



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 336 OF 2014**

**MOBILE TELEPHONE NETWORKS BUSINESS KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**IPHONE GLOBAL LIMITED .....DEFENDANT**

**RULING**

1. An award of interest for any period prior to filing of suit is a matter of substantive law (see **Highway Furniture Mart Ltd vs The Permanent Secretary and Another** [2006] 2 ER 94 amongst others).

2. Judgment on the principal claim was entered against the Defendant through a ruling delivered on 13<sup>th</sup> July 2017 and what remains for determination is whether the Plaintiff is deserving of antecedent interest and if so at what rate.

3. How was the issue of interest pleaded? In the prayers, the plaintiff states;

“Wherefore the plaintiff prays for judgment against the defendant jointly and severally for US \$97,604.21 together with interest at the rate of 1 ½% per month and costs.”

4. Apparent is that the effective date is not pleaded. Whilst Counsel Kashindi for the plaintiff had at first argued that the omission was not fatal, she later made an oral application to amend the Plaintiff to plead interest from the date of default as set out in the respective invoices. The oral application was resisted and this court upheld the objection.

5. The provisions of section 26 of the Civil Procedure Act reads;

(1) Where and in so far as a decree is for the 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 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.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

Now, while these provisions allow the grant of interest for a period before the institution of suit, antecedent interest rates is a matter of substantive law and a Claimant who wishes to benefit from it must plead the effective date. This gives notice to the other side as to what he/she must answer.

6. As the effective date has not been pleaded and it is in respect to special damages, I hold that whatever interest the Court shall Award will be from the date of filing suit, that is pendent late.

7. Although under Section 26 of the Civil Procedure Act, the rate of interest payable is generally at the Discretion of the court, that Discretion is taken away where parties have fixed the rate unless it is shown that, the agreed rate is illegal or unconscionable or fraudulent. The Court of Appeal makes this clear in its decision on Civil Appeal No. 135 of 2011; **Ajay Indravadan Shah –vs- Guilders International Bank LTD [2003] eKLR** where it held;

“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 judgement 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”.

8. The Plaintiff’s argue that the rate of interest applicable to this dispute was agreed at the rate of 1 ½ % per month and charges of interest for late payment is common Commercial practice. The basis for it being that late payment deprives the innocent party of a liquidated amount and a charge of interest as a penalty provides some compensation for the loss (see Prem Pata –vs- Peter Musa Mbiyu [1985] EA 592

9. The Defendants, not surprising, take a different view. It was argued that under the terms of the agreement upon which the interest claim is anchored, the levying and payment of interest was optional, that is not mandatory. Secondly that interest payment is pegged on an enabling law and the onus to prove that the interest rate charged within the limits sanctioned by law lay with the Plaintiff. Lastly, the plaintiff’s principal claim of US \$ 92,604.21 evidently exceeds the credit limit of Ksh 1,000,000.00.

10. A probe as to whether there was an agreed rate of interest on unpaid amounts and whether the same has accrued necessarily takes this decision to the provisions of Clause 4.4 of the Interconnection Agreement of 8<sup>th</sup> November 2007 which provides as follows:-

“Payment is due (“Due Date”) 7 days after date of invoice, which shall not precede the end of the week in which the charges were incurred. If full payment is not received by a Party by the Due Date, the said Party may suspend its Services until full payment is received. A defaulting Party shall be responsible for reasonable legal and any other costs associated with collecting late payments of whatever nature further to any clause of this agreement from it and interest charges may be added to any past due amounts at the rate of one and one-half percent (1 ½%) per month, unless such interest rate exceeds the maximum allowed by applicable law, in which case interest shall be at the maximum lawful rate. Notwithstanding anything herein, under no circumstances will the Unpaid Usage by a Party, as defined below, be permitted to exceed the relevant Credit Limit stated in Schedule 2 or Schedule 3 as applicable. Either Party may suspend Services without notice to the other if its Unpaid Usage exceeds its Credit Limit at any time. Both parties will notify the other if such a situation is imminent. Unpaid usage shall mean the sum of all net billing by a Party which is unpaid, plus charges for all Services of whatever nature which have been used by the other Party but not yet billed.”

11. The Plaintiff’s basis for seeking a rate of 1 ½% per month is clause 4.4 above. The onus was therefore on the Plaintiff to demonstrate that this was indeed the agreed rate. But as pointed out by Defendants, the interest rate was pegged on the maximum permitted by applicable law. This is significance in the following words in Clause 4.4.

“A defaulting party shall be responsible for reasonable legal and any other costs associated with collecting late payments of whatever nature, further to any Clause of this agreement from it and interest charges may be added to any past due amounts at the rate of one and one-half percent (1½%) month, unless such interest rate exceeds the maximum allowed by applicable law, in which case interest shall be at the maximum lawful rate.”

My understanding of this provision is that the agreed interest rate was either 1 ½ % per month or the maximum interest rate allowed by the applicable law, whichever is lower. Flowing from this, it is not possible to tell what was the agreed rate of interest unless one knows the maximum interest rate allowed by the applicable law of essence. Two elements needed to be proved:-

- a. The applicable law contemplated by clause 4.4.
- b. The maximum interest rate permitted by that applicable law.

12. Neither of the parties provides evidence on these two elements but were content to blame each other. The Plaintiff took a view that the burden to prove the applicable law could not lie on the Plaintiff, unless it is shown what law is alleged to have been breached. The Defendants were clear in their mind that it was the Plaintiff who ought to have provided the proof.

13. As a general proposition he who asserts must prove (Section 107 of the Evidence Act) and on the incidence of Burden, Section 108 provides;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

It has been the finding of this Court that it is the plaintiff who seek to rely on the “agreed” interest rate. The Court has further found that the “agreed” interest rate cannot be proved in the absence of evidence of the applicable law and the maximum rate of interest it permits and without this evidence the person to fail has to be the plaintiff. It is therefore the Court’s determination that the Plaintiff bore the burden of proof and has therefore failed to prove the agreed rate of interest.

14. Given this set of circumstances I order that interest in the principal sum shall be at Court rates from the date of filing of suit (7<sup>th</sup>December, 2016).

**Dated, Signed and Delivered in Court at Nairobi this 20<sup>th</sup> day of July, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Obara for Plaintiff

Kimara for Thiga for Defendant

Nixon - Court Assistant