



REPUBLIC OF KENYA

High Court at Mombasa

Commercial Civil Case 43 of 2010

C.M.C. MOTORS GROUP LTD.....PLAINTIFF

VERSUS

1. BENERIA ARAP KORIR T/A MARBEN

SCHOOL

2. ST. ELIZABETH ACADEMY SCHOOL KAREN.....DEFENDANTS

Coram:

Mwera J.

Munyithya for Plaintiff

Masika for 1st Defendant

Ms. Langat for 2nd Defendant/Applicant – n/a

Furaha Court Clerk

JUDGMENT

The plaintiff company sued the two defendants herein by filing a plaint on 9th December, 2010. It was therein pleaded that as at 1st May, 2009 the 1st defendant owed it Shs. 4,243,390/80 in debt. Then the 1st and 2nd defendant entered into an agreement for sale whereby the 1st defendant's outfit (Marben School) and its assets were to be sold and taken over by the 2nd defendant and by that the debt owed by the 1st defendant was to be settled by the 2nd defendant. The 2nd defendant took possession and ownership of Marben School, an arrangement that the plaintiff was well aware of. After some period without the 2nd defendant settling the debt, the plaintiff wrote to the 2nd defendant about it on 24th April, 209 and by implied or express acknowledgment the 2nd defendant replied that the amount of the debt:

“.....was captured on the list of debts.”

And with that the plaintiff took it that by the whole transaction the 2nd defendant had become a guarantor for the debt the 1st defendant owed it and so the 2nd defendant ought to pay up without denying liability. The plaintiff sent demands to the defendants without payment, hence this suit, seeking payment of the debt, costs and interest.

In the 2nd defendant's defence it was denied that there was an agreement that that party do settle the 1st defendant's debt owed to the plaintiff. That the deal to buy the school from the 1st defendant and taking possession thereof, was with the clear understanding that the 1st defendant would pay off all its creditors and that the 2nd defendant would not assume any of those. It was denied that that the plaintiff company was involved in the school sale transaction between the 1st and 2nd defendants. It was thus a stranger to the agreement between the two. And finally that the 2nd defendant was at no time a guarantor to the 1st defendant's debt to the plaintiff.

In reply to the 2nd defendant's statement of defence, the plaintiff joined issue accordingly and repeated the contents of the plaint claiming that it was no stranger to the aforesaid sale agreement and had right to sue the defendants with a view to recover what it was owed.

The court file did not as at this stage yield documents as to what happened with the 2nd defendant or whether the 1st defendant filed any defence but as at the time of trial Mr. F. Masika appeared for the 1st defendant and it was shown to the court that M/S George N. Kimani & Company Advocates for the 2nd defendant, were served with a hearing notice for 2nd October, 2012. They acknowledged/stamped the notice but did not appear at the trial. The same then proceeded between the plaintiff and the 1st defendant, with the main issue to determine being as to who between the defendants was liable to pay the subject debt and the costs.

Titus Mbiti (PW1), a regional manager of the plaintiff company, knew all about the claim for Shs. 4,243,390/80 – the subject herein. From the plaintiff's bundle of documents (Exhibit P1), PW1 pointed to a letter dated 24th April, 2009 (Exhibit P1 – 66), to Mrs. Ann Wado, director of the 2nd defendant to the effect that on PW1's visit to her offices, it was confirmed that the subject debt had been part of the handover deal between the 2nd defendant and the 1st defendant. PW1 sought Mrs. Wado's confirmation of the state of affairs, the same being backed up by a payment cheque.

That Mrs. Wado responded on 8th June, 2009 (Exhibit P67) (there was some misnumbering of pages in the respective bundle of documents – Exhibit P1), that as contained in the sale agreement the 2nd defendant would draw a cheque in favour of the plaintiffs to settle the debt, or part of the debt, owed to it by the 1st defendant. PW1 had not seen the agreement but on his visit to Mrs. Wado's office he was shown the schedule of creditors referred to. The plaintiff featured there. Then on 5th November, 2009 (Exhibit P1-69, not 70) the witness wrote another letter to the 2nd defendant following up the issue to be paid. A further reminder followed on 3rd February, 2012 (Exhibit P1-70) and finally the plaintiff's advocates sent a demand letter with notice to sue (Exhibit P1-71) to either of the defendants. There was no compliance.

PW1 then referred to the bundle of documents filed in court by the 2nd defendant. There was an agreement of sale dated 10th February, 2009 in whose clause 4 the purchaser of Marben School, St. Elizabeth Academy (the 2nd defendant) agreed to pay off all the creditors of the seller (1st defendant) as per the schedule attached to that agreement. In that schedule the plaintiff featured at number 4, being owned Shs. 4,243,390/80, as claimed in this suit. Neither the seller nor the buyer of Marben School had made payment of the debt. If any did so the plaintiff would happily accept the payment.

In cross-examination PW1 told the court that the plaintiff was not given a copy of the sale agreement but PW1 was informed of it when he wrote to the 2nd defendant. But the 1st defendant had informed the plaintiff of the sale transaction. That Mrs. Wado showed PW1 the list of creditors including the plaintiff's

name. She wrote letters promising to pay up but with no action. It was the 2nd defendant to pay the debt but because no such thing was forthcoming, the plaintiff caused a letter of demand by its lawyers to be sent to both defendants, ending in both being sued. To the plaintiff, the transaction between the defendants made the 2nd defendant guarantor of the debt the 1st defendant owed. The plaintiff knew of the sale deal between the two defendants even earlier than March, 2009. The plaintiff's case closed and the defence was heard.

Bengeria arap Korir (DW1), an employee of the Kenya Revenue Authority, registered Marben School, Miritini Mombasa in 2001. It expanded. Due to falling student attendances in 2009 he looked out for a buyer. Mrs. Ann Wado of St. Elizabeth Academy showed up and the two drew a sale agreement on 10th February, 2009 for a price of Shs. 58.5 million (Exhibit P1-88). It was agreed that Shs. 25 million pays off the school. DW1 owed creditors Shs. 24,167,662/80. They were to be paid off as per clause 4 of the agreement (Exhibit P1-90) already referred to above. Any surplus could be paid to the 1st defendant in 180 days. On signing the agreement DW1 was paid Shs. 33.5 million and the 2nd defendant took over Marben School immediately, changing the signages, logos, etc. By that the witness ceased to run the school. Mr. Wado paid some of the creditors e.g. Diamond Trust, Barclays Bank. All creditors were set out in a schedule annexed to the sale agreement. The plaintiff, among them was owed Shs. 4.2 million. On selling the school DW1 informed the plaintiff. Its officers visited Mrs. Wado and agreed on the mode of payment. That led to the letter dated 24th April, 2009 (Exhibit P1-66) between the plaintiff and the 2nd defendant. The two were on one and the same subject matter of the sale of the school and paying off the debts. So this suit surprised the witness who claimed that his balance had not been paid either. The 2nd defendant should pay the sum, which apparently had not been paid. It was nonetheless incurred when DW1 was running the school.

DW1 told the court that he told the plaintiff that the 2nd defendant would pay them while the buyer of the school (2nd defendant) told DW1 that it could pay his creditors. The sale agreement applied/bound all the three – the seller, the buyer (1st; 2nd defendant) and the plaintiff who had been mentioned in the schedule of creditors. That closed the trial and each side submitted.

The plaintiff's side urged the court to find that by its letter of 8th June, 2009 the 2nd defendant confirmed that the debt being claimed was captured on the list of creditors. It stated that it could draw a cheque and pay the debt. The list of creditors/debts was the schedule annexed to the sale agreement dated 10th February, 2009 between the two defendants. Then the 2nd defendant failed to settle the debt. The plaintiff thus deserved judgment and the joinder of parties was in order.

On his part the 1st defendant reviewed the pleadings and the evidence. He stressed that by the sale agreement in issue and the dealings/correspondences that went on between the plaintiff and the 2nd defendant, the latter did not dispute all that by evidence or other, thus the 2nd defendant was liable. The suit against the 1st defendant should be dismissed.

Having reviewed the pleadings and set out and the evidence before the court, it is not in doubt that the 1st defendant owed the plaintiff money in the sum claimed here on account of Marben School. The 1st defendant moved to sell that school to the 2nd defendant as per the agreement exhibited. While he got some payment, it was stated in that agreement for sale that the 2nd defendant would expend some of the purchase proceeds to pay creditors who were listed as per the schedule. The schedule formed part of the sale agreement and specifically as refers to clause 4 (above). The creditors the 2nd defendant undertook to pay included the plaintiff. The plaintiff was not party to the sale agreement. But it was mentioned in it and PW1 was shown the schedule of creditors to which Mrs. Wado referred in her letter to the plaintiff. She promised to make payment on that account. So all in all, the debt was owed by the 1st defendant to the plaintiff. When selling the school to the 2nd defendant, that debt was part of the sale agreement. The 2nd defendant was to pay it off and she contacted/communicated with the plaintiff, promising to pay. Accordingly, the 2nd defendant guaranteed to pay the 1st defendant debt to the plaintiff

and by its own acts including writing letters, the 2nd defendant is found liable to pay that debt. It did not dispute that state of things or place before court any other state of affairs to the contrary. Then the 1st defendant told the court that he was not paid the sum due to the plaintiff and indeed the balance due to him had not been paid either.

To conclude all the above, this court finds the 2nd defendant liable to pay the claimed sum due to the plaintiff together with costs and interest. The suit against the 1st defendant is dismissed with costs being borne by the 2nd defendant.

Delivered on 7th November, 2012.

J. W. MWERA

JUDGE