



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E437 OF 2019

BETWEEN

STANBIC BANK KENYA LIMITED.....PLAINTIFF

AND

ATI FREIGHT KENYA LIMITED.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

RULING

1. The application before the court is the Notice of Motion dated 3rd December 2019 filed by the Plaintiff (“the Bank”) seeking a raft of reliefs against the Defendants. It seeks an injunction restraining the 2nd Defendant (“Kenya Railways”) from using certain containers given to it by the 1st Defendant (“ATI Freight”). The Bank also seeks summary judgment against ATI Freight for USD 1,332,919.20 and Kshs. 17,183,432.92 on account of banking facilities advanced to it.

2. The application is supported by the affidavit of Elisha Nyikuli, the Bank’s Senior Legal Counsel, sworn on 3rd December 2019. The application is opposed by ATI Freight through the replying affidavit of its director, Vinay Shah, sworn on 27th February 2020. Kenya Railways has relied on the affidavit of its Senior Legal Officer, Stanley Gitari, sworn on 27th May 2020. The parties filed written submissions in support of their respective positions.

3. The Bank’s case is set out in the Complaint dated 3rd December 2019 and reflects in Mr Nyikuli’s affidavit. The Bank extended various facilities to ATI Freight including Hire Purchase Agreements dated 20th May 2015 and 14th May 2016. The facilities were secured, by amongst others, a Debenture for USD 1,500,000.00 registered on 27th April 2016 as well as an All Assets Supplemental Debenture issued on 28th November 2016 for the maximum sum of USD. 2,500,000.00 holding a fixed charge over, inter alia, 255 containers (“the Containers”) which are in possession of Kenya Railways.

4. The Bank’s claim is that as result of default, it issued a demand letter dated 23rd September 2019 to ATI Freight to regularize its account. The Bank also states that its right to take possession of the Containers has been impeded by the Kenya Railways. The Bank claimed the following reliefs in the Complaint:

(a) Judgment against the 1st Defendant for:

(i) USD. 1,332,919.25

(ii) Contractual interest on (i) above at 10% per annum above the Prime Lending Rate from 24th November 2019 until payment in full.

(iii) Kshs. 17,183,432.92; and

(iv) Contractual interest on (iii) above at 10% per annum above the Central Bank Rate from 24th October 2019 until payment in full.

(b) A declaration that the Plaintiff is entitled to possession of the 255 containers set out in paragraph 7 of the Plaintiff.

(c) An order directing the 2nd Defendant to deliver up the 255 containers set out in paragraph 7 of the Plaintiff to the Plaintiff

(d) Costs of the suit.

(e) Interest on (d) above at Court rates until payment in full.

5. In the replying affidavit, ATI Freight took the position that the Bank did not finance the purchase of the Containers. It claimed that it owned the Containers which were in its possession without any encumbrance prior to 20th May 2015 and 14th December 2016 when the alleged Hire Purchase Agreements were made. It further averred that one of the documents attached to the supporting deposition is a not a security document but a proposed Vehicle Asset Finance Facility Letter which described the facility offered to it by the Bank as a Re-Finance of Assets which it had already acquired. It also further stated that the Hire Purchase Agreements do not have any schedule of or identity the Containers as part of the agreements confirming that in fact the Containers were not securities.

6. ATI Freight further denied that it owed the Bank the amount prayed in the Plaintiff, any part thereof or at all. It asserted that the Debenture relied on by the Bank and provided as evidence does not give the Bank any legal or contractual right to support the orders sought in the application.

7. Kenya Railways contested the Bank's claim against it on several grounds. First, it contended that it was not privy to the agreements between the Bank and ATI Freight. Second, it relied on **section 87** of the **Kenya Railway Corporation Act (Chapter 397 of the Laws of Kenya)** to submit that the suit was incompetent for failure by the Bank to serve a 30-day statutory notice giving notice of intention to file a suit. It added that the letter dated 23rd September 2019 addressed to it by the Bank was not a notice contemplated by the law. Third, it asserted that the Bank knew that it has a lien over the Containers for Kshs. 46,529,697.00 from accrued transportation and storage fees due from ATI Freight and that it was holding 400 containers, including the 255 container claimed by the Bank.

8. Whether or not the application succeeds, depends on the relationship between the parties and the legal obligations arising from the documents presented by the Bank. In support of its deposition, the Bank has annexed two Hire Purchase Agreements dated 20th May 2015 and 14th December 2016 for the purchase of 205 and 50 containers respectively. The documents do not have a schedule of the assets showing the Containers, however, the insurance policy endorsement which is a requirement under both agreements confirms that the Containers were the subject of the agreement as ATI Freight was required to insure them. There is also the Vehicle and Asset Finance Facility Letter dated 1st March 2016, advancing ATI Freight USD 1,500,000.00 but it is not clear how this facility is connected to the Hire Purchase Agreement. Finally, there is the All Assets Supplemental Debenture dated 28th November 2016 which was registered with the Companies Registrar on 2nd December 2016.

9. Although I have no doubt that there is sufficient evidence to show that the Containers were security for borrowing and that there is evidence of indebtedness, I am not disposed to grant summary judgment at this stage. The Statement of Account annexed to the Bank's deposition is only for the year 2019, yet the facilities appear to be at least from 2015 and 2016. In Paragraph 4 of the Plaintiff, the Bank states, "*Plaintiff extended various financial facilities to the 1st Defendant.*" I would have expected to see the letters of offer and the supporting documents for those facilities to give the court a complete picture of ATI Freight's liability under those facilities. The general principle is that the court will not enter summary judgment if there is a single triable issue (see **Gupta v Continental Builders Ltd [1976-80] 1 KLR 809** and **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR**). While I do not entertain any doubt that ATI Freight is indebted to the Bank, in this case, the nature and extent of indebtedness of ATI Freight's indebtedness is a bona fide triable issue. I decline the plea for summary judgment.

10. It is common ground that the Containers are in the possession of Kenya Railways which is exercising its lien or storage and demurrage charges which it is entitled to charge under the **Kenya Railways Act**. As against the lien, the Bank has a registered Debenture which means that Kenya Railways is deemed to have notice of the Bank's interest. The question for trial would be whether the encumbrance arising from the Debenture is superior to the lien. This is an issue that should proceed to trial and it is an issue given that it appears that the parties were involved in certain negotiations and agreements particularly as between ATI Freight and Kenya Railways in order to reduce the liability for money due to Kenya Railways. I would therefore prefer to decide the matter on the balance of convenience in light of the need to consider the parties' positions fully.

11. For the reasons I have set out above, I dismiss the Notice of Motion dated 3rd December 2019 except that I grant an injunction restraining the 2nd defendant from selling or otherwise disposing off the 255 Containers which are particularized at paragraph 7 of the Plaintiff and which are in its possession pending hearing and determination of the suit or until further orders.

12. I have considered the nature of the matter and direct that it be scheduled for mediation.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ogunde instructed by Walker Kontos Advocates for the Plaintiff.

Ms Sagini instructed by Otieno Okeyo and Company Advocates for the 1st defendant.

Mr Mutei instructed by Tom Mutei and Company Advocates for the 2nd defendant.