



Valentinos Footwear Manufactures Ltd v Development Finance Co [K] Ltd (Commercial Case 9 of 2023) [2024] KEHC 13963 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 9 OF 2023
FG MUGAMBI, J
NOVEMBER 8, 2024
[FORMERLY HCCC NO. 2983 OF 1989]**

BETWEEN

VALENTINOS FOOTWEAR MANUFACTURES LTD PLAINTIFF

AND

DEVELOPMENT FINANCE CO [K] LTD DEFENDANT

JUDGMENT

Background and Introduction

1. The plaintiff instituted this suit vide a plaint dated 12/7/1989 seeking the following orders:
 - i. Spent;
 - ii. Spent;
 - iii. General damages for breach of contract;
 - iv. Costs and interest.
2. The plaintiff contends that it entered into a loan agreement with the defendant on 29/1/1985 under which the defendant advanced a loan facility of Kshs. 13,500,000/= to the plaintiff. A dispute arose over the amount repayable by the plaintiff primarily due to the defendant's claim that the loan had been disbursed in foreign currency. The plaintiff claims that the defendant breached the loan agreement when they calculated the loan interest in foreign currency, which inflated the outstanding balance due to exchange rate fluctuations.
3. The plaintiff asserts that despite diligently repaying an already inflated loan, the defendant unlawfully declared an event of default in 1989 and appointed a receiver over the plaintiff's business. At the time



of the receiver's appointment, the plaintiff was making monthly installments of Kshs. 250,000/= to the defendant, and its machinery was valued at Kshs. 23,469,000/=. Nevertheless, the defendant sold the machinery for a meager Kshs. 750,000/=.

4. To support its case, the plaintiff called one witness and submitted a list of documents dated September 28, 2021. Martin Wainaina Kinyanjui, the plaintiff's director and principal shareholder, testified as PW1 and adopted his witness statement dated September 28, 2021. During cross-examination, PW1 confirmed that the active prayers in the plaint were for general damages, costs and interest. He admitted that the loan had not been fully repaid, attributing the delays to late delivery of machinery. He emphasized that, according to the loan agreement, the defendant would waive the repayment period if delays were beyond the plaintiff's control.
5. He was emphatic that the loan was disbursed in Kenya shillings and that the repayment was also in Kenya shillings even though he acknowledges having signed the letter of offer and the agreement. The witness also confirmed receipt of the statement of currency, which he signed.
6. PW1 also took issue with the commitment fee charged by the defendant. He admitted that he had not written to the bank to dispute the outstanding balance but had instead requested additional time on behalf of the plaintiff, to make payments. He equally confirmed that the plaintiff sought to restructure the facility. He confirmed that the matter was referred to arbitration but the plaintiff later withdrew from the process.
7. During re-examination, he clarified that the plaintiff withdrew from arbitration because the bank advertised the property for sale before the process was completed. He also testified that the board paper was not a contract and had been prepared by the defendant.
8. PW1 stated that the amounts disbursed were in Kenya shillings, totaling Kshs. 13,474,406/=:, which was less Kshs. 25,000/= commitment fee deducted by the Bank. He maintained that no disbursement was made in foreign currency and that he did not request the loan to be advanced in foreign currency.
9. Regarding the statement of currency, it was the testimony by PW1 on re examination that he signed it after the money had been disbursed and that he had no choice but to sign it.

The Defendant's case:

10. The defendant opposed the suit through a statement of defence dated 9/11/1989. While acknowledging the loan agreement, the defendant asserted that under the agreement, it agreed to lend, and the plaintiff agreed to borrow, a facility denominated in one or more convertible currencies determined by the defendant. The total was equivalent to Kshs. 13,500,000/= at the time of disbursement and was to be paid to the plaintiff or its nominees in Kenya shillings. The reason for this is that the amounts lent to the plaintiff were borrowed by the Bank from the European Investment Bank in foreign currencies.
11. Accordingly, the defendant asserts that the monies lent to the plaintiff were denominated in foreign currencies, as stipulated in article 2.12 of the agreement and the statement of currency of the loan dated 3/12/1985. The plaintiff signed and accepted this statement, making it an integral part of the agreement.
12. The defendant's position is that the plaintiff was obligated to repay the equivalent of the specified foreign currencies in Kenya shillings, based on the exchange rate prevailing on the payment due date, and that any exchange rate risk was expressly to be borne by the plaintiff. Therefore, the Bank argues that it did not breach the loan agreement.



13. During hearing the Bank called Chris Gachiri Waithaka, its Principal Legal Officer who testified as DW1. The witness's testimony mirrors his witness statement dated 16/11/2023. The witness produced the defendant's bundle of documents dated 23/10/2008 and supplementary bundle of documents dated 14/1/2009.
14. On cross examination DW1 confirmed that the loan to the plaintiff was to be disbursed in a mixture of currencies including Kenya shillings. It was his testimony that the repayment was dependent on the prevailing exchange rate which was bound to fluctuate from time to time. He clarified that the Bank was at liberty to disburse the money in Kenya shillings of foreign currency and that the bank could also charge commitment fees, which was not pegged on disbursements.
15. PW1 also confirmed that the suit property was eventually advertised even though the sale documents and evidence of conclusion of receivership are not on record. On re-examination, DW1 testified that the issue of disbursement was a contractual issue and that the statement of currencies was accepted by the defendant and formed part of the agreement between the parties. He further testified that the exchange rate and the currency of disbursement was at the banks discretion.

Analysis and determination

16. Parties filed their respective submissions which I have considered alongside their pleadings, evidence and authorities as cited. At the heart of this dispute is the question as to whether the loan advanced to the plaintiff was given in Kenya Shillings, was measurable in Kenya Shillings and whether it was repayable in Kenya Shillings. In light of this, I have distilled two issues for determination; that is whether the defendant breached the terms of the loan agreement and whether the plaintiff is entitled to the prayers sought in the plaint.
17. It is undisputed that the relationship between the parties in this case was contractual. Established legal principles hold that parties are bound by the terms of a contract they willingly enter into, except in cases where coercion, fraud, or undue influence can be demonstrated and substantiated. The court does not have the authority to alter or rewrite the terms of a contract, as affirmed in *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & Another*, [2001] eKLR.
18. The documents before me also clearly show that there were pre-contractual agreements leading up to the loan agreement ultimately executed by the parties. These pre-contractual agreements include the Board Paper, of which both parties are aware.
19. The legal position regarding the relevance of such pre-contractual documents is well-established, as outlined in *Damodar Jinabhai & Co Ltd V Eustace Estates Ltd*, [1967] EA 153. In that case, Sir Charles Newbold, P., at page 155, articulated a principle later endorsed by the Court of Appeal in *Development Finance Company of Kenya Limited & 2 Others V Wino Industries Limited*, [1995] KECA 122 (KLR). The learned judge stated:

“I would begin by stating what I understand to be the law relating to the interpretation of contracts in Tanganyika. First, where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add to or detract from it, but where necessary extrinsic evidence may be given of surrounding facts, although evidence of the negotiations is never admissible to vary the terms of the written contract.”
20. The import of this statement is that pre-contractual documents, including evidence of negotiations, may assist the court only insofar as they do not contradict the terms of the final contract entered into



by the parties. In this context, I turn to the board paper dated 17/10/1984, included on pages 46 to 81 of the plaintiff's bundle.

21. While I note the testimony of PW1 that this document was not a contract, I would consider it only to the extent that it aligns with, and does not contradict, the provisions of the final loan agreement. In my view, it clearly indicates the intention of the parties prior to the loan agreement and affirms the fact that the plaintiff was well aware of the terms even before executing the agreement.

22. Clause 35(6) of the board paper states as follows:

“The loan to be advanced and the loan repayments and interest payments to be in foreign currency or a combination of foreign currencies to be determined by DFCK. The exchange risk to be the responsibility of VFL.” (emphasis added).

23. In my view, this term of negotiation corroborates the eventual terms found in the loan agreement produced at pages 84-110 of the plaintiff's bundle of documents. Pertinent provisions of the loan agreement include the following:

24. Article 2.01(a):

“Subject to the terms and conditions herein set forth DFCK agrees to lend to the company and the company agrees to borrow from DFCK an amount in one or more convertible currencies to be determined by DFCK equivalent to the sum of Shillings Thirteen Million five hundred thousand (Ksh 13,500,000/=)” PROVIDED THAT if all or part of the loan shall be disbursed in a currency or currencies other than the Shillings the Company alone shall bear the entire risk of any exchange rate fluctuation.

(b) The Loan or part thereof shall be made available by DFCK from monies allocated by EIB in accordance with the EIB Finance Contract.” (emphasis added).

25. Article 2.12:

“Once the Loan has been fully disbursed DFCK shall deliver to the Company a statement (hereinafter referred to as “the statement of currencies”) substantially in the form set out in Schedule C hereto showing:

- a. The several currencies in which the loan has been made and the amount of each currency;
- b. The proportion of each payment of interest payable in each currency;
- c. The amount in each currency payable on each repayment date in accordance with Article 2.07.

Upon delivery to and acceptance by the Company the statement of currencies shall be deemed to form an integral part of this Agreement.”

26. As previously noted, the central issue in this dispute revolves around the interpretation of the currency of account and currency of payment. The Court in the Wino case [supra] defined these terms citing



Lord Denning's judgment in the case of *Woodhouse AC Israel Cocoa Ltd SA V Nigerian Produce Marketing Co Ltd*, [1971] 2 QB 23 at page 54:

“At the heart of this case lies the difference between the money of account and the money of payment. It is this: The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay. Take an example: Suppose an English merchant buys 20 tons of cocoa beans from a Nigerian supplier for delivery in three months' time at the price of five Nigerian pounds a ton payable in pounds sterling in London. Then the money of account is Nigerian pounds. But the money of payment is Sterling.”

27. My understanding is that the "currency of account" refers to the currency used as a standard of value, the unit in which the obligation, debt, or contract amount is denominated. It establishes the amount owed or specified in a financial agreement, irrespective of the actual currency used for payment. In contrast, the "currency of payment" refers to the actual currency used to fulfill or discharge the obligation or debt outlined in the contract. This currency may differ from the currency of account, especially in cases where exchange rates or currency conversions are involved.
28. The plaintiffs have implored this Court to assume a similar interpretation as that in the *Wino* case [supra]. They contend that the loan agreement in the case before the Court is identical to the agreement in the said case. That agreement has not been provided for the benefit of this Court and I will therefore proceed on the basis of the evidence tabled before me.
29. Based on a comprehensive review of the loan agreement and the supporting documents before me, it appears that the currency of account included various foreign currencies along with Kenyan Shillings, amounting to a total of Kshs. 13,500,000/=. This was the principal amount to be advanced to the plaintiff. Articles 2.01(a) and 2.12 of the agreement support this interpretation, referring to these currencies collectively as 'convertible currencies'.
30. The 'currency of payment', on the other hand, was designated as Kenyan Shillings. This was the currency in which the plaintiff was obligated to repay the loan, as stipulated in the loan agreement.
31. The rationale behind this arrangement was clarified by DW1, who explained that the defendant is a development finance institution funded by the European Investment Bank. This funding may have been provided in various foreign currencies, which likely influenced the structure of the loan agreement. Given that the plaintiff has not disputed this point, it is reasonable to infer that they were aware of this funding arrangement and, accordingly, chose to enter into the agreement with the defendant.
32. I have carefully considered the testimonies of PW1 and DW1 regarding the currencies in which the loan was disbursed. I have also reviewed the evidence provided in the form of bank statements on pages 220 to 225 of the defendant's documents, which detail the transactions in the plaintiff's loan account.
33. The bank statement on page 210 of the bundle shows that the defendant disbursed funds in various currencies, including Belgian francs, British pounds, and US dollars, with disbursements occurring between March and August 1985. The statements further indicate that payments made by the plaintiff toward repayment of the loan were in Kenyan Shillings. This evidence is corroborated by invoices on pages 134 to 140 and 145 to 150 of the plaintiff's bundle, which reflect interest and penalties calculated in foreign currencies and converted to Kenyan Shillings. These amounts were ultimately paid by the plaintiff in Kenyan Shillings.



34. I further note that the plaintiff does not dispute the substance of Article 2.11, which requires the defendant to determine and inform the plaintiff of the currency or currencies in which the loan would be advanced. The plaintiff asserts that the Bank was obligated to notify the plaintiff of these alternative currencies prior to disbursement.
35. I disagree with this submission. Article 2.01(a) clearly states that the selection of the convertible currencies was at the defendant's discretion. The defendant was only required to provide a statement of currencies to the plaintiff after advancing the loan, detailing the currencies in which the loan had been disbursed and specifying the proportion of principal and interest payable in each currency. This, in my view, is the intended effect of Articles 2.11 and 2.12.
36. Even if I were to accept the argument that the defendant was obligated to provide prior notification, it is noteworthy that this issue has been raised only years after the loan was disbursed. The plaintiff, who presumably understood all terms of the agreement, effectively accepted these terms by receiving the disbursements and acknowledging the statements of payment without objection.
37. Accordingly, a statement of the loan currency, dated 3/12/1985 and found on pages 139-141 of the defendant's bundle, was prepared by the defendant and sent to the plaintiff. This document, which the plaintiff signed in acceptance, specifies the currencies in which the loan was disbursed, their conversion into Kenyan Shillings (as the currency of payment), and the percentage breakdown of the loan. In a letter to the defendant dated 19/12/1985, the plaintiff returned the signed statement without raising any concerns. PW1 confirmed in his testimony that he received and accepted this statement without objection.
38. Regarding the default, although the plaintiff argued that it was diligently repaying the loan, the record suggests otherwise. Letters in the defendant's supplementary bundle, including a letter dated 4/7/1989 declaring an event of default, as well as correspondence between the parties' advocates, show that the plaintiff acknowledged its indebtedness to the defendant. This debt was further confirmed by PW1, who also acknowledged that the plaintiff had approached the defendant to localize the account and to restructure the facility.
39. On the argument advanced by the plaintiff that the defendant was wrong to charge a commitment fee, I note that the same was provided for in Article 2.06 of the loan agreement.
40. At paragraph 6 of its plaint, the plaintiff particularized the alleged breaches to the terms of the loan agreement as follows:
 - a) It alleged to have disbursed certain principal sums to the plaintiff in foreign currencies. Such allegation is wrongful not only because it is denied but contrary to the provisions of the contract the plaintiff was never informed or notified either before or at the time of such disbursement.
 - b) It wrongfully alleges and demand repayment of principal sums in foreign currencies in which the loan was never disbursed.
 - c) It wrongfully and in breach of the agreement of the agreement demands payment of interest calculated on the basis of foreign currencies in which the principal loan was not disbursed.
 - d) It wrongfully misled and misrepresented to the plaintiff that certain principal sums were paid in foreign currencies leading the plaintiff to execute a statement of currency.



- e) It has wrongfully and without notice to the plaintiff appropriated the sum of Kshs.25,593/30 as commitment fee.
- f) It has in consequence of the above wrongfully and in breach of the Agreement declared an Event of default.”

41. In light of the analysis of the evidence, I find that the defendant did not breach the terms of the loan agreement. The plaintiff’s allegations of breach, as set out in the plaint, are unsupported by the record and lack merit. The evidence demonstrates that the defendant acted within its contractual rights in determining the currencies of disbursement and in notifying the plaintiff post-disbursement, as stipulated in the agreement.
42. The plaintiff’s acceptance of the loan disbursements, without objection at the time, further reinforces the conclusion that both parties understood and adhered to the terms.

Disposition

43. Accordingly, I dismiss the plaintiff’s claim in its entirety with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

