



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 287 OF 2013**

**TAJ MALL LIMITED.....PLAINTIFF**

**VERSUS**

**HELLEN NJAMBI MBUGUA.....DEFENDANT**

**JUDGMENT**

The plaintiff herein moved the court by way of the plaint dated the 24<sup>th</sup> day of July 2013 in which it has sought judgment against the defendant for Kshs. 3,548,327.90cts plus interest at the rate of 29% per annum. It has also prayed for costs of the suit.

In the plaint, it has pleaded that by an agreement dated the 15<sup>th</sup> day of August, 2007, the defendant entered into an agreement with the plaintiff of the sale and purchase of maisonnette at a consideration of Kshs. Sixteen million, five hundred thousand (Kshs. 16,500,000/=).

That the defendant paid the sum of kshs. 3,500,000/= and it was agreed that she would pay Kshs. 2, 000,000= on or before 15<sup>th</sup> October, 2007 and the balance of kshs. 11,000,000/= was to be paid on completion. The plaintiff avers that contrary to the provisions of the agreement, the defendant failed to pay the balance of the purchase price as and when it fell due thereby attracting interest at the contractual rate of 17% per annum and penalty on the late payment at the rate of 1% per month totaling to 29% being the interest at commercial rates which the plaintiff was liable to pay to its bank on any outstanding amount.

The plaintiff thus claims the aforesaid amount plus interest at contractual rate of 29% pa. until payment in full.

In her defence filed in court on the 26<sup>th</sup> September, 2013, the defendant admitted having entered into the Sale Agreement dated the 15<sup>th</sup> August, 2007 but avers that the same was later varied by the parties specifically with regard to the time of payments and also by conduct of the parties. She stated that she paid the kshs. 3,500,000/= to the plaintiff at the time of execution of the Sale Agreement and not thereafter as alleged.

The defendant contended that the instant suit is improper and cannot be founded on a fully performed contract vide the doctrine of acquiescence. That the suit is frivolous and an abuse of the court process.

At the hearing, each party called one witness in support of their respective cases.

Rameshchandra Govind Gorasia gave evidence as PW1. He is the Managing Director of the Plaintiff. It was his evidence that according to the terms of the agreement dated the 15<sup>th</sup> August, 2007, the defendant was to pay Kshs. 3,500,000/= as deposit, a further Kshs. 2,000,000/- payable on or before 15<sup>th</sup> October, 2007 and the balance of kshs. 11,000,000/= to be paid on completion. He stated that the defendant failed to pay the balance of the purchase price as and when they fall due thereby attracting interest at the rate of 1% per month totaling to 29% Pa. He produced the documents filed on 24<sup>th</sup> July, 2012 as exhibits.

The defendant testified as DW1. She adopted her witness statement dated 25<sup>th</sup> September, 2013 and filed in court on 26<sup>th</sup> September, 2013 as exhibits.

It was her evidence that she entered into an agreement with the plaintiff on the 15<sup>th</sup> August, 2007 but had paid the initial deposit on the 24<sup>th</sup> July, 2007 before she executed the agreement. She stated that she continued making payments even as the plaintiff continued constructing and readying the suit premises for occupation and procuring instruments for registration.

That to the best of her knowledge, the transaction was completed and all the obligations of the respective parties were fulfilled. She stated that the interest rates were never mutually agreed on or captured in any instrument. It was her evidence that if any money was paid late, which she denied, the plaintiff accepted and/or received the same without qualms or reservations. That the plaintiff never invoked any claim for any breach at the time, and he cannot be heard to cry wolf when the sale contract is complete and a title issued in her name. She

contended that the suit herein is an afterthought only meant to embarrass her and that in law, parties cannot unilaterally vary the terms of a sale agreement by invoking alleged interest rates that were never part of the agreement in the first place and moreover, when the contract is fully performed by the parties. She prayed that the suit be dismissed.

Parties filed their respective submissions which they later highlighted in court. From the evidence on record and the submissions by the parties, there are two issues for determination;

1. Whether the plaintiff is entitled to charge interest at the rate of 29% per annum;
2. Whether by its own actions and/or conduct, the plaintiff is estopped in law from claiming interest.

In its submissions, the plaintiff claimed that it is entitled to interest at commercial rate for the late payment of the balance of the purchase price which it has claimed at 17% per annum and penalty for late payment at the rate of 1% per month totaling to 29% per annum, being interest at commercial rates which it was liable to pay to its bank or any outstanding amount. The plaintiff has relied on clause 2 of the agreement which provides that time was deemed to be of essence for all purposes of the agreement. It has contended that a certificate of occupation for the property was issued by Nairobi City Council on the 7<sup>th</sup> day of September, 2007 about one month after the agreement of sale was entered into by the parties and therefore, the defendant was free to occupy the house within one month if the entire purchase price was paid within that period.

The plaintiff further contended that the completion date of the agreement for sale was delayed and postponed severally due to the defendant's inability to pay the full purchase price when it fell due. It has relied on the letters dated 25<sup>th</sup> January, 2008, 22<sup>nd</sup> April, 2008, 2<sup>nd</sup> May, 2008 and 5<sup>th</sup> June, 2008. PW1 testified that despite the property being ready for occupation in the month of September, 2007, the defendant could not take possession for a period of over one year because she did not pay the balance of the purchase price.

While relying on clause 12 of the agreement, the plaintiff submitted that if the defendant was unable to take possession for whatever reason within three months upon being informed at his last known address that the maisonette was ready for possession, the purchaser (defendant) was liable to pay interest at commercial rate at which the vendor (plaintiff) was liable to pay to its bank on the outstanding amount.

In supporting its contention that time was of essence as provided for under clause 3 of the agreement, the plaintiff cited the case of David Mvuri Mwangi vs. Kiiru (Civil Appeal No. 66 of 1983), in which the court of appeal held;

***“Where a stipulation making time of the essence has been waived, time may be made of the essence where there is unreasonable delay, by a notice from the other party who is not in default fixing a reasonable time for completion and stating that in the event of non compliance within the time so fixed, he intends to enforce or abandon the contract.....”***

and argued that in its letter dated 25<sup>th</sup> January, 2008 it duly informed the defendant of its intention to enforce the contract by way of charging interest on the outstanding balance.

On her part, the defendant has claimed that the plaintiff is seeking special damages being interest on alleged breach of contract and therefore, the same ought to have been specifically pleaded and strictly proven. She made reliance on the case of Capital Fish Kenya Limited vs. Kenya Power & Co. Limited.

The defendant also cited City on contract which states that;

***“It has always been open to the parties to make express provision in their contract for payment of interest, which courts will enforce.”***

The court has considered the submissions by the respective parties on the issue of whether interest is payable. When dealing with this issue, the first port of call is the agreement of sale dated the 15<sup>th</sup> August, 2007. It provides that the deposit of kshs. 3,500,000/- was to be paid at the execution of the agreement. In fact the evidence available to the court was that the same was paid on 24<sup>th</sup> July, 2007 before the execution of the agreement. The next installment of kshs. 2,000,000/= was supposed to be paid on the 15<sup>th</sup> October, 2007 and the final installment of kshs. 11,000,000/= was to be paid on the completion date.

Before I can address my mind to the final installment of Kshs. 11,000,000/=, it is clear that the 2<sup>nd</sup> installment of Kshs. 2,000,000/= was not paid on schedule as provided for in the sale agreement. The defendant has argued that the maisonette was still under construction and that is the reason she delayed in making the payment. On its part, the plaintiff has contended that the defendant was in financial problems and hence her inability to meet her financial obligations relating to the transaction on time. The reason for her failure to pay the installments on time notwithstanding, the issue before the court is whether the plaintiff is entitled to charge interest for the late payment at the rate of 29% per annum which it alleges was the commercial rate that it was charged by its bank.

Looking at clause 8 of the agreement of sale, the plaintiff was supposed to hand over vacant possession of the house to the defendant within 30 days upon issuance of the Certificate of Occupation by Nairobi City Council or on the completion date, which was set on September, 2007 whichever was later.

On the other hand, clause 12 of the same agreement provides that;

***“if the purchaser shall be unable to take possession for whatever reason within three months, upon being informed at his last***

***known address that the maisonette is ready for possession the purchase will be liable to pay interest at commercial rate at which the vendor is liable to pay to its bank on outstanding amount. And after three months the vendor is at liberty to sell the same at a price available in local market and refund the deposit less loss and expenses to the purchaser only after the suit property has been resold.***

In respect to clause 8, the plaintiff has argued that the house was ready for occupation within 30 days from the date the certificate of occupation was issued. The said certificate was produced as exhibit 3 and it's dated 7<sup>th</sup> September 2007. According to it, the defendant was free to take possession one month later that is to say, by 7<sup>th</sup> October, 2007 or by latest September, 2007 which was the completion date.

The evidence available to the court is that the defendant did not take possession pursuant to clause 8 of the agreement though the certificate of occupation was issued and the completion date passed. Following the happening of the two events, the plaintiff wrote the letter dated 25<sup>th</sup> January, 2008 to the defendant informing her that it was still holding her cheque of kshs. 2,000,000/= and reminding her to pay the money as fulfillment of her part of the agreement.

In the same letter, the plaintiff notified the defendant that interest at 2% per annum would be charged on the outstanding balance with effect from January, 1<sup>st</sup>, 2008.

On the 5<sup>th</sup> June, 2008, the plaintiff wrote another letter to the defendant reminding her to pay the balance of the purchase price and informing her that interest of 2% per annum has been charged on all the outstanding balance with effect from 1<sup>st</sup> January, 2008. The plaintiff gave her up to 15<sup>th</sup> June, 2008 to pay the difference between what Barclays Bank was financing her, interest on balance and on the deposit that she had already paid plus the extra charges as set out in the said letter and totaling to kshs. 898,200/=.

According to the evidence available to the court, before the 15<sup>th</sup> June, 2008, the defendant wrote the letter dated 12<sup>th</sup> June, 2008 to the plaintiff in which she referred to a meeting held between them on 11<sup>th</sup> June, 2008 and their agreement on the final position regarding amounts payable in the transaction. She attached a cheque of Kshs. 2,000,000/= and stated that the balance of Kshs. 11,000,000/= would be disbursed to the plaintiff by Barclays bank of Kenya on the registration of the transfer of title as per the charge documents.

In the said letter, the defendant further stated that she would pay a further Kshs. 860,000/= for stamp duty together with other expenses required for the transfer of the property.

Of importance, is the last sentence in the letter in which she stated that;

***“This will be in full and final settlement of the total amount with regard to the full transaction on the property.”***

The said letter is signed by a Mr. James Kimani and it's duly stamped with the plaintiff's stamp who also acknowledged receipt of the said cheque. The documents in possession of the court shows that this was the last communication between the parties in regard to the sale transaction.

The plaintiff acknowledged not only the payment of Kshs. 2,000,000/= but also the cheque of Kshs. 11,000,000/= from Barclays Bank of Kenya Limited dated 27<sup>th</sup> October, 2008.

The court notes that by the time these two installments were paid, the certificate of occupation had been issued and the completion date had passed. Though in its letters dated 25/01/2008 and 5/06/2008, the plaintiff had expressed its intention to charge interest at the rate of 2% per month with effect from 1<sup>st</sup> January, 2008, the same was never demanded from the defendant when the two payments were made. There is also no indication that the payments were received on a “***without prejudice basis***”. In fact, upon receipt of the kshs. 11,000,000/= the plaintiff went quiet and did not even write to the defendant to demand the payment of interest or inquire about it at all.

On clause 12 of the agreement, there is no evidence on record that the defendant was informed that the house was ready for her to take possession. In the letter dated 25<sup>th</sup> January, 2008, the plaintiff did not inform the defendant to take possession but only reminded her of her financial obligations under the Sale Agreement and so is the letter dated 15<sup>th</sup> June, 2008.

Even assuming that the defendant is liable to pay interest, which is not the case, clause 12 indicates that she is liable to pay interest at commercial rate at which the vendor is liable to pay its bank on outstanding amount. The court notes that the said interest rate is neither indicated in the agreement nor is its bank indicated.

It is common knowledge that the agreement was entered into in the year 2007 and different banks were charging different rates of interest. As rightly submitted by counsel for the defendant, the loan agreement between the plaintiff and its bank was not produced as an exhibit and therefore it is difficult if not impossible for this court to know the commercial interest rate that the plaintiff was charged by its bank and which it is claiming from the defendant.

The plaintiff has claimed a sum of Kshs. 3, 548,327.90cts which is a special damage claim. It is trite law that special damages have to be specifically pleaded and strictly proven. The Plaintiff did not tell the court how the amount was arrived at.

Further, the plaintiff has claimed interest on the basis of delayed payment. In the case of ***Telkom Kenya Limited vs. Paul Gachanja Ndarua*** the court stated as follows;

***In the matter before us, the record shows that the element on interest on the principal amount was claimed on account of delay***

*of payment of the principal amount..... there was no evidence that the rate charged therein was agreed by the parties..... the position at common law is that where interest is not agreed as a matter of contract, is not payable except certain specific circumstances which include custom and trade”*

The defendant also pleaded that the plaintiff by its conduct had waived its right to interest and has relied on the case of George Boniface Mbugua vs. Mohammed jawayd Lqbal where the court held that;

*Time may cease to be of essence where a party waives the benefit of such a provision in the contract by words or conduct. Waiver may occur where negotiations occur after the time of completion. The defendant engaged in further negotiations and accepted payments from the plaintiff after the dates indicated for completion in Mr. Khans letter.*

On the same issue of waiver, the court in the case of John Mburu Vs. Consolidated Bank Limited cited with approval in the case of D & C V Builders vs. Sidney Res held;

*“It is the first principle upon which all courts of equity proved that, if parties who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.”*

By accepting the late payments without raising the issue of interest, the plaintiff waived his right to interest. In holding this view, I wish to rely on the case of Sifa Steel Rolling Mills ltd vs. Jubilee Insurance Company Limited in which the court held;

*“Waiver can be express or implied, disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive this right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from the conduct or acts putting one off ones guard and leading one to believe that the other has waived his right.”*

The plaintiff in this case not only accepted the late payment but also put the defendant into possession of the house and transferred the same into her name. In those circumstances, it cannot be heard to complain about interest at this late hour. Clearly it lost its right to claim the same.

After the above analysis, the court finds that the plaintiff did not lead any evidence to prove its claim of interest at the rate of 29% per annum. There is no evidence on record proving the prevailing commercial rate of interest and therefore it has failed to prove its case on a balance of probability and the same is hereby dismissed. Due to the nature of the case, each party shall bear its own costs.

**Dated, signed and delivered at NAIROBI this 21<sup>st</sup> day of November, 2019**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Plaintiff

..... for the Defendant