REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY

CIVIL CASE NO. 458 OF 2008

TAUSI ASSURANCE COMPANY LIMITED …… PLAINTIFF

VERSUS

NIC BANK LIMITED …….. DEFENDANT

R U L I N G

1. On the 29th May 2014, this Court delivered its Ruling as regards an application for judgement for the Plaintiff on admission in the amount of Shs. 31,534,672.99. Having found the application meritorious, leave was given to the Defendant to appeal the said Ruling and the Court granted the Defendant 30 days stay of execution in order for it to apply formally for stay pending appeal. What is now before this Court is that formal Application dated 12th June 2014. The substantive prayer requested of this Court is to review and set aside its Order made on 29th May 2014 that the Defendant do pay interest to the Plaintiff on the said sum of Shs. 31,534,672.99 at court rates from the date of the filing of the suit. The application that was brought under the provisions of **Order 45 rule 1** and **Order 51 rule 1** of the *Civil Procedure Rules 2010* as well as **sections 1A, 1B, 3A, 63 (e)** and **80** of the *Civil Procedure Act*.
2. The Defendant's said Application was brought on the following grounds:

"1. THAT there is an error apparent on the face of the record necessitating this Application for review.

2. THAT the Plaintiff filed an Application dated 14th October 2013 seeking the following orders:-

i. **"That Judgment on admission be entered for the Plaintiff in the sum of Shs. 31,564,672.99 being part of the Plaintiff's claim and being the amount unequivocally admitted by the Defendant as "the Plaintiff being entitled to Shs. 40,674,398.99 less the sum of Shs. 9,139,726/-" (i.e. Shs. 31,564,672.99) as specified in the Defendant's witness statement dated 5th December 2012 and filed in this Honourable Court on 6th December 2012 made and duly signed by Henry Maina, the Manager-Legal with the Defendant.**
ii. **That the suit herein do proceed and be fixed for trial to determine the balance of the Plaintiff's claim as pleaded and prayed for in the Plaint.**
iii. **That the Costs of this Application to be provided for."**

3. THAT the said application was heard and a Ruling delivered on 29th May 2014 by Honourable

Justice J.B. Havelock allowing the Application and entering judgement for the Plaintiff in the amount of Kshs. 31,564,672.99 together with interest thereon at Court rate from the date of filing suit.

4. THAT there was no prayer for interest in the Application aforesaid nor was the issue of interest canvassed during the hearing of Application aforesaid.

5. THAT under the agreement between the Plaintiff and the Defendant interest on the fixed deposit facility which is the subject matter of this suit was accruing at the rate of 8.5% per Annum.

6. THAT the said rate of 8.5% per annum is admitted by the Plaintiff in paragraph 4 of its Plaint filed in Court.

7. THAT the Defendant is ready and willing to pay the Plaintiff the amount of Kshs. 31,564,672.99 as ordered by the Court on 29th May 2014 as parties await the determination of the issue of interest at trial.

8. THAT substantial loss will result to the Defendant if the orders sought are not granted as the interest ordered is quite substantial and the informal stay of execution Order issued by the Court at the time of delivery of the Ruling is set to lapse on 29th June 2014.

9. THAT the Defendant has demonstrated sufficient reasons for review of the order aforesaid.

10. THAT this application ought to be granted in the interest of Equity and Justice".

3. The Defendant's said Application was further supported by the Affidavit of the Legal Manager of the Defendant one **Henry Maina** sworn on even date. The Affidavit basically repeated the grounds in support of the Notice of Motion as above. The deponent noted that the Court in its Ruling, had granted interest on the said admitted sum at Court rates from the date of filing suit until payment in full. Interest had not been prayed for in the Plaintiff's Application for judgement on admission dated 14th October 2013. Further, under the agreement between the Plaintiff and the Defendant, interest on the fixed deposit facility being the subject matter of this suit, was accruing at the rate of 8.5% per annum which rate had been admitted by the Plaintiff in paragraph 4 of the Plaint herein. Mr. Maina said that the Defendant was ready and willing to pay the said amount of Shs. 31,564,672.99 as above as parties await the determination of the issue of interest.
4. The Defendant's said Application was opposed, the Plaintiff filing a Statement of Grounds of Opposition dated 20th June 2014. The grounds were detailed the follows:

"1. The application as filed is misconceived, bad in law and is not available to the Defendant.

2. the Defendant has in its application and the affidavit in support thereof reaffirmed its admission in the sum of Shs. 31,564,672.99 as ruled in the Ruling dated 29th May, 2014 delivered by the Honourable Havelock J. and there is consequently no defence in respect of this sum or any error on the face of the record in this regard.

3. It is admitted by the Defendant that the Fixed Deposit, which is the subject of the suit herein, matured on 26th November, 2007. The Defendant has further admitted that it had already set off their alleged claim in the sum of Shs. 9,139,726/= on 29th November, 2007. The Defendant has

since then withheld the admitted sum of Shs. 31,564,672.99 and has refused or failed to pay the same to the Plaintiff.

4. The Defendant has continued to withhold the admitted amount of Shs. 31,564,672.99 despite the set off as above and the rate of interest stipulated in the matured Deposit subject of the suit is not available to the Defendant.

5. The Plaintiff continues to suffer loss consequent to the Defendant's refusal and or failure to make payment since the set off was admitted.

6. The award of interest and the rate thereof is entirely in the discretion of this Honourable Court.

7. That there is no error apparent on the face of the record".

5. The Plaintiff also put in a Replying Affidavit sworn by its Chief Executive Officer and General Manager being **Rita Thatthi** dated 20th June 2014. The deponent maintained that she had the management of the whole affairs of the Plaintiff company and had personal knowledge of the matters before this Court. She maintained that she had been advised by the advocate on record for the Plaintiff firstly, that the Defendant's Application was misconceived and bad in law. Secondly, by its said Application, the Defendant had reaffirmed its admission that it owed the Plaintiff the said sum of Shs. 31,564,672.99. As a result, there could not be any error in regard to that amount and any stay applied for would be irregular so as to cause further loss and damage to the Plaintiff. Although the deponent agreed that the interest rate as regards the Fixed Deposit was at 8.5% per annum, the said Deposit matured on 26th of November 2007, before the filing of this suit and as a result, the interest rate of 8.5% per annum was no longer applicable. The deponent had been further advised by the advocate on record for the Plaintiff that an award of interest and the rate thereof it entirely within the discretion of the Court. As such, there was no error apparent on the face of the record and the Defendant could not claim any loss in consequence of the Orders made by this Court. The deponent was of the belief that the Defendant had not demonstrated any or any sufficient reason or reasons for the review applied for. Further, the Defendant had not, in the opinion of the deponent demonstrated any reason or any had a good reason to justify the grant of stay of execution.
6. It was agreed between Counsel for the parties that the Defendant's said Application dated 12th June 2014 be argued by way of written submissions. The Defendant filed its submissions herein on 3rd July 2014 followed by those of the Plaintiff filed on 8th July 2014. The Defendant opened its submissions by setting out the Orders that it was seeking as regards its Application before Court dated 12th June 2014. It then set out the prayers of the Plaintiff's Application dated 14th October 2013 pointing out that there was no prayer for interest in that Application nor was the question/issue of interest canvassed during the hearing thereof. The Defendant then set out the provisions of **Order 45 rule 1** as regards review and maintained that its Application before Court was based on two grounds namely that there was an error apparent on the face of the Court record and that there was sufficient reason for the Orders sought to issue. The Defendant referred this Court to the cases of **National Bank of Kenya Ltd v Ndungu Njau (1997) eKLR, Njeri Onyango v Patrick Musimba (2005) eKLR**, **Ole Nganai v Arap Bor (1983) KLR 233** and **Shah v Guilders International Bank Ltd (2002) 1EA 269**.
7. Of the authorities cited to Court by the Plaintiff, the Defendant distinguished the cases being **Autolog Kenya Ltd v Navisat Telematics (Kenya) Ltd HCCC No. 259 of 2012 (unreported)** where the issue of interest was pleaded in the Summary Judgement Application and was canvassed before the Court, unlike in the present suit. Further in the cases of **Kahia v Nganga**

EALR (2004) and **Civil Appeal No. 330 of 2001 Kenindia Assurance Company Ltd v Alpha Knits Ltd & Anor**, the Defendant argued that the rate of interest was determined after the full hearing of both these cases. Interest had been specifically pleaded unlike in the present case before Court. The Defendant noted that in the **Shah v Guilders Bank** case, the Court of Appeal had found that where the rate of interest had been agreed on a contract, the Court was obliged to enforce that agreed rate and had no discretion to award a different rate of interest. As regards the Application before Court being of sufficient reason, the Defendant detailed that it was a cardinal principle of natural justice entrenched in the Constitution that every party has a right to be heard before an adverse order is made against him/her. In the present case, the Defendant had been condemned to pay interest to the Plaintiff at Court rates without being given any opportunity to make submissions or adduce evidence in response thereto. The issue of interest was neither pleaded nor canvassed and consequently, the Defendant was not aware that it was an issue that it was required to prove or disprove. As a result, the Defendant maintained that it had established sufficient grounds for review and it was in the interests of justice that the Court's Order as regards interest be reviewed and set aside.

8. The Plaintiff, in its submissions before Court, noted that the defendant's Application was for review under **Order 45 rule 1** of the *Civil Procedure Rules* and **section 80** of the *Civil Procedure Act*. The Plaintiff set out the provisions of **section 45 rule 1** as follows:

"1. (1) Any person considering himself aggrieved –

a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

(b) by a decree or order from which no appeal is hereby allowed….."

It was the Plaintiff's submission that as the Defendant had given Notice of Appeal dated 17th June 2014 and served the same upon the Plaintiff, it was no longer entitled to seek relief under the provisions of **Order 45 rule 1**. The Plaintiff stressed that the Application before Court was not an application for stay pending hearing and determination of an appeal which would be covered by **Order 42 rule 6**. There was no corresponding provision under **Order 45** of the *Civil Procedure Rules, 2010*. The Plaintiff emphasised the provisions of ground No. 7 of the Defendant's application where it had detailed that it was ready and willing to pay to the Plaintiff the said amount of Shs. 31,564,672.99. Despite the Defendant's assertion in this regard, it had taken no steps to pay the said amount to the Plaintiff.

9. The Defendant had also argued that the rate of interest that should apply to the judgement sum on admission was 8.5% per annum being the rate of interest for the Fixed Deposit amount being the subject matter of this suit. Paragraph 8 of the Plaintiff's Replying Affidavit herein made it clear that the said Deposit matured on 26th November 2007. The Plaintiff noted that the Defendant had withheld payment since that date despite the fact that its alleged claim of Shs. 9,139,736/- was arbitrarily set off as long ago as 29th November 2007. The Plaintiff submitted that the interest rate of 8.5% was not applicable or available to the Defendant as it had withheld payment thereof after maturity of the Deposit. In any event, the Plaintiff maintained that the award of interest and the rate thereon is entirely within the discretion of the Court. In this regard the Plaintiff pointed to the provisions of **section 26** of the *Civil Procedure Act* as well as the cases of **Autolog Kenya Ltd**, **Kahiga v Nganga** and **Kenindia Assurance Company Ltd v Alpha Knits Ltd** (all supra). It was the Plaintiff's conclusion that there was no error on the face the record and that the Court, in its Ruling dated 29th May 2014, had exercised its discretion as is vested in it.
10. I have taken note of the case cited by the Plaintiff being **National Bank of Kenya Ltd v Ndungu**

Njau (supra) wherein the Court of Appeal detailed as follows:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Underlining mine).

In my view the provisions of **Order 45 rule 1** are very clear, they read as follows:

"(1) Any person considering himself aggrieved—

a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

(b) by a decree or order from which no appeal is hereby allowed,

and who from the *discovery of new and important matter or evidence* which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on *account of some mistake or error apparent on the face of the record*, or *for any other sufficient reason*, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (Underlining mine).

11. It is therefore imperative, that for the Court to consider an application for review, the aforementioned provisions under **Order 45 Rule 1** have to be satisfied. The Plaintiff has pointed out that review cannot apply in this matter as the Defendant has filed a Notice of Appeal as against this Court's Ruling dated 29th May 2014. Once that Notice was lodged in the Court of Appeal, the appeal process is considered to have started or been proferred. In response, the Defendant has pointed to the finding of my learned sister **Ngugi J.** in **Anders Bruel T/A Queenscross Aviation v Kenya Civil Aviation Authority & Anor.** (2013) eKLR when she found:

"The respondent submits that the applicant has lodged a Notice of Appeal against the decision made by this court on 12th October 2012, and is therefore not entitled to a review. However, I agree with the applicant that, on the authority of the Constitution and the decision in *Gucokaniriria Kihato Traders & Farmers Co. Ltd –v-The Attorney General Nairobi High Court Misc. Civil Appl No 1251 of 2002, a Notice of Appeal simply shows an intention to appeal and is not an appeal. I therefore hold that the application for review is properly before me."*

Against this finding, is the decision of the Court of Appeal in the **National Bank of Kenya** case (supra) referred to this Court by the Plaintiff, in which **Kwach, Akiwumi and Pall JJA** found as follows:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an

erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it".

Furthermore in another authority cited to Court by the Plaintiff being **Ujagar Singh v Runda Coffee Estates Ltd. (1966) EA 263,** the Court of Appeal held:

"(i) the word 'appeal' in r. 53 of the Eastern Africa Court of Appeal Rules, 1954, is used to describe the procedure started by filing a notice of appeal;"

12. What amounts to an appeal has been defined by the Court of Appeal in the case of **Equity Bank Ltd v West Link Mbo Ltd (2013) eKLR** as per **Musinga JA** when he detailed:

"I must go back to the question – '*what is an appeal*'" The Constitution does not define what an appeal is. The Constitution is the fundamental law of the land and provides a general framework and principles that prescribed the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. I must therefore turn to *rule 2 (2)* of the *Court of Appeal Rules* which states that:

'appeal', in relation to appeals to the Court, includes an intended appeal.

What is *'an intended appeal'" Rule 75 (1)* states as follows:

'Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.'

The first step in instituting an appeal is the filing of a notice of appeal. *Order 42 rule 6 (4)* of the *Civil Procedure Rules* is also relevant in considering what an appeal is. It states that:

'*for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*'

It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence….."

This Court is bound to follow the determinations of the Court of Appeal. There would seem to be no doubt that a Notice of Appeal was filed by the Defendant dated 17th June 2014. As a result, the Defendant has brought itself outside the provisions of **Order 45 rule 1** of the *Civil Procedure Rules, 2010* as well as **section 80** of the *Civil Procedure Act*. As a consequence, on this ground alone, I am unable to review the said Ruling of this Court dated 29th May 2014.

13. Even if I am wrong in that regard, the further complaint of the Defendant was that interest in the admitted Judgement amount was not pleaded in the Application before Court dated 14th October 2013.

That may be so but the question of interest was prayed for in paragraph (iii) in the prayers of the Plaint. **Section 26** of the *Civil Procedure Act* 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.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 12 per cent per annum".

As found by my learned brother **Mabeya J.** in the **Autolog Kenya** case (supra):

"it is clear that under Section 26 aforesaid the award of interest and the rate thereof is in the discretion of the court."

I agree with learned counsel for the Plaintiff that although the monies placed with the Defendant by the Plaintiff detailed interest at the rate of 8.5% per annum, that Deposit Receipt matured on 26th November 2007 and I find that the interest rate quoted is not pertinent to this case which was filed well after that date. If the Plaintiff had chosen to roll over the said deposit, there is no way of knowing what interest rate the Plaintiff could have received thereon. With this in mind, it seemed to me that the fair rate of interest was the Court rate which, in any event, was pleaded for in the Plaint.

14. The result of all the above is that I find no merit in the Defendant's Notice of Motion dated 12th June 2014 and the same is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 7th day of August, 2014.

J. B. HAVELOCK

JUDGE