



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.377 OF 2016

VEHICLE AND EQUIPMENT LEASING LIMITED.....PLAINTIFF

VERSUS

COCA COLA JUICES KENYA LIMITED

Formerly T/A BEVERAGE SERVICES (K) LTD.....DEFENDANT

JUDGMENT

1. The plaintiff through a plaint dated 16th September 2016 and filed on 16th September 2016 against the defendant seeks the following orders:-

- a) Kshs. 1,921,040 being the cost incurred on repairs of the defective motor vehicles that were returned and/or surrendered as per the agreement.
- b) Kshs. 12,271,798 being the unpaid/withheld Lease/rental installments up to the date of termination together with interest thereon on account of motor vehicles and equipment.
- c) Kshs.8, 000,593 being the contractually agreed sum that is to say 50% of the remaining rental/lease fees to the end of the lease period/term on account of motor vehicles and equipment.
- d) Kshs.28, 536 as losses incurred as result of undue delay in return/surrender of I.T equipment upon termination of the Agreements.
- e) Kshs.17, 756,169 loan balance and/or early repayment break costs on account of motor vehicles and equipment.
- f) General Damages.
- g) Interest on (a) to (e) above.
- h) Costs of the suit.
- i) Any other/further relief that this Honourable Court may deem fit to grant.

2. The defendant in response to the plaintiff's claim filed defence dated 26th October 2016 on 28th October 2016 and bundle of documents on 9th March 2017. In the defence the defendant admitted owing a sum of Kshs.6, 708,309.42.

3. Owing to the admission, the plaintiff filed an application dated 20th December 2016, seeking judgment on admission for the sum of Kshs.6, 708,309/42 together with interest at the rate of 17% per annum from 13th August 2014 till payment. The application was opposed. However after hearing, summary judgment was entered in favour of the plaintiff in the sum of Kshs.6, 708,309.42 together with interest from the date of filing the suit until payment in full. The matter subsequently proceeded to main hearing on the remaining claims.

4. During the hearing of the suit on the remaining claims, the plaintiff called one witness whereas the defendant called one witness.

Brief fact of the case

5. The plaintiff and the defendant entered into a lease agreement dated 10th September 2009 (hereinafter referred to as ("*the Master Rental Agreement*") on the basis of which the defendant leased motor vehicles; **I.T.** equipment and Forklifts from the plaintiff (*see pages 1 – 7 plaintiff's Bundle of document*). The leasing of the items thereto was formalized by executing Rental schedules in respect of each of the items leased (*refer to pages 10-96*) of the plaintiff's Bundle of documents).

6. Following the defendant's failure to make regular payments, the parties mutually terminated the lease of 10 Maruti Omni Cargos leased to the defendant in terms *agreed upon in the Termination Agreement executed by both parties (see plaintiff's Bundle of documents pages 99-100)*. In the agreement under clause 4 of the Mutual Termination Agreement it was provided that the defendant would repair the defects that would be identified by the plaintiff's technicians prior to their return and facilitate the inspection of the vehicles by the plaintiff's technicians. The parties upon the mutual Termination of the leasing arrangements, proceeded to execute on diverse dates several fresh Rental schedules on which basis the defendant rented from the plaintiff's **I.T** equipment, motor vehicles and Forklift Heyster.

7. The following key terms of the Agreement between the parties need to be highlighted at this stage:-

a) Clause 4.1 and 4.2; the Defendant would pay the rental installments as specified in the applicable Rental Schedule either on quarterly or monthly basis;

b) Clause 4.6, that the Rental Installments were on floating financing charges;

c) Clause 9.1 (a) that the Defendant would pay all the Rental Installments on time;

d) Clause 9.2, that the Defendant would "...be taken to have repudiated this Agreement if it breached any of the essential terms referred to under Clause 9.1".

e) Clause 11.3 that if the terms of the Rental Agreement were breached, the Plaintiff would have a right to terminate the same; and

f) Clause 11.3 if termination was effected due to the Defendant's breach, then:

(i)

The Defendant would return the vehicles and/or equipment to a place specified by the Plaintiff;

(ii)

The Defendant would be liable to pay the Plaintiff an amount equivalent to 50% of the remaining lease period calculated in respect of each item; and

(iii)

The Defendant would be liable to pay the Plaintiff any early repayment or other break costs incurred by the Plaintiff or a secured or financing party or the owner of the vehicles and or Equipment in preparing any funding arrangements in connection with the purchase and renting of the vehicles and or Equipment.

g) Further under Clause 13.1 upon expiration or either termination of the rental agreement the Defendant would return the leased items in good working conditions as specified in the contract, of which under Clause 13.2 will not be regarded as returned unless where applicable the same is decommissioned in accordance with the original manufacturers specifications and appropriate certificates supplied and the same returned in accordance with the requirements set out in the agreement.

8. The plaintiff contention is that upon mutual termination of the contract, the defendant failed and/or refused to pay the rental amounts as agreed or return the leased equipment's and vehicle within specified time and the plaintiff's attempt to recover the amount were futile forcing it to file this suit.

9. The defendant avers, that it sought reconciliation of the claim for outstanding lease rentals to take into account a payment of Kshs.1, 309,293/55 made on 15th July 2014 and not reflected in the schedule of outstanding invoices and also sought a month's extension period for the purposes of return of the motor vehicles and I T equipment (*see at page 69 of defendant's bundle of documents*); which extension was confirmed upto 13th September 2014. The defendant avers therefore it was required to return the vehicle by 20th August 2014 and the I T equipment by 13th September 2014 (*refer to page 72 of the defendant's documents*).

10. The defendant returned the motor vehicles to the plaintiff's agent, Alfa Motors, on 21st August 2014 being one day off the scheduled return date, while the **I T** equipment were returned by 15th September 2014 (*see page 73 to 83 of the Defendant's Bundle of documents*).

11. That after return of motor vehicle and **I T** equipment the plaintiff made subsequent demand for payments of amount over and above the initial amount demanded sum of Kshs. 6 million as set out in the termination letter. The amount demanded is reflected in series of correspondence being as follows:-

a) By a letter dated 27th August 2014, the Plaintiff's lawyers demanded payment of a blanket sum of Kshs. 20 Million alleged

as contract termination costs. In response the Defendant sought particulars of the claim. (See letters at page 84-86 of the Defendant's Document).

b) Instead of supplying the particulars sought, by a letter dated 22nd September 2014, the Plaintiff's lawyers made a new and unexplained demand of Kshs.26, 279,336. (See letter at page 87-91 of the Defendant's Documents).

c) The demands by the Plaintiff continued to be erratic with figures increasing by the day without explanation and/or supporting documents. The Plaintiff further failed to acknowledge and/or take into account the payment of Kshs.4, 942,605.20 paid by the Defendant. This led the Defendant's advocates to request for further explanations in a letter dated 23rd September 2014 (See letter at page 92 of the Defendant's Documents).

d) On or about 24th September 2014, the Plaintiff forwarded to the Defendant various Credit Notes which had not been factored in the demand for the outstanding rentals. This therefore necessitated the need for a reconciliation to ascertain the Plaintiff's claim (See page 93-98 of the Defendant's Document).

12. The defendant avers that consequently and in a bid to resolve the dispute between the parties, on 22nd April 2015 the parties held a reconciliation meeting where it was determined that the valid sum due from the Defendant to the Plaintiff was Kshs.8,863,733.73 subject to additional adjustments of Kshs.2,155,424.31 on credit notes issued after termination and contested invoices. This left a net payable balance of Kshs.6, 708,309.42. (*The Minutes of the said Meeting together with the Reconciliation Schedule are at page 99-104 of the Defendant's Documents*).

13. I have very carefully perused the pleadings, witnesses statements and evidence adduced before court, bundle of documents by both parties, written submissions by counsel for both parties and authorities relies upon; the issues arising therefore for consideration; can briefly be summarized as follows:-

a) Whether the plaintiff's claim is merited and should be paid?

b) Which party should bear costs?

A) Whether the plaintiff's claim is merited and should be paid?

14. A quick re-look at the plaintiff's plaint dated 16th September 2016 and the main prayers, reveals that the plaintiff's claims are in the nature of special damages. According to the plaintiff's counsel submission he is seeking Kshs.1, 921,040 being costs incurred on repairs of the defective motor vehicles that were returned and/or surrendered as per the agreement.

15. As per the agreement, it is not in dispute that the Termination Agreement provided that the defendant would incur the cost of the repairing all the defects identified by the plaintiff's technicians on the leased motor vehicle handed back to the plaintiff. It is further the plaintiff's averment, that the defendant returned the Maruti Omini Cargo to the plaintiffs with defects and without repairing them and as such the plaintiff incurred costs of Kshs.1, 921,010/- to rectify the defects. There is no dispute that **PW1** and **DW1** confirmed the vehicles were returned with various defects and that the defendant did not pay for the costs of repair as demanded by the plaintiff.

16. The plaintiff presented to the defendant a quotation of Kshs.1, 824,808/-; whereas the defendant's assessor claimed a figure of Kshs.429, 640 (*See page 83 of the defendant's bundle*) which amount the defendant paid after the summary judgment. The plaintiff is of the view that the defendant should pay the remainder of Kshs.1, 385,168/- being balance of the repair cost as quoted by Alfa Motors. The plaintiff further claims additional charges being diagnostic fee amounting to Kshs.58, 000/- and Government inspection fees amounting to Kshs.38, 232 in addition to the amount claimed herein by the plaintiff.

17. The plaintiff further claims Kshs.12, 271,708/- being the unpaid/withheld lease/rental instalments upto the date of the termination together with interest therein on account of motor vehicles and equipment. The main obligation imposed on the defendant by the Master Rental Agreement and subsequent Rental schedules, that it had executed was to pay the rental installments for each item that it had leased at the indicated amount. The plaintiff submits as the defendant admitted and paid Kshs.6, 708,309/94; the balance due and payment is Kshs. 5,568,398/58.

18. The plaintiff further claim Kshs.8,000,593/- being contractually agreed sum that is to say 50% of the remaining rental/lease fees by the end of the lease period term on account of the motor vehicles and equipment. The plaintiff further claim Kshs.28,536 as losses incurred as result of undue delay in return/surrender of **I T** equipment upon termination of the agreements; Kshs.17,756,167 loan balance and/or every repayment breach costs on account of motor vehicles and equipment.

19. The plaintiff's claims are in the nature of special damages. The law is well settled on special damages, that a party seeking special damages must not only specifically plead the claim but must also strictly prove the same by way of evidence. In the case of **Capital Fish Kenya Limited Vs Kenya Power & Lighting Company Limited (2016) eKLR** the court reiterated the principle as follows:-

"...not only should a claim for special damages be specially pleaded, but it is also incumbent upon the claimant to prove it, failure to prove disentitles claimant to the award sought. And that is the case here although the plaintiff pleaded special damages, it did nothing to prove the same and so that claim is dismissed... it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit."

20. In the instant case, the plaintiff specially pleaded the claim, but it did produce any documents to prove the claim. On alleged claim for Kshs.1, 921,040/- the claim relates to alleged cost of repair of ten (10) Maruti Omni Cargo following termination of lease as per termination

agreement. **PW1** during cross-examination confirmed the ten (10) Maruti Omni Cargo were returned by the defendant in the year 2011 (*see page 97 of plaintiff's documents*). I therefore find as such the said vehicles had nothing to do with the 2014 termination that gave rise to the suit. **PW1** went on to confirm that the claim for alleged cost of repairs of the said vehicle was not supported by any document and/or computation which could be exhibited before court. In view of the **PW1's** evidence and in absence of particulars and evidentiary documents to support that limb of claim, I find the same is bound to fail.

21. That under clause 4 of the Termination Agreement, it is provided that upon the return of the motor vehicles, the plaintiff's technicians would inspect the vehicles and require any repairs to be made before the vehicles could be accepted. The said clause reads as follows:-

"Clause 13 of the MRA, making provision for the return conditions of the vehicles shall remain in effect coupled with other defects that shall be identified by the lessor's technicians, and would require to be rectified by the lessee, prior to the return of the vehicles...the vehicles shall not be considered returned until certified by the lessor...."

22. It was of paramount importance for the plaintiff to produce in evidence a report from the technician setting out the defects noted following return of the vehicles or a report declining to certify the motor vehicles as duly returned.

23. The plaintiff's vehicles after termination of **MRA** on 14th August 2014; thus on 21st August 2014 to the plaintiff's agent, Alfa Motors, in presence of the defendant's agents, Hazina Motors, as per return forms produced at page (73 to 82 *Defendant's documents*) and duly signed by both parties, the only defect noted were minor defendants such as scratches and dents. **PW1's** confirmed that was so. I find that would only be account payable to the plaintiff upon compliance with the terms of the agreement. The total amount found due by the defendant's agent M/s Hazina Motors was estimated at Kshs.439, 640.00, which amount has duly been paid as per defendant's (*reconciliation schedule 104 of defendant's documents*).

24. I find though the plaintiff claims that a total of repairs was Kshs.1, 824,805/- as per entry shown at page 115 of the statement of accounts, no particulars were submitted in support of the claim; no computation by Alfa Motors or quotation in support was produced and in absence of such documents; I find the claim is not strictly proved as required.

25. On the alleged diagnosis for Kshs. 58,000/-. I find that this claim has not been specifically pleaded in the plaint nor proved by way of documentary evidence; nor has it been proved that this was a responsibility of the defendant. I find that this claim cannot be passed to the defendant and must fail.

26. On the alleged Government inspection fees of Kshs. 38,232/-; the fees is required to be paid yearly and the amount claimed is not for the period the vehicle was in use by the defendant. The defendant averred that it procured the relevant yearly government inspection stickers. That upon return of the vehicles, the plaintiff being the user of the vehicles, had the responsibility and obligation of procuring such government inspection approval stickers at its own cost. The plaintiff, cannot pass its responsibility after taking possession of the vehicles to the previous users. I find this claim is not only weird but misconceived and the same must fail for those reasons and also for lack of documentary evidence.

27. I now turn to the alleged outstanding lease rental installment of Kshs. 12,271,708/-. In this case, it is clear that while terminating the **MRA**, by its letter dated 13th August 2014, the plaintiff demanded payment of the sum of Kshs. 6,005,669/35 as the total outstanding lease rental as at 13th August 2014. **PW1** during cross-examination was pressed to explain how the demand of Kshs. 6,005,669/35 rose to Kshs. 12,271,708 but could not explain how the figure rose to Kshs.12, 271,708/- neither could he explain how a statement at page 112 to 115 of the plaintiff's bundle of documents was generated or how the figure was made up. I find the figure now, being sought do not reconcile with the plaintiff's demand of 13th August 2014. I find that no particulars have been furnished to the court and no documentary evidence has been produced. I therefore find that the claim is not proved and must fail.

28. On the alleged rental fees (50% of balance of term) the plaintiff claims 8,000,593/- as per clause 11.3(b) of the **MRA**. The defendant claims in compliance with this obligation, that it paid to the plaintiff a total of Kshs. 3,008,285/41 being Kshs. 2,102,388/67 for the vehicles and Kshs.905,896/74 for **I T** Equipment and urged no further payment are payable. It is further urged the plaintiff's claim is based on erroneous expiry date for both motor vehicles and equipment. That by email dated 25th June 2014 and before termination of **MRA**, the defendant wrote to the plaintiff confirming, that the lease with respect to 8 vehicles were due to expire by the end of June 2014 and August 2014. That the plaintiff terminated the **MRA** and following return of motor vehicle on 21st August, the 8 vehicles were not subject to the claim for 50% of the remainder of the lease rentals. The plaintiff by its own email of 25th June 2014 confirmed the expiry of the lease term for the four (4) Nissans, hence they cannot now be heard to say the Nissan had a remaining lease period of 4 quarters; that if that is allowed it would amount to approbation and reprobation. The plaintiff is therefore by its own representation, estopped from making a claim with regard to the four (4) Nissans. In this regard I am guided by the case of **Serah Njeri Mbobi Vs John Kimani Njoroge Civil Appeal No. 314 of 2009** in which it was held:-

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person....It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship..."

29. In view of the above, it is my finding, that the defendant relied on the plaintiff's own representation in making provision of what was validly due under the claim and in arriving at the sum of Kshs.3, 008,285/41 for both the vehicles and **IT** equipment.

30. I find further, the only items whose term had not expired and for which the claim for 50% of the remainder of the term applies relates to four (4) Isuzu pickups, **KBQ 877C, KBQ 882C, KBQ 883C, KBQ 884C** as they had 14 months remaining in the term with rentals of Kshs.4,204,777/20. The 50% thereon amounted to Kshs.2, 102,388/67. The **I T** had a remainder of 10 months amounting to Kshs.

1,811,793/48. The 50% thereon amounts to Kshs.905, 896/74; all in all being Kshs.3, 008,285/41, which sum the defendant has already paid. In view of the above I find that the claim of Kshs.8, 000,593 is not proved and is without basis.

31. On the alleged loan balance or early repayment of Kshs. 17,756,169/-; it is plaintiff's case, that the defendant was aware, that part of the periodic payments, rent was towards settling the loan amount the plaintiff incurred as a direct result of the plaintiff acquiring the rentals for the defendant and that due to the defendant's untimely payments, the plaintiff incurred huge and unanticipated extra costs on account of the loan facilities taken out on the rentals. It is the plaintiff's case that as per Clause 4.6, 4.7 and 4.8 of **MRA** specifically provided that rental motor vehicles and machinery were taken on floating finance charges.

32. In this matter, I note the plaintiff has not bothered at all to furnish any particulars to substantiate the claim but has generally addressed the issue. No details have been submitted on the alleged loan balance or bank loan giving rise to the claim for payment of the alleged loan balances. It is also of great significant, to note the defendant was not at any rate privy to any financing arrangement involving the plaintiff and its financiers. Further the leasing arrangement between the plaintiff and the defendant was on "*operating lease*" rather than a "*Financing lease*". The plaintiff in the instant case, retained the ownership of the equipment and vehicles and it enjoyed the benefits of capital tax allowances. The defendant obligation under the lease agreement was to pay the lease rentals quarterly in advance and subsequently release the vehicles and equipment to the plaintiff upon expiry of the lease period. The burden of paying any loans related to the purchase of the vehicles and equipment could not be an obligation, which could be transferred to the defendant by virtue of the lease agreement. Further on my reading the **MRA**, and Rental schedules, it reveals that the plaintiff in computing the rental payable, took into account its financing cost to cushion itself in its loan obligations, if any. The defendant having paid the total outstanding lease rentals, the 50% penalty for the remained of the lease terms and upon return of the vehicles and **IT** equipment, it cushioned the plaintiff for any loss it would have suffered on account of the termination of **MRA**.

33. If the court were to award this claim, it would amount to nothing but unjust enrichment for the plaintiff to receive lease rentals and payment for 50% balance of the lease term; and continue to retain the ownership of the vehicles, equipment and at the same time demand, that defendant pays an alleged loan balance, this would be tantamount to paying for the purchase of the vehicles. This would not only be unjustified but would be unconscionable and illegal. I am guided on this point by the case of **Margaret Nyari Muiruri Vs Bank of Baroda (Kenya) Limited [2014] eKLR**, where the court in defining unconscionable contract terms and the court's power to vary the same held as follows:-

"It is not for the Court to rewrite a contract for the parties....36. Nevertheless, Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case..."

34. In view of the above, I am satisfied that the plaintiff is not entitled to the alleged financial cost by virtue of being the owner of the vehicles and equipment and having terminated the lease agreement and retaining the vehicles and equipment. Further the entire claim is not specifically proved. The entire claim in my view constitutes unjust enrichment and is unconscionable, neither does it amount to any loss emanating from the termination of the agreement.

35. On the claim for alleged delay in return of **I T** equipment; the claim for Kshs.28, 536/-; the plaintiff urges on termination of the lease Agreement between the parties, the defendant was required to return the goods by 13th August 2014 but this period was extended to 13th September 2014 by the plaintiff. However in contravention of the agreement, the defendant returned the goods on 15th September 2014 as a result of which the plaintiff incurred loss amounting to Kshs.28,536/-.

36. It is submitted on behalf of the defendant, whereas **I T** equipment was to be returned on 13th September 2014, the said date fell on a Saturday rendering the equipment to be delivered on 15th September 2014. **DW1** in her evidence, testified that the plaintiff's offices were not open on Saturday (13/9/2014) to allow the return of the items, hence the same were returned on the next available working day being on Monday 15th September 2014. **DW1** evidence was not challenged. Secondly there were no particulars provided nor documentary evidence produced to substantiate how the claim of Kshs.28, 536/- was arrived at. I find the claim is not proved as no particulars nor documentary evidence was produced.

37. I now turn to the plaintiff's claim of General damages. The plaintiff prays for General damages urging that the defendant's refusal to settle the amount owed to the plaintiff has caused it injury and loss. That the plaintiff has been denied use and profit from the equipment and motor vehicles leased to the defendant. The plaintiff relied on the decision by Hon. Justice Aburili in **Equity Bank Limited & Another Vs Robert Chesang [2016] eKLR** where in granting general damages, the Judge cited the literary works of Anson's Law of Contract 28th Edition which states at page 589 that:-

"(1) Every breach of contract entitles the injured party to damages for the loss he or she has suffered." Page 590. "Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."

38. In the case of **Consolata Anyango Ouma Vs South Nyanza Sugar Co. Ltd [2015] eKLR**, the Court in reiterating this principle held as follows:-

"As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd Vs Lee Enterprises Ltd NRB

CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd Vs Natex Distributors Ltd Milimani Hccc No.704 of 2000 [2004] eKLR). The measure of damages....is such as may be fairly and reasonably be considered arising naturally from the breach itself... Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved..."

39. I have considered the parties pleadings and evidence adduced. It is clear the following the reconciliation meeting, as early as April 2015, the defendant was ready to pay the undisputed amount of Kshs.6, 708,309/42, however the plaintiff, shifted the goal post by demanding unsubstantiated amounts more than once, and lately filed this suit. The claim for general damages is unsubstantiated neither is it in the nature of special damages nor is it pleaded and is not proved as required. I find that the plaintiff has failed to prove the defendant refused to settle the amount owed to the plaintiff nor did it prove injury allegedly caused. The plaintiff further has not proved that it has been denied the use and profit from the equipment and motor vehicles leased for which it has fully been paid the amount that was due and payable to it. I find the claim for general damages is not proved nor merited and the same must fail.

40. On the interest on prayer (a) to (e) of the plaint, the plaintiff urges the defendant was at all the material times aware of the colossal amount of money it owes the plaintiff but continuously failed to settle the sum urging as such, it is entitled to interest on the outstanding amount claimed. The plaintiff referred to the case of **Nalinkumar M. Shah Vs Mumias Sugar Company Ltd [2010] eKLR** where the Honourable Judge F. Azangalala stated that interest can be awarded for the period prior to the date of the suit and added that:-

"...Kenyan courts have power at common law to award interest for late payment of a debt or damages irrespective of whether or not there is an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the ends of justice."

41. It is clear that interest is a discretionary remedy as provided under section 26 of the Civil Procedure Act. In **Dipak Emporium Vs Bond's Clothing [1973] E A 553**, the Court held:-

"The court's right to award interest is based on Section 26(1) of the Civil Procedure Act...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 suit. Where, however, damages have to be assessed by the court, the right to those damages does not rise until they are assessed and therefore interest is only given from the date of judgment."

42. In the instant case, I find that the plaintiff has failed to prove that the defendant deprived it of the use of the funds. The defendant as at April 2016 was ready and willing to pay the plaintiff the undisputed amount of Kshs.6, 708,309/42 but the plaintiff declined to accept payment. The claim for interest on the amount was well addressed in court's ruling dated 10th March 2017, in which the plaintiff was paid the sum found due and interest all in all being Kshs.7, 125, 143 inclusive of costs. There is no further pending interest on the amount found due and paid.

B) Which party should bear costs?

43. On costs, it is trite law that cost follows the event. The plaintiff in this suit has failed to prove any of the special damages claimed. The net effect is that the plaintiff's suit ought to be dismissed.

44. Having come to the conclusion that I have, I find the plaintiff has failed to prove its case on balance of probability. The plaintiff's claim is therefore not merited. Accordingly the plaintiff's suit is dismissed with cost to the defendant.

Dated, signed and delivered at Nairobi this 6th day of December, 2018.

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J .A. MAKAU

JUDGE