



Royalken Limited v China International Aero-Tech International Engineering Corp (Civil Suit E455 of 2022) [2025] KEHC 8708 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E455 OF 2022
H NAMISI, J
JUNE 20, 2025**

BETWEEN

ROYALKEN LIMITED PLAINTIFF

AND

**CHINA INTERNATIONAL AERO-TECH INTERNATIONAL ENGINEERING
CORP DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant seeking the following reliefs:
 - i. Special damage in the sum of Kshs 21,860,036.00;
 - ii. Damages for breach of contract;
 - iii. Costs of the suit
 - iv. Interest on (i), (ii) and (iii) above from the date of filing until payment in full at court rates.
2. The Plaintiff's case is that on diverse dates between 11 November 2019 and 24 September 2020, the parties entered into a series of agreements for the sale of construction material, specifically bitumen. The Plaintiff pleaded that on 11 November 2019, parties entered into an agreement for the sale of 51.2 metric tons of cutback MC-30 for a sum of Kshs 5,017,600/=. Pursuant to Clause 5 of the Agreement, the Plaintiff would make the delivery within a week, and the Defendant would make payment within 30 days. Failure to pay the contract sum within the stipulated time would attract a 5% monthly interest on the total sum.
3. On 20 February 2020, parties entered into another agreement for the sale of 31.2 metric tons of Bitumen Grade 80/100 for a sum of Kshs 2,093,080/=. Once again, Clause 5 provided that the delivery would



be made within one week and payment by the Defendant would be within 30 days. Failure to pay the contract sum within the stipulated time would attract a 1.5% monthly interest on the total sum.

4. On 20 July 2020, the parties entered into two agreements. The first was for the sale of cutback MC-30 worth Kshs 21,779,200/- and the second was for the sale of bitumen grade 80/100 worth Kshs 17,341,245/=. Both agreements stipulated that delivery would be within a week, and payment by the Defendant would be within 30 days. The default interest rate this time around was 5% per month on the total sum.
5. A similar contract was entered into on 24 September 2020 for the sale of cutback MC-30 for the sum of Kshs 680,600/-. The default interest rate was 1.5% monthly.
6. It is the Plaintiff's case that the Defendant breached the contract by failing to make the requisite payments within the stipulated time. The Plaintiff particularised the breach as: Failure to adhere to the strict timelines in the agreement for sale; failure to pay for the goods at the agreed time in the agreement for sale; failure to pay the full amount of the purchase price and failure to pay the accrued interest.
7. PW1 was Mohamed Mirfajari, a Director of the Plaintiff. He adopted his Witness Statement dated 4 Nov 2022, which reiterated the contents of the Plaint. He also produced a bundle of documents (Exhibits 1 to 16). PW1 asserted that the Plaintiff performed its obligations under the agreements and raised invoices after the delivery of the consignments. The Defendant settled the invoices, but after a long time. The payments took 1 year, with no reasons advanced for the delay.
8. On cross examination, PW1 confirmed that not all agreements had been signed by both parties. Some agreements bore the signature of one party only. The witness also confirmed that the principal sum was eventually paid and this suit relates to the interest accrued. Further, PW1 confirmed that the total contractual sum for the five agreements was Kshs 46,911,125/=. The Plaintiff had received a total of Kshs 83,487,439/-
9. The Defendant entered appearance and filed a Defence that simply denied the contents of the Plaint. DW1, George Ochieng Ojuok, an Administrator at the Defendant company, adopted his undated Witness Statement and bundle of documents. He confirmed that the parties entered into a series of agreements for supply of the construction material. He testified that when the Covid-19 pandemic hit, the same dealt a big blow to the Defendant's business and they suffered great loss. Government projects were put on halt and payments stalled. DW1 confirmed that to date, the company has pending bills but has endeavoured to pay its suppliers.
10. It was DW1's testimony that when the Plaintiff insisted on payment of interest, the Defendant felt that the same was out of proportion since the principal sum had been paid in full. His prayer to the Court was that the huge sum of interest claimed by the Plaintiff be set aside.
11. On cross examination, DW1 averred that the issue of the pandemic was communicated to the Plaintiff, but did not have any evidence to prove. He confirmed that interest did accrue on the principal sum. He offered no suggestion as to what would be a reasonable rate of interest.
12. Parties filed their respective submissions.

Analysis & Determination

13. Having read the pleadings, submissions and carefully analysed the evidence presented, the issues for determination herein are summarised as:
 - i. Whether there was a valid contract between the parties?



- ii. Whether the Defendant breached the contract?
- iii. Whether the Plaintiff is entitled to interest as special damages and at what rate?
- iv. Who bears Costs of this suit

Existence of Valid Contract

14. It was the Plaintiff's assertion that parties entered into a series of agreement, under which the Plaintiff performed its obligations by delivering the construction material and the Defendant made payments, albeit delayed. The Defendant argued that only two agreements were formally executed by both parties. The Defendant submitted that since Clause 10 of the agreement specifically required the execution of the agreements by both parties, then the Plaintiff's failure to sign the other agreements negated the intention to be bound, thus rendering them invalid and incapable of breach.
15. Despite the Defendant's submissions, DW1 conceded that the Plaintiff delivered the construction material as required and that the Defendant received invoices from the Plaintiff. Further, he confirmed that the principal had been fully paid. This is a clear demonstration that despite the absence of the Plaintiff's signature on some agreement, both parties proceeded to act as if the agreements were fully executed.
16. Curiously, in its submissions, the Defendant relied on the case of Reveille Independent LLC vs. Anotech International (UK) Ltd [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J), which contradicts its argument herein. In the said case, the Court stated thus, with respect to the effect of an unsigned agreement:

“... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly.”
17. The consistent pattern of delivery by the Plaintiff and the subsequent acceptance and payment by the Defendant, irrespective of whether a specific agreement bore both signatures, is compelling evidence of a mutual intention to create legal relations. In short, the contracts were valid and enforceable.

Breach of Contract

18. The Plaintiff's case is premised on the Defendant's failure to adhere to the agreed timelines, leading to a breach of contract. PW1 testified that the payments were made irregularly and well after they fell due. On cross examination, DW1 admitted that the Defendant did, in fact, delay in making payments to the Plaintiff. He attributed the delay to the outbreak of COVID-19 pandemic. He also confirmed that there is a clause in the agreements requiring any party unable to perform to give notice, and that such notice was never issued to the Plaintiff regarding delay in payment. This admission alone is confirmation that the Defendant breached the contract. The Defendant's failure to make the payments within the stipulated time constitutes a clear violation of their primary contractual obligations.

Special Damages

19. The Plaintiff claims Kshs 21,860,036/= as special damages, representing the accrued interest due to delay in payments by the Defendant. The Plaintiff asserted that the various agreements explicitly stated the penalties for the delayed payments. The copies of agreements produced by the Defendant indicate the interest as follows:



- a. Agreement dated 20 Nov 2019 – “5% of total contract value monthly”
 - b. Agreement dated 27 Nov 2019 – “5% of total contract value monthly”
 - c. Agreement dated 24 Nov 2020 – “5% of total contract value”
 - d. Agreement dated 22 October 2020 – “1.5% of total contract value”
 - e. Agreement dated 22 October 2020 – “5% of total contract value”
20. On the other hand, the copies of agreements produced by the Plaintiff indicate the interest as follows:
- a. Agreement dated 11 Nov 2019 – “5% of total contract value”
 - b. Agreement dated 20 Feb 2020 – “1.5% of total contract value”
 - c. Agreement dated 20 July 2020 – “5% of total contract value”
 - d. Agreement dated 20 July 2020 – “1.5% of total contract value”
 - e. Agreement dated 24 Sep 2020 – “1.5% of total contract value”
21. From the evidence adduced by both parties, it is clear that the issue of interest was not disputed at the point when invoices were raised. Despite the Defendant’s denial of the provision of interest in the agreements, it is very clear from their own evidence that the same existed. What is not clear, however, is why some agreements stated “monthly” and others omitted the same, thus creating ambiguity. It is the considered view of this Court that the explicit inclusion of “monthly” in some agreements and omission in others, suggests a potential difference in the agreed penalty. This Court cannot simply assume “monthly” when the parties clearly demonstrated the capacity to include it elsewhere. The burden, therefore, lies on the Plaintiff to demonstrate that the intention was for monthly accrual. In the absence of such proof, this Court leans towards a one-off penalty as a reasonable interpretation.
22. The Plaintiff cited the case of *Danson Muriuki Kihara -V- Amos Kuthua Gatungo (2012) eKLR*, where the Court stated thus:

“The plaintiff/appellant filed a claim for Kshs.40,000/= plus interest at 50% per month. The matter proceeded to full hearing and the learned trial magistrate entered judgment for Shs.40,000/= plus costs and interest at court rates. The appellant appealed against the judgment on ground that the interest payable was reduced from 50% per month to interest at Court rates. The court held that the interest rate of 50% was unconscionable and stated:
In the case of the *National Bank of Kenya Ltd Vs Pipeplastic Samkolit (k) Limited (Supra)* the Court of Appeal held that:-

“A Court of law cannot re-rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

This case was decided on 8th June 2001. And later on 28th June 2002 in the case of *Ajay Indravadan Shah Vs Guilders International Bank Ltd Civil Appeal No. 135/2001 [2002] 1 EA 269*. The Court of Appeal held that the provisions of Section 26 (1) of the *Civil Procedure Act* are applicable only where the parties to a dispute have no, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest, then the Court has no discretion



in the matter and must enforce the agreed rate UNLESS it is shown in the usual way that either that agreed rate is illegal or unconscionable or fraudulent.

From these two judgments, it is clear that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or fraudulent. From the evidence before the learned trial Magistrate there is no evidence of illegality or fraud.....

An interest of 50% per Month was agreed on. This calculates to an interest of 600% per Annum. Even the financial institutions which are authorized to charge interest do not charge those kind of rates. The agreement was drafted after the Respondent had already been given the cash and taken it to school. This bargain between the Appellant and Respondent is found by this Court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the Respondent, even though they had agreed to it. The Appellant took advantage of the Respondent's desperate situation to fleece him.”

23. In the instant case, the rates of 1.5% and 5% per month would translate to 18% and 60% per annum, respectively. While the rate of 60% per annum is a high commercial rate, it is substantially lower than the rates found unconscionable in the Danson Muriuki Kihara case (Supra). The context of the agreements is also crucial: these are commercial transactions between two limited liability companies, presumably operating at arm's length unlike a friendly loan to a desperate borrower as described in Danson Muriuki Kihara case. Commercial entities are generally presumed to have equal bargaining power and to understand the terms they agree to. The principle of *pacta sunt servanda* holds strong in commercial contracts, and Courts are reluctant to rewrite terms voluntarily entered into, unless they are illegal, fraudulent, or demonstrably unconscionable to the extent of being extremely unfair or commercially unreasonable given the circumstances. The rates of 1.5% and 5% per month, while steep, do not appear to cross the extreme threshold of unconscionability set in the Kihara case (Supra).
24. The long and short of it is that the Plaintiff is entitled to special damages in the form of accrued interest based on the contractual rates. Since by the Plaintiff's own evidence the period is not specified, then the interpretation is a one-off charge per delayed payment. The same is calculated as follows:

Agreement Date	Contract Value (Kshs)	Interest rate	Interest Payable (Kshs)
11 Nov 2019	5,017,600.00	5%	250,880.00
20 Feb 2020	2,093,080.00	1.5%	31,396.20
20 July 2020	21,779,200.00	5%	1,088,960.00
20 July 2020	17,341,275.00	5%	867,063.75
24 Sep 2020	680,600.00	1.5%	10,209.00
			2,248,508.95



General Damages

25. The Plaintiff pleaded for an award of general damages for breach of contract. It is their contention that the delayed payments caused them loss, prevented them from meeting financial obligations and making profit. They relied on the case of *Hydro Water Well (K) Ltd -vs- Sechere & 2 Others* KEHC 22 (KLR), which reiterates the common law principle that damages in contract are intended to place the claimant in the same position as if the contract had been performed.
26. The Defendant opposed this claim, arguing that general damages are ordinarily not recoverable in cases concerning breach of contract. They submitted that awarding general damages in addition to special damages would amount to duplication. They relied on the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* (2015) eKLR, where the Court of Appeal stated:
- “We hold that the correct course the trial court should have taken is not to award general damages as it is trite law and in many cases of this Court that general damages do not normally fall to be awarded where a breach of contract has been proved.”
27. While the *Hydro Water Well* case correctly articulates the compensatory nature of contract damages, it does not override the principle regarding non-recoverability of general damages in breach of contract cases where the loss is quantifiable and claimed as special damages. Awarding both accrued interest and general damages for the same breach would, indeed, constitute an impermissible duplication of compensation.
28. In the premise, judgement is entered in favor of the Plaintiff as against the Defendant in the following terms:
- i. Special Damages is awarded in the sum of Kshs 2,248,508.95 and interest thereon at court rates from the date of filing the suit until payment in full;
 - ii. Costs of the suit and interest thereon at court rates from the date of this judgement until payment in full.

DATED AND DELIVERED AT NAIROBI THIS 20 DAY OF JUNE 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Libertine Achieng Court Assistant

