



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC.COMM. 89 OF 2016**

**DEACONS (EAST AFRICA) PLC...PLAINTIFF**

**VERSUS**

**MODERN TECHNO FITNESS GYM LIMITED**

**DK REAL ESTATE LIMITED...DEFENDANTS**

**R U L I N G**

1. By its plaint dated the 19/8/2016, the Plaintiff sued the defendant for a raft of orders including a permanent injunction, liquidated sum of Kshs.27,472,033 and for general damages for breach of contract.

2. The suit is grounded upon a contract for the sale of enumerated equipments described as gym equipment at a price and consideration of Kshs.34,995,512 of which the sum of Kshs.7,523,479 was paid leaving a balance of Kshs.27,472,033 which, to the plaintiff, remained unpaid during which pendency the 1<sup>st</sup> defendant is alleged to have moved the equipment into the basement of the building disclosed. In the list of documents filed there are exhibited documents which show the terms of sale between the parties and correspondence between them essentially agreeing that the balance outstanding as at 5/2/2016 was Kshs.23,528,032 and not the claimed sum.

3. Infact there is an unequivocal admission of the debt and a commitment to pay in full by a letter by the 1<sup>st</sup> defendant dated 5/2/2017. Of note in the list of documents is a document leaded "ACCOUNT APPLICATION FORM" by which the 1<sup>st</sup> defendant, on 23/12/2015 did commit to the statement that:-

**"We have read and understood your conditions of sale and agree to trade in accordance with these conditions for any goods supplied. We accept that the title to all goods supplied to us will remain vested in Deacons Kenya Ltd until all amounts outstanding from us on any account have been paid in full to Deacons Kenya Ltd"**

4. To that plaint the 1<sup>st</sup> defendant filed a statement of defence dated 26/10/2016, admitted the contract of sale but denied the allegations of breach and the balance outstanding. The defendant also put up the defence that the contract was frustrated by an act of good on an alleged collapse of the building the Gym was to be operated upon. On those grounds the 1<sup>st</sup> defendant resisted the plaintiff's claim and prayed that it be dismissed with costs.

5. On its side the 2<sup>nd</sup> defendant did file a statement of defence dated 19/9/2016 and contended being a stranger to the dispute on the basis that it is not the registered proprietor of the land upon which the gym

was to be operated; asserted to have been improperly joined, contended that it was in the knowledge of general public knowledge that the equipment sued on was distrained upon by an auctioneer for rent arrears and availed details of such and challenged the courts jurisdiction to entertain and determine the suit and reserved the right to raise a preliminary objection on a point of law. The 2<sup>nd</sup> defendant also urged the court to dismiss the plaintiffs suit with costs.

6. With the plaint, the plaintiff filed a Notice of Motion seeking a temporary injunction to restrain alienation of the equipment pending determination of the suit and a mandatory injunction commanding the release. That application was filed under certificate of urgency and an interim order of injunction granted on the 23.8.2016.

7. Before it could be disposed of and after the defendants had entered appearance, the plaintiff filed yet another application dated 7/10/2016 by which it sought summary judgment in the sum of Kshs.27,472,033.

8. When the parties attend court to argue the two applications and the Preliminary Objection, each having filed respective submissions with list of authorities, they essentially reiterated their positions in the pleadings. It is those submissions I have taken into account in the light of the pleadings filed and applied to the law applicable and I will seek to determine the matter on such material. The material as presented do reveal that there are three broad issues for determination as follows:-

**a) Whether the court is vested with jurisdiction to entertain and determine this matter.**

**b) Whether the plaintiff is entitled to an order for summary judgment.**

**c) Whether the plaintiff is entitled to orders of injunction in terms of the application dated 19/8/2016.**

#### **Does the court have jurisdiction to hear and determine this suit?**

9. The defendant has in its preliminary objection asserted that the court lacks jurisdiction to determine the matter owing to the provisions of Articles 162(2) (b) & 165(5) of the Constitution as read together with section 13 of the Environment and Land Court Act.

10. To put the objection in proper perspective this court has to look at the plaintiffs claim with some clarity.

11. It is unequivocally put that the plaintiff claims the debt of Kshs.27,472,033 on account of good sold and delivered and whose passage of title was made conditional to payment of purchase price. For that claim the plaintiff seeks an injunction to stop alienation or dissipation of the equipment and an order that it gets an access for the purposes of inspection valuation and release. To this court, the claim as framed is purely for the recovery of the sold items undoubtedly exercising its rights under part V of the Sale of Goods Act and in the alternative the recovery of the balance of the purchase price. There is no inference or indeed any claim that can be genuinely and honestly be said to touch on environment and the use and occupation of or title to land. That the goods are kept in premises comprised on a parcel of land does not make the suit a claim to use or occupy land. Neither is the prayer for access to the goods a claim to an interest in land.

12. None, of those facts, *ipso facto*, make the land part of the dispute or claim. To say otherwise would to give the interpretation and extent of the application of Environment and Land Court Act to include all claims including, I dare say, family dispute which indeed all arise on land but are in many cases never claims to use and occupation of or title to land. I think the 2<sup>nd</sup> defendant has stretched the interpretation too far and wide and may, if yielded to, lead to a very absurd and undesirable results. I hold the view that the objection was improperly taken with no purpose at all to enhance the justice of the case between the parties and for that reason I dismiss it and order that the costs thereto be paid by the 2<sup>nd</sup> defendant to the plaintiff.

## **Should summary judgment be entered for the plaintiff?**

13. Under the provisions of Order 36 Civil Procedure Act, a plaintiff making a liquidated demand with or without interest or the recovery of land with or without a claim for rent may apply for summary judgment for the sum or part thereof or recovery of the land.

14. In this suit therefore, the only part of the claim that must therefore be seen to capable of pursuit by the application for summary judgment is the liquidated claim as pleaded in the alternative prayer and not the claim for the recovery of the goods sold.

15. For the plaintiff to succeed in the application it is duty bound to demonstrate that it is justly owed the sum or part thereof and that the defence put up by the defendant does not entitle the defendant to defend the suit. In *ELLIS Mechanical Services Ltd VS Wates Construction Ltd [1978] 1 Lloyds Rep 33*, quoted with approval by the Court of Appeal in *UAP Provincial Insurance Co. Ltd vs Michael John Beckett [2006] eKLR*. The law was set as follows:-

**“nevertheless the court is able, on an application of this kind to give summary judgment for such sum as appears to be indisputably due:.....if the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration.....”**

16. Bridge L J in the same case is reported to have held:-

**“To my mind the test to be applied in such a case is perfectly clear. The question to be asked is. Is it established beyond reasonable doubt by evidence before the court that atleast X is presently due from the defendant to the plaintiff? If it is, then judgment should be given to the plaintiff for that sum whatever X may be ....”**

17. In this case, the sale is not disputed. Infact there is an admission by the 1<sup>st</sup> defendant contained in its letter of 5/2/2016 where the supply of the equipment is confirmed and a debt of Kshs.23,528,032 is admitted unequivocally and a proposal to pay offered within 210 days. The letter says at the pertinent portion:-

**“By this letter, we commit to full payment to clear the**

**Outstanding dues totaling Kshs.23,528,032 (twenty three million, Five Hundred and Twenty Eight Thousand and Thirty Two within 210 days for the date of this letter”.**

18. Nothing can be clearer than the fact that these is a debt due and admitted in the disclosed sum. This is the sum the plaintiff should not be kept away from whatever the defendant says subsequently. It would serve no purpose totally to pretend that there is a dispute when no other than the person obligated to pay has admitted and said if owes and made a commitment to pay.

19. I therefore acceded to the plaintiffs application dated 7/10/2016 and enter summary judgment for him against the defendant in the sum of Kshs.23,528,032 and not Kshs.27,472,033 as prayed in the plaint.

20. On the application for injunction, the court notes and appreciate that the parties in their dealings agreed that the title in the goods would not pass till the purchase price is paid in full. Under the provisions of section 19 of the Sale of Goods Act, the intention of the parties must be respected and guarded.

21. Now that it is established that the purchase price is yet to be paid in full and the title in the goods still vest in a plaintiff, those are facts that presents a prima facie case and satisfies the first test in *Giella vs Casman Brown*. The only other consideration to be taken into account is whether the plaintiff will be exposed to incur and suffer a damage incapable of remedy by an award of damages.

22. Granted that the goods have known value, it is also true that the 1<sup>st</sup> defendant has not asserted that the property in the goods ever passed to them. To this court, even in the absence of the principles in *Giella vs Casman Brown*, where a party demonstrates entitlement to title in any property, it is the duty of the court to protect that right as a constitutional right guaranteed under the constitution. The court would loath to allow arbitrary deprivation of such title.

23. That to this court is a consideration that far outweigh any other. It would be an artithesis to justice to turn a blind eye to such entitlement just because damage would be on adequate remedy.

24. The flipside is to say that even this judgment is by itself a declaration of right in the property comprised in the sum adjudged to be due. That is equally entitled to protection under the constitution.

25. The third way to view it is the financial conduct of the 1<sup>st</sup> defendant prior to and even after the suit was filed. It has been demonstrated that it was unable to pay the purchase price and that even the rent due to the 2<sup>nd</sup> defendant fell in arrears and that led to the good being distrained upon. Those facts point to the need to secure not only the goods but the decree from this judgment from being a worthless one. The two can only be secured by an order that the goods be forthwith released to the plaintiff and to remain in its custody till the sum herein shall have been paid in full. Once the sum is paid, the intention of the parties, plaintiff and 1<sup>st</sup> defendant, for the passage of title shall have been realized and the 1<sup>st</sup> defendant will have the undoubted right to possession and title.

26. There was a submission by the 2<sup>nd</sup> defendant that section 10 of the Distress for Rent Act and Rules under Auctioneers Act forbid any person from interfering with any distrained goods.

27. My interpretation and understanding of that provision is that it is a prohibition against the tenant and any person claiming against the tenant from taking any steps so as to defeat the distress once lawfully levied. It cannot be interpreted or understood to take away the adjudicative powers of the court to decide for example on the validity or propriety of the distress or even on the question of who owns the distrained goods.

28. To say otherwise from the foregoing interpretation would be to totally defeat and ignore the clear and unambiguous provisions of section 19(1) of the same Act which entitles a person claiming distrained goods to notify the landlord by a declaration that the goods to not belong to the tenant.

### **Rendition**

29. The upshort of the foregoing, is that I grant to the Plaintiff/Applicant orders as follows:-

a) The application dated 7/10/2016 is allowed and judgment entered for the plaintiff in the sum of Kshs.23,528,032.00 with costs and interest thereon from the date of the suit till payment in full. The balance of the claim may be pursued by the suit being heard by production of evidence.

b) The application dated 19/8/2016 is allowed in that :-

**i) Orders of permanent injunction granted to restrained the defendants jointly and severally from alienating disposing selling or in any way interfering with the suit goods pending the final determination of the suit.**

**ii) An order of mandatory injunction is directed at the defendants, jointly and severally, and compelling them to forthwith release to the plaintiff the suit goods pending the payment of the sum adjudged by this judgment to be due and payable to the plaintiff.**

c) The notices of preliminary objection by the defendants based on lack of jurisdiction are dismissed with costs to the plaintiff.

30. On costs, I have noted that the plaintiff has succeeded against both defendants but it is the 1<sup>st</sup> defendant who precipitated and necessitated circumstances leading to the suit. For that reason the 1<sup>st</sup> defendant shall meet the costs of the entire suit while the 2<sup>nd</sup> defendant will only meet the costs necessitate by its resistance to the two applications and those occasioned by the preliminary objection filed by it.

31. It is so ordered.

Dated and delivered at **Mombasa** this **23rd** day of **June 2017**.

**HON. P.J.O. OTIENO**

**JUDGE**