IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Masime JA, Gicheru & Kwach Ag JJA)

CIVIL APPEAL NO 57 OF 1985

BETWEEN

NEW TYRES ENTERPRISES LIMITED..... APPELLANT

AND

KENYA ALLIANCE INSURANCE

COMPANY LIMITED..... RESPONDENT

(Appeal from the High Court at Nairobi, Gachuhi J)

JUDGMENT

November 7, 1988, **Kwach Ag JA** delivered the following Judgment.

New Tyres Enterprises Limited (hereinafter called "the appellant") sued The Kenya Alliance Insurance Company Limited (hereinafter called "the respondent") in the High Court of Kenya at Nairobi to recover Kshs 781,219 together with interest and costs.

The appellant carries on the business of tyre distributors in certain premises on plots Nos 209/136/29 and 209/136/154, Kirinyaga Road, Nairobi. The respondent is a well known insurance company. By a policy of insurance issued on September 6, 1978, the respondent agreed to insure the appellant against loss by theft upon actual forcible and violent entry into the premises of tyres, tubes and other items subject to a maximum limit of Kshs 1,840,000. On December 21, 1982 the premises were broken into and tyres and tubes to the value of Kshs 781,219 were stolen and the appellant notified the respondent of the loss and asked to be indemnified by the respondent. The respondent them instructed his Toplis & Harding, a Nairobi based firm of loss adjusters, to visit the appellant's premises to investigate the circumstances of the burglary and to determine the extent of the actual loss sustained by the appellant. This assignment was undertaken by Mr N J Woodgates who was a consultant with Toplis & Harding. After inspecting the premises he submitted a written report to the respondent dated January 7, 1983 in which he adjusted the claim to Kshs 781,219 but he also said that the appellant had made a material misrepresentation of fact at the time the policy was being issued in that the appellant had concealed or failed to disclose the fact that there had been a previous burglary on the premises. According to him, there was evidence of previous forcible entry on one of the walls which had since been repaired. On this basis he took the view that the appellant had not given a full and frank disclosure in its responses to the questions asked in the proposal form and the respondent was accordingly entitled to repudiate the claim.

On completion of his inspection Mr Woodgates made the appellant to sign some form of

acknowledgement on the letter head of Toplis and Harding Kenya Limited which read as follows:

> "Subject to the directors of the Kenya Aliance Company Limited admitting liability we hereby offer to accept the sum of Kshs 781,219 in full settlement and discharge of claims for burglary under policy No 08/B 01337 and which occurred on the 21st/ 22nd day of December 982 and we declare that there is no other insurance covering the same property. Signed (Sales Manager)"

This document is undated but there is at the bottom of it the respondent's stamp showing that it was received by the respondent on January 13, 1983. More about this document later.

As it turned out, the respondent repudiated the claim and the appellant was obliged to file proceedings. In the original plaint the claim was for Kshs 909,608.50, which was subsequently amended right at the conclusion of evidence to Kshs 781,219. The amendment also affected prayer (c) in respect of interest under which the appellant now claimed interest on the decretal amount (principal and costs) from February 4, 1983 being the date of repudiation of liability up to the date of payment at the rate of 12% pa.

The bottom line of the defence filed on behalf of the respondent was that the appellant failed in its duty of *uberrima fides* and was consequently not entitled to be indemnified for the loss under the policy.

The case came before Gachuhi J, (as he then was) who found on the evidence before him that the allegation by the respondent that there had been a previous burglary had not been proved and gave judgment for the appellant for the amount claimed together with interest and costs. He awarded interest on the principal sum at the rate of 12% pa from the date of filing suit, and on costs at the same rate from the date of taxation, until payment in full.

The Court was informed from the bar that the full amount payable under the decree has been paid. The appellant now appeals to this Court on the following grounds:-

> *(1) "The learned judge erred in awarding the appellant interest at the rate of 12% pa on the principal sum of Kshs 781,219 only from January 20, 1984 being the date of filing of the action and not from February 4, 1983 being the date of repudiation of liability.*
>
> *(2) The learned judge erred in awarding the appellant interest at the Court rate of 12% pa on costs only from the date of taxation and not from the date of filing of the action."*

At the commencement of this appeal, Mr Omesh Kapila, learned counsel for the appellant, very wisely abandoned the second ground of appeal and made submissions only in relation to the first ground. He submitted that the defence raised by the respondent was a sham and was only put forward to buy time and delay the appellant's claim. If the defence was a sham as Mr Kapila now contends, he had the clear option of moving to strike it out or applying for summary judgment none of which he did. A defence which fails is not necessarily frivolous or bogus. In this particular case it would appear that the witnesses upon whom the respondent could have relied to sustain the allegation had second thoughts.

Mr Kapila submitted further that interest should have been awarded from February 4, 1983 because that was the date on which liability was repudiated. This submission is based on the belief that document signed by the appellant at the request of Mr Woodgates and to which I have already made reference was a legal discharge. One only needs to read the document to appreciate that it could not possibly be a discharge. It was subject to the directors of The Kenya Alliance Insurance Company Limited admitting liability which plainly means no liability had been admitted at that stage. In the event the respondent denied liability and the only evidential value of that document was the extent of the damage. In my judgment therefore that document was not a legal discharge and there was no admission of liability on the part of the respondent at any time.

The power to award interest generally is given to the Court by section 26(1) of the Civil Procedure Act (cap 21) which reads:

> "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."

It is evident from the reading of this provision that the Court enjoys a wide measure of discretion on the question of interest. And being an appeal against a trial judge's exercise of his discretion this Court is enjoined to treat the original decision with the utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong.

The award of interest for any period prior to the filing of the suit is a matter of substantive law; see *Gulamhussein v French Somali-land Shipping Company Limited* [1959] EA 25. 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: (see *Kimani v Attorney General* [1969] EA 502.

In the present case the liability of the respondent to pay for the appellant's loss was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge's order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion.

In the upshot this appeal fails and is dismissed with costs.

Masime JA. The facts of the case from which this appeal arises are clearly set out in the judgment of Kwach Ag JA which I have read in draft. The only ground argued in this appeal is an objection to the learned trial judge's exercise of discretion in awarding interest on the decretal amount.

I agree with Kwach Ag JA that there is no reason disclosed for this Court to interfere with the learned trial judge's exercise of discretion.

Consequently this appeal should be dismissed with costs. As Gicheru Ag JA agrees it is so ordered.

Gicheru Ag JA. I have read in draft the judgments of Masime JA and Kwach Ag JA and I agree that this appeal should be dismissed with costs to the respondent.

Dated and delivered at Narobi this 7th day of November , 1988

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR