



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 570 OF 2011**

**BRITISH AMERICAN INVESTMENTS COMPANY (K) LIMITED.....PLAINTIFF**

**-VERSUS-**

**NJOMAITHA INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**GICHUKI KING'ARA & CO. ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**RULING**

[1] The Notice of Motion dated **7 October 2016** was brought by the **Njomaiitha Investment Limited**, the 1<sup>st</sup> Defendant/Applicant herein, for orders that the Court be pleased to determine whether any interest whatsoever is payable on the decretal amount in terms of the consent letter dated **10 February 2016** and filed in Court on **15 February 2016**; and that costs be awarded to the 1<sup>st</sup> Defendant. The application was filed pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 35 Rule 1(1)(a)** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**. It was premised on the grounds that the parties did execute a Consent dated **10 February 2016** whereby the suit was compromised, save for the question of interest; which was to be agreed on in 90 days, failing which the parties would be at liberty to put the question to the Court for determination. The Consent was adopted by the Court on **16 February 2016**; and, for the reason that the parties have since failed to agree on interest, the Court has thus been invited to make a determination on the matter, vide the instant application.

[2] The application was supported by the affidavit of the 1<sup>st</sup> Defendant's Director, **Mr. Michael Njoroge Muigai**, sworn on **7 October 2016**. He averred that in spite of correspondence having been exchanged on the question of interest, no consensus had been reached between the parties. He annexed to his affidavit copies of the Consent Letter (marked **Annexure MNM1**), the Preliminary Decree (marked **Annexure MNM2**) and two letters dated **8 April 2016** and **6 July 2016** (marked **Annexure MNM3** and **Annexure MNM4**, respectively) in support of his averments. It was further the averment of **Mr. Muigai** that, in accordance with the Sale Agreement dated **12 August 2011** (annexed to the Supporting Affidavit as **Annexure MNM5**), no interest is payable to the Plaintiff.

[3] The application was opposed by the Plaintiff, and an affidavit filed in response thereto, sworn by **Ms. Nancy Kiruki**, the Plaintiff's Company Secretary. She confirmed that the parties filed a Consent Letter which formed the basis of the Preliminary Decree dated **12 February 2016**. She further confirmed that thereafter, the parties have been unable to agree on whether or not interest is payable on the decretal amount. According to **Ms. Kiruki, Clause 7.7** of the Sale Agreement made provision for the payment of interest upon rescission of the Contract and consequent refund of the deposit, in the event of failure by the Vendor (the 1<sup>st</sup> Defendant) to make the refund within 7 days of demand. Copies of the demand letters dated **26 October 2011** and **21 November 2011** were exhibited as **Annexure NK1** to the Replying Affidavit.

[4] In response to the Replying Affidavit, the 1<sup>st</sup> Defendant filed a Further Affidavit herein on **18 October 2017**, contending that the applicable clause to the situation is **Clause 7.6** of the Sale Agreement, and therefore that since it was at all material times ready, willing and able to complete the sale and transfer the property to the Plaintiff, the Plaintiff is not entitled to any interest, for it was the Plaintiff that unilaterally rescinded the Contract without any basis or reference to any particular provision of the Sale Agreement.

[5] The brief background of the matter, as gleaned from the court record, is that the parties entered into a Sale Agreement on **12 August 2011** in respect of the sale of the 1<sup>st</sup> Defendant's parcels of land known as **L.R Nos. 13136/11, 12, 13, 14 and 15**, situate off Thika Road, Nairobi. The suit property was to be sold at **Kshs. 700 million**, out of which a deposit equivalent to 10% of the purchase price was to be paid, and was indeed paid upon execution of the Sale Agreement. The deposit sum of **Kshs. 70 million** was paid to the 2<sup>nd</sup> Defendant as stakeholder; and the completion date was agreed to be 60 days from **12 August 2011**, hence **12 October 2011**.

[6] It is manifest that the Contract was not completed within the agreed timeline; and that by a letter dated **26 October 2011**, the Plaintiff purported to rescind the Contract and demand for a refund of the deposit paid, contending that it had been put on notice about the existence of an injunction order in respect of the property that had been obtained by **Suraya Property Group Limited** in **Nairobi High Court Civil Case No. 385 of 2010**. It was therefore the contention of the Plaintiff that, as at the completion date of **12 October 2011**, the 1<sup>st</sup> Defendant was in no position to effect a transfer in favour of the Plaintiff. That the 1<sup>st</sup> Defendant, having failed to heed its demand for a refund, the Plaintiff opted to file the instant suit, seeking the following reliefs:

[a] A declaration that the Agreement for Sale dated **12 August 2011** was null and void *ab initio* and was lawfully rescinded by the Plaintiff;

[b] A refund of the sum of **Kshs. 70,000,000/=** together with interest at 15% per annum from **3 November 2011** until payment in full;

[c] Credit to be given for the interest earned in the event that the sum of **Kshs. 70,000,000/=** was placed in an interest earning account by the 2<sup>nd</sup> Defendant;

[d] Costs on an Advocate-Client basis on account of material non-disclosure;

[e] Any further relief that this Court deems fit.

[7] Contemporaneously, the Plaintiff moved the Court by way of a Notice of Motion dated **15 December 2011**, seeking orders that the 2<sup>nd</sup> Defendant, as stakeholder, be ordered to refund the sum of **Kshs. 63,000,000/=** with accrued interest on the sum of **Kshs. 70,000,000/=** to the Plaintiff's Advocates within 3 days of the order of the Court; and that the sum of **Kshs. 7,000,000/=** be deposited in an interest earning account in the joint names of the Plaintiff's Advocates and the 1<sup>st</sup> Defendant's Advocates within 7 days of the order of the court pending determination of the suit. That application was however dismissed on **21 June 2012**.

[8] The parties thereafter engaged in negotiations with a view of reaching an out of court settlement. These efforts bore fruit and thus on **16 February 2016**, a Consent Order was recorded herein in the following terms:

" Upon reading the Consent Letter dated **10 February 2016**, and filed on **15 February 2016** by **Walker Kontos & Co. Advocates for the Plaintiff, Githii & Co. Advocates for the First Defendant and Gichuki King'ara & Co. Advocates for the Second Defendant**, it is hereby Ordered by Consent:

a) THAT a Preliminary Decree do issue in favour of the Plaintiff for the sum of **Kshs. 63,000,000** by the First Defendant within the next 6 months from the date hereof.

b) THAT the issue of what and whether interest or any other sum is payable (if at all) be agreed between the Plaintiff and the First Defendant within the next 90 days failing which the same be remitted for the decision of the Judge upon the Plaintiff and the First Defendant making submissions on the same.

c) THAT the Plaintiff's claim as against the 2<sup>nd</sup> Defendant herein Messrs. Gichuki King'ara & Co. Advocates be and is hereby marked as settled and each party to bear its own costs.

d) THAT the First Defendant's Counterclaim as against the Plaintiff be and is hereby marked as settled with each party meeting its own costs.

e) THAT Notice of Claim against Co-Defendant filed by the Second Defendant as against the First Defendant be deemed compromised on the basis that the First Defendant forthwith meet the Plaintiff's claim as agreed herein.

f) THAT the Plaintiffs application dated 6<sup>th</sup> October 2015 and the Second Defendant's application dated 23<sup>rd</sup> November 2015 be and are hereby withdrawn with no orders as to costs.

g) THAT in consideration of the First Defendant meeting the entire obligation to the Plaintiff herein, the Second Defendant hereby:

(i) withdraws the Bill of Costs filed against the First Defendant to wit, High Court Misc. Civil Application No. 128 of 2015: **Gichuki King'ara vs. Njomaiitha Investments Limited**;

(ii) Agrees that High Court Civil Case No. 155 of 2015: **Peter Gichuki King'ara vs. Njomaiitha Investments Ltd & Michael Njoroge Muigai**, be marked as settled with each of the parties bearing their own costs."

[9] The parties were accordingly accorded time to finalize the remaining aspects of the settlement, and when it was apparent that no consensus could be reached on the outstanding issue of interest, the 1<sup>st</sup> Defendant opted to file the instant application; which was urged by way of written submissions. The 1<sup>st</sup> Defendant's written submissions were filed on **16 October 2017**, while the Plaintiff's written submissions were filed on **3 November 2017**. Those submissions were restricted to the single issue of interest.

[10] I have given due consideration to the Notice of Motion dated **7 October 2016**, the affidavits filed in respect thereof as well as the

written submissions filed herein. The jurisdiction to award interest is anchored in **Section 26(1)** of the **Civil Procedure Act**, which 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 principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to 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 payment or to such earlier date as the court thinks fit."**

[11] In connection with the aforestated provisions, the Court of Appeal had occasion to express itself thus in **Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR**:

**"This section, in our understanding, confers upon the Court the discretion to award and fix the rate of interest to cover three stages, namely:**

**(1) the period before the suit is filed;**

**(2) the period from the date the suit is filed to the date when the Court gives its judgment, and**

**(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.**

**We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."**

[12] And in **Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR** the justification for the payment of interest was succinctly put thus:

**"The justification for an award of interest on the principal sum is to compensate a Plaintiff for the deprivation of any money, or specific goods though the wrong act of a defendant."**

There is no doubt that the Plaintiff paid **Kshs. 70,000,000/=** to the Defendant on **12 August 2011** pursuant to the Agreement for Sale of 5 pieces of land then owned by the Defendant, being **L.R. No. 13136/11, 12, 13, 14 and 15**. The transaction, which was to be completed by **12 October 2011** fell through. Evidently, the Plaintiff was therefore kept out of his funds from **12 October 2011 to 16 February 2016** when the Consent Order was made. As of **3 February 2017** when the Plaintiff filed its Notice of Motion of even date for leave to attach and sell the suit property in satisfaction of the Preliminary Decree, the decretal sum had not been paid; and so logically, the Plaintiff is in order in seeking to be awarded interest. However, given the background of the claim, and particularly the contention of the 1<sup>st</sup> Defendant that it was the Plaintiff that unilaterally rescinded the Contract without any justifiable cause, the question to pose is whether the Plaintiff is entitled to interest in the circumstances; and pertinent thereto is the question as to why the sale transaction was not seen to completion as envisaged under Clause 7 of the Sale Agreement.

[13] A perusal of the Sale Agreement shows that, vide Clause 6.2, it was the responsibility of the Purchaser (the Plaintiff herein), having paid the 10% deposit of **Kshs. 70,000,000/=**, to provide an undertaking in respect of the balance of the sums that were due and payable to **Barclays Bank of Kenya Limited (BBKL)**. That Clause states as follows:

**"On or prior to the Completion Date the Purchaser shall procure that the Purchaser's Advocates shall issue an undertaking to BBKL securing the payment of the BBKL Amount within Fourteen (14) days of receipt by the Purchaser's Advocates of the Transfers duly registered in favour of the Purchaser. The Vendor shall procure that in consideration of the said undertaking, BBKL shall fully discharge the Charges and Debenture and in this regard, release to the Purchaser or the Purchaser's Advocates the original Certificates of Title in respect of the Property as described in clause 1.1.13, an unconditional discharge of the Charges together with the Release Order and Notice of withdrawal of the caveats placed on the property by BBKL."**

[14] By **Clauses 6.3 and 6.4** of the Sale Agreement, the Vendor (the 1<sup>st</sup> Defendant) appointed **BBKL** as the payee in respect of the **BBKL** amount and confirmed that upon payment thereof to **BBKL**, the Plaintiff would be discharged of its payment obligations in respect of the balance of Purchase Price to the extent of the **BBKL** amount; and that the balance thereof would be secured by an undertaking issued by the Purchaser's Advocates or the Purchaser's financiers' Advocates within 14 days of receipt by the Purchaser's Advocates of the Transfers duly registered in favour of the Purchaser. It is manifest therefore that by the time the subject Sale Agreement was made, the suit property was already encumbered to **BBKL** and there was in existence a pending suit, being **HCCC No. 385 of 2010**, to which **Muraya Property Group Limited** had sought to be enjoined as an Interested Party. A certified copy of the Ruling of the Court was exhibited by the 1<sup>st</sup> Defendant herein as **Annexure MNM3** to the Further Affidavit of **Michael Njoroge Muigai**. At page 61 thereof, the Court (**Mabeya, J.**) ruled that:

**"...I am of the view and I so hold that by virtue of the transitional provisions of Order 54 Rule 2 of the Civil Procedure Rules, it was intended that the Civil Procedure Rules 2010 do apply retroactively to the extent of any proceedings then pending at the time of coming into force of those rules. This suit is no exception. Order 40 Rule 6 of the Civil Procedure Rules to that extent applied to the orders of 6<sup>th</sup> August 2010 which therefore lapsed as at 6<sup>th</sup> August 2011."**

[15] Accordingly, the injunction having expired before the Agreement of Sale dated **12 August 2011**, the contention of the Plaintiff, per **Annexure NK1** to the Replying Affidavit, that it had just been put on notice regarding Suit No. **HCCC No. 385 of 2010** and the injunction issued therein by the High Court on **6 August 2010** at the instance of **Suraya Property Group Ltd**, is untenable. Indeed, in the Ruling of **Mutava, J.** dated **21 June 2012**, which apparently was not appealed or otherwise reviewed or set aside, it was found as a fact that:

**"From my review of the affidavit evidence tendered, the court record and the submissions by the parties, my view on which party was blamable for non-completion of the sale is now plain. In the sequence of events set out in the Sale Agreement, the obligation following execution of the Agreement and payment of deposit was as stipulated in Clause 6.2 of the Agreement. The Plaintiff's lawyers were to issue two professional undertakings one in favour of Barclays for the amount owed to the Bank and the second in favour of the 1<sup>st</sup> Defendant. In the absence of such undertaking, the other sequential obligations could not be implemented. The express reference to Barclays Bank of Kenya in the Agreement and the obligation for the Plaintiff to issue the undertaking to the Bank rendered it obvious that the Plaintiff was aware that the property was encumbered. The key impediment to completion of the sale was therefore squarely the omission of the Plaintiff to issue the undertakings stipulated in Clause 6.2 of the Agreement."**

[16] On the basis of the foregoing then, I am satisfied that **Clause 7.6** is the applicable Clause, for clearly, the Purchaser is to blame for the termination of the Contract. That Clause provides that:

**"Subject to clause 7.7 if on the Completion Date the Purchaser is not ready, able or willing to provide the undertaking as required under the provisions of this Agreement and the Vendor is ready, willing and able to complete the sale and transfer of the Property as provided in this Agreement the Vendor shall be entitled to give the Purchaser twenty [one] (21) days notice to complete and if after the expiry of the said notice period the Purchaser is still not ready, able or willing to complete, the Vendor shall be entitled to forfeit 10% of the Deposit and this Agreement shall thereafter terminate and cease to have force or effect and no party hereunder shall have any claim or demand (whether arising in contract or in tort) against the other under or pursuant to this Agreement."**

[17] The 1<sup>st</sup> Defendant, in the Further Affidavit filed on **18 October 2017**, exhibited documentation to show that on **13 December 2011**, it issued the Plaintiff with the requisite 21 days' notice to complete the transaction vide **Annexure MNM2**; and that the Plaintiff failed refused and or ignored to comply with the said notice. The 1<sup>st</sup> Defendant then issued and served a Notice of Forfeiture dated **20 January 2012 (Annexure MNM4)** in respect of 10% of the Deposit. Hence, looking at the tenor and effect of the Consent Order dated **16 February 2016**, all indications are that the parties were in agreement on this aspect for the Consent was recorded for the sum of **Kshs. 63,000,000/=** only as opposed to **Kshs. 70,000,000/=**. The difference of **Kshs. 7,000,000/=** being the equivalent of 10% of the Deposit of **Kshs. 70,000,000/=** appears to have been ceded to the 1<sup>st</sup> Defendant by the Plaintiff.

[18] In the foregoing premises, there would be no basis for awarding the Plaintiff interest on the **Kshs. 70,000,000/=** at 15% per annum from **3 November 2011** until payment in full. However, there is no gainsaying that, pursuant to the Consent Order, the aforesaid sum of **Kshs. 63,000,000/=** was payable over a period of 6 months from the date of the Order. Accordingly, to the extent that the amount remains outstanding to date, the Plaintiff is entitled to interest at Court rates from **September 2016** until payment in full.

[19] In the result, and in respect of the 1<sup>st</sup> Defendant's Notice of Motion dated **7 October 2016**, it is hereby ordered that interest is indeed payable to the Plaintiff on the decretal sum of **Kshs. 63,000,000/=** but only with effect from **September 2016**, that is to say after the 6 months agreed moratorium, till payment in full; and that each party shall bear its own costs of the said application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2018**

**OLGA SEWE**

**JUDGE**