



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 6 OF 2010

BETWEEN

MUMIAS OUTGROWERS COMPANY (1998) LIMITED.....1ST PLAINTIFF

KENYA SUGAR BOARD.....2ND PLAINTIFF

AND

CMC MOTORS GROUP LIMITED.....DEFENDANT

JUDGMENT

1. In the Amended Complaint filed on 25th March 2010, the 1st Plaintiff (“MOCO”) averred that the defendant (“CMC”) won a tender on or about 21st December 2006 to supply it with 10 New Holland Tractors valued at Kshs. 31,990,000/- to be paid within 31 days of delivery. It stated that the parties later agreed to pay the amount by instalments and that it paid CMC over Kshs. 25,000,000/-. The purchase of the tractors and other farm equipment was financed by a loan from the 2nd plaintiff (“KSB”) which was secured by a floating debenture over all MOCO’s assets, present or future. It further pleaded that in the course of its dealings, CMC supplied it with spare parts for its fleet of tractors on credit for which it continued to pay.

2. The gravamen of MOCO’s case is that on 11th January 2010, CMC sent auctioneers, Jone Brooks Consultant Limited (“Jone Brooks”), who proclaimed all its assets on account of debt amounting to Kshs. 11, 192,700.26 accruing from the tractor purchase and spare parts accounts. It contended that the attachment was illegal as no decree was issued against it and that CMC, having received two-thirds of the purchase price, could not proceed with repossession without following due process. It further contended that CMC could not attach its property as it was subject to a debenture in favour of KSB. MOCO also stated that CMC unlawfully detained a tractor KAW 817Y (“the Tractor”) and a Suzuki Jimny KAM 531 (“the Suzuki”) and has continued to detain them since 2007 when they were taken for repairs.

3. As a result of the foregoing, the plaintiffs prayed for the following reliefs:

(a) Attachment process be declared illegal and a permanent injunction do issue restraining the defendants its servants, agents, employee or any other person claiming through them from repossessing any of the plaintiff’s tractors or goods.

(b) A mandatory injunction do issue compelling the defendant to release motor vehicles KAW 817Y and SUZUKI KAM 531 Z.

(c) Accounts be taken.

4. CMC defended the plaintiffs' claim through the further amended defence and counterclaim. It admitted the agreement for delivery of the tractors and other farm implements but stated that the payment was strictly on a cash basis to be paid within 30 days of delivery. It further stated that it delivered 10 New Holland Tractors worth Kshs. 31,990,000/- and other farm implements worth Kshs. 58,374,000/-. It averred that it was not party to the debenture issued in favour of KSB and that such debenture did not impede its rights as a creditor as it was merely intended to hinder its right to recover the debt. In response to the allegation regarding the Tractor and Suzuki, CMC denied that it was unlawfully detaining the vehicle. It stated that if indeed the vehicles were detained, they were detained because of non-payment of repair fees.

5. CMC made a counterclaim for Kshs. 5,170,483.00 on account of the tractors supplied and a further Kshs. 6,022,271.26 on account of the spare parts account making a total of Kshs. 11,192,700.26.

6. Prior to the hearing, I made, among others, the following orders on 9th March 2017:

(i) The defendant to provide the plaintiff within 7 days from the date hereof a running account demonstrating that it owes Kshs. 11, 192,700.26 claimed in the plaint.

(ii) The defendant shall also provide the value of the two motor vehicle repossessed to wit; KAW 817Y and Suzuki KAM 531Z.

7. Since the 1st plaintiff's claim was essentially one for accounts, the order aforesaid provided an opportunity for the parties to settle non-contentious issues. The parties exchanged correspondence which was produced in evidence. According to the letter dated 7th June 2017 from MOCO to its advocates, MOCO indicated that it paid a total of Kshs. 54,054,000.00 for the tractor units leaving a balance of Kshs. 4,320,000.00. It contended that from the balance, it should be given credit for the Tractor worth Kshs. 3,199,000.00 and the Suzuki worth an estimated Kshs. 1,500,000.00 leaving Kshs. 379,000.00 due to it. On the spares account, MOCO admitted that the amount due was Kshs. 6,022,217.26 less interest claimed by CMC amounting to Kshs. 949,783.00 making a total of Kshs. 5,072, 434.26.

8. The defendant's advocates responded to MOCO's contentions by the letter dated 5th July 2017. CMC accepted that it received Kshs. 54,054,000.00 between January 2007 and November 2009 leaving a balance of Kshs. 4,320,000/- which was expected within 30 days of delivery as the transaction was a cash sale. It pointed out that the Tractor and Suzuki were brought to the workshop for repairs and were still there. It accepted Kshs. 5,072,434.26 being the principal amount due to it on the spare parts account.

9. Following my orders of 9th March 2017, CMC commissioned valuations of the Tractor and Suzuki. Maka Automotive Works and Assessors inspected the two vehicles and prepared valuation reports. In the respective valuation reports dated 10th May 2017, the Tractor was valued at Kshs. 740,000.00 while the Suzuki was valued at Kshs. 130,000.00.

10. Both parties called one witness each. Gamaliel Anamanjia (PW 1), the Chief Executive of MOCO, testified on its behalf while Duncan Omutitia Zakayo (DW 1), an accounts administrator at CMC, testified on its behalf. Their testimony followed the contours I have set out above. The parties also filed written submissions which I have considered.

11. Before I consider the relevant issues, it is important to note that the plaintiffs' main prayer is for accounts and the defendant seeks judgment for a specific sum due. The parties are agreed that MOCO has two accounts at CMC; the tractor account and the spare parts account. From the facts I have outlined above, it is not in dispute that MOCO purchased tractors and farm equipment from CMC. MOCO admitted in its letter that out of the sum of Kshs. 54,054,000.00, Kshs. 4,320,000.00 remained outstanding. This was a clear and unequivocal admission contained in its letter dated 7th June 2017 accepted by CMC. PW 1 confirmed as much in cross-examination. The question then is whether CMC is entitled to judgment on its counterclaim subject to MOCO being given credit for the value of the Tractor and Suzuki which it alleged was unlawfully detained.

12. Before I deal with the other issues, I will first deal with the issue of attachment. MOCO claimed that the attachment of property was illegal. In January 2010, CMC Motors through Jone Brooks proceeded to the MOCO's premises and proclaimed 14 tractors and any other moveable properties on account of the debt of Kshs. 11,192,700.26. MOCO moved this court for interim relief and by a ruling dated 26th November 2010, Ali-Aroni J., held that:

The court is of the view that the defendant must of necessity in the absence of a repossession arrangement file suit and obtain judgment against the 1st plaintiff before attaching the properties of the 1st plaintiff.

13. I agree with the aforesaid sentiments. CMC did not show that it had a chattel mortgage or other security over MOCO's tractors and other moveable properties entitling it to retain property therein. It did not have any court orders entitling it to effect attachment. Even assuming that the CMC was exercising its right of lien, the right of lien would not entitle it to sell the goods. CMC admitted that the sale of the tractors was a cash sale which means that the property in the goods passed upon payment hence, it could not proceed with attachment on account of outstanding sums or other claims it had against MOCO without a court order or decree. I therefore, declare that the attachment carried out by Jone Brooks on behalf of CMC Motors was illegal in the circumstances.

14. I now turn to the issue of the Tractor and Suzuki. DW 1 admitted in evidence that MOCO brought the Tractor and Suzuki to Kisumu for repairs. On its part, MOCO maintained that the Tractor was returned to CMC during the warranty period for repairs and the Suzuki was never released to it after it was brought for repairs. I find that MOCO's claim regarding the Tractor is inconsistent with its pleading. It did not plead that one Tractor was never supplied or that it was returned to CMC for repairs. It did not make any claim based on breach of warranty. Paragraph 10 of the Amended Plaintiff reads, "[T]he defendant unlawfully detained one tractor KAW 817Y and SUZUKI KAM 531L since 2007 when they were taken to the defendant's premises for repairs and [the plaintiffs] claim release of the same and damages for loss of user."

15. The plaintiffs' case set out in the Amended Plaintiff is that the Tractor and Suzuki were in CMC's possession from 2007, when they were taken for repairs, until 2010 when the proclamation was issued and they became the subject of attachment. PW 1, did not tell the court why it could not collect both vehicles from CMC for a period of three years when there was no attachment. Further, the attachment by Jone Brooks was done on or about 12th January 2010 and the injunction in favour of MOCO granted on 26th November 2010. Thereafter, MOCO did not take any step to collect its vehicles as CMC was under an injunction not to interfere with its property. The totality of this evidence is that MOCO cannot claim that CMC is unlawfully holding the Tractor and Suzuki and since it is at liberty to collect them at any time, it cannot be given credit for them.

16. Even if I were convinced that MOCO was entitled to set off the value of the vehicles from what was due to CMC, its claim could only be one for special damages which as a matter of law must be pleaded and proved (see **Hann v Singh [1985] KLR 716, Kenya National Library Services v Noorien CA Civil Appeal No. 109 of 1988 (UR)**). Since the 1st plaintiff did not plead either the value of the vehicles or the quantum of loss of user, its claim would fail on that score.

17. I now turn to the issue of the spare parts account. Counsel for MOCO submitted that the claim of Kshs. 6,022,217.26 being costs of repairs, service and spare parts is in the nature of special damages and ought to have been proved by way of Local Purchase Orders (LPO's), contracts, invoices and reports which were never produced. On the other hand, counsel for CMC submitted that the amount was admitted. As I have stated, the letter dated 7th June 2017 was a clear and unequivocal admission that the MOCO owed CMC money and that the sum owed was Kshs. 6,022,217.26. Although PW 1 stated in evidence in-chief that the sum due was about Kshs. 5,000,000.00 and was difficult to ascertain, when pressed in cross-examination, PW 1 admitted that the amount was indeed correct. In light of the clear admission, CMC was relieved of the burden of proving the debt pleaded in the counterclaim.

18. The tenor and purport of the plaintiff's case is that though it was indebted to the defendant, it could not tell how much it owed the defendant. Ali-Aroni J., found in the ruling dated 26th November 2010, that the plaintiff was indebted to the defendant and in the course of these proceedings, the 1st plaintiff unequivocally admitted its indebtedness to the defendant. In light of that admission, I enter judgment for the defendant on its counterclaim.

19. Although the defendant has claimed interest, the plaintiff has contested the claim for interest on the ground that the parties did not agree on interest under the contract. The power of the court to award interest is provided in **section 26** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which reads as follows:

26(1) Where and in so far as a decree is for the payment of money the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

20. The rationale for the above provision was explained in *Lata v Mbiyu [1965] EA 592* where the court held that the justification for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money or specific goods through acts of a defendant. The court stated that:

The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit.

21. In this case there is no reason why the defendant should be denied interest on the debt that has been admitted and has been outstanding since 2007. I will however, award interest from the date of filing the counterclaim as the defendant had the opportunity to file and prosecute its claim at the earliest opportunity.

22. It is clear from the foregoing that save for the declaration sought in relation to the attachment, the plaintiffs' case fails. The defendant shall therefore pay one-third of the plaintiffs' costs. The defendant has succeeded in its counterclaim against the 1st plaintiff and as costs follow the event, the 1st plaintiff shall bear the full costs of the counterclaim.

23. For the reasons I have set out above, I now make the following orders:

(a) A declaration be and is hereby issued declaring the attachment process commenced on 11th January 2010 by Jone Brooks Consultants Limited and the subsequent proclamation of the 1st defendant's tractors and other moveable properties on instructions of the defendant is illegal, null and void.

(b) Judgment be and is hereby entered for the defendant and against the 1st plaintiff for **Kshs. 11,192,700.26**

(c) The amount in (b) shall accrue interest at court rates from 8th March 2012.

(d) The defendant shall pay 1/3 of the plaintiff's suit and the 1st plaintiff shall bear the costs of the counterclaim.

DATED and DELIVERED at KISUMU this 28th day of September 2017.

D.S. MAJANJA

JUDGE

Mr Onyango instructed by Olel, Onyango, Ingutiah and Company Advocates for the plaintiffs.

Mr Kimanga instructed by Kimanga and Company Advocates for the defendant.