REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 226 OF 2003

FEROZ NURALJI HIRJI (Suing through his duly authorized Attorney

SHAROK KHER MOHAMMED ALI HIRJI)…….....PLAINTIFF

Versus

HOUSING FINANCE COMPNAY OF KENYA LTD……..1ST DEFENDANT

WATTS ENTERPRISES LTD…….……...……..2ND DEFENDANT

RULING

[1] Judgment was entered in favour of the Plaintiff on 29th November 2010. The only outstanding issue is the rate of interest applicable on the decretal sum; whether it should be calculated on the basis ofsimple interest or compound interest. The Plaintiff submitted that the interest be compounded; whilst the 1st Defendant was of the view that interest should be on a basis of simple interest. The court issued directions on 30th January 2015 that this issue to be canvassed by way of written submissions.

Plaintiff: Compound Interest Applies

[2] The Plaintiff filed his submissions dated 13th February 2015. Therein, it submitted that the 1st Defendant which is a financial institution, charged interest on a compounded basis as a matter of routine, trade usage and custom. They argued that, in line with the industry trade usage and custom, the interest rate applicable in this case and decree of the court should be on the basis of compound interest, given that it was the same rate of interest that they had charged and claimed from the Plaintiff. On trade usage and custom, the Plaintiff relied upon the case of **Veleo (K) Ltd v Barclays Bank of Kenya Ltd (2013) eKLR**where it was held that there was no reason as to why the rate of interest to be applied would not be the same as that which was applicable to the Plaintiff had they been the party in default. They further relied on the case of **Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34** in which it was held that compound interest would be awarded in the exercise of the courts equitable jurisdiction. It was submitted that since the 1st Defendant in their line of business applied compound interest, then there was obviously a need for the same to be applied in this case, as the Plaintiff had undoubtedly been denied the opportunity to invest in his monies which he was deprived of by the 1st Defendant's actions.

Defendant: Simple Interest Applies

[3] The 1st Defendant filed its submissions dated 4th March 2015. They stressed that, in terms of the judgment and evaluation of the evidence placed before the trial court, there was no provision that the rate of interest applicable was compound interest, and that as a matter of practice, the court usually award interest on a simple basis. They amplified this submission by citing the cases of **East African Engineering Consultants v Municipal Council of Kisumu Misc Application No 748 of 1996** and **HCCC No 500 of 2000 Anab Hussein Arab v Small Enterprises Finance Co. Ltd** in which the common thread was that simple rate of interest was applicable in so far as, and unlessthere was no specific order, to an alternative effect in most instances by the Court. Further reliance was placed upon the case of **Barclays Bank (K) Ltd v William Mwangi Nguruki [2014] eKLR** in which it was determined that rate of interest applicable by the court was simple interest. It was submitted that no justification had been advanced by the Plaintiff for interest on the award to be calculated at a compounded rate, and that in any event, it was awarded at the discretion of the court, which discretion was unfettered and unconscionable.

[4] The judgment of the court entered on 29th November 2010 by Khaminwa, Jwas couched in the following manner;

> **"5. All awards of money shall carry interest at the rate of 26% p.a. from 19/1/2000 until the day the amount shall be fully paid."**

The Defendant urged that, at no point in the judgment did the learned Judge refer that the rate of interest applicable was either compound or simple, and that it was therefore encumbered upon this court to make a determination on which either of the two was applicable. They cited Section 26 (1) of the Civil Procedure Act which provides for interest to be awarded on decrees as follows;

> **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.**

[5] According to the Defendant, the above provision is manifestly and explicitly evident that the power to award interest by the Court is discretionary, and the Court would therefore award interest in any manner that it deems fit and reasonable in the circumstances. But, as with all other discretionary powers of the court, it should be exercised with caution and should not be whimsically and capriciously applied to the detriment of any of the parties. In considering that the interest rate of 26% p.a. was fair and reasonable, Khaminwa, J (as she then was) awarded the same. They urged the Court to take an objective view of the matter and make a decision based on facts, evidence, and the law. They stated that Khaminwa, J was guided by the circumstances of the case, and ordered the rate of interest charged under the loan agreement, which in this case was 26% p.a. up from 13.5% p.a.

DETERMINATION

Issue at hand

[6] The judgment of the court entered on 29th November 2010 by Khaminwa, J held the following on interest;

> **"5. All awards of money shall carry interest at the rate of 26% p.a. from 19/1/2000 until the day the amount shall be fully paid."**

The court did not specify whether the interest was to be calculated on the basis of compound or simple interest. The issue at hand is therefore:-

a. **Whether the interest awarded should be calculated on the basis of compound or simple interest.**

It is not in doubt that the interest rate applicable under the loan agreement was compound interest. I will examine this fact, the circumstances of this case and the law applicable the final analysis of this issue.

[7] My view is that Section 26(1) of the Civil Procedure Act does not provide for a method of computing interest. It leaves it to the discretion of the court to award interest on the adjudged or principal sum as it deems reasonable and fit. In other jurisdictions, there is a presumption that interest is simple interest unless expressly stated. See for instance **The Law of Interest in Canada(Scarborough: Thomson Canada Ltd.,1992) at pg. 37** that;

> **"Canada Law contains a presumption that interest is simple unless expressly stated."**

This presumption is also captured in the case of **Park Projects Ltd v Halifax City (1981) 48 NSR (2d)** which was adopted by the Court of Appeal in **Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd (1991) 83 Alta. LR (2d) 289; [1992] 1 WWR 557 CA** wherein it was stated;

> **"…interest should be calculated using the nominal rate method (simple interest) and not the effective rate method (compound interest) unless there is a good reason for importing the reinvestment principle into the contract."**

[8] When I come back home, in the case of**East African Engineering Consultants v Municipal Council of Kisumu** (supra) Waweru, J stated inter alia;

> **"It appears that in its computation of interest the decree holder may have compounded the same. This is unlawful. The court ordinarily awards simple, not compound, interest unless there is a specific order to that effect. It is this aspect of compounding interest that has so ballooned an initial modest decretal sum to an amount that the judgment debtor may be finding hard to pay, and hence the present application."**

See also Kasango, J in **Anab Hussein Arab v Small Enterprises Finance Co. Ltd** (supra) when she stated that;

> **"I have considered the submissions of counsels and my ruling is simply this, that the words of the judgment are very clear. There is no compound interest awarded, to say so would be to impose words that were not in the judgment. The rate of interest awarded in that judgment was 27% per annum. Had the court intended to award compound interest it would have stated so."**

[9] Contrast the above with the decision in **Veleo (K) Ltd v Barclays Bank of Kenya** (supra) Havelock, J (as he then was) which quoted with approval the ruling of Major, J in Bank of **America Canada v Mutual Trust Co. (2002) 2 SCR 601**and stated that;

> **"Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent…where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid."**

Consider also what the learned judge said further in the above ruling;

> **"[T]here seems in principle no reason why compound interest should not be awarded. Had the prompt recompense been made at the date of the wrong the Plaintiff would have had the capital sum to invest; the Plaintiff would have received interest on it at regular intervals and would have invested those sums also."**

[10] The Plaintiff has argued that the circumstances of this case warrant order for interest to be computed on the basis of compound interest because they would have made investments of the adjudged sum herein and earned income. They argued further that the failure by the 1st Defendant to promptly recompense the Plaintiff gave rise to circumstances which the court would consider awarding interest on a compounded basis. I agree that the time element and the possibility that the funds held by the 1st Defendant would have been otherwise utilized as re-investment, should be considered by the court when awarding interest on the decretal sum on a compounded basis. This is to recompense the party who has been denied use of money and has as a consequence lost investment opportunities too. That will not be a punishment in any sense but a fair equitable compensation. I am persuaded by the decisions in **Bank of America Canada v Mutual Trust Co**. (supra) as well as **Veleo (K) Ltd v Barclays Bank of Kenya Ltd** inter alia;

> **"It was not anticipated that a situation would arise whereby the Defendant would haveto repay the Plaintiff for monies withheld in its accounts. As such it would only seem logical, (in the absence of any agreement, express or otherwise), that the rate of interest applicable would be simple interest. However, the circumstances here are that there was no provision as to the calculation of the rate of interest applicable. The Plaintiff, as a result, has invoked the court's discretion in applying an equitable remedy to ameliorate the issue. As was held in Pacific Playground Holdings Ltd v Endeavour Developments Ltd (supra), the Plaintiff was indeed denied the opportunity to invest the money withheld by the Defendant, and therefore missed opportunities. I was also impressed by the finding in Bank of America Canada v Mutual Trust Co. [2002] 2 SCR 601, where Major, J of the Supreme Court of Canada held that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it, regardless of the wording of the Act."**

[11] I should state again that our law on award of interest, does not provide for the method of calculating the interest awarded by the court. The Judgment in favour of the Plaintiff on 29th November 2010 did not also provide whether the interest was simple or compound interest. And critical analysis of the law and the judicial decisions on this subject in Kenya, there is no prohibition to interest on the principal sum being calculated as compound interest. However, I would state that courts have always proceeded on a presumption that interest awarded by the court should be simple interest unless otherwise ordered by the court. To me the ''unless'' aspect which is pronounced in the decisions I have encountered portend that a court may order interest to be compounded where circumstances allow. It is, therefore, permitted in law to order a post-judgment equitable relief that interest to be calculated on a compound basis where fairness concerns dictate it. The compounded interest acts as recompense to the Plaintiff. In this case, interest at the rate of 26% p.a. was from 19/1/2000 until the day the amount shall be fully paid. It is now over 15 years since the interest became due and payable. Also it is now about 5 years since the judgment was entered into in favour of the Plaintiff. To date, the 1st Defendant has not settled the decretal sum. The judgment sum has been withheld from the Plaintiff for the period I have mentioned. It would be reasonably presumed that the Plaintiff would have applied these sums in investments. Therefore, bycomputing the award at simple interest, the Plaintiff would not be adequately compensated with regards to the time value component as well as the deprivation of the use of its money for such long period of time. Interest should not be viewed as a punishment but rather as a fair recompense to a person who has been deprived of his money or property by another. I note also that, interest agreed in the agreement was a compound interest which is also supported by the trade usage and custom norm within the banking industry. There is absolutely no reason why this court should not award interest on the basis of compound interest. These words of

Havelock, J (as he then was) in **Veleo (K) Ltd v Barclays Bank of Kenya Ltd**(supra) are instructive;

> **"Accordingly I would find that there was no express provision as to the method of calculating interest rate on the pecuniary judgment in this case. However, the Defendant, having withheld the amount of money for a period of over twelve (12) years, it would be presumed to have applied the same to its business, and therefore gained significantly from the same. The opportunities lost by the Plaintiff in this instance would only be adequately compensated by applying a rate that would reflect the time value component to interest…I see no reason why the Plaintiff herein should not enjoy the same method of calculation of interest that as would have been employed and calculated payable by it, if it had been in default."**

The upshot

[12] The Plaintiff has shown that the circumstances at hand warrant for the award of interest herein to be computed on the basis of compound interest. I hereby order that the interest on the principal sum shall be calculated at 26% per annum on the basis of compound interest from 19th January 2000 until the entire debt shall have been paid. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 3rd day of June 2015.

F. GIKONYO

JUDGE