



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. 712 OF 2003

NOVA INDUSTRIES LIMITED & ANOTHER.....PLAINTIFF

VERSUS

ZE YUN YANG LIMITED.....1STDEFENDANT

STANDARD CHARTERED BANK LIMITED.....2ND DEFENDANT

JUDGMENT

1. The claim in this matter is contained in the Re-Amended Plaint of 19th October 2018.
2. At all material times Nova Industries Limited (**Nova or the Plaintiff**) was a customer of Standard Chartered Bank Limited (**Standard or the 2nd Defendant**) and had taken a facility of Kshs.4,926,600.00 through a letter of offer dated 14th July 1995 (**P. Exhibit 1 Pages 1-5**). The facility was a term loan and part of security was a charge over Land Reference 12715/724 (**the suit property**).
3. The letter of offer, and therefore the contract between the parties, required Nova to repay the loan in 50 equal monthly instalments of Kshs.100,000.00. Nova's case is that it regularly serviced the facility but the Bank made a demand of Kshs.7,303,046/25 on 23rd May 1997 (**P. Exhibit 1 Page 41**).
4. At the heart of the grievance by Nova is that without issuing a statutory demand, the Bank sold the property by way of private treaty. That this was in spite of Nova Industries Ltd v Standard Chartered Bank(k) Ltd(HCCC 2622/1997) which was a suit by Nova to restrain the Bank from selling, alienating, and/or disposing off the suit property.
5. Nova alleges sale of the property at an undervalue. The sale was to ZeYun Yang (**Yang or the 1st Defendant**) who through, Civil Suit No. 9/2003, sought an eviction order against Nova. Nova states that on 11th February 2003, Hon Lady Justice Ondeyo issued an order restraining Yang from selling, disposing, evicting, destroying, tampering or in any other manner alienating the suit land. That in disobedience of this order, Yang, on 11th February 2003, maliciously entered the suit property and demolished the main office, godown Building, outer buildings and the perimeter fence. The Plaintiff claims special damages of Kshs.189,717,311.00 in addition to general damages.
6. Yang resists the claim and denies wrong doing. In respect to Suit No. 9 of 2003(Ze Yun Yang v Nova Industries Ltd)(**Suit 9/2003**) he asserts that through subsequent events, Nova voluntarily ceased operating on the suit premises and he peacefully took over possession.
7. For the Bank, it alleges default on the part of Nova and states that prior to the sale by private treaty it had made 10 failed attempts to sell the property by public auction. The Bank makes a Counterclaim of Kshs.3,104,838 which it alleges was the sum owing after the sale to Yang.
8. The issues for determination are as follows:-
 - i. Did Nova default in payment of the loan? If yes,
 - ii. Was the sale by private treaty lawful?
 - iii. Did Yang evict Nova?

- iv. If so, was the eviction in disregard of a Court order?
- v. Does Nova still owe the Bank money?
- vi. What are the appropriate orders, including of Costs, to make?

9. Although Nova denies default in repaying the facility granted to it by the Bank, it would be hard put to explain the letter of 4th June 1997 by its lawyers Mutula&Kasyoka Advocates (**D. Exhibit Pages 47-48**), and its letters of 27th May 1997 (**D. Exhibit Pages 49-50**) and 10th June 1997 (D. Exhibit Page 53). Take for example the latter, Nova writes:-

Nova Industries Limited,

NAIROBI.

10th June 1997

The Manager

Standard Chartered Bank,

NAIROBI.

ATTENTION: MR. MUTHOKA

Dear Sir,

RE: BANKING FACILITIES – KSHS.7.6 MILLION

We refer to our above facilities with you and the various correspondences between us, you, your lawyers and our lawyers. We would like to make the following proposal to you.

We have negotiated for a Tenant Purchase Housing Development Project in two 5 acres of our plots. We have been offered Kshs.460.0 Million for this project. The two plots will be purchased by the project for Kshs.20.0 Million. We offer to pay your entire debt to the bank immediately this loan is advanced. This is expected 60 days from the time we pay our commitment fees of 0.5% or Kshs.2.3 Million. It is unfortunate we cannot raise this from the bank for it would speed the process.

Our request is for you to hold any statutory notices or, action to recover the above facility for the 90 days required by your special Assets Management Unit. The undersigned is available for discussion on this proposal at your earliest convenience.

Thanking you.

Yours faithfully,

NOVA INDUSTRIES LIMITED

J. K. MANGELI

MANAGING DIRECTOR

10. I doubt that Nova can extricate itself from this admission. There was default.

11. Evidence by the Bank is that it served Nova with a Statutory Notice of 29th September 2000(**D. Exhibit Page 59**). Service was by registered post (**Certificate of posting D. Exhibit Page 60**). Mr. John KiloloMangeli, the Managing Director of Nova said as follows in respect to the letter:-

“The address for Nova was 18510 - the address is correct. (2nd Defendant’s Bundle Page 60). I see a certificate of posting. I see an address 18510 Nairobi.”

12. On a balance of probabilities the Court finds that the Statutory Notice was duly served. The Notice of 29th September 2000 is a notice to Nova to pay the sum of Kshs 8,334,527/-being the principal sum and interest owing as at 31st August 2000 before the expiration of 3

months failing which the property comprised in the charge would be sold. Looking at the title document (**D2 Exhibit pages 105 to 109**), the Charged property was registered under the Registration of Titles Act Cap 281 (now repealed) and the legal regime for realisation would be the Transfer of Property Act (now repealed). The Bank had complied with the notice required by section 69A of the said Act;

“69A. (1) A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.”

13. It is common ground that the Bank, without success, attempted to sell the property at a public auction on several occasions. Indeed, the Plaintiff’s witness stated:-

“The Bank had attempted to auction the property several times but without success.”

In addition counsel for Nova admits as much. He submits;

“It is not in dispute that the 2nd Defendant had made several attempts to sell the property.”

14. Further, it does not seem to be the case of Nova that the Bank was not entitled to sell the property by private treaty. Had it been so, then the law would not be on its side because Section 69(1) of the Transfer of Property Act allows for sale by private treaty;

“69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee’s statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable.”

15. What Nova faults is the sale price. The Bank and Yang entered a private treaty Sale Agreement on 3rd October 2002 (**D. Exhibit 1 Pages 9-13**) and a Transfer effected on 5th December 2002 (**D. Exhibit Pages 14-16**). The purchase price was Ksh.6,500,000.00. Was this an undervalue?

16. The Bank instructed Gathumbi & Associates to value the property for purposes of advising on a forced sale value. On 24th April 2002, the valuers returned an opinion that the forced sale value of the property would be Kshs.9,000,000.0 (**D2 Exhibit Pages 111-118**). The valuation was done within 12 months of the sale and would be a current valuation as of the date of sale.

17. The Court accepts the Plaintiff’s assertion that the sale was at an undervalue as it was about 70% of the forced sale value of the property and will come back to this when discussing the remedy available to Nova.

18. As to the Counterclaim by the Bank, Nova takes up the issue of limitations of actions. And I think that is right. The sale happened in October 2002. It was not until 14th February 2019 that the Bank mounted the Counterclaim. It is of course true that time, for purposes of limitation, would not start to run as long as the charge subsisted. But the charge came to an end on the date of sale and so days started to count. Being a contract, the Bank could not claim after six years from the date of the sale and so a claim after 3rd October 2008 would be time barred (**Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya**)

19. The Court now turns to consider the claim by Nova against Yang. The valuation by Gathumbi was on the land and the permanent improvements. Nova’s gripe is that in breach of a Court order, Yang entered the premises and using bulldozers, demolished the main gate and godown buildings, outer buildings, the perimeter fence, plant and machinery, raw materials, finished product, packaging materials and other equipment. On the other hand, Yang’s defence is that HCCC No. 9 of 2009 was rendered irrelevant through subsequent events in that Nova ceased operating and he thereafter peacefully took over possession of the land.

20. The first issue to determine is when Yang moved into the property. Following the entry into the property, criminal proceedings were commenced against Mr. Mangeli in Machakos Criminal Case No. 460 of 2003. In that matter Yang testified as witness Number 11. His testimony (**P. Exhibit Page 199**) was:-

“On 10.2.2012 me and 2 other Directors went to Mr. Mangela’s office. We asked him to move out since we will move into

the plot. He was angry so we did not talk much. He told us we can do whatever we want. On 11.2.2002 I and my other directors and about 50 staff members from the company went to that plot. There were some workers from Nova. They were loading the goods into a truck. We also helped to remove whatever do not belong to us outside. We started to demolish the fence, cut trees and generally property of the land for demolition.”

From the evidence the entry was on 11th February 2002, although reading the entire proceedings and the case as pleaded by both sides the entry happened in 2003 and not 2002.

21. The case of Nova was that this entry was in disobedience of a Court order issued in Nairobi Milimani Commercial Civil Case No. 9 of 2003 Ze Yun Yang –vs- Nova Industries Limited which reads:-

“[2] The Plaintiff herein by himself and or his agents be and is hereby restrained from selling, disposing, evicting, destroying, tampering or in any other manner whatsoever from alienating all that parcel of land known as L.R No. 12715/724 situated at Athi River Machakos District pending the determination of the application inter partes on a date to be fixed at the Registry.”

22. In paragraphs 20A and 20B of its pleadings, Nova asserts that the order was issued in the presence of counsel for Yang and that it was subsequently extracted and served upon Yang on the same day, that is 11th July 2003. That is denied in paragraph 7(b) of Yang’s Defence and in which he invites Nova to prove its allegations.

23. At the hearing, Yang was cross-examined on the order and he responded;

“Order was given on 11th Feb 2003. I do not know about this order”

24. It has to be remembered that Nova’s proposition was that not only was the order served upon Yang prior to his entry into the suit property, but that it was given in the presence of Yang’s advocates. Yet on the face of the order itself it states that it was issued *ex parte* upon hearing of Nova’s Counsel. And, and not to be ignored, is that the order was issued a day after, on 12th February 2003. It being common ground that the eviction commenced and completed on 11th February 2003, is it conceivable that an order issued on 12th February 2003 was served before Yang made entry.

25. There is further evidence that the Court order may not have been in place prior to the entry by the Yang. It is found in the chamber summons of 11th February 2003 by Nova (**D. Exhibit Page 54 – 57**). In an affidavit in support of the summons, Mangelidepones:-

“[9] That, now to-day the 11th day of February 2003 the Plaintiff, accompanied by his lawyer one Mr. Gatundu, and about one hundred (100) hired thugs without a valid court order descended on the suit premises, tore the main gate apart, demolished the whole stone wall surrounding the factory, broke all doors and windows and looted property including machinery therein.

[10] That I sought police assistance at Athi River Police Station who refused to take action insisting that I produce an injunction order.

[11] That when Mr. Gatundu and the Plaintiff were asked by the Police whether they had a Court order, they said they did not need one to evict me.”

26. Emerging from this evidence is that the order was obtained after Yang had made entry and further there is no evidence as when it was served on Yang or that at any rate it was served before the eviction was complete. The result is that Nova has failed to prove two critical facets of its claim.

27. Now, the subject of the private treaty sale was the land and improvements. It did not include the moveables. Since the purchase included the improvements, Yang was entitled to bring down those improvements and that would include the perimeter wall, the outer buildings and the godown as the private treaty agreement bestowed the ownership on him.

28. As to the moveables, there is conflicting evidence as to whether they were destroyed. Yet there is unanimity about one thing. The machinery and raw materials were moved and placed in a neighbour plot. Answering questions in cross-examination Mangelidepones:-

“Yang took everything in the premises - raw materials, machinery. He placed them in a plot next door.”

29. This in some respect rhymes with Yang’s evidence that:-

“The moveable machinery had been taken (some) by the owner and some had been taken to the neighbour plot. This was taken by people led by my lawyer.”

This land was said to belong to Mangelidepones.

30. Yang’s further evidence is that he even paid for security for guarding the property which they had left unattended.

31. The Court has been shown some photographs (**P. Exhibit Pages 166 -171**). However, those photographs were not sufficiently explained by Mangeli. The Court has looked at the photos. In some, there appear to be people working on some plant and machinery. The Plaintiff's case is that Yang demolished and destroyed the plant and machinery. On the other hand, Yang says that the plant and machinery were dismantled and moved to the neighbouring plot. There would be a difference between dismantling the plant and machinery, and demolishing and destroying it. The onus was on Nova to prove its case. I am afraid that, on this, Nova did not produce cogent evidence. It has to be asked what was difficult in taking close and clear photographs of what is said to have been destroyed. For that reason I am unable to find any fault on the part of the Yang.

32. I turn now to consider the orders that the Plaintiff would be deserving of. The purchase price was paid in two instalments of Kshs.1,625,000.00 and Kshs.4,875,000.00. Prior to the payment, Nova owed the Bank Kshs.8,814,688.00 (see copy of **Bank Statement D2 Exhibit page 134**). Had the property been sold at its forced sale value, then the amount that would have been realized was Kshs.9,000,000.00 and the debt would have been completely paid and Kshs.185,312.00 left to the credit of Nova. This is the amount Nova is deserving.

33. Had I found that Nova had proved its case against Yang, then I would have made an award of Ksh.97,018,270/-. There was proof of the replacement value of the equipment but inadequate proof of the value of materials and loss of sales. As to the buildings, no loss is awardable as it is part of the property purchased by Yang.

34. The final orders are as follows:-

- i. The Counterclaim is dismissed with costs.
- ii. The claim against the 1st Defendant is dismissed with costs.
- iii. Judgment for Kshs.185,312.00 in favour of the Plaintiff as against the 2nd Defendant with interest at Court rates from the date of filing of the suit. The Plaintiff shall also have costs.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of August 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for the Plaintiff.

P. Kingara for the 1st Defendant.

Chege for 2nd Defendant.