



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 196 of 2008

SYNERGY INDUSTRIAL CREDIT LTD.....PLAINTIFF

VERSUS

NTULELE ESTATES LTD 1ST DEFENDANT

MUMIAS SUGAR COMPANY LTD 2ND DEFENDANT

RULING

(1) On the 11th April, 2008, Synergy Industrial Credit Ltd. (“**the Plaintiff**”) filed a suit against Ntulele Estate Ltd (“**the first Defendant**”) and Mumias Sugar Company Ltd. The Plaintiff avers that pursuant to various Hire Purchase Agreements (“**the Agreements**”), it lent the first Defendant the total sum of Kshs.14,326,930/= to finance the purchase of various tractors and other vehicles and that the first Defendant in breach of the Agreements defaulted in payment of the installments and other moneys due thereunder totaling Kshs.7,493,047/=. The Plaintiff therefore prays for judgment against the first Defendant for the said sum, among other orders.

(2) In its Statement of Defence and Counterclaim filed on the 18th April, 2008, the first Defendant says that it had to date paid a total sum of Kshs.15,120,690/= under the Agreements; that the Plaintiff’s claim for payment of Kshs.7,493,097/= constitutes illegal and usurious interest payments not provided by the Agreements; that the attachment and removal from the first Defendant’s custody of various vehicles by the Plaintiff’s agents on the 14th April, 2008 was unlawful and that as a result the first Defendant has suffered and continues to suffer loss of use of such vehicles as well as loss of business at the rate of Kshs.50,000/= per day. The first Defendant, therefore, prays for judgment on its counterclaim, general damages and the following, among other orders –

“(c) **A mandatory injunction against the**

Plaintiff its servants and agents directing it to return to the custody of the 1st Defendant Tractor registration number KAQ 142U, Tractor registration number KAQ145U, Trailer (unregistered) Trailer (unregistered).”

“(d) **A permanent injunction do issue against**

The Plaintiff, its servants and agents prohibiting it from repossessing KAN 654V pick up truck, KAQ 144J Cane harvester, KAQ145U Tractor, KAQ 142U Tractor, KAQ 143U Tractor, KAS 068Y Cane Harvester.”

(3) Simultaneously with the filing of the Statement of Defence and Counterclaim, the first Defendant took out the Notice of Motion dated the 18th April, 2008 now before me seeking a mandatory injunction directed at the Plaintiff to return forthwith the vehicles alleged to have been unlawfully re-possessed as well as a temporary injunction to restrain the Plaintiff from repossessing other vehicles belonging to the 1st Defendant. The first Defendant reiterates the averments made in the Statement of Defence and Counterclaim as the grounds upon which the application is made.

(4) The supporting affidavit which also contains virtually the same averments as those made in the Statement of Defence and Counterclaim was sworn by Helen Kiplagat who says she is a Director of the first Defendant and duly authorized to make the affidavit. She has annexed to her affidavit documents evidencing the various payments made by

the 1st Defendant under the Agreements in addition to a statement of account in support of her averment that two trailers re-possessed by the Plaintiff are in fact the subject of a separate hire purchase agreement between the first Defendant and CMC Motor Group Ltd. The first Defendant also admits owing the sum of Kshs.1.6 million.

(5) The application is opposed. In his replying affidavit dated the 21st April, 2008, Jacob Meeme, the Plaintiff's Legal Officer, reiterates the averments made in the Plaintiff; he says that the first Defendant is in breach of the express terms of the Agreements and of Clause 4(b) and (d), and Clauses 6 and 7 thereof in particular; that a Director of the first Defendant, Lawi Kiplagat, has duly "**acknowledged**" the outstanding amount of Kshs.7,493,047/= as at 29th February, 2008; and that the first Defendant's application seeking similar orders against the Plaintiff in Nairobi Milimani **HCCC No.158 of 2008** is still pending, a fact the first Defendant has failed to disclose to the court.

(6) Both learned counsel would appear to be in agreement, albeit for different reasons, that the provisions of the Hire Purchase Act [Cap.507] do not apply to the Agreements. However, and whatever the case may be, I do not find it necessary for the purposes of the application to make a determination at this interlocutory stage in the proceedings; that is an issue that can safely be left to the trial judge.

(7) Clause 4 (b) of the Agreements provides –

"b) To punctually and consistently pay the installments set out in the schedule annexed hereto without any deductions whatsoever and at the time and place therein stated throughout the existence of this agreement" while the provisions to Clause 6 thereof provides that if the first Defendant shall default in payment of any of the sums payable thereunder:

"THEN without prejudice to any of the existing obligations of the Hirer to the owner and also without prejudice to any of the other remedies, rights and entitlements of the owner herein thereupon no longer be in possession of the goods with the consent of the owner.

PROVIDED and it is hereby expressly agreed and understood that should any of the things set out in clauses (i), (ii), (iii), (iv), (ix) and (x) happen then this agreement shall automatically determine and the owner shall, without prior notice be entitled to immediate repossession of the goods and without prejudice to the provisions of clause 7 below, neither party shall have any or any further rights under this agreement."

(8) It is evident from the statements of account annexed to the replying affidavit that the Plaintiff has charged a total sum of Kshs.5,148,997/= by way of "**Late Payment**" charges. In paragraph 8 of the replying affidavit, the Plaintiff says that a Director of the first defendant has duly acknowledged the outstanding amount of Kshs.7,493,047/= as at the 29th February, 2008. However, all that one finds on perusing the statements are signatures (presumably of Lawi Kiplagat) and endorsements "**Received 28/2/2008**" which cannot be construed as an acceptance or confirmation as to the correctness of the statements.

(9) By letter dated the 4th March, 2008, the first Defendant's Advocates informed the Plaintiff that the first Defendant disputed the statements of account and in particular the legal basis upon which the claims for late payment charges were levied and demanded. Of the sum of Kshs.7.4 million odd claimed by the Plaintiff, Kshs.5.1 million odd thereof would appear to be by way of Late Payment charges. The difference is Kshs.1.6 Million which the 1st Defendant admits is due and payable.

(10) I have carefully considered the Agreements and find no provision whatsoever, express or even implied, allowing the Plaintiff to levy these late payment charges. The price and terms of payment, the hire-charges, the number of instalments and the monthly instalments payable are clearly provided in Schedule "A" to the Agreements. The assertion in paragraph 7 c) of the replying affidavit that the first Defendant is also obligated to pay other charges that may arise out of the transaction by virtue of Clause 4(d) of the Agreements is not helpful because this provision expressly relates to the first Defendant's option to purchase the goods the subject matter of the Agreements. I am not persuaded, therefore, that the Late Payment charges claimed by the Plaintiff can properly be construed as sums payable pursuant to the Agreements.

I have also called for the court file relating to Nairobi Milimani **HCCC No.158 of 2008** and established that Notice of Withdrawal of Claim was duly filed therein on the 22nd April, 2008.

(11) For these reasons, the application must succeed. Accordingly, orders in terms of prayers Nos. 2 and 4 in the Notice of Motion filed on the 18th April, 2008 be and are hereby granted with costs to the first Defendant. However, prayer No.5 in the application is denied and dismissed as the first Defendant has not shown how its Directors are alleged to have been harassed and/or intimidated. The orders of mandatory and temporary injunction respectively hereby made

are conditional upon the first Defendant depositing the sum of Kshs.1,600,000/= in court as security within the next seven (7) days of the date hereof.

Orders accordingly.

Dated and delivered at Nairobi this Second day of May, 2008.

P. Kihara Kariuki

JUDGE