judgment herein arose from a "*commercial transaction*" as aforesaid. For a transaction of this magnitude, I would have expected the parties to have entered into an elaborate written agreement with adequate provision for 'penalties in the event of breach or default by either or both parties.

Having taken the foregoing factors into account, it is hereby ordered that interest on the admitted principal sum of Kshs. 22,250,000/- shall be paid by the Defendant to the Plaintiff at the court rate of fourteen per centum (14%) per annum from the date of filing suit namely the 9th September 1998, to the date of payment in full, both days inclusive.

Dated and delivered at Nairobi this 17th day of September 2004.

P. Kihara Kariuki

Ag. Judge