



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 177 OF 2015**

**MAGIC CHEMICALS INC.....PLAINTIFF**

**-VERSUS-**

**PRAPID ENTERPRISES LIMITED (E.A.) LIMITED.....DEFENDANT**

**JUDGMENT**

[1] By its Complaint filed herein on **20 December 2013**, the Plaintiff claimed a sum of **USD 70,350** being the value of goods supplied and delivered to the Defendant at its instance on the basis of a Commercial Invoice dated **5 April 2013**. The payment was due on **27 June 2013** but had not been paid by **20 December 2013** when this suit was filed by the Plaintiff. The Plaintiff accordingly prayed for judgment against the Defendant in the aforesaid sum of **USD 70,350**, together with interest at commercial rates from **27 June 2013** when the same became due, till payment in full together with costs of the suit.

[2] After the close of pleadings, the Plaintiff filed an application dated **8 October 2014** seeking for judgment on admission, which application was allowed and judgment entered in the Plaintiff's favour for **USD 70,350** together with costs on **24 March 2016**. As the claim for antecedent compound interest was contested, the Court directed that the same proceeds to trial for determination on merits. Thus, at the hearing on the question of interest on **27 July 2016**, the Plaintiff called one witness, **Mr. Gurvinder Singh Bawa (PW1)**, who, on the basis of his witness statement filed herein, stated that it was a term of the contract between the parties that interest would be charged on delayed payments at the rate of 1% per month, which is equivalent to 12% per annum. In particular, **PW1** drew the Court's attention to the **Commercial Invoice No. TKB/MCI/KEN/2057** dated **5 April 2013** (see page 5 of the Plaintiff's Bundle of Documents) wherein it was clearly stated that the payment for the goods was due 90 days from the date of the Bill of Lading and that interest would be charged at 1% per month on delayed payment.

[3] It was thus the contention of the Plaintiff that it is entitled to interest as claimed in the Complaint. In his written submissions, Counsel for the Plaintiff cited the cases of **Shah vs. Guilders International Bank Ltd [2002] 1 EA 269** and **Nalinkumar M. Shah vs Mumias Sugar Company Ltd [2010] eKLR** in support of their contention that the Plaintiff is entitled to interest from the date of deprivation, namely **27 June 2013**, when the sum claimed was due for payment. The Defence on the other hand opted to call no evidence but relied on the written submissions filed herein on **10 August 2016**, contending that, after 27 June 2016, there was a re-negotiation of the contractual sum downwards from **USD 74,850** to **USD 70,350** and that there was no mention or provision for any interest at any rate after the said amendments. Relying on **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya**, and the cases of **Shariff Salim & Another vs. Malundu Kikava [1989] eKLR**, and **Lawrence Mukora Muniu T/A**

**Dynamite Civil Electrical Contractors vs. KamanduraTarambana Water Development Society [2016] eKLR**, it was the submission of the Defence Counsel that the Plaintiff had failed to discharge its burden of proof.

[4] As to whether the interest should be charged from **27 June 2013** till payment, it is now trite that interest is awarded at the discretion of the court. In this regard, **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, stipulates that:

**"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 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."**(underlining supplied)

[5] Two points were raised by Counsel for the Plaintiff in support of their position. The first is that the parties herein, by their **agreement**, provided that interest would be charged on delayed payments. The evidence in this respect has not been controverted. As to whether the contract was re-negotiated to do away with interest, I have considered the evidence of PW1. According to him the reduction was in respect of a Credit Note for **USD 4,500** for sundry charges incurred by the Defendant for the purchase of a Gelatin Crusher Machine. It is noteworthy that in the Plaint filed on **20 December 2013**, all these matters about the Credit Note were pleaded at paragraphs 7 and 9, and that those averments informed the claim for **USD 70,350**. Moreover, the Plaintiff proceeded to claim interest on the aforesaid sum of **USD 70,350** from **27 June 2013**. In the circumstances, it is my finding that the Plaintiff is entitled to antecedent interest as claimed in the Plaint from **27 June 2013** on the basis of the agreement aforementioned. Indeed, the Court of Appeal in **Shah vs Guilders International Bank Limited [2003] KLR 8** expressed the view that the discretion of the court under **Section 26(1) of the Civil Procedure Act** is ousted where the parties have by their agreement expressly agreed on the question of interest. It held that:

**"...we further understand these provisions to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement 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 is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent..."**

In the premises, the parties having agreed not only on the rate of interest payable, but also on when chargeable, I would find for the Plaintiff, that it is entitled to interest from **27 June 2013** as claimed in the Plaint.

[6] The second point raised in support of the Plaintiff's case is that it has been deprived of funds from **27 June 2013** to date. This posturing is not disputed by the Defence. In **New Tyres Enterprises Limited vs Kenya Alliance Company Limited [1987] KLR 380** the Court of Appeal held that:

**"The award of interest for any period prior to the filing of the suit is a matter of substantive law...Where a party has been deprived of land or movable property and receives a monetary award in compensation for the loss, the usual practice is to award interest from the date of such deprivation..."**

[7] And in a later decision, **Omega Enterprises Kenya Limited vs EldoretSirikwa Hotel Limited & Others Civil Appeal No. 235 of 2001**, this position was reiterated by the Court of Appeal thus:

**"There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he was so deprived."**

Accordingly, I would agree with the decision of **Azangalala J** (as he then was) in **Nalinkumar M. Shah vs. Mumias Sugar Company Ltd [2010] eKLR** that:

**"...Kenyan courts have power at common law to award interest for late payment of 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. After all a commercial transaction deserves the same treatment whether and wherever it takes place."**

**[8]** In the result, I would enter judgment in favour of the Plaintiff for interest on the sum of **USD70,350** at 12% per annum from **27 July 2013** till payment in full.

Orders accordingly.

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**OLGA SEWE**

**JUDGE**

**COUNTER SIGNED, DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2016.**

**FRANCIS TUIYOTT**

**JUDGE**