Scania Credit Solutions (Pty) Limited v Wargen Services Limited & 2 others (Civil Suit 379 of 2015) [2023] KEHC 17334 (KLR) (Commercial & Admiralty) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL SUIT 379 OF 2015

A MABEYA, J

MAY 12, 2023

BETWEEN

SCANIA CREDIT SOLUTIONS (PTY) LIMITED ..... PLAINTIFF

AND

WARGEN SERVICES LIMITED ..... 1ST DEFENDANT

GITONGA KURIA KABERA ..... 2ND DEFENDANT

IRENE WANGUI MWANGI ..... 3RD DEFENDANT

JUDGMENT

1. Vide a plaint dated 8/7/2015, the plaintiff sought judgment against the defendants for the sum of Kshs. 39,602,079.41 plus interest at court rates from 6/3/2014 until payment. It also sought a mandatory injunction directing the defendant to deliver to the plaintiff the Randon 2011 Randon Tank 36000TL Trailer, plus costs of the suit and interest thereon.

2. The plaintiff is a company incorporated in South Africa and provides credit financing and insurance for Scania trucks, buses, trailers and engines and is registered as a branch in Kenya as Scania Credit Solutions Limited. The 1st defendant is a company incorporated in Kenya while the 2nd and 3rd defendant are adult Kenyan citizens.

3. The plaintiff's case was that by various contracts entered into in April 2011 between the plaintiff and 1st defendant, and in particular a Finance Lease Agreement entered on 3/5/2011, the plaintiff leased five Scania 2011 P380 6X4 Prime Movers and Five Randon 2011 Randon Tank 36000L trailers ("the assets") to the 1st defendant for a fixed term of 48 months from 21/4/2011 to 5/5/2015.

4. That for each Scania 2011 P380 6X4 Prime Movers, the 1st defendant was to make an initial payment of Kshs. 1,364,250/= and thereafter make a monthly payment of Kshs.213,602/98. For the Randon 2011

Randon Tank 36000L trailers, the 1st defendant was to make an initial payment of Kshs. 562,500/= and thereafter a monthly payment of Kshs. 88.071.60. That the plaintiff remained the owner of the assets and did not confer the 1st defendant any right or profit in the assets other than the right to lease them.

5. That *vide* a Deed of Surety and Indemnity, the 2nd and 3rd defendant bound themselves to the plaintiff for any debts accrued by the 1st defendant. That the 1st defendant breached the agreement in January 2013 and the same was terminated, but later reinstated after the 1st defendant's request vide letter dated 21/2/2013. The 1st defendant failed to rectify the breach and vide letter dated 19/12/2013, the plaintiff terminated the contract.

6. That after termination, the 1st defendant was liable to deliver possession of the assets and settle the accrued arrears and interest. That all the assets were delivered but for one Randon Trailer. That the plaintiff made a demand for the consolidated arrears amounting to Kshs. 10,393,368.60 and the amount for the unexpired term of the agreement being Kshs. 29,209,710.54/= but the same was not paid. The plaintiff therefore claimed the total sum of Kshs.39,602,079.14.

7. The defendants filed their amended statement of defense and counterclaim dated 27/9/2016. They denied the claims and averred that the contracts were contrary to public policy and the *Consumer Protection Act* as the plaintiff failed to disclose the consequences of default or that the leased assets would not vest in the 1st defendant. The 2nd and 3rd defendant admitted that there existed a Deed of Surety and Indemnity, but the same had no legal consequences as the principal contract was null and void for want of good faith.

8. It was further averred that some of the assets were of substandard quality and defective and the plaintiff was not entitled to the reliefs sought. Vide the counterclaim, the defendants claimed that they were entitled to retain the assets under the Hire Purchase Act. That the plaintiff had failed to produce a comprehensive statement of accounts and had repossessed all the assets. That the contract was null and void and the 1st defendant was entitled to a refund of all monies paid under the contract.

9. The defendants thus sought a declaration that the contract between the parties was illegal and that the 1st defendant was entitled to a refund of all monies paid under the contract. In the alternative, the they prayed that the plaintiff be compelled to render a true and accurate account statement since inception of the contract.

10. In its reply to defence and defence to counterclaim dated 31/10/2016, the plaintiff denied that the contract was contrary to public policy and contended that the terms thereof were clear that the relationship was that of lessee and lessor. It denied that the assets were of substandard quality and averred that no particulars were provided. That the 1st defendant had made use of the assets. That the agreement was a Finance Lease Agreement and not a Hire Purchase Agreement as claimed and the Hire Purchase Act was inapplicable.

11. The matter was heard in open court on 24/10/2022. The defendants, though served, did not appear.

12. The plaintiff called one witness Jane Wamuti. She adopted her witness statement dated 12/12/2019 as her evidence in chief. Her testimony was as per the statement of claim. She testified that following the 1st defendant's breach, demand was made upon the 2nd and 3rd defendants as sureties to settle the accrued arrears of Kshs. 10,392,368.87 as of December 2013.

13. That the parties agreed that the sums due for the unexpired term of the lease would be the value of the liquidated damages being Kshs. 29,209,710.14. That the values payable for the full terms of the leases were known o the defendants as they were attached to the transaction schedules at the time of execution of the agreement.

14. She told the Court that the relationship between the plaintiff and 1st defendant was a financial lease agreement and the plaintiff was to remain the owner of the assets until the end of the agreement. That the assets were never to pass to the 1st defendant. That the defendants never complained of any defects in the assets nor provide any particulars for the claimed defects.

15. The plaintiff closed its case at that point. The defendants being absent, they did not cross examine PW1 nor call any witnesses. The plaintiff filed its submissions dated 14/11/2022 which have been considered alongside the pleadings and evidence before court.

16. Among the undisputed facts is that the plaintiff and 1st defendant entered into an agreement dated 3/5/2011, pursuant to which the 2nd and 3rd defendants signed a Deed of Surety and Indemnity Agreement. This Court has seen the various Financial Lease Agreements at pages 2-51 of the plaintiff's bundle of documents dated 8/7/2015. There is also the final Consolidation of Agreements dated 3/5/2011 appearing at pages 52-54.

17. The first issue to consider is the nature of the relationship created by the agreement of 3/5/2011. In the definitions, the agreement described the plaintiff as the lessor and the 1st defendant as the lesee. Clause 9 provided that the lessor would remain the owner of the goods and that nothing in the agreement conferred the lessee any right or profit in the goods other than the right to lease the goods from the lessor as per the terms in the agreement.

18. Clause 28 provided that any repairs or maintenance was to be carried out only by the plaintiff and before any other party carried out repairs, its consent had to be obtained.

19. The agreement also obligated the 1st defendant to only use the assets in the manner provided for and ensure reasonable care was taken in the use of the assets. It was to keep them in proper working conditions and protected from loss or damage. Further, Clause 39 provided for return conditions in case of breach and the same included a return of all statutory documents relating to the goods including registration documents.

20. The various transaction schedules clearly stipulated that the period of the lease was 48 months from 21/4/2011 to 5/5/2015. Clause 42 provided that upon expiry of the term stipulated in the agreement or upon termination of the agreement for any other reason, the 1st defendant was to immediately return the assets unencumbered and in good condition.

21. This Court carefully considered the entire agreement. The language used and the terms therein reveals that the intention of the parties was that ownership was not to pass to the 1st defendant at any point. That the plaintiff remained in control of the assets. The 1st defendant was to pay a monthly rate until expiry of the term and was to then return possession of the assets to the plaintiff. There was no provision for transfer of ownership. Though the 1st defendant was in possession, the property did not at any point vest in or pass the 1st defendant.

22. From the foregoing, the Court finds that the agreement between the plaintiff and 1st defendant was that of lessor and lessee and not otherwise. Though the defendants in their amended defence pleaded that the contract was contrary to public policy for non-disclosure, the agreement had very clear and elaborate terms.

23. The 1st defendant executed the agreement and became bound to the terms therein. It took possession and began making the monthly payments as stipulated in the transaction schedules. It cannot now turn around and claim that it was unaware that the assets would not eventually vest in it. Nor can it claim that it was unaware of the consequences of breach whereas the same were clearly set out. provide for.

24. In *Rose and Frank Co. v. J R Crompton & Bros Ltd* (1923) 2 KB, it was held that: -

> " To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."

25. In *G. Percy Trentham Ltd v. Archital Luxfer Ltd* (1993) 1 Lloyds Rep. 25, Lord Steyn stated: -

> " The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential.

26. Back home, in *William Muthee Muthami v. Bank of Baroda* (2014) eKLR, the Court of Appeal observed that: -

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

27. In this case, there was an offer made, the 1st defendant accepted and executed the agreement. It proceeded to pay consideration in terms of the monthly payments evidenced in the statement of account produced in Court. Accordingly, there was a valid lease agreement between the parties. There was nothing against public policy or unconscionable.

28. An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. The defendants having failed to participate in the trial, a basis was not laid for the Court to appreciate the allegation.

29. Having found that the contract created a valid lease agreement, this Court will now determine whether the plaintiff successfully proved the claim for accrued arrears of Kshs.10, 392,368.87 and value of the unexpired term lease of Kshs. 29,209,710.14.

30. Appearing at pages 88-97 of the plaintiff's bundle was the 1st defendant's statement of account indicating arrears of Kshs.10,392,368.87 as of December 2013. There is also proof of demand of this amount upon the defendants. Being a liquidated claim, the same was proved to the required standard.

31. As to whether the plaintiff is deserving of the unexpired term value, the answer is to be found in Clauses 63 - 65 of the agreement. These provided that in case of the 1st defendant's breach, the 1st defendant was to immediately give up possession and the plaintiff was entitled to claim payment of all rentals and other amounts due under the agreement for the unexpired term of the agreement as liquidated damages.

32. Clause 76 further provided that if for any reason, including termination of the agreement by the plaintiff due to the 1st defendant's default, the agreement was terminated before expiry of the minimum term, the 1st defendant would upon demand pay damages to the lessor in an amount equal to the amounts that would have been payable by the lessee for the remaining term of the agreement.

33. From the foregoing, it is clear that it was a term of the agreement that if the contract was terminated before its expiry date, the plaintiff was entitled to demand the value of the unexpired term and

the defendant was liable to pay. From the statement of account, the claimed amount of Kshs. 29,209,710.14 was ascertainable from the unexpired term as guided by the transaction schedules which provided for consistent monthly payments.

34. I therefore find that the claim for Kshs. 29,209,710.14/= has been proved.

35. As regards the mandatory injunction for the defendants to deliver to the plaintiff one Randon 2011 Randon Tank 36000L, there was no evidence to support the claim that not all assets were delivered to the plaintiff. The plaintiff did not produce the inventory for the returned and unreturned goods. Without such inventory, the Court cannot with certainty hold that the said tank had not been returned. It should be recalled that the defendants had pleaded that all the assets had been taken be the plaintiff.

36. Being a company in the usual business of leasing out such assets, it is unlikely that there is no elaborate system and documentation that is filled to indicate that a client has returned all leased goods. No such documentation was provided. That prayer cannot therefore issue.

37. As to whether the defendants should be jointly and severally liable to pay the proven claims, the answer is in the affirmative. The 2nd and 3rd defendant admitted in their amended defence that they signed a Deed of Surety and Indemnity. The same was produced at pages 74-79 of the bundle.

38. There is evidence that the 2nd and 3rd defendant were notified of the 1st defendant's default and due demand made. They never responded. Consequently, the 2nd and 3rd defendant are jointly and severally liable to pay.

39. Accordingly, the plaintiff has proved its case to the required standard. Judgment is hereby entered for the plaintiff against the defendants, jointly and severally, for: -

a. The sum of Kshs. 39,602,079.41 plus interest at court rates from the date of filing suit until payment in full.

b. Costs of the suit and interest thereon at court rate until payment in full.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE