



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.1123 OF 2001

PREMIER BAG AND CORDAGE LTD.....PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD.....DEFENDANT

RULING

1. Section 26 of the Civil Procedure Rules provides:-

“26. (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”

2. On 7th June, 2002, summary judgment was entered for the Plaintiff against the Defendant for Kshs.14,982,807/= as at 31st October, 2000 together with interest at the rate of 24% p.a. from the said 31st October, 2000 until payment in full. Costs of the suit were also ordered against the Defendant. There followed a milliard of proceedings culminating in a consent recorded on 11th November, 2011 whereby, the parties agreed that their respective Auditors do recalculate the interest on the decretal sum on simple interest basis. Upon such recalculation, the court was to ascertain the actual sum due on the decree of 7th June, 2002.
3. The parties filed their respective calculations and Affidavits as well as written submissions. This ruling is on the said recalculation of interest.
4. The Plaintiff filed an Affidavit by Azim Jamal Virjee sworn on 23rd January, 2012. The deponent swore that he was a Certified Public Accountant (CPA) by profession and the Chairman of RSM Ashvir Certified Public Accountants who are the auditors of the Plaintiff. He confirmed that he had done the calculation of interest on the rate of 24% per annum as ordered by the court and

produced two (2) reports which he marked as “AJV1”, based on compound interest on daily rests and “AJV2”, based on the simple interest basis on monthly rests. He explained that the computation on compound interest on daily rests is the normal method used by banks on calculating interest on overdraft facilities granted to customers. In addition to the aforesaid two reports, Mr. Azim yet again produced a third report “AJV3” which he explained to be the calculated amount of the decretal amount on simple interest.

5. Mr. Azim swore that he made the said calculations based on acceptable accounting formula in order to assist the court arrive at the correct decretal amount due to the judgment debtor. In the said reports, the following was the result:-

- a. “AJV1”-
 - (i) Total interest – Kshs.127,137,160/22
 - (ii) Total paid – Kshs.32,992,108/20
 - (iii) Balance unpaid – Kshs.105,303,336/02
- b. “AJV2”-
 - (i) Total interest – Kshs.127,933,827/88
 - (ii) Total paid – Kshs.32,992,108/20
 - (iii) Balance unpaid – Kshs.106,100,004/=
- c. “AJV3”-
 - (i) Total interest – Kshs.89,039,449/=
 - (ii) Total paid – Kshs.32,992,108/=
 - (iii) Balance unpaid – Kshs.67,205,625/=

According to the said reports therefore, on the basis of the consent order of 11th November, 2011, the amount due on the decree was Kshs.67,205,625/=.

1. In his submissions, learned Counsel for the Plaintiff submitted that the Plaintiff’s bankers advised on how the simple interest is charged on loan facilities. The opinion of the Plaintiff’s bankers dated 19th March, 2012 was produced and Counsel submitted that the Plaintiff’s internal auditor applied the said formulae in his recalculation. He further submitted that a party who is deprived of goods or money by a wrongful act of another party should be compensated by an award of interest. That the recalculation of the simple interest was based on daily rests. That the Defendant’s recalculation of interest was erroneous as it was not based on the daily rests as per the banks and that the Plaintiff was entitled on the sum as calculated by its auditor as the formulae used was correct. Counsel therefore urged that the calculation of the sums as per its auditor be upheld.
2. On its part, the Defendant filed a Replying Affidavit by Engineer Daniel Baraza sworn on 17th April, 2012. In it, the Defendant produced a report made by the Kenya National Audit Office, the Defendant’s auditors. The Defendant also produced the report by an organization called IRAC of calculation of simple interest on the amount of the decree. The Defendants contended that from the reports, the Defendant had overpaid the Plaintiff a sum of Kshs.5,451,838/84 for which it indicated it would seek a refund. In the report by the Kenya National Audit Office dated 23rd March, 2012, the total interest for the period 31st October, 2000 to 2nd September, 2011 is shown as Kshs.13,557,462/=. In the second report by IRAC, the amount contended to be the total interest for the same period is Kshs.13,557,462/36. The report also indicate that there is an overpayment of Kshs.5,451,838/84. In both reports, the amount is arrived at on the basis that the total amount so far paid by the Defendant is Kshs.33,992,108/20 whilst the Plaintiff’s report is calculated on the basis that the total amount paid by the Defendant is Kshs.32,992,108/20.
3. In her submissions, Counsel for the Defendant contended that the calculations of interest presented by the Defendant were in accordance with the order of this court of 11th November, 2011. It was

further submitted that the Plaintiff's calculations produced as "AJV1" and "2" were in contravention of the order of 11th November, 2011 and should be disregarded. Counsel urged that the Plaintiff's calculations produced as "AJV3" should also be rejected because they start from 31st January, 1999 with a principal of Kshs.11,158,284/= instead of 31st October, 2000 with the principal of Kshs.14,982,807/- and that there has been interest applied over interest. Counsel submitted that interest is meant to compensate a party and not to be punitive. That once any money has been paid to a decree holder, such money should stop accruing interest. Counsel urged that the calculations presented by the Defendant should be upheld and a refund of Kshs.5,541,838/84 ordered.

4. I have considered the Affidavits on record, the recalculations produced and submission of counsel. My reading of Section 26 of the Civil Procedure Act set out at the beginning of this Ruling is that interest is in the discretion of the court. Once such interest is ordered by the court, the same is meant to be compensatory and not punitive. In my view, unless a court expressly decrees that interest payable under Section 26 be compounded, such interest should as a matter of course be simple interest. As early as 1965, Law J. A in **Prem Lata Vs Peter Musa Mbiyu 1965 EA 592** was of the view that, an award of interest was meant to compensate the person who has been deprived money he is entitled to. In the case of **London Chatham and Dover Railway Co. Vs South Eastern Railway Co. (1893) AC 429**, the House of Lords held that interest cannot be ordered and/or given by way of damages for detention of a debt.
5. By way of definition in **BLACKS LAW DICTIONARY 9th Edn at page 887**, simple interest is

“Interest paid on the principal only and not on accumulated interest. Interest accrues only on the principal balance regardless of how often interest is paid.”

Whilst compound interest is:-

“Interest paid on both the principal and the previously accumulated interest.”

6. From the foregoing, once payment of interest is ordered on a decree, such interest shall only accrue on the principal only and not otherwise. This is so because, charging interest on interest otherwise known in the commercial world as compound interest is punitive and not compensatory. As already held, interest is meant to compensate a party for having been kept out of its/his funds or property for some time and not either to enrich such a party or punish the opposing party. In this regard, the moment any interest is levied on any accumulated interest and not principal sum, such interest stops being simple and becomes compounded, and therefore punitive.
7. With the foregoing principles in mind, this court is called upon to decide which of the calculations presented by the Plaintiff and the Defendant is in consonance with the consent order of 11th November, 2011. That order required the parties to present a recalculation of the interest on the decree on the basis of simple interest.
8. On the admission of Azim Jamal Verjee in his Supporting Affidavit, the Plaintiff's recalculations produced as "AJV1" and "AJV2" respectively are compounded and are therefore not applicable. He has contended however, that the recalculation in "AJV3" is on the basis of simple interest and is the one applicable. I have considered his and the contention of the Defendant in respect thereof. To begin with, the calculation begins with the opening balance of Kshs.9,644,472/- as at 4th December, 1998. The first interest of Kshs.1,301,800/- is posted on 31st May, 1999. There is also additional interest posted on 21st July, 1999 and 31st December, 1999. The suit herein was filed two (2) years later on 23rd July, 2001 for Kshs.14,982,807/= as at 31st October, 2000. There was a specific prayer for interest at 24% on the said Kshs.14,982,807/= from the said 31st October, 2000 till payment in full.
9. From the foregoing, it is clear that the calculation in "AJV3" was erroneous in so far as it commenced on the 4th December, 1998 with an opening balance of Kshs.9,644,472/= instead of 31st October, 2000 with an opening balance of Kshs.14,982,807/=. Further, whilst the statement of

claim prayed for Kshs.14,982,807/= at 24% per annum from 31st October, 2000, that report shows that the amount due as at 31st October, 2000 was Kshs.12,721,380/- which is completely at variant with the Judgment of the court .

10. The other reason why the recalculation of interest in “AJV2” cannot be correct is that the opening balances include the accumulated interest. In so doing, what we ended having as interest was compound interest instead of the simple interest ordered on 11th November, 2011. In this regard, I reject the figures presented by the Plaintiff in “AJV3”.
11. As regards the calculations presented by the Defendant, they both begin with an opening balance of Kshs.14,982,807/- as at 31st October, 2000 as per the judgment. They have only applied interest on the principal sum as required. In my view, they have applied the correct formulae unlike the Plaintiff.
12. In this regard however, I am unable to hold that the final figures applied or arrived at by the Defendant are the correct ones. This is so because, the amount shown in the calculations as already paid to the Plaintiff amount to Kshs.33,992,108/20 whilst the plaintiff only admits Kshs.32,992,108/= as the amount already paid. This arises out of the following:-
 - a. the defendant has taken the dates when it issued the cheques to be the date of payment yet the Plaintiff has shown as the date of payment to be completely different sometimes a month later. For the purposes of this case, the date of payment is the date when the Plaintiff received the cheque. If the date is not known, it should be deemed to be seven (7) days from the date when the cheque was posted, whichever is earlier.
 - b. there are some payments reflected in the Defendants calculations that are missing from the Plaintiffs. In this regard, the figures produced cannot be held to be conclusive.

1. From the foregoing, I am in agreement with the formulae applied by the Defendant in their calculation. Accordingly, in terms of order No.2 of the order of 11th November, 2011, I refer the issue of the calculation of the interest due to the Deputy Registrar of this Court on the following terms:-

- a. Within 21 days of the date of this ruling
 - i. The parties are to agree and reconcile the total amount paid to date to the Plaintiff in view of the difference of Kshs.1million apparent in their calculations
 - ii. The parties are to agree on the date such payments were made applying the direction contained in paragraph 16(a) hereinabove.
- a. In default of the parties agreeing as directed in (a) above, they are to file their respective Affidavits before the Deputy Registrar within 7 days of such disagreement for his/her decision on the issues in (a) (i) and (ii) above.
- b. Upon settling the amount paid and the dates of such payment, the Deputy Registrar to calculate the rate of interest due on the decree on simple interest using the formulae applied by the Defendant in their recalculations above.

It is so ordered.

DATED and SIGNED at BUNGOMA this day 21st of February, 2014.

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A. MABEYA

JUDGE

DELIVERED and SIGNED at NAIROBI this ...5thday of....March.....2014.

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J.B. HAVELOCK

JUDGE