



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & MURGOR, JJ.A.)

CIVIL APPEAL NO. 178 OF 2005

BETWEEN

TOTAL (KENYA) LIMITED

Formally CALTEX OIL (KENYA) LIMITED.....APPLICANT

AND

JANEVAMS LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of High Court of Kenya at Nairobi (Onyango Otieno, J.) dated 4th March 2003)

in

H.C.C.C. No. 3325 of 1994)

JUDGEMENT OF THE COURT

In this appeal the appellant, **Total (Kenya) Ltd** challenges the damages and interest awarded to the respondent, **Janevams Ltd** by the High Court in a suit for breach of a dealership and operators agreement made between the parties on the 10th June 1987.

The brief facts of the case are that the appellant was at all material times a wholesale supplier of petroleum products while the respondent was an operator of a service station, which the appellant had contracted to sell its products. On 1st June 1987, the respondent entered into an agreement with the appellant granting the latter the right and licence to operate one of its service stations. The agreement provided amongst other terms that the appellant would deposit with the respondent Kshs 491,450 refundable with interest upon termination of the contract. In addition the respondent was required to achieve monthly sales targets specified in the agreement.

The respondent was also required to install and maintain such equipment as necessary for the running of the service station. The respondent pleaded that it installed, a wheel balancing machine, tyre changer, a trolley jack, wheel aligner, welding machine, lawn mower, car spraying machine, garage shade, Oxygen

Acetylene Cylinder, metal safe, car repair tools, brooms, hose pipe and forks.

On or about 21st December 1990, the appellant terminated the agreement and gave the respondent one months' notice to vacate the service station. The appellant contended that it terminated the agreement in accordance with the provisions of the dealership agreement after the respondent failed to achieve the sales targets stipulated in the agreement, despite numerous warnings.

Upon termination of the agreement, the respondent filed a suit in the High Court for damages for breach of contract and claimed special damages of Kshs 1,978,225.80 as follows:

1. Debtors comprising:

-Volvo repairs settlement	Kshs.91,613/-
-Garage work in progress as at February 1991	Kshs. 38,000/-
-Uncollected debts	Kshs.104,330/-
-Stores of car accessories sold by the appellant	Kshs. 8000/-
-East African Oxygen Head deposit	Kshs.3,000/-

2. Equipment and accessories comprising:

-Wheel and balancing machine	Kshs. 468,460/
-Tyre Changer	Kshs.225,000/-
-Trolley Jack	Kshs.175,000/-
-Wheel aligner	Kshs.75,000/-
-Welding Machine	Kshs.48,870/-
-Lawn Mower	Kshs.48,000/-
-Car spraying machine	Kshs.31,255/-
-Garage shade	Kshs.35,000/-
-Oxygen acetylene cylinder	Kshs.22,707/-
-B.M.W. two doors	Kshs.20,000/-

3. Accessorie

-Fixed metal safe	Kshs. 8,000/-
-Car repair tools	Kshs5,000/-
-Complete assembly of rare left light	Kshs.3,500
-Two forks and three brooms	Kshs. 860/-

-Hose pipe

Kshs 800/-

At the hearing of the suit, five witnesses testified on behalf of the respondent while the appellant did not call any witnesses. In a judgment delivered on 4th March 2003, Onyango Otieno, J. (as he then was) found that the appellant had unlawfully terminated the agreement. On the respondent's claim for the refundable deposit of Kshs.491,450/-, the learned judge found that the same ought to have been refunded to the respondent upon termination of the agreement.

Accordingly he awarded the respondent a total of Kshs.560,530/80 together with interest. With respect to the claim for special damages on the loss of equipment, the learned judge found the same proved on the basis of proforma invoices. Accordingly he awarded Kshs. 468,460/- for the wheel balance, Kshs. 225,000/- for the automatic tyre changer, Kshs. 175,000/- for the trolley jack and Kshs. 75,000/- for the wheel aligner. The claim for the motor vehicle tools and accessories, the value of the Volvo repairs settlement, V.W. or BMW vehicle doors, and the garage shade were found not to be unproven and disallowed. The learned judge equally disallowed the claim of retained motor vehicle accessories and that pertaining to East African Oxygen Head deposit.

On the claim for uncollected debts, particularly the loss on account of motor vehicle overhaul repairs of Kshs.91,613/-, the learned judge was not convinced that the loss could be attributed to the appellant, and therefore rejected the claim, as well as the claim for uncollected debts amounting to Kshs.104,330/- allegedly owed by four of the respondent's debtors.

Finally the learned judge awarded the respondent Kshs. 50,000 as general damages for breach of contract. In summarizing the award the learned judge stated thus:-

“In conclusion, judgment is entered for the Plaintiff against the defendant in the sum of Kshs.1,267,125/- being value of the equipment, plus interest on Kshs. 491,450/- and also for Kshs 50,000 being general damages for breach of contract. Total amount awarded in Kshs. 1,317,125/-. Interest on both awards shall be at court rates from the date the suit was filed”.

Being dissatisfied with the judgment the appellant filed this appeal setting out seven grounds of appeal which the appellant ultimately reduced to five as follows:-

- i. *the decree drawn and certified by the Deputy Registrar dated 4th March 2003 and issued on 19th May 2004, was erroneous in that the trial judge did not award the respondent further interest on the sum of Kshs.491,450/- from 14th September 1994 to 4th March 2003, and that therefore the resultant sum of Kshs.496,674/10 is erroneously included in the decretal sum.*
- ii. *the judgment bore some arithmetical mistakes that ought to have been corrected by the learned judge, in that the sum of Kshs.562,250/- specified, should instead be Kshs.56,250/-.*
- iii. *there was the issue of accrual of interest when the appellant had refused to pay interest earned on the withheld deposit of Kshs.491,450/- then amounting to Kshs.560,530/80 last applied on 30th June – at the rate of 35% per annum.*
- iv. *in the claim for special damages, the respondent was awarded Kshs.706,595/- on the basis of Proforma Invoices which did not amount to specific proof.*
- v. *There can be no award for general damages for breach of contract.*

At the hearing of the appeal, **Mr. Mwaniki Gitau**, learned counsel appeared for the appellant, while **Mrs. P.M. Ndungu**, learned counsel appeared for the respondent. The parties agreed by consent to file written submissions under **rule 103 of the Court of Appeal Rules**, after which the Court would render its judgment. By consent too, ground 1 of the appeal was abandoned.

The appellant submitted that in the decree drawn and certified by the Deputy Registrar on 4th March 2003, and issued on 19th May 2004, was erroneous in that the trial judge did not award the respondent further interest on the sum of Kshs.491,450/- from 14th September 1994 to 4th March 2003, and that therefore the resultant sum of Kshs.496,674/10 was erroneously included in the decretal sum.

Secondly, it was contended that the judgment bore arithmetical mistakes that ought to have been corrected by the learned judge, in that the sum of Kshs.562,250/- should have read Kshs.56,250/-. The appellant cited the case of **Highway Furniture Mart Limited vs The Permanent Secretary Office of the President, Civil Appeal No. 52 of 2005** where this Court held that a decree that does not correspond to the judgment must be set aside.

Thirdly, on the award of interest on the deposit of Kshs. 491,450 at 35% per annum, the appellant submitted that there was no agreement between the parties that the deposit would accrue any interest. Accordingly, it was submitted that the learned judge had erred by compensating the respondent by an award of interest on the deposit for the period refund was delayed. It was further contended that the learned judge had erroneously considered this as loss of business, which it was not.

Next, relying on Section 26 of the Civil Procedure Act, the appellant submitted that there was no basis for the computation of interest at the rate of 35% per annum and that the learned judge had erred by finding that the deposit withheld was Kshs.461,450/-, instead of Kshs.100,000/- with the balance of Kshs.391,459/- representing the cost of petroleum products returned to the appellant.

On the issue of special damages, the appellant submitted that the learned judge had erred by awarding the same on the basis of Proforma invoices which did not amount to specific proof of the special damages as required in law.

Finally, the appellant submitted, on the authority of **Dharanishi vs Karsam (1974) EA 4** that no general damages can be awarded for breach of contract. Relying on **Prem Iata vs Peter M. Mbiyu [1965] EA 593**, the appellant concluded by arguing that interest accrued from the date of judgment and not before that date.

For the respondent, it was submitted that the learned judge had found that the respondent had paid the deposit of Kshs 491,450/- to the appellant, and that at no time was any distinction made in respect of the amount referred to as the deposit. The respondent further submitted that the learned judge was correct in finding that this amount should have been paid to the respondent from the date of termination of the agreement, and that since it was wrongfully withheld by the appellant, it was liable to accrue interest until payment in full.

Regarding grounds 3 and 4 on the rate of interest applicable on the withheld deposit, the respondent submitted that, the learned judge was right to award interest at 35%per annum which was the rate of interest charged by the respondent's bank on an outstanding loan owed by the respondent.

On the award of general damages, the respondent submitted that award of general damages is discretionary and that the learned judge was right to award general damages of Kshs.50,000/- to the respondent having found that the respondent had been unlawfully evicted by the appellant, and that the purposes of awarding general damages was to restore the respondent back into the position it would have been had the breach not occurred.

Regarding the award of interest on the amounts awarded, including the awards for special and general damages, the respondent submitted that this award was well within the learned judge's discretion, and having awarded interest, this Court could not interfere with such award unless it could be shown that the learned judge applied the wrong principles.

This is a first appeal, which takes the nature of a retrial. See **Selle vs Associated Motor Boat Co Ltd [1968] EA, Mariera vs Kenya Bus Service (MBS) Ltd [1987] KLR 440**. Taking into consideration the fact that we have not seen or heard the witnesses, the Court will be slow to interfere with the findings of

fact by the trial court. See ***Peters vs Sunday Post Ltd [1958] EA 474.***

We will begin by addressing the issue of the correction of the arithmetical error concerning the accrued interest on the withheld amount of Kshs. 491,450/-. By consent of the parties the amount of Kshs. 562,250/-, which was erroneously provided for in the judgment as accrued interest, was amended by the learned judge on 11th November 2003, to reflect the correct amount of Kshs 56,250/-. Consequently in determining the question of accrued interest on the withheld deposit, the amount of interest ascertained by the learned judge was Kshs. 56,250/-.

The next issue concerns interest charged on the refund of the deposit of Kshs.491,450/-from the date of termination of the agreement to the date of payment of the deposit in full. In the judgment the learned judge awarded the respondent the amount of Kshs.56,250/-as the interest computed for this period. The total award amount inclusive of interest was Kshs.560,530/80.

It is undisputed that the respondent initially paid a refundable amount to the appellant as deposit. The actual amount paid at the time was not specified. It is also undisputed that the appellant refunded an amount of Kshs.491,450/- to the appellant vide a letter dated 20th June 1994 from the appellant's advocates ***Mbai & Kibuthu Advocates.*** No breakdown of the payment was specified.

From the evidence ***Joseph Matu Muthodu, PW1*** the respondent's Managing Director testified that the appellant's statement specified that of the amount of Kshs. 491,450/-, an amount of Kshs. 100,000/- was retained as the deposit, while Kshs. 391, 450/- was in respect of petroleum products. It is our view that, by the time the agreement was terminated, the sum owed to the respondent was Kshs.491,450/-, and when the sum was refunded, the appellant did not categorize the payment in any way. What is clear is that the entire sum was due to the respondent, and was not refunded until 20th June 1994 to the respondent's detriment.

Did the learned judge err in awarding interest at 35% per annum on the sum of Kshs. 491,450/-? The appellant argues that it was not a part of the agreement that interest was to be earned on the deposit paid by the respondent. It further submits that the learned judge re-wrote the terms of the agreement in that he awarded the amount for the appellant's delay in refunding this sum to the respondent. It is not in dispute that the respondent was evicted from the premises on the 15th February 1991. The respondent stated that the money was eventually paid to it in June 1994, that is three years and four months later. The learned judge expressed himself on this point as follows:

***“The deposit was not refunded on that day neither is there any evidence that it was offered to the plaintiff. PW.1 says the same deposit was paid to the Plaintiff in June 1994, some three years and four months later. In cross-examination, it would appear that the Defendant is claiming that the payment was delayed because there were court cases which were initiated by the Plaintiff. It is however not suggested that this money was ever offered to the Plaintiff and was rejected by the Plaintiff. The Defendant has not availed any evidence or any legal proposition that necessitated this delay in the payment being made. In my mind, as the Defendant has given what it called one month's notice to the Plaintiff of its intention to take over the station, it should have been prepared to refund this deposit on the very day of taking over the station as it knew all along for over a month that it was going to take over the station.*”**

This was money for business. Its delay in being released to the Plaintiff meant loss to the Plaintiff and the only way to compensate that loss is to award interest on it for the period it delayed with the Defendant so that the Plaintiff is reinstated to the position it would have been had the money been paid in time and used for business. The Defendant has not challenged the rate that the Plaintiff alleges was applicable at the relevant time and has in fact not challenged the quantum claimed of KSh.560,530/80. It will be awarded as claimed.”

The power of the court to award interest is derived from section 26 of the Civil Procedure Act. Section 26 (1) provides that:

“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.”

This section was judicially considered in *New Tyres Enterprises v Kenya Alliance Insurance [1988] KLR 380* wherein it was held that:

“the court, under section 26 (1) of the Civil Procedure Act has a wide measure of discretion on the question of interest.”

The award of interest is therefore a matter that is left to the discretion of the trial judge, and generally, an appellate court is enjoined to treat the decision of a trial court with respect, and refrain from interfering with the decision unless it is convinced that the trial judge based the award on some erroneous principal or was plainly wrong.

In the instant appeal, the learned judge awarded the interest at 35% as claimed by the respondent on the grounds that first, the interest rate was not challenged, and secondly, that the respondent was entitled to compensation for the delay in refund of the deposit. Due to the lengthy period of delay, it was only fair that the amount should attract some interest in recompense to the respondent, so as to place it in the same position as if the money had been repaid immediately, or soon after, its eviction from the premises. Section 26 (1) would therefore give the trial judge the authority to award interest before the institution of the suit. In *Ajay Indravadan Shah v Guilders International Bank Ltd [2002] 1 EA 269*, this Court stated that:

“under section 26 (1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interest to cover three stages, namely:

- i. The period before the suit;***
- ii. The period from the date of the suit is filed to the date when the Court gives its judgment; and***
- iii. From the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.”***

In the instant case, there was an agreement between the parties that the deposit paid was to be refunded to the parties. This much was admitted by the appellant in the defence. It can therefore be implied from the course of dealing between the two parties that there was an agreement that the appellant was not to retain, for an inordinately long period of time, the money due to the respondent.

Having found so, what should have been the interest rate? As stated earlier, the grant of an award of interest is an exercise of a judge’s discretion, but that discretion must always be exercised within limits. It must not be capricious or based on whim. In *Abok James Odera T/A 10 A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)*, the Court was confronted with an appeal where the learned judge had awarded the sum of Kshs 25% claimed by a party in the plaint. The court considered the propriety of that rate of interest and stated that the judge fell into error in awarding that rate when it had neither been provided for in the agreement between the parties, nor in the documents filed before the court. The court expressed itself in the following manner:

“Bearing the above principles in mind, we make no hesitation in finding that the learned trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% from 4th March, 1996 when the same had neither been provided for in the said agreement or justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary Judgment and or oral highlights in court at the time of the respondents

request for the said summary Judgment.

We appreciate that section 26 (1) of the Civil procedure Act Cap 21 Laws of Kenya tended to give the learned trial Judge a wide discretion with regard to the award of interest. It reads:- Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principal such adjudged from the date of the suit to the date of decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit....”

The above discretion notwithstanding it is now trite that the exercise of the judicial discretion donated by this section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason. Herein the learned trial Judge gave no reason as to why he awarded interest at the rate of 25% from the pre-claim period.”

The rate of 35% was suggested by the respondent, who said that it was a commercial rate that had been provided by his bankers. On cross examination, he stated that he had no proof of the communication with his bankers. There was never any basis therefore of this rate and the most appropriate route would have been to award interest at court rates.

We turn next to the issue of special damages, and whether the learned judge was right to award special damages on the basis of the proforma invoices produced before the trial Court. This Court has consistently held that it is trite law that special damages must be specifically pleaded and proved. In the case of *Hahn vs Singh 1985 Kenya Law Reports 716*, this Court stated thus:-

“...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves”.

The appellant’s contention is that the respondent produced proforma invoices from various suppliers specifying the equipment in question, together with their values, yet, with reference to the proforma invoices, the learned judge stated thus:-

“...PW.1 in his evidence identified proforma invoices. These were proforma invoices in respect of wheel balance valued at Kshs. 468,460/-. The invoice was dated 22nd December 1993, invoices for automatic Tyre changer which showed an amount of Kshs 225,000/-. It was also dated the same date 22nd December 1993. Invoice for Ksh. 175,000/- in respect of the value of trolley jack and Invoice for wheel aligner valued at Kshs 75,000/- The last two invoices were both dated 22nd December 1993 also. These four equipment were the ones in respect of which the Plaintiff made some effort to prove their values. But even the same proof was only in respect of new ones as on 22nd December 1993, and thus did not reflect their true values as on the date the Plaintiff was evicted from the service station...”

The learned judge concluded:-

“...With all this in mind and doing the best I can, I will reduce the values given in the invoices i.e. in Exh 12, 13, 14, and 15 by 25% in an attempt to arrive at a value which would reflect all of the above. Thus I do allow an amount of KSh.351,345/- for Wheel Balance, I allow KSh. 168,750/- as the value of the tyre changer. For Trolley jack, I accept the amount of KSh. 131,250/-, and finally on that I do KSh. 56,250/-for wheel aligner. These were the only equipment whose values were to an extent availed in accordance with the legal requirements...”

In the case of *Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority (2009) eKLR 720*, on the production of proforma invoices, this Court stated thus’

“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word” paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”

From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.

The next issue raised by the appellant is the propriety of the award of general damages for breach of contract. As a general rule, there can be no damages for breach of contract. This was the holding of this Court in *Provincial Insurance Co East Africa Ltd v Nandwa LLR No. 867 (CAK)*. In *Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81* at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of *Dharamshi vs. Karan (supra)* where that court held as follows:

“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general...”

(see also *Securicor Courier (K) Ltd vs Benson David Onyango [2008] eKLR*).

However, where there has been some loss arising from such breach, then damages may be awarded so as to put the claimant in a good position as if there had been no such loss. This was the holding of the Court in *Visoi Saw Mills Ltd v The Attorney-General [1997] eKLR (Civil Appeal No. 78 Of 1996)*:

“But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss: it is to put the appellant into as good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference.”

It appears that the trial judge granted general damages on the basis that the respondent must have suffered some loss. The termination letter, in the opinion of the judge was not justifiable and was illegal. He considered that since the respondent may have had to relocate its business, then ***“there must have been some elements of suffering by the [respondent] as a result of what happened.”*** The respondent was therefore awarded Kshs 50,000.00. As stated above, the award of damages is an exercise of judicial discretion that should seldom be interfered with by an appellate court. In our opinion this award of damages is reasonable, and we shall not interfere with it.

Lastly is the question whether the general damages should have attracted interest from the date of filing suit. While the award of interest on damages is a discretionary matter, the award of interest on general damages can only accrue from the date of judgment, since that is when the obligation to pay arises. This was explained in *Kenya Commercial Bank Limited v Sheikh Osman Mohammed [2013] eKLR (Civil Appeal No. 179 of 2010)*

“The principle is that the award of interest is a matter of discretion but generally interest on general damages is awarded from the date of judgment, being the date when the principal obligation to pay is established.”

For the foregoing reasons, the appeal partially succeeds. The award of special damages is hereby set aside. The award of interest at 35% on the sum of Kshs 491,450 is set aside and substituted therefor with an award for interest at court rates. The award for general damages will attract interest from the date of judgment. Since each party has partially succeeded, the most appropriate order that commends itself on costs is that each party bears its own costs. It is so ordered.

Dated and delivered at Nairobi this 13th day of February, 2015.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR