



**Transafrica Motors Limited v County Government of Machakos (Civil Appeal E004 of 2021) [2024] KEHC 12274 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E004 OF 2021**

**FR OLEL, J**

**OCTOBER 9, 2024**

**BETWEEN**

**TRANSAFRICA MOTORS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff vide their plaint dated 11<sup>th</sup> February 2021 filed this claim as against the defendant, seeking for judgment to be entered in their favour in the sum of Kenya shillings forty-one million, eight hundred and thirty-two thousand, five hundred and forty and sixty cents (Ksh.41,832,540.60) and also sought interest thereon in the sum of Kenya shillings fifty-nine million, fifteen thousand, three hundred and eighty-two and fifty-seven cents ( Kshs.59,015,382.57/=) being the purchase price balance and interest due to them at prevailing commercial rates of interest calculated at 14% P.A. as at 11<sup>th</sup> December 2020 from the defendant for the supply of twenty (20) tippers, 6 by 4, 15 tonnes each (spec no. MTD- 1420-023-13) to the defendant's Water, irrigation and sanitization department pursuant to paragraph 6 and 15 of the Public Procurement guidelines framework contracting, 2010 as issued by the Public Procurement oversight Authority under Section 9(c) (1) of the *Public Procurement and Asset Disposal Act*, 2015.
2. It was the plaintiff's further contention that after they were awarded the said contract, the lorries were built based on LPO no. 2571013 dated 19<sup>th</sup> January 2016, and deliveries were affected between 14<sup>th</sup> March 2016 and 13<sup>th</sup> May 2016. Thereafter they sent specific invoices to the defendant for settlement but unfortunately, the defendant breached the signed contract and intermittently made payments amounting to Kenya shillings ninety-six million, five hundred and sixty-seven thousand, four hundred and fifty-nine only(ksh.96,514,459.00) which accounts for the purchase price of only fourteen (14) units and left the outstanding sum claimed.



3. The principal sum also attracted interest at a commercial rate of 14% P.A from 30<sup>th</sup> June 2015, which was when the last invoice was sent to the defendant, up to 11<sup>th</sup> December 2020 when demand was made and this was justifiable based on Section 140 of the *Public Procurement and Asset Disposal Act* 2005. The plaintiff therefore urged the court to find that their claim was merited and proceed to award the same with costs.
4. The defendant upon service did enter appearance and filed their statement of defence dated 14<sup>th</sup> April 2021. They denied all the averments made by the plaintiff and for good measure stated that no lorries-trippers were supplied to them and/or in the alternative, if the same were supplied, it stems from an illegal and unenforceable contract which could not be enforced as it contravened/flouted procurement laws and regulations. The defendant reiterated that no money was owed to the plaintiff an account of the principal sum and/or interest and thus prayed that this suit be dismissed with costs.
5. The plaintiff in a rejoinder did file their reply to defence dated 24<sup>th</sup> May 2021 and joined issues with the defendant on all averments made. They stated that the defendant could not be heard to allege that the contract implemented was illegal and/or fraudulent without pleading the particulars of fraud alleged in the said contract and/or noted in the procurement process. The defendant had also not denied receiving the said trippers and making part payment thereof. The plaintiff therefore urged the court to strike out the statement of defence filed, for being frivolous and proceed to enter judgment as prayed for in the plaint.
6. Before trial, the parties opted to mediate this dispute, through the court-annexed mediation process, and eventually the mediation settlement report dated 22 September 2022 was filed confirming partial agreement on sums owed. On 25<sup>th</sup> April 2023, the parties' counsels did appear before the court and by consent, entered partial judgment in favour of the plaintiff in the sum of Kenya shillings thirty-five million, one hundred and eighty thousand, five hundred and forty-three hundred and fifty-eight cents. (ksh.35,180,543.58/=). What then remained for determination was what amount of interest was due and owing if at all and also if any VAT was due on the principal sum.
7. On 7<sup>th</sup> February 2024, both parties consented that the issue that remained for determination be canvassed by way of written submission which the parties respectively filed.

## **B. Parties Submissions**

### **(i)Plaintiff Submissions**

8. The plaintiff submitted that it was legally entitled to interest on the principle sum owed to it by the defendant at the prevailing commercial rates until payment in full and such interest was payable from the date when the principal amount became due under the contract. The plaintiff relied on *Supermarine Hunting Services Ltd versus Kenya Revenue Authority* (2010)eKLR where *Prem Lata versus Peter Musau Mboya* (1915) E.A 592 and *Orix Oil (Kenya) Ltd versus Paul Kabeu & 2 others* (2004) eKLR were cited with approval.
9. The plaintiff also relied on Section 140(a) of the *Public Procurement and Asset Disposal Act*, 2015 which provides that where there was a delay in the performance of a contract and it led to overdue amounts being owed unless the contract provided otherwise, the procuring entity would pay interest on the overdue amounts owed. The contract signed and local purchase Order no. 2571013 issued did not contain any provision that barred payment of interest on overdue amounts thus, the aforesaid Section 140 (c) of the Public Procurement & Assent Disposal Act 2015 became applicable. Reliance was also placed on *Jane Wanjiku Wambu vrs Anthony Kigamba Hat & 3 others* (2018)eKLR where it was held that where there is a statutory right to interest the same should be allowed.



10. The plaintiff also urged the court to find that interest was due and payable based on Section 26 of the Civil Procedure Act. The plaintiff also prayed for the costs of this suit to be awarded to them.

#### **(ii)Defendant’s Submissions**

11. The defendant on the other hand did contend that the contract executed did not provide for payment of interest and as such it was never intended by the parties that any interest would be payable. They urged the court to find that the contract entered into by the parties could not be construed in a manner not contemplated by the parties and since no contractual timelines were provided for payment of the principal sum, no interest on late payment could arise. The Plaintiff therefore could not take advantage of this situation to warrant invoking provisions of Section 140(a) of Public Procurement and Asset Disposal Act 2015. Reliance was placed on the case of National Bank of Kenya vrs Pipeplastic Samkolit & another (2001)KLR 112.
12. The defendant further submitted that the plaintiff was also not entitled to claim general damages as the same was not provided for in the said contract and further, the plaintiff had also not demonstrated any breach of contract on their part. This position was affirmed in the case of South Nyanza Sugar Company Ltd vs Dunda Ochung Mideny (2018) eKLR. Where it was held that no damages were payable for breach of contract when the contract did not provide for the same.
13. The defendant therefore prayed that the plaintiff’s claim for interest be denied and they only be awarded the principal sum due without costs.

#### **C. Analysis and Determination**

14. The only issue which arises for determination in this matter is whether or not the plaintiff is entitled to claim interest on the unpaid sums of Kenya shillings thirty-five million, one hundred and eighty thousand, five hundred and forty-three hundred and fifty-eight cents. (kshs.35,180,543.58/=) already admitted as due and owing to the plaintiff and for which consent Judgment in respect thereof had been entered.
15. Order 26 of the Civil Procedure Act also does provide that the court may award interest on the degree for payment of money. Order 26 (1) of the Civil Procedure Act provides that;  

“where and in so far as a decree is for payment of money, the court may, in the decree order interest at such rate as the court deems reasonable to be paid on the principle sum adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”
16. Generally, the rule is that a party cannot charge interest if it is not provided for in the contract or unless the right to charge interest was agreed to when the deal was made as held in the case of; King Road Paving and Land Scaping Inc Vs Plati (2017), ONSC 557.
17. However, common law seeks to remedy a party who has suffered loss due to delayed payment, where there is no contractual clause on interest. Indeed, the courts have come to accept without requiring special proof that, a party who has been deprived of use of his or her capital for a period of time has suffered loss, as held in the case of; Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (SCA) and that in the normal cause of events, such a party will be compensated for his loss by an award of mora interest.



18. In the case of; Crookes Brothers Limited Vs Regional Land Claims Commission & Others Case No. 590/2011, the Supreme court of South Africa, held that;

“(14) Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date”.

19. Similarly, it was held in the case of; Bellairs v Hodnett & another 1978 (1) SA 1109, that;

“under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor.

20. In the case of Crookes Brothers Limited (supra) the court stated that the term mora simply means delay or default. When the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona. (See Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA) paras 11 & 12.)

21. The purpose of mora interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking. Here a demand (interpellatio) was necessary to place the respondents in mora.

22. Finally In the case of Mukisa Biscuits Manufacturing Ltd Vs West End Distributers (No 2 (1970) EA, 469 at 475, spray V.P did state that;

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where however damages have to be assessed by court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.”

#### **D. Disposition**

23. It is clear beyond peradventure that the plaintiff is entitled to interest on the unpaid sum and I do award the same at 14% P.A. from the date of filing this suit until the date of payment of the principal sum in full.

24. The plaintiff will also have the costs of this suit.

25. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**



**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024**

In the presence of

No appearance for Plaintiff

No appearance for Defendant

Susan Court Assistant

