REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 5281 OF 1991

MUSICRAFT MANUFACTURE (K) LTD.....PLAINTIFF

VERSUS

DOUGHTY LTD.....DEFENDANT

RULING

The plaintiff's motor vehicle was involved in an accident whilst in custody of the defendant, as the repairers. The plaintiff demanded special damages.

A similar claim filed in Court by the plaintiff's advocate on behalf of another person against the defendant was pending in Court. The defendant's advocate suggested to await the outcome of the pending case, before filing a suit, in order to save second set of costs. The plaintiff's advocates agreed to the same provided the period of limitation was not pleaded.

Judgment in the pending suit was given against the defendant, who filed a notice of appeal but did not, apparently, prosecute the appeal.

All the above and other incidental matters emerge from the affidavit of Mr Oyatsi, the plaintiff's counsel and correspondance annexed to such affidavit in support of the originating summons filed on 2nd October, 1991 to enforce the compromise as above and to enter judgment in the sum of Shs 211,020/= plus costs and interest from 14th May, 1984, being the date on which the plaintiff accepted the compromise.

The defendant paid the sum of Shs 211,020/= on 6th November, 1991 and does not dispute the plaintiff's entitlement to costs as taxed by the Court. The only dispute is whether any interest is payable and if so, whether it should be calculated from 14th May, 1984, being the date of compromise or 2nd October, 1991, being the date of filing in Court of the originating summons. The parties also wish the Court to determine whether costs should be taxed on the sum of Shs 211,020/= or on that sum plus any interest that may be awarded.

The source to found award of interest on decree for payment of money is s 26 (1) of the Civil Procedure Act.

> "Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest on such a 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 as such principal sum for any period before the institution of the suit, with further interest at such a rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date as the Court thinks fit."

The above section is identical with the Indian section 34 of the Code of Civil Procedure, which was in force prior to the alteration by the amending Indian Act of 1956. It may therefore be useful to look at *Mulla's Code of Civil Procedure*. I have before me photocopies of two editions of *Mulla*. One furnished to me by Mr Oyatsi does not provide the date of edition but it contains the section identical to our section, whilst that provided by Mr Fraser is 13th Ed incorporating the alteration by amending Act of 1956. It would therefore be prudent to look at the edition provided by Mr Oyatsi for guidance. This is at pp 144 to 147.

The commentary provides that interest that may be awarded to a plaintiff in a suit for money may be divided into three heads or stages, according to the period for which it is allowed namely-

> "(1) Interest accrued due prior to the institution of the suit on the principal sum adjudged (as distinguished from principal sum claimed),
>
> (2) Additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, 'at such a rate as the Court deems reasonable'
>
> (3) Further interest on the aggregate sum adjudged, ie the principal plus interest, from the date of the decree (i) to the date of payment or (ii) to such earlier date as the Court thinks fit 'at such a rate as the Court deems reasonable.'"

The crux of the dispute between the parties is not so much to the award of interest from the date of suit because the defendant having paid the principal amount on 6th November, 1991, about 35 to 36 days after the suit was filed on 2nd October, 1991 but to award of interest prior to the institution of the suit, namely from 14th May, 1984 to the date of filing suit, a period of 7 years. If such award is made in favour of the plaintiff, it may not only increase on the aggregate amount but also further add to the costs. The Court will, therefore, address primarily to award of interest prior to the date of the suit.

Mulla's commentary suggests that interest up to date of suit is a matter of substantive law. Interest antecedent to the suit is not a matter of procedure. It would seem from the above that the section with regard to interest in the Civil Procedure Act does not refer to discretion to award interest antecedent to the suit. This seems so by the reading of the words, "in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit." This would seem to suggest that antecedent interest is subject of adjudication and not discretion. Be that as it may, the Court may obtain useful guidance from *Mulla* at p 145 under the heading "Interest prior to the date of the suit" It says-

> "The law of the subject may be considered under the following two heads:

(1) Where there is a stipulation for the payment of interest at a fixed rate.

> 2. Where there is no stipulation at all for the payment of interest."

In the instant case there is no stipulation for payment of interest at a fixed rate and therefore Court must consider the law where there is no stipulation at all for the payment of interest. In such cases, the plaintiff is not entitled to interest except in the following cases:-

> (i) Mercantile usage- but such usage must be pleaded and proved. This does not apply to the case under consideration.
>
> (ii) Statutory right to interest. In the instant case, no such right is conferred by statute.
>
> (iii) Implied agreement- where an agreement to pay interest can be implied from the course of dealing between the parties.

The Indian case of *Bengal Nagpur Railway Co vs Rattaji Ramji*, 6 S I A 66 (1938) 2 Cal 73 deals with cases in which Courts of Equity allow interest. However, *Nagpur Railway* has followed the dictum of

House of Lords in *London, Chatham and Dover Railway Company vs South Eastern Railway Co* [1893] AC 429 that interest cannot be given by way of damages for detention of a debt.

Mr Oyatsi for the plaintiff argues that the present case is covered by (iii) above, namely, 'implied agreement', which he says may be implied from the course of dealings between the parties. Mr Oyatsi says that it is implied in the compromise that the defendant would be liable to pay to the plaintiff, its claim, as if the plaintiff had filed its claim, on the date of compromise, namely 14th May, 1984. With respect, there is no such implication which may be derived from the reading of the correspondence between the parties culminating in the acceptance on 14th May, 1984 by the plaintiff to await the pending suit filed in Court. The mere fact that another suit is pending in Court is not tantamount to plaintiff having filed its claim on 14th May 1984.

Mr Oyatsi has drawn my attention to the precedent in *Bullen and Leake*. Unfortunately, the 'edition' of the publication is not furnished to the Court. Be that as it may, the commentary, at p 445 with regard to right of action on 'forbearance and compromise' does not say anything with regard to antecedent interest. It merely re-iterates that " forbearance to commence or prosecute an action for a *bona fide* claim is a sufficient consideration for a promise." Moreover in the precedent for "claim to enforce compromise agreement" No 225 at p 446 the prayer does not seek antecedent interest. The fact that the cause of action being compromise as in present suit is entirely different from the cause of action, had the plaintiff filed a suit for breach of contract to repair a motor vehicle, does not *ipso facto* entitle the plaintiff to antecedent interest. I do not accept that forbearance to sue implies that plaintiff is entitled to interest from the date of compromise.

My attention has been drawn to the decision in the House of Lords in *Hunt vs BP Exploration Co (Libya) Ltd* cited at p 279 of Commonwealth Law Report (1980-84) and delivered on 4th February, 1984. In that case, the House of Lords (leading judgment of Lord Brandon of Oakbrook) upheld the award of interest by Robert Golf J because it was a proper exercise of discretion under s 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934 because the words "any debt or damages" were very wide and covered any sum of money recoverable by one party against the other and the trial Judge was entitled to award any interest as from any date after the respondents cause of action arose. It is to be noted that this is an award of interest in pursuance of the statutory provision of s 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934 which reads-

> "In any proceedings in any Court of record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum of which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole of or any part of the period between the date when the cause of action arose and the date of judgment."

No such express provision is obtainable in Kenya. In any event one must not lose sight of the fact that the English cases are merely persuasive authority in Kenya.

In related cases over two years later, delivered on 24th May 1984, the House of Lords (leading judgment of the same Lord Brandon of Oakbrook) in *President of India vs La Pintada Compania Navigacion SA* (1985) 1 AC 104 reversed the confirmation of award of umpire of interest by Staughton J by holding that

> "Umpire had no power to award interest on sums due in respect of freight and demurrage where payments had been made late either under the Common Law or, at the time of award, under of s 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934."

In the *Pintada* case above, the issue was more or less the same, namely payment of interest on debt paid late. However, *Pintada* case may be distinguished from *Hunt's* case *supra* in that the statutory provisions of s 3(1) of 1934 Act gave discretion to the trial Judge, no such power was conferred on the umpire. Be that as it may, several important observations were made in *Pintada* case and it may not be out of place to set them down here.

At p 105 is the following holding of Lord Scarman and Lord Roskill-

> "The present state of law in relation to cases where a debt is paid late but before any proceedings for its recovery have begun places the small creditor at grave disadvantages *vis-a-vis* the substantial and influential debtor and it is to be hoped that a solution will be found promptly and the remaining injustice in this branch of the law finally removed."

Whilst not saying that the present plaintiff is a small creditor at grave disadvantage *vis-a- vis* the defendant who may or may not be a substantial and influential creditor because the compromise was made in the contemplation that payment of the debt would be delayed, yet it would seem that, considering the various rapid changes of the commercial transaction in the fast communications globe, a review of section 26 of the Civil Procedure Act may bring about desirable solution to reflect the needs of the present time.

Of course, *London, Chatham and Dower Railway Company vs South Eastern Railway Co (ibid)* which was affirmed by *Pintada*, refused to award interests probably on the ground that interest was generally presumed to be within the contemplation of the parties, the *obiter dicta* of Denning LJ in *Trans Trust SPRL vs Danubian Trading Co Ltd* (1952) 2 QB 297 may be noted –

> "When the circumstances are such that there is a special loss foreseeable at the time of contract as the consequence of non payment, then I think such loss may be well recoverable."

In affirming *London, Chatham & Dover* case, Lord Brandon of Oakbrook observed in *Pintada* case that –

> "I think that we ought not to depart from the long established rule that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. "

Mr Oyatsi has cited a paragraph 355 in *Halsbury's* 4th Edition p 229 to amplify why implied term in the compromise should be presumed. The paragraph reads-

> "Giving efficacy to contract: An implied warranty, or as it has been called, a covenant in law, as distinguished from an express contract or express warranty, is really founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, it draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side; and in all the cases of implied warranties or covenants of law, it will be found that the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that it should have. In business transactions, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties as businessmen; that is not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party in law as much, at all events, as it must have been at the contemplation of both parties that he should be responsible for in respect of those perils or chances."

Elaborating on the application of rules with regard to giving efficacy to contracts, Mr Oyatsi urged the Court to determine in that the contract of compromise dated 14th May, 1984, there was an implied term of payment of interest. It is his contention that as at May 1984, certain statutory rights of interests as provided by s 26 of Civil Procedure Act had crystallized. With respect, nothing of that sort materialized because award of interest is a matter of discretion and not of right. Of course, if the plaintiff had filed a suit as at 14th May, 1984, then by reason of s 26 of Civil Procedure Act, Court could "order interests at such rate as it deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree" but it must be made clear that by then, the plaintiff had not filed a suit. The plaintiff had a cause of action on that date either on the original cause of action or on the contract of compromise.

To ask Court to accept that as at 14th May 1984 the parties were saying to each other with regard to payment of interest, that, "of course, interest be paid. It is too clear" is stretching a point beyond what the above passage sets out. As at 14th May 1984, the parties had agreed that pending the outcome of the other suit, plaintiff would not file a suit to save second set of costs. The second set of costs would have cut both ways. If the judgment had been in favour of the defendant, plaintiff would have saved costs. It so happens, that the other plaintiff won the suit and the consequence is that the defendant had saved second set of suits. Be that as it may, as at 14th May 1984, it was within contemplation of both parties that the payment of the amount of special damages would not plead period of limitation. I cannot read in that correspondence culminating on 14th May 1984 of acceptance by plaintiff to await the outcome of the other case, any presumed intention or contemplation of either party that interest will be payable by the defendant to the plaintiffs from that date until payment.

The present proceedings were commenced by way of originating summons in pursuance of order XXXVI r 7 of the Civil Procedure Rules, and such originating summons is required to be in Form 13 or 13A of Appendix B. It would seem the various questions under o XXXVI to be determined would be in the nature of orders as shown by the format of Form 13 or 13A. Mr Fraser for the defendant has pointed out that such orders are not decrees on the basis of *obiter* in *Gurdial Singh Dhillon vs Sham Kaur and others* (1960) EACA 795 Sir Alastair Forbes VP observed at p796 that –

> "It may be noted that the description of the grounds for the learned judges decision as a 'judgment' is incorrect. It is common ground that the common adjudication upon an originating summons under order XXXVI of the Civil Procedure Rules is an 'order' and not a 'decree'."

This being so, s 26 of the Civil Procedure Act may not apply to the present proceedings because power to award interest thereunder relates to "where and in so far as a decree is for payment of money." It may seem that the omission of the words 'or order' after decree may have been inadvertent. It is not so, looking at subsequent section 27 and 28. S 27 which deals with costs, relates to "the costs of and incident to all suits" which would of course include judgment, decree, decision or an order. S 28 dealing with execution includes reference to decree to apply to orders. It reads-

> "The provisions of this Act relating to the execution of decrees shall, so far as they are applicable be deemed to apply to the execution of orders."

There can be no doubt that the omission to include 'order' in s 26 with regard to award of interest was designed and deliberate. I must uphold the submission of Mr Fraser that s 26 of the Civil Procedure empowering Court to award interest on decree for payment cannot and does not apply to orders made under originating summons.

There being no express or implied agreement for payment of interest nor statutory provision for award of interest on delayed payment, I rule that plaintiff is not entitled to any interest and no interest is payable by the defendant.

There being no dispute that the plaintiff is entitled to payment of the principal sum of Shs 211,020/= and costs thereon, I make order for such payment. The principal sum having been paid, the plaintiff shall have costs of the originating summons.

The plaintiff having failed on the issue of payment of interest, the defendant shall have costs of hearing of arguments with regard to such issue.

Dated and delivered at Nairobi this 3rd day of September 1992

F.E ABDULLAH

JUDGE