



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 1 OF 2014

BUSIA OUTGROWERS COMPANY LTD.....PLAINTIFF

VERSUS

NILE HAULIERS LIMITED.....DEFENDANT

JUGDMENT

1. The plaintiff herein is a limited liability company. She had initially sued Kenya sugar Board as a first defendant but they abandoned the claim after their fleet of tractors were released to them. They therefore proceed with the claim against the second defendant, **Nile Hauliers Limited**.

2. The claim against Nile Hauliers Limited is for Kshs. 25,805,452.33 but which was amended in the course of hearing of the suit to Kshs.25,070,169, this being arrears for hire services of the plaintiff's fleet of tractors.

3. On 31st January 2012 the plaintiff and **Nile Hauliers Limited**, the defendant herein entered into a lease agreement where the plaintiff leased to the defendant a fleet of tractors to operate cane transportation business. The lease agreement was for a period of 24 months.

4. The agreed monthly consideration for the lease of the entire fleet, was Kshs.3,000,000/= with effect from 1st April 2012 with the exception of the period from 1st February 2012 to 31st March 2012 when the monthly consideration was to be Kshs. 2,000,000/=.

5. Before the expiry of the lease period, the plaintiff complains that the defendant terminated the contract without notice as had been agreed in their lease agreement. The said termination therefore gave rise to this case.

6. **Nile Hauliers Limited**, the defendant is also a limited liability company. In her defence pleaded that the parties agreed to vary the agreement. She argued that the plaintiff having accepted varied payments is estopped from demanding contract hire charges.

7. The defendant made a counter -claim of Kshs. 2,250, 000 which was used in the repair of the plaintiff's tractors and trailers. There was also a counter-claim of Kshs.5000,000/= which the was allegedly held unlawfully by the plaintiff and Kenya sugar Board.

8. The issues for my determination are as follows:

- a) Whether the plaintiff and the defendant agreed to vary their lease contract dated 31st January 2012; and if not
- b) Whether the defendant was in breach of the contract.
- c) Whether the plaintiff is liable to the defendant for counter-claim.

9. Though the defendant through Benjamin Kigen contended that there was a renegotiated lease agreement with the plaintiff, this is not the correct position. The copies of letters he attached to his affidavit were correspondence between the defendant and the Sugar Board. The sugar Board was not party to the lease agreement and could not therefore be in apposition to vary the same. In any case, the letters were only addressing their interest in the leased tractors. I accordingly dismiss the claim by the defendant that there was in existence of a renegotiated lease agreement.

10. Fredrick Marthia wandera (PW1) testified that the defendant brought the contact to an abrupt end in October 2013. The affidavit of Benjamin Kigen (PW1) is that when they entered into the lease contract the understanding was that they were going to be the sole transporter for the cane grown by plaintiff's farmers. It turned out not to be so. This caused the business not to be viable. Clause 12.1 of the lease agreement states:

Area of operation:

The lessee undertakes that the machinery hereby leased shall only be used for purposes of cane transport within the Busia sugarcane Outgrowers zone, for delivery of cane to Mumias Sugar factory or any other duly authorised miller and or recognized cane buying Centre in the said zone but not further.

This is the only clause in the lease agreement that touches on the issue of the out-growers. It is however a very clear clause which was referring to the area of operation and did not state that the defendant was going to be the sole transporter in that zone.

11. When business became challenging, and the defendant was not able to make profits as earlier anticipated, there was an exit clause. This is what clause 16 (a) of the lease agreement provided:

Should either party to this agreement wish to terminate this agreement other than for reasons of fundamental breach of terms and conditions herein, then it shall give the other party 3 (THRE) months written notice of its intention to do so.

PROVIDED however that such notice shall only be effective upon the expiry if the parties hereto have reconciled the books of accounts and any other outstanding liabilities settled.

Had the defendant taken this course of action, it is unlikely this suit will be in existence. She opted to terminate a contract without a notice. This was a breach of the lease agreement.

12. The defendant made a counter-claim of Kshs. 2,250, 000 which was used in the repair of the plaintiff's tractors and trailers. Clause 5 of the lease agreement states:

The lessee has nevertheless agreed to start off operations forthwith (sic) SIX (6) tractors and SIX (6) trailers and ONE (1) tractor subject to the terms and conditions set out herein.

My perusal of the lease document does not address the issue of the initial repairs. However, common sense would dictate that the plaintiff meets the repair expenses before leasing the tractors. There was no response to this claim by the plaintiff. I therefore allow this claim.

13. The defendant in the counter-claim demanded a refund of Kshs.5,000,000/= deposit. According to clause 12.2 (xv) of the lease agreement, was to be refunded at the expiry of the lease if there are no outstanding liabilities. It cannot therefore be subject to a counter-claim. It is however, recognized as a deposit.

14. Having failed to give notice as envisaged in their lease agreement, the defendant is liable to the plaintiff for Kshs.25,070,169 less Kshs. 2,250, 000 which was used in the repair of the plaintiff's tractors and trailers and Kshs. 5,000,000/= deposit if there is no other outstanding claims. The decretal amount will earn interest at court rates from the date of filing of the suit until payment in full. Right of appeal 28 days.

DELIVERED and SIGNED at BUSIA this 28th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE.