REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 197 OF 2013

ROSE KAUME…….....……1ST PLAINTIFF

ENOS NTOMBURA…….....……2ND PLAINTIFF

VERSUS

STEPHEN GITONGA MBAABU T/A

S. G MBAABU & CO. ADVOCATES…….....……1ST DEFENDANT

OCEAN BREEZE ESTATES LIMITED…….....……..2ND DEFENDANT

RULING

1. For the determination of the Court was the issue of costs and interest raised by the Plaintiffs pursuant to the consent entered by the parties for the settlement of the Plaintiffs' claim. The particulars of the Plaintiffs' claim were set out in the Plaint dated 16th May 2013, which was followed by an application for summary judgment. The issues therein were not canvassed, but the suit was compromised by the Defendants conceding to the settlement of the Plaintiffs' claim by repaying the monetary claim of Kshs 8,060,000/- on diverse dates as per the consent.
2. It was the Plaintiffs' contention that the Defendants settled the amount as stated in their claim, and that as such, there were costs and interests that follow the event. Further, it was contended that the consent that was entered was with regard to a monetary claim, and that as such, costs followed the event once the Defendant agreed to the settlement of the same.
3. In opposing the Plaintiffs' contention, the Defendants pointed out that settlement was with regards to an agreement, and in which the issue of breach thereof had not been determined. As such, it was argued, there was no event to be followed by costs, and that therefore, the fact that the Defendants agreed to the consent was not a reason for them to be condemned to costs.
4. The Plaintiffs came before the Court on 20th May 2013 with an application seeking summary judgment to be entered against the Defendants. With direction by the Court on 5thJuly 2013, the parties sought to compromise the suit by way of settlement, and after which on 9th September 2013, the Plaintiffs stated in court that they were in agreement with the Defendants that the money claimed would be refunded. As of 3rd June 2015, the Plaintiffs stated before Court that the decretal sum had been paid, and all that remained to be determined was the issue of costs and interest. On 22nd September 2015, the parties decided that they would negotiate in terms of the costs and interest, although the parties did not seem to have come to a consensus when they appeared before this Court on 22nd October 2015.

5. The Plaintiffs, on the issue of compromise of the suit by consent judgment, relied on the case of **Morgan Air Cargo Ltd v Everest Enterprises Ltd (2014) eKLR** in which Gikonyo, J on the issue reiterated as follows;

"The Court takes the view that awarding costs is a matter of the discretion of the Court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case… I need to discuss one important issue; the law on compromise, and the work of David Foskett, QC of Gray's Inn at pg. 77 of his book In the Law and Practice of Compromise is relevant that;

> ***'An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issue of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action.'"***

In rendering his decision on the issue of costs on compromised suit, the learned Judge held *inter alia*;

> ***"Of necessary note, the successful claim herein is not one which does not attract costs or is incapable of attracting costs. The consent filed herein did not compromise on costs as that item was left out of the compromise and was to be agreed at a later date. It is the failure to agree on costs that parties asked the court to make a determination on the issue. There is also no attrition of any conduct which would prevent the Plaintiff from being awarded costs. In sum, I do not find any material on which an estoppel would arise in this matter."***

6. In **Orix Oil (Kenya) Ltd v Paul Kabeu & 2 Others (2014) eKLR**, cited in **Morgan Air Cargo Ltd v Everest Enteroprises Ltd** (supra) it was held that;

" …the court should have been guided by the law that costs follow the event, and that the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs.None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do."

7. In both afore cited cases, the Court relied on the provisions of Section 27(1) of the Civil Procedure Act which provided for costs to be awarded at the discretion of the Court. These provisions have been pronounced in various decisions including the decision of the Court of Appeal in **Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No 85 of 2006; (2010) eKLR** which was cited with approval by Odunga, J in **Joseph Oduor Anode v Kenya Red Cross Society (2012) eKLR** and in which the learned Judge held;

"In the present case an application was made by the Plaintiff to transfer the suit. The Defendant filed grounds of opposition. Confronted with the said grounds, the Plaintiff threw in the towel and promptly sought to withdraw the application. Either way, the Defendant succeeded in depriving the Plaintiff of the orders he had sought to obtain. In the foregoing premises I am not convinced that the Defendant's conduct in the said proceedings was such that it did not deserve costs being awarded in its favour…In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise."

8. With regards to the issue of interest, it was the Plaintiffs' contention that they had been deprived of the use of the money that they had given to the 1st Defendant to invest in the erstwhile 2nd Defendant. That being the case, it would only be just and fair that the Plaintiffs be awarded interest on the money that they had been deprived of by the acts of the Defendant. Under Section 26(1) of the Civil Procedure Act, the court is empowered with the discretion to award interest on pecuniary judgments. This position was held by the Court of Appeal in **Later v Mbiyu (1965) EA 592** where it was held inter alia;

"In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the Defendant, and in such as case, it is clearly right that the party who has

been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

9. Similarly, the Court of Appeal in **Supermarine Handling Services Ltd v Kenya Revenue Authority** (supra) held that;

"The Plaintiff was deprived of the use of its money since 4/11/1999 and it was only fair that it should be compensated for such deprivation by the award of interest….We are, satisfied ,therefore, that the learned Judge's order in denying the Plaintiff interest was erroneous and was not in consonance with the normal practice and was plainly and obviously a wrong exercise of discretion. See* New Tyres v Kenya Alliance Insurance Company Ltd (1987) KLR 380*."

10. In so far as the Court has the discretion to award interest on pecuniary judgments as enunciated under Section 26(1) of the Civil Procedure Act, the same is, however, silent as to the method of computing interest, i.e. whether the same should be simple or compound. It is undeniable that the Plaintiffs were denied an opportunity to invest the money that they were deprived of by the Defendants, but with these missed opportunity, what would have been return on the investment? In an attempt to ameliorate such scenario, the Supreme Court of Canada in **Bank of America Canada v Mutual Trust Co (2002) 2 SCR 601**, cited in **Veleo (K) Ltd Barclays Bank of Kenya Ltd (2013) eKLR** by Havelock, J (as he was then), the Court had held that;

"Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payment while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all the money which is due but as yet unpaid because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard of 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."

In his determination on the issue of interest, the learned Judge held that;

> ***"The opportunities lost by the Plaintiff in this instance would only be compensated by applying a rate of interest that would reflect the time-value component to interest."***

11. Further in **Bank of America Canada v Mutual Trust Co** (supra), it had been held that;

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

12. In the Plaint at prayer (b), the Plaintiffs had prayed for interest at 19% with effect from 27th January 2012. Although there is no specific reference as to the where the Plaintiffs may have derived the rate of interest of 19%, the 2ndDefendant at para. 10 had alleged to have borrowed money on his credit card, which money was further transmitted to the 1st Defendant. No evidence has been adduced before the Court to show that the 2nd Defendant had borrowed these facilities for the purpose of remitting to the Defendants. In the absence of such evidence, the Court would be hard strung to award such interest at the rate as prayed for by the Plaintiffs. As such, the court would allow interest pegged at Court rates, as from the date of filing the instant suit to date of payment of decretal amount.

13. In summation of the foregoing, the upshot is that the Court accordingly awards costs to the Plaintiffs, with interest charged at court rates in accordance with the provisions of Section 27(2) of the Civil Procedure Act, from the date of filing of the suit to date of payment.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of December, 2015.

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C. KARIUKI

JUDGE