



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NO. 63 OF 2006

JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF

VERSUS

HOMELEX LIMITED.....RESPONDENT

JUDGEMENT

Plaintiff's Case

1. By its plaint dated 21st February, 2006 filed on 22nd February, 2006, the plaintiff herein seeks that:

(a)The defendant whether by itself, its agents or servants be restrained by an order of injunction by this court from presenting to court, advertising or howsoever in any way filing or taking out Winding Up proceedings against the plaintiff in respect of a claim for Kshs 1,191,504.00 or in respect of any other claim the defendant may make against the plaintiff in any way whatsoever.

(b)Damages

(c) Costs.

(d) Interest.

2. The cause of action according to the plaintiff, arose from a contract which was entered into between the plaintiff and the defendant in the year 2004 by which the Defendant was to supply various/assorted electronic goods including radios, radio cassettes, television sets, etc of various makes, i.e. Sony Philips, Panasonic etc. to the Plaintiff in Nairobi and for which the Defendant was to receive payment from the Plaintiff. Pursuant to the said contract, the Defendant went ahead to supply the said goods and presented invoices to the Plaintiff for payment totalling Kshs. 1,191,504.00.

3. It was pleaded that the Defendant gave the Plaintiff a verbal guarantee at the time of sale that the goods being sold and delivered to the Plaintiff by the Defendant were genuine goods and not counterfeit and that the Plaintiff relied on that verbal guarantee to buy the goods from the Defendant.

4. Upon receipt of the goods the plaintiff went ahead to distribute the goods for sale to its various branches in Kenya. However, in breach of the agreement of sale, the Defendant sold and delivered to the Plaintiff goods that were counterfeit as a result of which the Plaintiff has suffered loss and damage particulars of which were that the customers of the Plaintiff rejected the plaintiff's goods and returned

them to the Plaintiff; the reputation of the plaintiff in the market was dented and injured; the Plaintiff was placed under investigation by the Government for offering for sale counterfeit goods contrary to the law; and the Plaintiff suffered loss in lost sales and profits.

5. It was further pleaded that when the Plaintiff informed the Defendant of the loss and damage aforesaid a dispute arose regarding the payment of the Defendant's invoices but while the dispute was going on between the Plaintiff and the Defendant, on 9th December 2005, the Defendant served a Winding Up Notice upon the Plaintiff which notice the plaintiff averred that irregular, null and void due to the fact that the purported debt is *bona fide* disputed by the Plaintiff.

6. According to the plaintiff the Defendant's action in serving the plaintiff with the Winding Up Notice was actuated by malice and bad faith on the part of the Defendant in that the Defendant intended to threaten, coerce and force the Plaintiff to pay a bona fide disputed debt; the Defendant's action was purely to harass the Plaintiff; and the Defendant failed to give any or any valid reason for its action.

7. It was therefore contended by the plaintiff that by reason of the matters aforesaid, the Plaintiff suffered and stood to suffer irreparable loss and damage if the Defendant proceeded to carry out its intention of presenting a Winding Up Petition against the Plaintiff unless restrained by an order of this court

8. In support of its case the plaintiff called **Kerval Kantaria**, its Managing Director as PW1 and its only witness. Apart from his oral testimony in Court PW1 relied on his statement filed herein on 11th November, 2011 as part of his cross examination in chief. In the said statement, P1 reiterated the contents of the plaint and added that there were copies of statements and inspection reports received by the Plaintiff to confirm that the goods sold to the Plaintiff by the Defendant were not genuine but counterfeit.

9. Despite the Plaintiff taking up the issue of the counterfeit goods with the Defendant, the Defendant refused to address the issue though in breach of the agreement of sale, the Defendant sold and delivered to the Plaintiff goods that were counterfeit and thus, the goods supplied were not as per the specifications requested in the Plaintiff's purchase order. It was therefore contended that as a result thereof the Plaintiff has suffered loss and damage and a dispute arose between the plaintiff and the defendant in respect thereof. The Plaintiff further took it upon itself to lay a complaint with the Kenya Bureau of Standards on 10th January 2006 regarding the counterfeit products and pursuant thereto on 10th February 2006, officers from the Ministry of Trade & Industry visited the plaintiff's premises and seized the goods on suspicion that the goods were counterfeit. However, while the dispute was going on, on 9th December 2005, the Defendant served a Winding Up Notice upon the Plaintiff.

10. According to the plaintiff, as there is a genuine dispute between the Plaintiff and the Defendant over the debt in issue, the Defendant's action of serving the Plaintiff with the Winding Up Notice was actuated by malice and bad faith on part of the Defendant. Further it was evident that the Defendant intended to threaten, coerce and force the Plaintiff to pay a bona fide dispute debt; the Defendant's action was purely to harass the Plaintiff; and the Defendant failed to give any valid reason for its action.

11. It was contended that as a result of the foregoing, the Plaintiffs customers rejected the Plaintiffs goods and returned them to the Plaintiff; the reputation of the Plaintiff in the market was dented and injured; the Plaintiff was placed under investigation by the Government for offering for sale counterfeit goods contrary to the law; and the Plaintiff suffered loss in lost sales and profits. Further, part of the consignment received from the defendant was seized by the Anti-Counterfeit Department of the Kenya Bureau of Standards and investigations were going on, consequently, the Plaintiff was unable to return these to the Defendant; the debt being claimed by the Defendant is truly and bona fide disputed; contrary to what the Defendant was claiming, the entire terms of the agreement between the plaintiff and the defendant were not contained in purchase order numbers POD00002639, POD00002647, POD00002683, POD00002667, POD00003373, POD00003388 and POD00003564 and Delivery Note Numbers 2517, 8014, 8067, 8068, 4092, 8074 and 8069; even though the defendant did eventually withdraw the Winding Up Notice which it had served upon the Plaintiff, the defendant did not do so voluntarily; a complaint was lodged on 29th March 2006 by the Weights and Measures Department to the relevant authorities as

against the Defendant in this case which gave rise to criminal case number 601 of 2006 which on the request of by the Plaintiff's advocates was thereafter withdrawn for reasons unknown to the Plaintiff; in paying Kshs 349,178.00/= under invoices numbers 8014, 8067 and 8068 the Plaintiff did not demonstrate its acceptance of the contract and the goods supplied hence the Plaintiff did not owe the Defendant Kshs 1,034,818/=; and the Plaintiff further denied that there was an amount of Kshs 218,774.00 in delay charges owing and outstanding to the defendant as at 31st March 2006.

12. The plaintiff therefore sought orders as prayed in the plaintiff and prayed that the Defendant's counterclaim be dismissed.

13. In cross-examination by **Mr. Njoroge** learned counsel for the Defendant, PW1 asserted that the plaintiff did not owe money to the Defendant and whereas the Winding Up proceedings no longer existed, there were threats of the same being revived.

14. In re-examination the witness said that he had not seen any notice withdrawing the Winding Up notice.

Defendant's Case

15. On the part of the defendant, it called **Adamali E. Mamujee** who testified as DW1. He similarly adopted his statement dated 16th May, 2012 as part of his evidence in chief.

16. According to the statement, in the early 2005 (i.e. 2/3/05, 14/3/05 and 9/6/05) the Defendant company ordered for assorted Electronic goods vide Local Purchase orders Nos. 3373, 3388 and 3564 for a value amounting to Kshs 1,034,818/= and they issued promissory notes Nos. 717, 743, 851, 853, 862, 863, 867 868,942,944,945 and 950 amounting to Kshs 1,034,818/= which all were to mature before 9th October 2005. The defendant company then invoiced for the goods supplied vide invoice number 2517, 8014, 8067, 8068, 8069, 8074 for Kshs 1,383,966/= and on 17th October 2005 the Plaintiff paid Kshs 349,178/= by way of cheque in regard of the invoices leaving a balance of Kshs 1,034,818/= unpaid and owing to the company.

17. In November 2005 the Plaintiff company started claiming that the assorted electronics supplied in the year 2004 and unrelated to the LPO's and invoices issued in the year 2005 were counterfeit and promised to return all the alleged goods to the Defendant which they never did. It was reiterated that the goods complained to be counterfeit were in respect of goods supplied in the year 2004 and not year 2005 and that in fact the Plaintiff had already made payments for the goods supplied in the year 2004.

18. According to the witness, the Defendant company and its director were charged in court with the offence of dealing in counterfeit goods but were never convicted for the same hence the said allegations by the plaintiff are meant to deny the Defendant their monies. Due to the plaintiff's inability to pay and/or honour the promissory notes the Defendant issued the letter for winding up the Plaintiff.

19. To the witness a surcharge of 3% is normally payable once accounts were due for more than 120 days and this was the agreement with the plaintiff and that what necessitated these proceedings was a demand issued by the Defendant to the Plaintiff to pay the outstanding debt of Kshs 1,034,818/=.

20. The defendant therefore sought an order for payment as claimed in the Defendant's counter-claim, interest and costs of this suit.

21. In his evidence before the Court DW1 denied that they had ever sold counterfeit products hence the plaintiff ought to be compelled to pay the defendant the sum due.

22. In cross-examination by **Mr. Murugara**, learned counsel for the plaintiff, DW1 admitted that they had a long trading dispute with the plaintiff without any complaint and that before the instant dispute the plaintiff was paying for the goods and that they gave promissory notes for the goods supplied which were

assorted electronic items, radios and tape recorders. According to him the plaintiff paid until there was an outstanding balance at which point they refused to pay under the pretext that the goods were counterfeit which according to him was untrue.

23. Referred to the seizure notice in the plaintiff's bundle the witness confirmed that they were the goods supplied. He also confirmed that the Defendant's Managing Director was charged with various charges though he was never convicted. Although he admitted having seen fake goods he insisted that no one can make Sony or Panasonic fake goods because the names are registered. According to him, they got the goods from their agents though he had no evidence that they were inspected.

24. The witness admitted that there was a genuine complaint in respect of the goods and agreed that if the goods were counterfeit the plaintiff would not be bound to pay for them. According to him, he did not know where the goods were. He however denied that it was a condition that the goods were not to be the plaintiff's till payment in full. The witness did however admit that if the goods were counterfeit the Plaintiff would not be liable to be wound up. However since the defendant had not taken back the goods, it was his view that the plaintiff was liable to pay for the same pursuant to the promissory notes.

25. Referred to the invoice from the Defendant the witness admitted that it was stated that the ownership of the goods would pass only after payment was made.

26. In re-examination by **Mr. Thuku**, learned counsel for the Defendant, DW1 reiterated that the goods had never been delivered to them as they were still with the plaintiff to the best of his knowledge hence the plaintiff was liable to pay for the goods.

Determinations

27. Having considered the pleadings, the evidence on record and the submissions filed, it is my view that the following are the issues for determination.

- 1. Whether the Defendant was in the circumstances of this case justified in issuing a Winding Up Notice.**
- 2. Whether the Plaintiff was liable to pay the defendant the balance of the cost of the goods supplied to the plaintiff by the defendant.**
- 3. What orders ought to be made with respect to the cases for the respective parties?**
- 4. Who should bear the costs of the suit?**

28. From the evidence on record there is evidence that there was a Notice of Seizure issued by Anti-Counterfeit Department of the Kenya Bureau of Standards and the defence witness confirmed that the goods specified in the notice of seizure were the goods the subject of these proceedings. It is therefore clear that the Defendant was aware that the issue of the plaintiff's liability was disputed and from the facts of this case one cannot say that the said dispute was not *bona fide*.

29. In **Re Tanganyika Produce Agency Limited HCMCC No. 6 of 1957 [1957] EA 241**, it was held that:

“It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the court, and should be dismissed with costs... If it is shown that an alleged dispute is not a *bona fide* one the objection to the petition fails. Thus it is not uncommon for a company, after again and again begging for time for payment of a debt, to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such defence is naturally open to great suspicion and meets with no favour from the court...A winding up petition is not to be used as machinery to try common law action...A winding up order cannot be obtained by a person claiming unliquidated damages,

his proper course being to change the claim for damages into a judgement and thus make himself a creditor; or by a judgement creditor who has attached a debt due from the company to his judgment debtor, his proper course being to obtain judgement in action and then petition.”

30. Similarly, it was held in Re Hoima Ginners Ltd (No. 2) Kampala HCCC No. 3 of 1964 [1964] EA 439 that:

“A petitioning creditor seeking a winding up order founded on unliquidated damages should first establish with certainty what the quantum of damages is and must make himself a creditor by changing his claim into a judgement before he can petition. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. A petition will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.”

31. The same position was adopted by Ringera, J (as he then was) in In Re Standard Ltd, Ex Parte Tricom Paper International BV [2002] 2 KLR 644, in which he expressed himself as follows:

“The Companies court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow a machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company’s head while that litigation is fought out. When a petition is based on a debt, which is disputed on substantial grounds, the petitioner is not a “creditor” within the meaning of the Companies Act who has the *locus standi* requisite for the presentation of the petition, even if the company is in fact insolvent. Again, The existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that the company has within the meaning of the Act “neglected” to pay the sum required by the statutory notice. In the context of a notice requiring a person to do some act, it cannot be said that the person “neglects” to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be “neglect” whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of “neglect” in relation to an obligation must rest...When the creditor’s debt is clearly established it, it follows that the court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would, as such, be entitled to present, a petition and the debtor would have his own remedy in paying the undisputed debt which it should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt. Further the winding up order on the ground of inability to pay debts would be the very matter which it would be for the companies court to decide after presentation of the petition; and validly to present a creditor’s petition which the company explicably would not pay could hardly, in general at any rate, be an abuse of the process of the court. Where it is established that there is no debt, it follows that there is no creditor, that the person claiming to be such has no *locus standi* and that the petition is bound to fail and once that becomes clear, pursuit of the petition would be an abuse of the process of the court, and the court would restrain its presentation or advertisement. Where the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore ignore) and the company is solvent the court will restrain the prosecution of the petition to wind up the company since winding up is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and a disputed debt... It is therefore clear that if a petition is intended to enforce payment of a disputed debt, it will be treated as an abuse of the process of the court and will be struck out. However, the dispute must be

predicated on substantial grounds and is not constituted by the mere fact of an affirmation by the creditor on the one hand and a denial by the debtor on the other hand.”

32. It is therefore my view and I so hold that the circumstances of this case did not render themselves to the invocation of the winding up procedure and hence it was not proper for the Defendant to have issued a winding up notice to the plaintiff.

33. The next issue for determination is whether the plaintiff owes the Defendant the sum claimed by the Defendant in the counterclaim. Section 14 of the *Sale of Goods Act*, Cap 31 Laws of Kenya provides as follows:

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

34. That counterfeit goods are liable to forfeiture and criminal proceedings in this country cannot be disputed. Therefore where the goods sold are counterfeit goods not only is that a breach of the condition that the seller has the right to sell the goods in question but also a breach of the warranty that the buyer will enjoy quiet possession thereof. I am not convinced by the Defendant's contention that such circumstances are covered under section 16 of the said Act.

35. In this case the Plaintiff has adduced evidence which on the balance of probabilities show that the goods in question were seized by the Anti-Counterfeit Department of the Kenya Bureau of Standards. The defence witness has conceded that if the said goods were counterfeit goods and were seized then the plaintiff was not obliged to pay for the same. There is evidence that the Defendant's director was charged in a criminal offence which proceedings were terminated under unclear circumstances. However if the goods were impounded by the said agency, it is my view that the plaintiff would not be liable.

36. Having considered the evidence before this Court it is my view that the plaintiff has proved on a balance of probability that the goods which were supplied to it by the Defendant were confiscated or seized by the Anti-Counterfeit Department of the Kenya Bureau of Standards. Accordingly the plaintiff is not liable to the Defendant on the counterclaim since if the goods in question were prohibited from being sold in the country then the contract founded on them would also be illegal. As was held in **Patel vs. Singh (No 2) [1987] KLR 585:**

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent of breaking the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio* and that arises if the making of the contract is expressly prohibited by statute or is otherwise contrary to public policy...The upshot of this was that the appellant sought the aid of the court to enforce a contract made illegal by statute. Well settled principles of common law preclude the court from assisting him...The result of this appeal is that the respondent is

getting away with a handsome present. He is the gainer by this illegal transaction. He succeeds on this appeal not because of any merit, which his case possessed, but because of what the court conceived to be a public policy of the law on this subject.”

Order

37. It follows that the plaintiffs case succeeds with the result that an order of injunction is hereby given restraining the defendant whether by itself, its agents or servants court from presenting to court, advertising or howsoever in any way filing or taking out Winding Up proceedings against the plaintiff in respect of a claim for Kshs 1,191,504.00. As no proper basis was laid upon which damages can be awarded there will no award of damages.

38. The Defendant’s claim against the plaintiff is hereby dismissed.

39. The costs of the main suit and the counterclaim are awarded to the plaintiff.

Dated at Nairobi this 19th day of January, 2015

G V ODUNGA

JUDGE

Delivered the presence of:

Mrs Omondi for Mr Murugara for the Plaintiff

Cc Patricia