



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO. 39 OF 2003

BHOGHALS GARAGE LIMITED.....PLAINTIFF

-VERSUS-

ZAHIR SHEIKH & ANDREW GREGORY

(Joint Receivers & Manager)

SAM-CON LIMITED (in (Receivership).....DEFENDANT

JUDGMENT

1. The Plaintiff by an amended Plaint filed on the 27th November 2006 prayed for judgment against the defendants severally and jointly for:
 - a) A permanent injunction against the defendants by themselves, their agents and/or servants restraining them from advertising, offering for the sale, leasing, mortgaging and/or in any way from interfering with the plaintiff's goods and machineries outlined in paragraph 3 and 5 of the amended plaint;
 - b) A mandatory injunction compelling the defendants by themselves, their agents and/or servants to release, return and/or put the Plaintiff into possession of the machineries and goods outlined in paragraph 3 and 5 above, or alternatively, the defendants be ordered to pay to the plaintiff a total sum of Kshs.7,156,000/= being the value of the said equipment and machineries plus a further sum of Kshs.300,000/= being the amount of money incurred by the Plaintiff in transporting the said equipment and machineries from Turkwel Gorge to Nakuru.
 - c) Costs of the suit.
 - d) Interest on the alternative prayer (b) above at such rates the court may deem fit from the date of storing the said items, equipment and machineries with the defendant until payment in full.
 - e) Interest on costs at court rates.
2. The defendant filed an amended Statement of defence on 13th December 2006 denying all the allegations contained in the Amended plaint and challenged the Plaintiff to strictly proof.
3. Subject of the above pleadings are some equipment and machinery purchased from SPIE BATTINGNOLLES by the plaintiff hereinafter called "Bhoghals" who were undertaking the Turkwell Gorge Project, which the Bhoghals claim to have bought, and requested the defendants herein, referred to as sister company, to provide storage facilities *exgracia* by a letter dated 12th October 2000, which request was agreed to by a letter dated 18th October 2000, without any conditionality, without any fees or consideration, and other items stored therein earlier.

The items so stored are tabulated in the letter dated 12th October 2000.
4. On the 16th January 2003 the defendant Sam-Com Ltd was placed under receivership by National Bank Limited, who appointed Zahir Sheikh & Andrew Gregory as joint receivers and managers to manage its affairs.
5. It was at this time that the Bhoghals wrote to the joint receivers informing them of the stored equipment and machinery stored in Sam-con

premises and sought their confirmation that the said equipment was in their records and custody. This was by a letter dated 1st February 2003, and a response in the affirmative was sent to the plaintiff upon which the plaintiff upon requested for release of the equipment and machinery to itself.

6. At the same time, the joint receivers requested the plaintiff to provide proof of ownership of the machinery and equipment and by a letter dated 1st February 2003, the plaintiff provided the said proof to the defendant, but the defendant failed to release them to Bhoghals, despite providing proof of ownership, and Sam-con having confirmed ownership, to the plaintiff, Bhoghals the Receivers advertised, inviting bids for the sale of the machinery and equipment, among other items for bidding on the 1st April 2003 in the Standard Newspaper that led to filing of this suit.

7. By its Amended statement of defence dated 13th December 2006 and filed on the 15th December 2006, the Receivers and managers of Sam-con denied all and singular the plaintiffs claims but acknowledged all the letters exchanged between the parties, but still failed to release them, on grounds that

- (a) *There existed no lease of the machinery to Sam-con.*
- (b) *Sam-con insured the machinery.*
- (c) *No records existed of the purchase of the machinery by Bhagals.*
- (d) *Some of the documents in Sam-con's possession showed purchase by Sam-con of some of the equipment.*
- (e) *No evidence of payment of storage charges to Sam-con.*

8. For the above, the defendant urged for striking out of the suit with costs to the receivers.

The letters and documents referred to above were produced as exhibits by the parties.

9. ISSUES FOR DETERMINATION

- (1) *Whether the machinery and equipment (Paragraph 3 and 5 plaintiff) were the property of the plaintiff or the defendant, and whether the defendant stored them on behalf of the plaintiff ex gratia.*
- (2) *Whether or not there were any outstanding balances due between Sam-con Ltd and the plaintiff at the date of filing suit out of their trading relationship.*
- (3) *Whether the defendants have a right of lien over the equipment and machinery for the alleged outstanding sum of Kshs.15,770,776/= as at 15th January 2003.*
- (4) *Whether the defendant is liable to compensate the plaintiff for the obsolete machinery and if so, to what extent.*
- (5) *Costs.*

10. Parties are bound by their pleadings, and any evidence that is adduced that does not support the pleadings cannot be admitted. The court is not obligated to give judgment on unpleaded issue, nor will it allow evidence that it at variance with the pleadings – **IEBC & Another – vs- Stephen Mutinda Mule & 3 Others (2014) e KLR, and Stephen Ndolo Wambua –vs- Beatrice Mbula Mutilu & 2 Others (2019) e KLR.**

11. Undisputed facts

- (1) *That the plaintiff and the defendant are sister companies.*
- (2) *Letter requesting for storage – exgratia or the facilities of the equipment & machinery dated 18th October 2000, was received and stamped on 20th October 2000 by the defendants.*
- (3) *Letter by the Receivers dated 1st February 2003 confirming presence of the machinery at the defendant's premises.*
- (4) *Defendants letter dated 25th March 2003 confirming existence of the machinery and equipment at the defendant's premises since 1992/1993.*
- (5) *Letter dated 22nd February 1993 by the plaintiff to the defendant listing the equipment sold to the plaintiff by SPIE BATTINGNOLLES of Turkwel Gorge project for Kshs.2,015,000/= for the said sum in its favour (sellers).*

(6) Letter dated 1st March 1993 captioning invoice 673/6513 addressed to Bhoghals forwarding a cheque No. 12390 issued to SPIE BATTINGNOLLES.

(7) Inspection report of the equipment and machinery at the Defendants premises, pursuant to a joint visit on the 6th July 2017 dated 25th May 2018.

12. ANALYSIS FINDINGS AND DETERMINATION

ISSUE NO. 1

There is sufficient evidence from both parties, by their witnesses that there was an agreement of storage of the equipment and machinery bought from SPIE BATTINGNOLLES for the sum of Kshs.2,015,000/= by Bhoghals, and others received earlier for storage by Sam-con valued at Kshs.5,141,000/=, in the total sum of Kshs.7,156,000/= as pleaded at paragraph 3 and 5 of the plaint.

13. The defendant by its evidence – DW1 -acknowledged being aware of the presence of the machinery, as well as acknowledging all the letters exchanged between the two parties in respect of the storage of the machinery.

He however testified that the said items were held on account of some unspecified unpaid dues owed by the plaintiff to the defendant for which a reconciliation was done by KPMG on 15th January 2003 and also by one Ken Wanyoike a former employee of the defendant without involvement or participation of the plaintiff.

14. This witness testified that no document of lien was created over the items, to show the defendant's rights over the items. With this admissions and knowledge, it was DW1's evidence that the defendant refused to release the items to the plaintiff.

15. There is no dispute that there existed no lease agreement between the parties, because, in my opinion, no intention to lease the equipment was existed.

The letters dated 18th October 2000 by the plaintiff, and one dated 25th March 2003 by the defendant do not speak of, nor do they show any intention of a lease or storage of the machinery at a cost, but was due to the plaintiff's expressed lack of storage space in its premises.

16. Nothing was mentioned as concerns storage charges at the time. The letter of 12th October 2000 by the plaintiff, and one dated 25th March 2003 by the defendant do not speak of, nor do they show any intention of a lease or storage of the machinery at a cost, but as the plaintiff had expressed lack of storage space. Further, nothing was mentioned as concerns storage charges. The letter of 12th October 2000 reconfirms the above and lists the items intended for storage. The letter of 18th October was signed for both parties.

17. I have considered the various correspondence between the two parties prior to the defendant's receivership. There was a cordial, sister to sister company business relationship.

In the case **Majanja Luseno & Co Advocates –vs- Leo Investments Ltd & Another, (2017) e KLR** the court held that

“...if the letter before action was construed to be an agreement, that would mean that correspondence can constitute an agreement---

Correspondences are capable of giving rise to agreements, provided that there was an offer, acceptance and consideration which can be discerned from the correspondence that would mean that there was an agreement.”

18. The parties were sister companies and used to do business together, as may be concerned from the letter dated 25th March 2003.

Ownership of the property is further evidenced by invoices and payment cheques between SPIE BATTINGNOLLES of Turkwel Gorge Project, by letter dated 22nd February 1993, in 1st March 1993 stating the list of the equipment, invoice number 12390, 673/6513 and cheque for Kshs.2,015,000/- in favour of SPIE BATTINGNOLLES being purchase price of the same.

Other than stating, no evidence was tendered to prove any ownership of the equipment and machinery by the defendant.

Accordingly, the machinery and equipment subject of this dispute, stored at the defendant's premises, were the property of the plaintiff, and were so stored *exgracia* at the defendant's premises.

19. ISSUE NO 2

Whether there was outstanding dues by the plaintiff to the defendant as at 15th January 2003.

In its Amended defence, the defendant alluded to existence of indebtedness by the plaintiff to the tune of Kshs.15,770,776/= as at 15th

January 2003, and therefore had a right of lien over all the property of the plaintiff lying at its premises.

20. By consent order between the parties recorded on the 31st March 2003, it was agreed that the equipment and machinery, subject hereof, would not be sold pending determination of ownership and reconciliation of the accounts between the plaintiff and the defendant.

On that basis, the machinery remained stored in the defendant's premises upto the 6th July 2017 upon a court order that a joint visit and inspection, a report was prepared on the status of the machinery and equipment.

I will come to the joint inspection report later in this judgment.

21. In its evidence the plaintiff by **PW1** denied having owed the stated sum to the defendant. The defendant however produced a reconciliation report of the two company's accounts.

This was a unilateral reconciliation. **DW1** confirmed that the plaintiff was not involved nor was it invited to undertake the reconciliation to ascertain if any money was due to the defendant as alluded to.

22. **DW1** testified that the defendant appointed one Ken Wanyoike its former employee to do the reconciliation, and was not aware of any other reconciliation by KPMG on 15th March 2003.

23. In cross examination on the audit documents filed by the defendant, it was his evidence that the Receivers stated certain indebtedness by the plaintiff by way of demand of Kshs.10 Million, but there was no proof, and that he could not confirm the debt, but agreed that before the receivers were appointed, there were inter-company debts, but could not state amounts and that the debts were not subject of this case, but separate cases.

24. It is instructive that the purported reconciliations were done without the plaintiff's participation in the exercise. The question then that arises is how the sum of over Kshs.15 Million was arrived at. The defendant did not avail the auditors to produce their reconciliation reports. Indeed, no reconciliation report was produced in court.

25. Filing of documents in court in itself is not or sufficient proof of any indebtedness. They are not evidence or exhibits in themselves. They were not produced as such. They therefore remain in the court file as such. And of no evidential value – **Court of Appeal in Kenneth Nyanga Mwiye –vs- Austin Kiguta & 2 Others (2015) e KLR.**

To that extent, the reconciliation documents though part of the court record are of no evidential value. Further to the above, there is no proof of the debt that is alleged to have been owing to the defendant by the plaintiff as at the commencement of this suit.

26. Parties are bound by their pleadings – See **IEBC –vs- Stephen Mutinda Mule & 3 Others (2013) e KLR, Philmark Systems Co. Ltd vs- Andermore Enterprises (2018) e KLR.** The defendant did not raise a counter-claim or set off against or for their claim of Kshs.15,770,776/=.

It is trite that he who alleges must prove, and that evidence that is not in support of pleading must be ignored.

27. In **Calystus Makokha –vs- Hussein Osore Munyifwa (2005) e KLR**, the court held that any aggrieved party has a right to institute legal proceedings in an attempt of seeking legal redress. Thus the defendant's failure to file a counter claim or set off against the defendant in this case in itself is a manifestation that it has no claim against the plaintiff, unless such claim is subject to a different case, which Defendant's witness, **DW1**, alluded to.

I therefore come to the finding that the defendant's claim of indebtedness by the plaintiff does not lie, and has not been proved to the required standard.

28. ISSUE NO. 3

Right of Lien or not over the plaintiff's equipment and machinery lying at the defendants premises.

In the first instance, a report of a joint site visit to Sam-cons premises following a joint inspection of the status of the said property undertaken on the 6th July 2017 concludes that, given the condition of the machines, the claim for the return of the machines in the original state is not tenable as they are absolutely obsolete, and that the plaintiff's only viable claim is for the monetary value of the machines – PExt 8.

29. The original value of the items at the date they were stored at the defendant's premises were stated a Kshs.7,165,000/=. That was in October 2000.

On the 16th January 2003 when the defendant was placed under Receivership, the defendant objected to, and failed to release the equipment to the plaintiff. By a consent order dated the 31st March 2003, both parties agreed that these equipment continue to be stored at the defendants' premises pending hearing and determination of this case. Finalization of the case has taken over sixteen years, during which period the equipment and machinery have become absolutely obsolete.

30. **Halsbury's Laws of England, 4th Edition Page 369** – states “a lien is in general an entitlement to a person in possession of chattels to retain them until all claims of accounts the person in possession against the owner are satisfied.”

The above definition is in line with judicial pronouncements, among them **Republic –vs- Lucas M. Maitha Chairman, Betting Control and Licensing Board and 4 Others, Exparte interactive Gaming and Lotteries Ltd, Misc App 370/2010**, that held

“A lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.”

See also **Evens Otieno Nyakwanga –vs- Cleophas Bwana Ongaro (2015) e KLR, John Kihara Timani Njihia –vs- Xplico Insurance Co. Ltd (2017) e KLR.**

31. It is therefore trite that a legal lien cannot arise unless and until possession has been obtained by the person claiming that lien, and that a legal lien is lost if the possession is lost.

Further, the possession necessary to sustain a lien must be lawful and there must be continuity in possession.

32. By the above legal imperatives, can it be said, with certainty, that the defendant had acquired legal lien over the plaintiff's properties?

There is no dispute that the two parties were trading alongside each other as sister companies, and had running accounts over a long period of time, evidenced by the consent order recorded on the 31st March 2003, upon an application dated 22nd March 2003 filed alongside the plaint, and the defendants defence where the matter of the plaintiffs indebtedness in the tune of over shillings fifteen million was stated.

33. It is the position of the court that despite the issue of the indebtedness being pleaded, no proof was adduced of the said debts during the hearing thereof, thus no precise amount was held due and owing to the defendant by the plaintiff, as no satisfactory or bilateral reconciliation of the accounts were undertaken-

It is the courts finding therefore that, though stated, the sum of Kshs.15,770,776/= or any other sum was verified, certified or proved as due and owing to the defendant. See Paragraph 27 above.

34. **Compensation to the plaintiff?**

The value of the equipment and machinery was stated as Kshs.7,156,000/= as at 12th October 2000, when they were stored in the defendant's premises.

The equipment being absolutely obsolete as stated in the report of the joint site visit and inspection by both parties dated the 25th May 2018, they are of no value to any of the parties.

35. The defendant did not state to the court that the said machinery were not of merchantable state when they were stored in its premises. Their value at the date is not contested. The issue of the debt was raised by the receivers upon the defendant being placed under receivership in the year 2003, a fact not under dispute, and which caused the machinery and equipment to continue being stored at the defendant's premises.

36. I am aware and I observed that during the pendency and hearing of the suit before me, the defendant by its advocates resisted seriously to any inspection of the said machinery and equipment necessitating the court to issue and order that it was necessary to undertake a joint inspection of the status of the said property. It is evident that the loss and damage loss of the property was not of the plaintiffs making. **Therefore, I come to the unenviable conclusion that the plaintiff's only viable remedy is compensation of the monetary value of the equipment and machinery.**

37. I am persuaded on a balance of probability, that the plaintiff has proved its case to the required standard, and is thus entitled to the prayers sought in its statement of claim, save for the claim of transportation costs of the machinery and equipment having not been proved.

38. **Consequently, I enter judgment for the plaintiff against the defendants for**

a) Compensation in the sum of Ksh.7,156,000/= being the value of the equipment and machinery stored in its premises in the year 2000 and now declared obsolete.

b) The above sum shall accrue interest at the rate of 8% per annum from the date of filing this suit upto date of this judgment, and 90 days thereafter, if not settled, interest at court rates until payment in full.

(c) Costs of the suit shall be borne by the defendant to the plaintiff.

Orders accordingly.

Delivered, signed and dated at Nakuru this 30th Day of January 2020.

J.N. MULWA

JUDGE