



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 615 OF 1994

NAIROBI IRONMONGERS LIMITED PLAINTIFF

VERSUS

LEONARD NDUATI KARIUKI 1ST DEFENDANT

NELLEON DEVELOPMENT COMPANY LTD. ... 2ND DEFENDANT

JUDGMENT

The plaintiff has filed this suit against the defendant to recover the sum of Shs.550,585/= being the balance of the sum said to be due and payable by the defendant to the plaintiff in respect of 2 cheques for Shs.380,000/= and Shs.170,585/= which said cheques were dishonoured upon presentment. In the alternative the plaintiff claims the sum of Shs.550,585/= being the balance of the agreed and/or reasonable amount due and payable by the defendants to the plaintiff in respect of goods and or materials and/or fittings sold and/or appropriated by the defendants from the plaintiff during 1993 and or also due and payable by the defendants to the plaintiff in respect of agreed and or liquidated damages or compensation for breach by the 2nd defendant of the terms of a consent letter dated 12th February, 1991 and recorded in the Business Premises Rent Tribunal at Nairobi Case Number 266 of 1990.

The plaintiff also claims damages in the sum of Shs.156,554/60 for having been deprived of the use of the money represented by the two cheques from the date of issue of the cheque.

The defendants' defence is that the two cheques were issued to the plaintiff for some future consideration which failed thus entitling the defendant to stop payment. The defendant therefore denies owing the plaintiff the sum of Shs.550,585/= or any part thereof. As to the consent order entered into in the Business Premises Rent Tribunal, the defendant avers that it did not confer upon the plaintiff any legal right to damages. The sale of the materials and fittings by the plaintiff is also denied. And with regard to the claim generally, the defendant avers that it amounts to extortion in that it is based on non-existent business goodwill.

Although a lot of evidence was tendered in this matter most of which it has to be observed was irrelevant and probably calculated to mislead the court, the position in this matter is very clear.

The plaintiff and defendant were landlord and tenant over those premises known as L.R. No. 209/697/24 Luthuli House, Luthuli Avenue, owed by the 2nd defendant, a body corporate owned by the 1st defendant and his wife. It would appear that the 2nd defendant was desirous of taking possession of the premises and because of that there was before the filing of this case some altercation between the parties which ultimately resulted in a case before the Business Premises Rent Tribunal. That case was however resolved by a consent order whereby the plaintiff and other tenants agreed to vacate temporarily the premises to enable the 2nd defendant reconstruct the premises upon the landlord agreeing to readmit the plaintiff and the other tenants into the premises once the renovations were complete. But

notwithstanding the agreement the defendant did not readmit the plaintiff into the premises. Instead it took possession of the premises under a new agreement which is the subject of this suit.

That new agreement was the result of discussions between Mr. Patel, a director of the plaintiff and Mr. Kariuki and Mrs. Macharia, both of whom were directors of the 2nd defendant. On 24.2.1993, Mr. L. N. Kariuki of the defendant wrote to the defendant regarding the agreement in the following terms:-

“Nairobi Iron Mongers Ltd.,

Industrial Area,

NAIROBI.

Dear Mrs. Macharia

RE: SH OP PREMISES: LUTHULI HOUSE – L.R. 209/697/24 LUTHULI AVENUE

This refers to discussions between you, Mr. Rasik and myself and my discussion with you on the phone yesterday.

I now confirm that a cheque for Kshs.380,000/= agreed upon is now ready for your collection and I have moved into the premises you agreed to vacate. You can collect it from my office any time.

The only outstanding issue that was left unsolved was payment for your grills and partitions. Mr. Rasik was supposed to give me the estimates of your claim for these but was not able to give me before he left. Perhaps this can be resolved when he comes back.

Meanwhile I have started reconstruction and decoration of the premises for its new use. I have therefore removed the remaining items you had left behind to the back yard where you can collect them any time.

Yours faithfully,

L. N. KARIUKI.

The plaintiff's response was their letter dated 3.3.1993 which was as follows:-

“Messrs Sera Pot Restaurant,

P. O. Box 14187,

NAIROBI.

Dear Sir,

SHOP PREMISES

L.R. NO. 209/197/4 – LUTHULI AVENUE, NAIROBI CITY.

We refer to your letter dated 24 th February, 1993 and besides Kshs.380,000/=.

We wish to state that in addition to grills and partition there are other fittings in the premises and costs of such fittings specified hereunder in addition to costs of grill and partition are as follows: -

SHOP

A. SHUTTER AND SECURITY GRILLS	Shs.180,000/=
B. STEEL DOOR AT BACK ENTRANCE	Shs.8,200/=
<u>MEZANINE OFFICE</u>	
C. BUILT IN CUPBOARD	Shs.30,000/=
D. GLASS PARTITION	Shs.75,000/=
E. CARPETS IN OFFICE FLOOR	Shs.35,000/=
F. TOILETS, WASHBASIN, WATER TANK & FITTINGS	Shs.6,500/=
Total	<u>Shs.334,700/=</u>

We would also like you to resolve liabilities for water conservancy dustbin charges and electric ity supply incurred from 1 st February 1991 till to -date or finalisation of our negotiations.

Notwithstanding instructions to City Council of Nairobi and Kenya Power & Lighting Company to discontinue supply and final accounts were made, unauthorised supply of water and electricity to the premises has rendered us liable for water and electricity though not consumed by us since 1 st February, 1991. Outstanding charges for water and electricity due and owing are as follows: -

(a) To City Council of Nairobi

Copies of a/c attached. Shs.5,705/=

(b) To Kenya Power & Lighting Co.

Copies of bills attached. Shs.585/=

It is common ground that after the above letter, M/S Kariuki and Patel met and went through the items listed in the above letter. At that meeting, some items were struck out altogether, others were reduced while others were left intact. The net result was a reduction of the original figure of Shs.334,700/= to Shs.270,000/=. That this was so is confirmed by the defendant's letter to the plaintiff dated 31.03.93 which reads:-

"Nairobi Iron Mongers

P. O. Box 43524,

NAIROBI

Dear Sirs,

RE: SURRENDER OF PREMSIES LR. 209/697 – 23

We refer to our letter of 29/01/93 and we amend our proposal as follows: - On surrendering the premises, you undertake n ot to remove the following things: -

1) Shutter and security grills

2) Steel door

3) *Office Cupboard*

4) *Office partitions*

5) *Carpets and toilets, washbasin and fittings*

6) *Telephone apparatus.*

You will however be entitled to remove:

1) *Four Steel stands/ racks.*

2) *Three wooden shop stands.*

We amend the figure for the items you will not take to Kshs.270,585/=. Kindly sign your agreement on this proposals for approval of our directors.

Yours faithfully,

NELLEON DEVELOPMENT CO. LTD.

L. N. KARIUKI

We accept the above terms.

Signed

Director Nairobi Iron Mongers Ltd.”

In view of that letter it was quite incorrect for Mr. Kariuki to state in his affidavit that the cheque for the sum of Shs.160,585/= was for a future consideration which failed. That claim becomes outrageously dishonest when regard is had to the fact that the sum of Shs.170,585/= was part of the larger sum of Shs.270,585/= agreed to be paid after negotiations by the defendant to the plaintiff (see Exh. 5) in respect of grills and partitions and other fittings in the premises the plaintiff was vacating and that the rest of the claim being the sum of Shs.100,000/= was in fact paid. Having paid part of the claim the defendant cannot now resile from its commitments and say that the payment was for other purposes. In my view therefore, the defendant has no answer to the plaintiff's claim in respect of the cheque for Shs.170,585/=.

The position with regard to the cheque for Shs.380,000/= is even clearer. In his letter dated 24.2.1993, Mr. Kariuki stated:-

“This refers to discussions between you, Mr. Rick and myself and my discussion with you on the phone yesterday.

I now confirm that a cheque for Shs.380,000/= agreed upon is now ready for your collection and I have moved into the premises you agreed to vacate. You can collect it from my office any time.

The only outstanding issue that was left unresolved was payment for your grills and partitions.”

Mr. Kariuki claims that the payment of Shs.380,000/= which he personally made was for introduction of customers to his business but that claim is clearly false. As clearly indicated in the letter of 24.2.1993 (above) the payment was clearly connected with the vacation of the premises and their occupation by him, 2nd defendant. The letter states that “the cheque is ready for collection and I (Mr. Kariuki) have moved into the premises you (the plaintiff) have agreed to vacate.” The letter goes on to state that the only outstanding issue that remained to be resolved was payment for grills and partitions. There is no mention or reference to introduction of customers and the allegation by Mr. Kariuki in that regard is clearly an

afterthought. That suggestion lacks credibility and is rejected. I find that the cheque for the payment of Shs.380,000/= was made for a valid consideration and neither defendant is entitled to resile from it.

As regards the claim for damages, Section 57 of the Bills of Exchange Act provides that where a bill is dishonourable the holder may recover the amount of the bill and interest thereon from the time of presentment for payment if the bill is (as was the case here) payable on demand. Accordingly the plaintiff is entitled to interest at commercial rates applicable from time to time on the sums reflected in the cheques from the dates of their presentment till payment in full. And as Mr. Kariuki did not appear to make any distinction between his actions in his personal capacity and those of his company, this court too will not attempt to make any such distinction. He is therefore equally liable to the plaintiff for the sums claimed.

For the above reasons, there will be judgment for the plaintiff against the defendants jointly and severally for the sum of Shs.380,000/= and Shs.170,585/= with interest thereon at commercial rates from the dates the respective cheques for the two amounts were presented for payment till payment in full. The defendants will jointly and severally bear the plaintiff's costs of the suit.

Dated at Nairobi this 4th day of April, 2001.

T. MBALUTO

JUDGE