



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 105 of 2005

KENYA PLANTERS CO-OPERATIVE UNION LTD.PLAINTIFF

VERSUS

MACHROSE FLORA LIMITEDDEFENDANT

RULING

This is an application by the plaintiff, for summary judgement.

The plaintiff is a co-operative society, registered under the Co-operative Societies Act (Cap 490). Although that fact was not disputed by the defendant, the plaintiff did adduce in evidence, its certificate of incorporation as well as its Memorandum and Articles of Association. The said Memorandum and Articles of Association also incorporate the society's regulations. By virtue of Article 132, the plaintiff is empowered to make advances to its members against coffee or other agricultural produce delivered by the members, to the society.

The said Article 132 also stipulates that all advances would carry interest at such rate as may be fixed from time to time by the plaintiff's directors.

The plaintiff also produced copies of statements of account, showing that as at December 2004, the defendant owed a sum of Kshs.3,256,457/80.

In its defence, the defendant denies owing that sum or any other amount. It explains that any loans or advances which the plaintiff may have given to the defendant had been fully paid, by way of direct payments.

However, it is significant that when the plaintiff made available the defendant's statement of account, the defendant did not challenge any of the entries therein. The defendant did not state that the plaintiff had failed to give credit for any particular payment or payments. What is more, is the fact that the defendant did not give independent evidence of any payments which it had made, but which had not been reflected in the statement of account. That omission by the defendant implied that its assertion that it had paid back all the loans and advances which the plaintiff had made to it, were unsupported by any material. To that extent, the assertions remained literally bereft of any substance. Therefore, I am unable to accept the defendant's bare assertion that it had paid the money which the plaintiff had advanced to it.

But, I do note that the defendant did raise another line of defence, to the effect that if it owed any money to the plaintiff, the same should be set-off against the sum of Kshs.4,000,000/- which the defendant asserts is owed to it, by the plaintiff, in respect of coffee delivered to the plaintiff.

The defendant has supported its assertion by producing copies of Delivery Notes and Weighbridge Tickets. There are five sets of Delivery Notes and Weighbridge Tickets, for a total of 750 bags of unmilled coffee. All the Delivery Notes bear dates ranging from 26th September 2000 to 28th September 2000.

Upon my perusal of the Delivered Notes and the Weighbridge Tickets, I was unable to ascertain the values of the coffee which was delivered by the defendant. None of the parties drew the court's attention to any values on the said documents.

But the plaintiff insisted that it had given all due credit to the defendant for all the coffee delivered. On the other hand, the defendant insists that the plaintiff had failed to give credit for a sum of Kshs.4,000,000/-.

Suffice it to say that if the 750 bags of coffee were valued at Kshs.4,000,000/=, as asserted by the defendant, the plaintiff has given credit for about Kshs.3.7 million, in the statement of account.

In my understanding, when the defence made reference to there being "direct payments", I understand that to mean that the plaintiff paid itself directly, out of the money which it received upon the sale of the defendant's coffee. Mr. Peter Kimani, the plaintiff's Company Secretary, explained in his affidavit that the plaintiff had given credit for all money due to the defendant for the coffee which the defendant had delivered to the plaintiff. The defendant has not rebutted that deposition, as it would have been expected to do, if the deposition was not factual.

In **GUPTA –VS- CONTINENTAL BUILDERS LTD. [1978] KLR 83 at page 87**, the Court of Appeal expressed itself in the manner following:

"In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case there is a complaint made that this was done instead of paying a compliment to the court's assiduity for doing so. If it had not been done, there would be some cause for making a complaint that the court failed in its task to do so, thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before the court is carried out by the court as part of its daily task in the performance of its judicial duty and, understandably (even inevitably), it may lead to both the acceptance or rejection of some documents and some facts which some people, in the case of an application for summary judgement, may construe, albeit incorrectly, as an actual trial. There is no more in it except the process of determining the judicial verdict to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted; but the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purpose."

Having carefully perused the material which the parties herein have place before the court, I find that there is absolutely no material to back the defendant's contention that it had paid back all the loans or advances which the plaintiff had made to it.

I also find that although the parties may not have expressly agreed that the plaintiff would charge interest at 21.5% per annum, the plaintiff was entitled to charge such interest as its directors may fix from time to time. That provision in the Memorandum and Articles of Association and Regulations empowered the plaintiff to charge interest at 21.5% per annum, provided that its directors fixed it at that rate. There as no need for an express agreement on a specific rate of interest before the plaintiff could become entitled to charge the same.

In other words, the defendant's assertion that the parties did not agree on the rate of interest chargeable on the advances does not give rise to a triable issue.

Accordingly, I find that the defence and the replying affidavit do not give rise to any triable issue. Therefore, I hereby enter judgement in favour of the plaintiff for Kshs.3,256,457/80 together with interest thereon at 21.5% per annum from 1st January 2005 until payment in full. The plaintiff is also awarded the

costs of the suit.

Dated and Delivered at Nairobi this 12TH day of May 2006.

FRED A. OCHIENG

JUDGE