



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 117 OF 2015

CHINA ROAD & BRIDGE CORPORATION (K).....PLAINTIFF

VERSUS

1. ECONITE MINING CO. LIMITED

2. MARY MANYIWA MERI

3. BENARD SHUME CHAMUTU

4. MERI CHIGAMBA MERI

5. JUMA MKALA MWABEJA

6. MANYIWA SHUME MANYIWA

7. MERI CHAMUTU MERIDEFENDANTS

J U D G M E N T

Outline of facts

Pleadings and Evidence

1. The plaintiff was during the year 2013, contracted by the Government of the Republic of Kenya the construction of the historic Standard Gauge Railways between Mombasa and Nairobi. By virtue of that engagement, it became necessary for it to operate a quarry for purposes of mining the construction materials.

2. By virtue of that need the plaintiff and the 1st defendant did execute an agreement for lease dated the 24/8/2014 expressed to be for a period of three(3) years at a consideration of an aggregate sum of thirteen million Kenya shillings [Kshs.13,000,000.00] payable in agreed three instalments.

3. That Agreement for lease described the 1st defendant as a lease over that property described as un-surveyed plot, otherwise known as Taru Quarry, consisting of some 50 acres and situate with Taru area of Kwale County, for a period of 10 years from by virtue of head lease dated the 15th July 2013. Both leases are exhibited by the plaintiff in this list of documents as well as the affidavit in support of an application for an injunction filed with the plaintiff.

4. The fact of the lease as sub lease are not in dispute but it is apparent that in September 2013 there arose a dispute between the 1st defendant on one side and the 2nd to the 7th defendant on the other side. That dispute was by consent referred to arbitration by a single arbitrator, Mr. Lumatete Muchai Advocate, appointed by the Law Society of Kenya by consent of the parties recorded in Mombasa PMCC No. 24 of 2013.

5. While that dispute was pending the 2nd to 7th defendant sought to recover arrears of rent in the sum of Kshs.10,801,500/= by proclaiming upon the plaintiff movable assets. That step provoked this suit. The summary of the pleadings reveal that the plaintiff had indeed paid the 1st defendant on account of the sub-lease, but the 1st defendant did not honour his obligations to the head lessor. The 1st defendant raised the defence that the contract between it and the 2nd – 7th defendants had been terminated but did not address the question of payment of the

reserved rent for the lease.

6. The 2nd – 7th defendants on their side raised the defence that being the head lessors they were entitled to payment of the consideration and on default to levy distress towards recovery.

7. After an application to injunct the distress was disallowed, the plaintiff and the 2nd – 7th defendant did enter into a consent by which the outstanding rents due to the said defendant's was agreed and settled at Kshs.8,300,000/= and the plaintiff then deemed it prudent to amend the plaint and demand/claim the sum it had paid to the 1st defendants in the sum of Kshs.8,300,000/= being what it considered as the loss occasioned by breach of the lease agreement by the 1st defendant. On 11/11/2016, the plaintiff was granted leave to amend the plaint and an amended plaint was filed on the 18/11/2016. A list and bundle of document and witness statement was equally filed with the amended plaint and demonstrated to have been served on all the parties. However, after that amendment only Mr. Tarus appeared for the 2nd -7th defendant while no attendance was ever made on behalf of the 1st defendant despite service evidence by affidavits of service.

8. The gist of the plaintiffs suit as declared in the said amended plaint was that having entered into a lease with the 1st defendant as lessee of the 2nd- 7th defendants, the 1st defendant breached his covenant to ensure quiet and peaceful user of the let premises by the plaintiff by failing to pay the rent reserved as due to the head lessor as a consequence of which the plaintiff was compelled to pay to the 2nd – 7th defendants the sum of Kshs.8,300,000.00. That claim was promised on clauses 6(9) and (l) of the sub lease.

9. At trial, after pre-trial directions, the plaintiff called one witness one Mr. WANG LIFEI, who essentially relied on the witness statement and produced the documents filed as exhibits.

10. The totality of that evidence is that the plaintiff had paid to the defendant a total of Kshs.11,000,000/= leaving a balance of Kshs.2,000,000/= in terms of clause 4(a) & (b) of the sublease and that after its application from injunction against distress was disallowed, was forced to pay to the 2nd – 7th defendants the additional sum of Kshs.8,300,000/= to obviate distress occasioned by the 1st defendants breach of its covenant to the 2nd -7th defendants as head lessors.

11. That evidence was supported by evidence of payment of both sets of payment and was never controverted by the 1st defendant who I have pointed out never filed any defence to the amended plaint, and did not attended court to challenge the claim against it. For clarity purposes the statement filed by the 1st defendant prior to the amendment did not address the plaintiffs claim at all.

Issues for determination

12. Having read the pleadings filed, documents and witness statements also filed in support thereof, I have come to the conclusion that the suit between the plaintiff and the 1st defendant, that between the plaintiff and the 2nd – 7th defendants having been compromised, is a liquidated demand with interest at court rates. That being so, there are only two issues that I need to determine:-

i) Did the 1st defendant breach his covenant to the plaintiff in the lease dated 24/8/2014.

ii) Did the plaintiff suffer loss of Kshs.8,300,000/= by payment to the 2nd – 7th defendant on account of the 1st defendant.

iii) What orders are just to grant on costs.

Analysis and determination

13. The only pedestal upon which the 1st defendant entered into the lease dated 24/8/2014 with the plaintiff was his capacity as lessee of the 2nd – 7th defendant courtesy of the lease dated 15/7/2013. By the recital to the lease at page 5, the 1st defendant was granted a lease over the demised premises for a period of 10 years renewable for a further term of 10 years yielding and paying therefore, as premium, Kenya Shillings One Hundred per ton of materials extracted.

14. It was that leasehold interest acquired by the 1st defendant pursuant to the lease that the said 1st defendant sublet to the plaintiff. It follows that the 1st defendant and his assign, the plaintiff, would only enjoy the peaceful occupation and use of the demised premises if the covenants to the 2nd – 7th defendant were met. The obligation to meet the covenants was that of the 1st defendant. It was demonstrated by the 2nd – 7th defendant that the 1st defendant failed to meet its obligation to pay the premium in the manner agreed and at all hence their resort to distress for rent. That failure by the 1st defendant and its consequence in distress by the 2nd – 7th defendant was never in congruence with the 1st defendants covenant to the plaintiff at clause 6(a)(f) & (i) of the lease dated 24/8/2014. To that extent the 1st defendant was in breach of the terms of the lease both to his landlords as well as his sub-lessee.

15. By dint of section 65(a) of the Land Act, it was a term implied upon the 1st defendant, as the lessor to the plaintiff, to guarantee to the plaintiff peaceable and quiet possession and enjoyment of the demised premises for purposes of the lease. That the peaceable possession and enjoyment was disrupted and safety of the plaintiffs' property threatened by the process of distress was clearly a breach. I find that the 1st defendant was in breach of its obligations to the plaintiff and therefore I determine the 1st issue in the affirmative.

16. Having found and held that the 1st defendant was in breach, has the plaintiff suffered any loss as a consequence?

17. In contract, the measure of damages the innocent party can recover from the party in breach is measured in terms of the loss actually and

naturally flowing from the breach or that which is reasonably anticipated by the parties at the time of entering into the contract such damages are not at large but are definite and must be pleaded specifically and strictly proved^[1].

18. In this matter, it has been sufficiently pleaded and adequately proved that in order to avoid distress being levied upon its quarry and office equipment, after the court had declined to grant to it an order of injunction, it did pay to the said 7th defendants and aggregate sum of Kshs.8,300,000/= in consideration of which a consent was recorded in court that it would use the premises upto the expiry of the lease dated 24/8/2014.

19. The court record reveal that on the 11/12/2015 and again on 14/3/2016, the plaintiff and the 2nd – 7th defendants by letters dated 9/12/2015 and 9/2/2016 respectively, agreed to settle the dispute between them by the plaintiff paying to the 2nd – 7th defendants an aggregate sum of Kshs.8,300,000/=. On 18/7/2017 and 4/10/2017 Mr. Tarus for the 2nd – 7th defendant did confirm to court that his clients claim had been settled in full and the dispute between them and the plaintiff fully settled. I take it that full settlement mean satisfaction of the terms of the two consents. That satisfaction essentially mean that the plaintiff did pay to the 2nd – 7th defendant an obligation of the 1st defendant pursuant to the lease dated 15/7/2013.

20. Now in terms of clause 6(g) of the lease dated 24/8/2014 the 1st defendant is bound to compensate the plaintiff for such loss. That covenant between the parties provided:

“6: The lessor hereby covenants with the lessee as follows:-

a.....

(g) The lessor shall take such responsibility including compensation for loss of damage that might be incurred in cases of dispute or any interference from the lessors appointees or parties claiming ownership of the demised property arising during the lease period”.

21. I find now that having been compelled to pay the sum of Kshs.8,300,000/= to the 2nd – 7th defendant, the plaintiff was mitigating otherwise enormous losses that would have been inevitable had distress been effected against it.

22. However, as at that time the plaintiff had only paid to the 1st defendant the sum of Kshs.11,000,000/= out of the agreed Kshs.13,000,000/=. It was still owing to the 1st defendant the sum of Kshs.2,000,000/= being the rent to cover upto the end of their lease. Effectively therefore there was a sum of Kshs.2,000,000/= justly due and owing to the 1st defendant from the plaintiff which the plaintiff is deemed to have paid on behalf of the 1st defendant to the 2nd – 7th defendant. That sum is itself not due for payment or refund to the plaintiff by the defendant.

23. Consequently, the only compensation or indemnity the plaintiff is entitled to from the 1st defendant is the sum of Kshs.6,300,000/=. I therefore enter judgment for the plaintiff against the 1st defendant in the sum of Kshs.6,300,000/= with interest thereon from the 1/3/2016 at 14% p.a. till payment in full.

24. I also award to the plaintiff the costs of the suit and interests on such costs at 14% from the date the costs shall have been agreed or taxed till payment in full.

25. It is so ordered.

Dated and delivered at Mombasa this 29th day of January 2018.

P.J.O. OTIENO

JUDGE

[1] Hadley vs Bexendale[1854]9 Exch. 341 and Standard Chartered Bank Ltd vs Intercom Services Ltd [2004]