



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 273 OF 2012

MAASAI KENYA LIMITED PLAINTIFF

VERSUS

HARDWARE & STEEL CENTRE LIMITED 1ST DEFENDANT

MANSUKH PARBAT PATEL 2ND DEFENDANT

R U L I N G

1. As detailed in the Plaintiff's written submissions dated 2nd May 2014, Judgement on admission was recorded herein on 23rd January 2013. Further, by a Ruling dated 28th June 2013, the Defendants were ordered to settle the principal amount owing to the Plaintiff of Shs. 2,316,730/- by monthly instalments of Shs. 200,000/-per month with effect from 30th June 2013. In the said Ruling of 23rd January 2013, the Court directed that the matter of the amount of interest claimed as well as the refund of bank charges on unpaid cheques would have to be dealt with at the trial of this matter in due course. When the suit was mentioned before Court on 18th March 2014, Mr. Oonge, learned counsel for the Plaintiff, submitted that it was not really necessary to call a witness as to questions of interest and costs. He proposed that the parties should prepare written submissions to be filed in that connection. He maintained that the refund of the bank charges as claimed in the Plaintiff was an insignificant amount and that the Plaintiff was prepared to forego the same. This Court directed that both parties should file written submissions as regards the questions of interest and costs.
2. The suit was further mentioned before Court on 11th June 2014 when Mr. Oonge again appeared for the Plaintiff but there was no appearance for the Defendant. The latter had been served with a mention notice to the satisfaction of this Court. Mr. Oonge detailed that the Plaintiff had complied with the directions of this Court and had filed its written submissions as regards the outstanding questions of costs and interest on 2nd May 2014. The Defendant failed to file any submissions in that regard. As regards costs, the Plaintiff cited to Court the observations of **Kuloba J.** in his work, **Judicial Hints on Civil Procedure, 2nd Edition** in the case of **Jasbir Singh Rai v Tarlochan Singh Rai & 4 Ors (2014) eKLR** where it was stated:

“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973”.

3. The Plaintiff went on to quote further from the **Kuloba J.** Volume and pointed out the award of costs made by this Court in relation to the two Applications that it had already dealt with. It now prayed for costs of the main suit on account of:

- “a. The Defendants were truly indebted to the Plaintiff (a fact now on record).**
- b. The Defendant was served with a demand notice a notice of intention to sue 21st February 2012.**
- c. The Defendants did not respond to the Demand notice aforesaid or make satisfaction of the debt.**
- d. The Plaintiff has suffered expenses and hardship pursuing recovery of the debt.**
- e. It is just that they are awarded cost in this matter.”**

4. As regards interest, the Plaintiff referred the Court to **section 26 (1)** of the *Civil Procedure Act*. It was the Plaintiff’s contention that the debts accrued interest as per the contract between the parties. Interest would be levied at prevailing commercial rates which, it maintained, were specifically as prescribed by the Central Bank of Kenya as being between 23% and 37% per annum. The Plaintiff submitted that the uncontested facts of this case demonstrated that the indebtedness accrued as from 15th October 2011. The Plaintiff referred this Court to the cases of **Bio-Medical Laboratories Ltd v Attorney General (2012) eKLR** and **Pickwell Properties Ltd v Kenya Commercial Bank Ltd (2013) eKLR** in this connection. It also pointed out that the second Defendant by written admission had committed the Defendants jointly and severally to pay the principal amount of the debt before the 15th October 2011 and interest thereon at Shs. 200,000/- per month. However, the Plaintiff also detailed that in other cases before Court it had been held that interest accrued from the date of filing suit. It pointed to the case of **Highway Furniture Mart Ltd v The Permanent Secretary (2006) 2 EA 94 (CA)** in this regard. The Plaintiff concluded that it should be entitled to interest at the rate of 27% per annum being the average as between 23% and 37% of the Central Bank of Kenya prescribed rates. It maintained that interest was payable from 15th October 2011 to date.

5. **Section 27** of the *Civil Procedure Act, Cap 21, Laws of Kenya* is quite clear as regards costs. It reads as follows:

“27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such”.

As this Court allowed costs of the Plaintiff’s Notice of Motion dated 21st August 2012 for Judgement on admission, I can see no good reason why, so far as this suit is concerned, that this Court should depart

from the normal principle that costs shall follow the event. Accordingly, I award of the costs of this suit to the Plaintiff herein. I also award interest on costs at the rate of 14% per annum until payment in full.

6. Moving onto the question of interest, the Plaintiff herein dated 7th May 2012 sought interest at the flat rate of Shs. 200,000/- per month from the respective due dates of the various invoices exhibited in the Plaintiff's List and Bundle of Documents bearing even date. The Plaintiff maintains that the figure of Shs. 200,000/-per month arose as a result of a complaint made by the Plaintiff through its director Mr. Meghji Varsani, to the Criminal Investigation Department dated 28th September 2011. It appears that as regards a series of cheques issued by the Defendant with Imperial Bank Ltd, Thika not going through, Mr.Varsani involved the Police. There followed a document dated 29th September 2011 which was signed by one **Mansukh Parbat Patel** of the Defendant company entitled: "Commitment to clear following chqs". Mr. Patel undertook to clear the listed cheques by 15th October 2011. At the bottom end of that document the following words appear: "**Interests of 200,000/-is even Commite above the cheques stated above.**" It is these words that the Plaintiff would have this Court believe that Mr. Patel for the Defendant committed to pay interest at Shs. 200,000/- every month. Certainly at paragraph 6 of the Defence herein, this allegation of the Plaintiff was controverted.

7. I have perused the Statement by Mr.Varsani filed together with the Plaintiff herein 7th May 2012. He details therein that the Plaintiff had dealership contracts with various major cement manufacturers including East African Portland Cement Ltd and Athi River Mining Company Ltd. He had been approached by Mr. Patel of the Defendant company who had proposed that the Defendant would like to deal with higher volumes of cement as it had obtained larger orders. For ease of payment, it was agreed that the Defendant be afforded a 3 day line of credit whereby he would give the Plaintiff postdated cheques payable in 3 days and collect cement from the cement manufacturers on the say-so of the Plaintiff as aforesaid. Mr.Varsani makes no mention of any interest on outstanding payments as regards the arrangement between the parties. Further, there is no documentation filed in Court to verify what was agreed between the parties in this connection. In the absence of any agreement between the parties particularly as regards interest, this Court has no option but to fall back upon the provisions of **section 26 (1)** of the *Civil Procedure Act* which reads 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".

8. In my opinion, the statement made by Mr. Patel to the Police is not worth the paper it is written on. Although the sentence mentions the word "interests" and the figure "Shs. 200,000/-" it says nothing about the same being paid monthly or any period whatsoever. Further, this Court strongly disapproves of parties seeking collection of debt utilising the security services to put pressure upon the debtor. I have also perused the professional undertaking given by the advocate Evanson Nyasani dated 10th October 2011. That undertaking had nothing whatsoever to do with the Defendant company and/or this suit but to do with Mr. Patel personally in relation to a conveyancing transaction involving L. R. No. 8336/23 Thika.

9. In this instance, it is apparent that the Plaintiff thought well of the Defendant and, as a result, failed to tie up the loose ends of the contractual arrangement between the two parties. **Section 26 (1)** of the *Civil Procedure Act* as above gives this Court a complete discretion to order interest to be paid at such rate as it deems reasonable. In my view, in the absence of any specific arrangement as between the parties in relation to the rate of interest, I direct that the Court rate shall apply. The Plaintiff has asked

that interest be levied from the respective due dates of the invoices. Upon my perusal of the Plaintiff's documents before Court, there are no invoices. Accordingly and doing the best I can, I order that interest shall run on the principle amount of Shs. 2,316,730/- from the date of filing suit herein being 7th May 2012 until payment in full. It is so ordered.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE



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