



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA MILIMANI
COMMERCIAL COURTS NAIROBI
CIVIL SUIT N0.1142 OF 1999

KABANSORA MILLERS LTD.....PLAINTIFF

VERSUS

NEW SALAMA WHOLESALERS1ST DEFENDANT

JINIT SHAH..... 2ND DEFENDANT

KETAN KESHAVALAL SHAH3RD DEFENDANT

JUDGEMENT

Kabansora Millers Ltd, the plaintiff herein, sues New Salama Wholesalers, the first defendant, together with Jinit Shah and Ketan Keshavlal Shah, the 2nd and 3rd defendants respectively for a sum of Kshs.3, 238,525 for flour sold and delivered. The 1st defendant is described as a limited liability company, the second defendant is said to be a Proprietor/Director of the 1st defendant company and the third defendant is said to be a guarantor. It is pleaded that the defendants issued cheques which have remained unpaid and that the 3rd defendant issued a guarantee for payment. It is also pleaded that the debt attracts interest at the contractual rate of 36% per annum. That rate was amended to 24% per annum before the commencement of the trial.

In the defendants' statement of defence and counterclaim, the 1st defendant denies ever ordering or being supplied with the flour alleged. The third defendant admits signing the guarantee but avers that he was induced to do so by duress, coercion or undue influence on the part of the plaintiff. The particulars pleaded are that on or about 30th March, 1999 the plaintiff had the 2nd defendant arrested for obtaining goods by deception and the Officer Commanding Kasarani police Station refused to release him from police custody until the 3rd defendant issued post dated cheques and a guarantee undertaking to pay for the goods allegedly supplied to the 1st defendant. The 3rd defendant admits issuing post dated cheques and instructing his bank not to honour them. He avers he did so as he had issued them under duress or coercion and there was no consideration for them. The defendants deny that the alleged debt attracted interest at 36% per annum. The 3rd defendant further avers that on or about 16th August, 1999, the plaintiff applied to court for his arrest on the basis that he was a British subject and about to leave the country. It is averred that the 3rd defendant was arrested on 25th August and held under the custody of the court bailiff from 11.00 am to 4.00 pm. He therefore counterclaims for damages for wrongful arrest and detention.

The issues framed for trial were:

1. Did the plaintiff supply flour to the 1st defendant company or not;
2. Did the 3rd defendant write and sign the letter of admission/guarantee dated 1.4.99 and if he did, was it under duress?;
3. Does the 1st defendant owe the plaintiff any money, and if so, how much;
4. Is the 3rd defendant liable to the plaintiff for the sum of Kshs.2, 944,524.00;
5. Is the plaintiff entitled to any interest from the 1st and/or 3rd defendant, and if so, how much; and
6. Was the 3rd defendant wrongfully arrested or not, and if yes, is he entitled to damages.

The suit was heard before me on 24th January, 2002. At the close of the evidence it was ordered that written submissions be exchanged within 14 days and that the advocates speak to those submissions on 14.2.2002. On the 14th February, it transpired that the plaintiff's advocate had not served the defendant's advocate with any written submissions. The defendant's advocate was however ready with his written submissions. I then ordered that oral submissions be made on 26.2.2002. Although the plaintiff's advocate was duly served with hearing notice, he did not attend court for submissions on that date. The defendant's advocate on his part intimated that he had nothing to add to his written submissions and asked the court to deliver judgement on the basis of the evidence on record and the written submissions filed on behalf of the defendants.

I have now considered the evidence and the submissions on record. From the said evidence, there is no dispute that the plaintiff supplied wheat and maize flour to the 1st defendant company. Mr. Ketan Keshavlal Shah, the 1st defendant's Director candidly admitted the fact of supply. The only denial he made was of the value thereof. So issue No.1 is answered in the affirmative.

The question of the value of the goods supplied and unpaid for is the subject matter of issue number 3. According to the plaintiff's tabulation produced in evidence as Plaintiff exhibit 12, the delivery notes/invoices tendered in evidence by the plaintiff as exhibits 1-11 are of the value of Kshs.2,812,990.00 before any credit notes are given for goods returned. However, two of those documents, namely invoices numbers 13795 and 13796 totalling Kshs.479,340.00 were held inadmissible in evidence on the grounds that they were secondary evidence and no foundation had been laid for their admissibility and they had been admitted on the record by a sleight of the hand. Invoice No.14016 (admitted in evidence as plaintiff exhibit 7) respect of which Kshs.152, 000.00 is claimed is blocked out where the value thereof should be shown. So is invoice number 13585 in respect of which Kshs.139, 000.00 is claimed. However both invoices/delivery notes are duly stamped by the defendant company and it was Ketan Shah's evidence that goods shown on the exhibits stamped were received by the defendant company. In the premises, the predicament facing the court is whether to find that the goods in question were delivered to the defendant but ascribe no value thereto because the same is not visible from the invoices/delivery notes or accept the value thereof claimed by the plaintiff. I do not think that the plaintiff could have picked the figures shown against those invoices in its computation from the air. They must have obtained them from other records which were not tendered in evidence. On a balance of probability I find that the goods shown on the two invoices/delivery notes were of the value indicated by the plaintiff.

As regards the credit given to the defendant against the value of the invoices, it is clear from exhibit 12 that the same should be Kshs.126, 150.00. There is also a credit of Kshs.25, 000.00 reflected in the plaintiff's exhibit 15 which appears to have been inadvertently omitted from exhibit 12. And Mr. Mitesh Patel, the plaintiff's Managing Director admitted in cross examination that one of the 3rd defendant's cheques in the sum of Kshs.200, 000.00 was honoured. That amount should also be credited to the first defendant. All in all I find that the 1st defendant ought to be credited with a sum of Kshs.351, 150.00. If this amount is added to the sum of Kshs.479, 340.00 on the inadmissible invoices, the court is entitled

to discount the plaintiffs principal claim by Kshs.830, 490.00. If my arithmetic is correct the plaintiffs proven claim is Kshs.1, 982,500.00 (i.e.Kshs.2, 812,990 less Kshs.830, 490.00). In view of the above finding, my answer to issue No.3 is, yes, the 1st defendant does owe some money to the plaintiff to the extent of Kshs.1, 982,500.00.

Issue Numbers 2 and 4 can be conveniently dealt with together. Having considered the evidence on record, I believe the evidence of Ketan Shah that he executed the guarantee dated 1.4.99 for the express purpose of securing the release of his brother Jitin Shah, the 2nd defendant from police custody at Embakasi Police Station. I also believe his testimony that it was made very clear to him by the officer commanding the police station and Mr. Mitesh Patel that his brother would not be released from custody unless he signed the guarantee and gave post dated cheques as demanded by Mr. Mitesh Patel. I further believe his testimony that although his brother was released on the night of 30.3.99 Mr Mitesh Patel threatened him that if he did not comply with his demands both he himself and his brother would be locked up again by the police. In those premises I accept the submissions by counsel for the defendants that the guarantee was executed under coercion, duress or undue influence which vitiated the 3rd defendant's consent. It was therefore null and void as a contract. I also accept the defendants other submissions that the said guarantee would also have been void for being contrary to public policy. To execute a guarantee in order to secure the release of a person being held by the police for questioning on allegation of obtaining goods by deception and to forestall the arrest again of such a person and another for the same reason appears to me to be to compound a felony by the police. That cannot but be contrary to public policy. Having taken that view of the matter my answer to issue numbers 2 and 4 is that yes, the 3rd defendant signed the guarantee dated 1.4.99 but he did not do so voluntarily. He did so in state of mental coercion he is not therefor liable under the guarantee to the plaintiff as claimed or at all. And as the 1st defendant is a limited liability company, the 3rd defendant as a Director thereof is not in the absence of any binding guarantee in favour of the plaintiff to secure the indebtedness of the company liable to pay for its debts to the plaintiff.

Issue number 5 is whether the plaintiff is entitled to any interest from the 1st and/or 3rd defendant. I have already found that the plaintiff is not entitled to any principal amount from the 3rd defendant. The issue of interest does not therefore arise in his case. As regards the first defendant, I accept the submissions of the defendant that the plaintiff is not entitled to interest on the principal amount of 24% per annum as claimed. As I understand the law, a court has no power to award interest for the late payment of a debt in the absence of any agreement or statutory basis therefor. In the matter at hand, I accept the submissions made on behalf of the defendants that the evidence does not support any express agreement on interest or any common business practice or trade usage which would justify the levying of interest at the rate claimed or at all. So the answer to issue No.5 is in the negative. However, under section 26 of the Civil Procedure Act, the court has discretion to award interest from the date of the decree. I will exercise such discretion in favour of the plaintiff herein and award it interest on the principal amount at 12% per annum from the date of the judgement.

The 6th issue is whether the 3rd defendant was wrongfully arrested and the damages he is entitled to if that was so. I have carefully considered the evidence of the 3rd defendant and the submissions of his advocate thereon. I accept the 3rd defendant's evidence that he was arrested in a humiliating manner and that he was deprived of his liberty for about six and half hours. However, I do find that the arrest was in execution of a valid court warrant issued in civil proceedings for the purpose of bringing him to court to show cause why he should not furnish security for his appearance at the trial. The defendant never challenged that order and indeed he complied therewith and deposited his passport in court. In those circumstances, even though he has now persuaded me that the order was applied for on grounds which do not stand serious scrutiny, I am afraid that I cannot find his arrest to have been wrongful. It was perfectly lawful. Issue number 6 is therefore answered in the negative. In the result, I dismiss the 3rd defendant's counterclaim with costs to the plaintiff.

The upshot of this trial is that there will be judgement for the plaintiff against the first defendant for Kshs.1, 982,500.000 together with interest thereon at 12% per annum from the date hereof until payment in full plus the costs of the suit. The plaintiffs suit against the 3rd defendant and the 3rd defendant's counterclaim against the plaintiff are both dismissed with costs.

Orders accordingly.

DATED and Delivered at Nairobi this 16th day of April 2002.

A.G. RINGERA

JUDGE

SALE OF GOODS

INTEREST

- Whether interest is payable for late payment of a debt
- Whether a person confined in execution of a warrant of arrest under Order 38 of the Civil Procedure Rules can claim damages for wrongful arrest at the trial if order of arrest had not been set aside or discharged.

CONTRACT OF GUARANTEE

- Validity of a guarantee executed for the purpose of securing the release of another person from police custody.