



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 44 OF 2015

NIC BANK LTD.....APPELLANT

AND

TAUSI ASSURANCE CO. LTD.....RESPONDENT

*(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Havelock, J.) dated 29<sup>th</sup> May 2014*

in

**HCCC NO. 458 OF 2008)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

In this interlocutory appeal, the question presented for resolution by the Court is whether the High Court (*Havelock, J.*) erred when he entered judgment on admission against the appellant for **Kshs 31,564,672.99** together with interest at court rate from the date of filing the suit. The appellant argues that the exercise of discretion was wrongful and that the learned judge also erred by awarding interest in the terms he did, while the respondent had not prayed for interest in the application for judgment on admission. The respondent, on the other hand, does not agree with the appellant and contends that the learned judge properly exercised his discretion, because the appellant admitted expressly and unequivocally in its witness statements the respondent's claim to the tune of the sums in respect of which the learned judge entered judgment.

The appeal arises from a bank-client relationship between the parties. By a plaint dated 12<sup>th</sup> August 2008, **the respondent, Tausi Assurance Co. Ltd.** commenced action for breach of contract against **the appellant, NIC Bank Ltd.** and prayed for judgment for Kshs 37, 991,307.35; interest at court rates from the date of filing suit; compound interest at 30% per annum with effect from 27<sup>th</sup> November 2007; general damages; and costs. The respondent pleaded that on 24<sup>th</sup> November 2006, it entered into a written deposit contract with the appellant pursuant to which it placed the sum of Kshs 35 million in a fixed deposit with the appellant for a period of 367 days, at the rate of interest of 8.5% per annum. The maturity date was 26<sup>th</sup> November 2007 by which date the accrued interest was Kshs 2,991,301.37, making the respondent's total entitlement to Kshs 37,991,301.37. In breach of the contract, the respondent averred, the appellant failed or refused to pay the said sum, occasioning it loss and damage.

The appellant filed its defence on 7<sup>th</sup> October 2008 and admitted the fixed deposit contract, but averred that it was a built in security deposit or guarantee for Kshs 35 million in consideration of the appellant extending hire purchase, banking facilities, and insurance premium financing to the respondent or its agents and brokers. Any outstanding liabilities, the appellant averred, were to be offset and liquidated against the fixed deposit.

As of the date of maturity of the deposit, the appellant further pleaded, the respondent owed it, on the account of 16 agents and brokers, a total of **Kshs 42, 612, 395.04** which it was entitled to set off against the respondent's fixed deposit. Of that amount Kshs 9,139,726 was owed on account of **Crownscope Insurance Brokers Ltd**. Accordingly the appellant denied owing the respondent the sum of Kshs 37,991,301.37 or at all. In paragraph 8 of the plaint the appellant alleged fraud against the respondent, the particulars of which were pleaded, in the main pertaining to the demand by the respondent for payment of the proceeds of the fixed deposit well aware that the same was a conditional and an in-built guarantee for due performance of the respondent's obligations.

The respondent delivered its reply to defence on 14<sup>th</sup> October 2008, after which the parties filed their respective witness statements. One of the witness statements on behalf of the appellant was by its **Manager-Legal, Mr. Henry Maina** and was dated 5<sup>th</sup> December 2012. In the respondent's view, that statement constituted an admission of the bulk of the respondent's claim. Consequently, by a Motion on Notice dated 14<sup>th</sup> October 2013, the respondent applied for judgment on admission in the sum of Kshs 31,564,672.99 and for an order that the suit do proceed for trial in respect of the balance of its claim against the appellant.

The appellant resisted the application by a replying affidavit sworn by the same Henry Maina in which he reiterated the averments in the defence and the witness statement. He however contended that the respondent's application should not be granted because the amounts in respect of which the respondent was seeking judgment on admission were never an issue in the suit, and that the suit ought to be heard on merit to determine the real issue in dispute.

Havelock, J. heard the application, allowed the same and entered judgment for the respondent for Kshs 31,564,672.99 as prayed with interest at court rates from the date of filing the suit. As for the balance of Kshs 9,139,726, which the appellant claimed to have set off, the learned judge directed that it be determined at the hearing of the suit. The appellant was aggrieved by the ruling and preferred this appeal.

It is apt to point out that pending the hearing of the appeal, the appellant obtained a conditional stay of execution from this Court on 25<sup>th</sup> November 2014 in **Civil Application No. Nai. 20 of 2014**, which required it to pay to the respondent within 14 days Kshs 31,564,672.99, but at the interest rate of 8.5% per annum from 27<sup>th</sup> November 2007. The actual rate of interest was ordered to be determined in this appeal. **Mr. Sehmi**, learned counsel for the respondent, stated, which is not disputed by the appellant, that on 9<sup>th</sup> December 2014 the appellant paid to the respondent Kshs 50,419,160 being the Kshs 31,564,672.99 plus interest at 8.5% per annum.

By consent of the parties, the appeal was heard through written submissions with the appellant filing its submissions on 28<sup>th</sup> September 2016 and the respondent on 26<sup>th</sup> October 2016. Both parties invited us to render our judgment on the basis of the record, the written submissions and their respective lists of authorities.

Although the appellant impugns the ruling of the High Court on seven grounds of appeal, they all boil down to two issues, namely whether the learned judge erred by entering judgment on admission and by awarding interest at court rates from the date of the filing of the suit. Prosecuting the appeal, the appellant submitted that the learned judge erred by entering judgment on admission under **Order 13 Rule 2** of the Civil Procedure Rules because the admission relied upon was far from clear and unequivocal. The judgment of this Court in **Cassam v. Sachania [1982] KLR 191** was cited in support of the proposition that the court's power to enter judgment on admission must be exercised sparingly and only in plain and clear cases. It was next urged that the real dispute between the parties, which was not pleaded, was the

correct interpretation of the guarantee in force between the parties, and therefore judgment on admission ought not to have been granted.

Regarding the award of interest, on which the appellant devoted the greater part of its submissions, it was submitted that the learned judge erred because no such remedy was prayed for in the application for judgment on admission. Relying on the judgments of this Court in **Abok James Odera v. John Patrick Machira, CA No. 161 of 1999** and **IEBC & Another v. Stephen Mutinda Mule & 3 Others, CA No. 219 of 2013**, the appellant submitted that responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not raised by the parties. It was also contended that by addressing the issue of interest when it had not been raised, the court had, in violation of the rules of natural justice, denied the appellant an opportunity to be heard on the issue.

The appellant next submitted that the interest rate agreed between the parties was 8.5% per annum or prevailing bank rates and that the respondent did not adduce any evidence to prove the compound interest at the rate of 30% per annum as pleaded in the plaint. By awarding interest at court rates, it was urged, the learned judge had erred by ignoring the 8.5% rate agreed upon by the parties. The judgement of this Court in **Ajay Indravadan Shah v. Guilders International Bank Ltd, CA No. 135 of 2001**, was cited in support of the proposition that where parties have fixed the rate of interest, the court has no discretion in the matter.

In addition the appellant contended that the failure by the learned judge to give reasons for awarding interest at court rates from the date of filing suit, was proof that he had not exercised his discretion, if any judicially. It was also submitted that the discretion to award interest under section 26 of the Civil Procedure Act is available only after a full trial and not when judgment is entered pursuant to an application, like in the present case. In the appellant's view, since the High Court directed part of the claim be determined after full hearing, the question of interest should have awaited determination at the full hearing.

The respondent opposed the appeal, defending both the judgment on admission and the award of interest. It was submitted that the appellant, having duly paid the principal sum and interest, the appeal was academic, and if it was not, the real question is the correct rate of interest, namely the difference between 8.5% per annum and 12% per annum (court rates).

Nevertheless the respondent submitted that the judgment on admission was properly entered because the appellant, through its Manager Legal had made express and unequivocal admission in his witness statement that the respondent was entitled to payment of Kshs 31,564,672.99.

On whether the learned judge should have awarded the respondent interest and at court rates, the respondent submitted that it had prayed for interest in the plaint and that the contractual rate of interest of 8.5% was applicable only up to 26<sup>th</sup> November 2007, the maturity date of the fixed deposit. The respondent contended that it made demand to the appellant for payment of the principal sum and the accrued interest on 26<sup>th</sup> November 2007 but the appellant unlawfully refused or failed to pay the amount to the respondent. In the respondent's view, the continued holding of the money by the appellant after the date of maturity was illegal and the appellant was not entitled to apply the 8.5% per annum rate of interest after the maturity date.

Relying on section 26 of the Civil Procedure Act, the judgment of this Court in **Kenindia Assurance Co Ltd v Alpha Knits Ltd & Another, CA. No 330 of 2001** and the ruling of the High Court in **Autolog (K) Ltd v. Navisat Telematics (K) Ltd, HCCC No. 259 of 2012**, the respondent submitted that award of interest and the rate thereof is in the discretion of the court. It was submitted that the exercise of discretion by the High Court was proper and that we should not interfere with it because the appellant had deliberately deprived the respondent the use of the money and was ostensibly trading with it.

We have carefully considered the record of appeal, the ruling by the learned judge, the memorandum of appeal, the parties' respective submissions and lists of authorities, and the law. From the outset we must remind ourselves that judgment on admission entails exercise of judicial discretion. In **Choitram v. Nazari**

[1984] KLR 327, *Chesoni, Ag. JA*, (as he then was), stated as follows on the nature of the court's power to enter judgment on admission:

***“The rule empowers the court to make such order, or give such judgment, as it (court) may think just. It is settled that a judgment on admissions is in the discretion of the court and not a matter of right...The court's discretion in the matter is unfettered, but as it was said in *Kiprotich v Gathua & Others (supra)* at p. 92 that discretion must be exercised judicially.”***

That being the case, this Court will be slow to interfere with exercise of discretion by the trial court unless it is satisfied that it misdirected itself in some matter and as a result arrived at a wrong conclusion or it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and as a result there was misjustice. (See *Mbogo & Another v. Shah [1968] EA 93*).

The principles that guide the court in an application for judgment on admission are well settled. *Madan JA* stated them as follows in *Choitram v. Nazari (supra)*:

***“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...”***

(See also *Cassam v. Sachania (supra)*, *Agricultural Finance Corporation v. Kenya National Assurance Co Ltd*, CA No 271 of 1996, and *Harit Sheth v. Shamas Charania*, CA No. 252 of 2008).

Was the admission relied upon in this case plain, obvious and unequivocal? To answer that question, it is necessary to set out verbatim, the germane paragraphs of Mr. Maina's witness statement:

***“20. All the 15 out of 16 outstanding accounts guaranteed by the plaintiff (the respondent) and detailed above were however subsequently settled between January and August 2008. The Crownscope Insurance Brokers Ltd facility in the sum of Kshs 9,139,726 was however not settled by the plaintiff***

***21. On or about 25<sup>th</sup> September 2008 the defendant (the appellant) in line with the guarantee and letter of set off dated 2<sup>nd</sup> January 2004 set off the sum of Kshs 9,139,726 from the plaintiff's deposit facility which had accumulated interest gain to a total of Kshs 40,674,398.99 leaving a balance of Kshs 31, 564,672.99.***

***22. The defendant has always been willing to pay the plaintiff this balance. But the plaintiff has failed, refused and/or neglected to accept the same...***

***23. I have seen the relief sought by the plaintiff in the plaint. I believe that the plaintiff is only entitled to the sum of Kshs 40,674,398.99 less the sum of Kshs 9,139,726 owing from the plaintiff to the defendant on account of refundable premium and which sum has already been set off by the defendant.*** (Emphasis added).

In our view, if there ever was a plain, obvious and unequivocal admission of a claim, this is it. The appellant mischievously avoids the central issue, namely whether the above paragraphs constitutes a clear admission of the respondent's claim, by recourse to sophistry. It submits that the real dispute between the parties is the correct interpretation of the guarantee, but confounds the matter by readily admitting that such issue has not been pleaded by any of the parties. So how is it to be determined if it is not before the court? Even if we were to agree for a moment that there is an issue of interpretation of the guarantee, how does that avail the appellant a defence to the respondent's claim for Kshs. 31,564,672.99, which Mr. Maina readily admits in paragraph 20 of his statement, was duly settled by the respondent's brokers and agents between January and August 2008? We are fully satisfied that the learned judge, in entering

judgment on admission for Kshs 31,564,672.99, exercised his discretion judicially and there is no basis for interfering with the exercise of that discretion.

On the question of interest, the issue was expressly pleaded in the plaint where the respondent prayed for compound interest at 30% per annum for loss of user of the sum of Kshs 37,991,307.35 from 27<sup>th</sup> November 2007 until payment in full and interest on the said amount at court rates from the date of filing the suit until payment in full. On page 8 of its written submissions in the High Court, the respondent urged the court to grant “**consequential orders in terms of interest and costs**”, together with the judgment on admission. Those submissions were filed on 17<sup>th</sup> March 2014 and the appellant was fully aware of what the respondent was claiming when it filed its submissions in reply on 23<sup>rd</sup> April 2014. In these circumstances it cannot fall from the mouth of the appellant to claim that the learned judge erred by determining unpleaded issues and by violating the rules of natural justice. The question of interest was also closely intertwined with the sum claimed in the application for judgment on admission and was live throughout the proceedings. We do not see any basis for faulting the learned judge.

We are also not persuaded by the appellant’s submission that interest cannot be awarded on judgment on admission. Beyond the fact that no authority was cited in support of such a radical proposition, the terms of Order 13 rule 2 as read with section 26 of the Civil Procedure Act strongly suggest that the court indeed has discretion to award interest even in judgement on admission.

Lastly, on whether the learned judge should have awarded interest at court rates, and from the date of filing suit, again what is in issue is exercise of discretion by the learned judge, regarding which we shall not readily interfere unless we are satisfied that the preconditions in ***Mbogo & Another v. Shah (supra)*** have been met. We agree with the respondent that the agreed 8.5% per annum rate of interest was for the duration of the fixed deposit, which was up to 26<sup>th</sup> November 2007. After maturity and the respondent’s call for the principal sum and accrued interest, which the appellant did not heed, there was no agreed rate of interest between the parties. Accordingly decision in ***Ajay Indravadan Shah v. Guilders International Bank Ltd (supra)*** to the effect that where parties have agreed on the rate of interest the court has no discretion in the matter has no application in the circumstances of this case.

The justification for award of interest was stated as follows in ***Lata v. Mbiyu [1965] EA 592***:

***“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 a 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.”***

The trial court did not award the compound interest of 30% per annum that the respondent had prayed for because no basis for such award was established. Also the court did not award any interest antecedent to the suit as prayed by the respondent, although it could validly have done so. (See ***Mumias Sugar Co. Ltd v. Nalinkumar M Shah, CA No 21 of 2011***). It only awarded interest at court rates for the admitted sum from the date of filing suit until payment in full. Under section 26 of the Civil Procedure Act, the court has discretion to award such interest. That section provides as follows:

***“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.”***

Commenting on the above provision in ***Omega Enterprises Ltd v. Eldoret Sirikwa Hotel Ltd & Others, CA No. 235 of 2001***, this Court stated that:

***“The question of interest as regards the date from which it should be paid, the rates thereof as well as whether the same should be on compound or simple basis, is essentially a matter for the***

***discretion of the court and unless the discretion is exercised wrongly an appellate court would not interfere with the (decision of the trial court)."***

We shall again advert to the judgment in ***Ajay Indravadan Shah v. Guilders International Bank Ltd (supra)***, which the appellant has relied upon, to demonstrate the reluctance of this Court to interfere with award of interest by the High Court. In that case, the court awarded interest at the rate of 35% per annum with effect from the date of a bank loan until payment in full. The parties themselves had not agreed on that rate of interest. In dismissing an appeal against award of that interest, this Court stated:

***"The only law on the point is section 26 (1) of the CPA, and that section as we pointed out at the beginning leaves the question of the rate of interest to the discretion of the Court. In fixing the rate at 35% per annum, Mr. Commissioner Ransley was clearly exercising his discretion. To be able to interfere with his exercise of discretion, the appellant was bound to demonstrate to us that in coming to his decision, the Commissioner took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account, or that he misapprehended the law applicable, or that he did not correctly appreciate the bearing of some evidence or that the decision itself was plainly wrong. The appellant did not demonstrate to us any of these matters. His complaint appeared to us to be on the issue of how the Commissioner arrived at the figure of 35% per annum. The Commissioner was bound to come up with a figure and even if we ourselves had thought that it was a high figure and would not have awarded it, that alone would not entitle us to substitute the Commissioner's discretion with our own. Some error in principle such as those we have already set out herein had to be shown before we could ever think of interfering with the exercise of discretion."***

Similarly, in refusing to disturb an award of rate of interest of 25% per annum in ***Kenindia Assurance Co. Ltd v. Alpha Knits Ltd & Another (supra)***, the Court (Waki, JA) stated:

***"Lastly Mr. Frazer argued that there was a triable issue on the interest awarded at 25% per annum. In his submissions no interest was payable at all. The question of interest of course lies in the discretion of the Court under section 26(1) of the Civil Procedure Act, chapter 21. With the finding that Alpha Knits was unlawfully deprived of the sum of money which was converted to the use of another person, I see no unreasonableness in awarding interest as pleaded at the rate of 25% per annum. I would not disturb the award by the learned judge of the superior court."***

In this appeal, other than the contention, which we have rejected, that the question of interest was not pleaded and was therefore not before the court, the appellant has not demonstrated how or why the judge erred by awarding interest at court rates. It is not enough to state that the learned judge should not have awarded interest at court rates and from the date of filing suit.

We are satisfied that this appeal is wholly bereft of merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of March 2017

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**