



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 72 OF 2009

SURYAKALA KIRIT SHAHPLAINTIFF

- VERSUS -

GUARANTY TRUST BANK KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH

HCCC NO. 5 OF 2006 NYERI

NELION SOAP INDUSTRIES LIMITED.....PLAINTIFF

-VERSUS-

GUARANTY TRUST BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

1. As the title to this judgment reveals, there are two cases before me. These were consolidated by an order of this court of 2nd September 2010. The two cases are filed by two different plaintiffs. The defendant in both those cases is one, that is Guaranty Trust Bank Kenya Limited (previously known as Fina Bank Limited) which I shall hereafter refer to as the Bank. The plaintiff in case Nairobi HCCC No 72 of 2009, hereinafter the Nairobi case is Suryakala Kirit Shah, who I shall refer to as Suryakala. The plaintiff in case Nyeri HCCC No 5 of 2009, hereinafter the Nyeri case, is Nelion Soap Industries Limited, which I shall hereafter refer to as the company. Suryakala is a director of the company.

2. The first case in time is the Nyeri case filed by the company. By that case the company admitted that in 1996 it obtained from the Bank a loan facility and it offered as security motor vehicles registration numbers KAJ 488 J, KAG 316X, KAG 633W, KAK 333U, KAG 578S, KAG 316S, KAK 056U and KAK 057U, amongst other properties all valued at Ksh 30 million. It pleaded that the Bank had on 31st January 2006, without notice to it, seized motor vehicles KAJ 488J, KAG 633W and KAK 33U. That the Bank also proclaimed for attachment with intention to sell motor vehicles KAG 316X, KAK 056U, KAG 316S, KAK 056U, and KAK 057U. Evidence was led that those vehicles were also taken away by auctioneers. The company pleaded that the Bank had charged unreasonable high interest on its loan accounts. It also pleaded that the Bank unlawfully appointed receivers and managers over its assets. The company prayed for orders that there be a declaration that the appointment of the receiver manager was unlawful, and that there be a declaration that the company had “cleared the debt” due to the Bank.

3. The Nairobi case, filed by Suryakala, also pleaded that the Bank had applied unlawful, unauthorised and excessive interest rates and other penalties which it required the company’s directors to guarantee. Suryakala also pleaded that the appointment of receivers over the company’s assets was unlawful and Suryakala also sought that the Bank be ordered to render accounts of the company. Suryakala alleged that the Bank had threatened to auction her property LR. No. 209/12143 (the property) which auction would have been illegal. She prayed for order for declaration that the loan/overdraft /financial accommodation between the Bank and the company and the guarantors is illegal, null and void, and for an order that the Bank do discharge the legal charge over the property, for permanent injunction restraining the Bank from auctioning the property, and that it be ordered to discharge the legal charge over the property.

4. The Bank denied both claims. It pleaded that the facilities to the company were secured by legal charge and various personal guarantees and that the plaintiffs had admitted the debt. That it entered into agreement through what he termed as indulgence letters dated 23rd September 2004 and 27th May 2005 which were intended to permit the company to repay the outstanding loan which stood at Ksh 47,954,000.25 as at 22nd September 2004, and continued to accrue interest. By those indulgence letters & Suryakala was allowed to privately sell the property for Ksh 14 million which amount was to be used to reduce the company’s debt. It was agreed that the company would sell

eight vehicles also to reduce its debt with the Bank. Further that the guarantees were to remain valid and enforce. The Bank pleaded that the interest rate was specifically agreed between the parties. That it lawfully appointed the receiver managers over the company's assets and the said receivership was concluded and final account were provided on 4 December 2006. The bank denied attempting to sell the property but its case is that it would auction it in due compliance with the law. The Bank pleaded the dismissal of the suit.

ANALYSIS

5. Although the Bank through its learned advocate submitted that there were no issues in this matter to determine I beg to differ. There are many issues for consideration but in my view they can be compressed to two: that is what if any is due and payable to the Bank and was the attachment of vehicles by the Bank lawful.

6. I will begin by making a general comment. As it often happens parties present bulky documents which they request be admitted in evidence but once admitted in evidence parties fail with particularity to state their relevance to their case if any. This is what the parties in this case have done but less so the Bank. There are documents in the bundle whose relevance to the case is unclear. Learned counsels need to take heed and assist the court by setting out the relevance of all documents before court. This indeed would have assisted the court to reach a just decision.

7. Although Suryakala and for that matter the company intimated that the loan account was regularly serviced I have come across letters written by the company where the company sought the Banks indulgence over the amount due and not paid. The Bank did indeed enter into restructuring of the outstanding loan with the company's directors. Although Kirit Kapurchand Shah, another director of the company, did state in evidence that the company's directors had no choice but to sign those restructuring of loans: he however did not elaborate this. This witness did confirm while under cross examination that after the receivership was concluded and the sale proceeds of the company's cars was credited into the company's bank account that no more payment was effected into the company bank account. He said this was because the seizure and sale of those cars was illegal. He finally stated that he had no evidence that the company repaid the Bank Ksh 47 million. He also stated:

“The Bank can realise its debt if it follows the correct legal procedure.”

8. Suryakala confirmed that she had charged the property as security for the facility given to the company. She confirmed that she was not under duress when she signed the loan restructuring letter at page 417 of the bundle but stated that the interest rate charged was excessive. When asked if the loan owed to the Bank was in dispute she stated:

“The Bank has not presented me with any demand and so it is assumed it is not owed.....There has been a dispute about the debt but I don't have the details.”

9. The plaintiff called Wilfred Abincha Onono as a witness. He previously was an accountant in private and public sector since 1973.

10. He produced a report which showed his analysis of the company's account and this he did from the documents presented to him by the plaintiffs; that is bank statements of loan account No. 011-4012697 from 3rd January 2003 to 1st October 2004, of loan account No. 011-4015675 from 1st October 2004 to 31st July 2005, and of loan account No. 011-100153 from 31st January 2001 to 1st October 2004. He also received from the plaintiffs facility letter dated 25th January 2001, of 9th February 2002 and 21st July 2003. He relied also on the plaintiff's information. He used that information and applied the provisions of section 44 of the Banking Act and Section 39 of the Central Bank of Kenya Act and found that the company owed the Bank Ksh 27,188,808.32 as at 31st July 2005.

11. Jacinta Kaminja works at the Bank in the legal department. She was not at the Bank when the transactions with the plaintiffs took place. She relied on the documents held by the Bank. She referred to various borrowings by the company starting from 1996. She referred to the Bank's securities that is the legal charge over the property, a debenture and personal guarantees of the directors of the company. She stated that the facility of Ksh 22 million given to the company was renewed on yearly basis upto the year 2001. In the year 2002 the company sought restructuring of the facility to be converted from overdraft facility to letters of credit facilities of Ksh 25 million and letters of credit facility for Ksh 10 million and a demand loan of Ksh 20 million which totalled to Ksh 55 million. That despite that restructuring the company was unable to service the loans satisfactorily. Due to the constant default the company made proposal to settle the amount then outstanding at Ksh 47,954,006.25 as at 22nd September 2004. But due to persistent default the Bank decided to exercise its rights by appointing Harveen Gadhoke and Daniel Mutisya Ndonye as receiver managers. They were appointed on 14th February 2006. The receivership, after selling the company's cars, paid to the Bank Ksh 2.5 million.

12. The witness stated that the company and the guarantors are still indebted to the Bank for Ksh 54 million as at 30th April 2008. It is on that basis the Bank holds the view that the cases before court have no proper foundation.

13. When the Bank's witness was cross examined and asked on what basis the Bank attached the Company's cars she was unable to give an answer.

14. Despite the claim before me being that the Bank is not owed any money and that the Bank charged exaggerated interest the Bank did not see it fit to provide to this court Bank Statements of the Company. The plaintiffs relied on the re-calculation made by Mr. Onono which as stated before showed the company owes the Bank Ksh 27,188,802.32. The Bank did not rebut that evidence by providing bank statements. If what is in pages 198, 199, 201, 202, 203 and 204 is intended to be the company's statement there was no mention of those pages in evidence and in any case the account numbers mentioned on those pages bear no relation to what is referred to in the report of Mr. Onono. There was no clear evidence submitted by the Bank of what is due and owed by the company at least by the date the suits were filed or as at the date of trial. It was not enough for the Bank official to state in evidence how much was due, as represented by correspondence when the company requested either for restructuring or indulgence. It was necessary, just as the plaintiffs did, for the Bank to have presented an

account of what it alleges it is owed. That lack of proof will lead this court to take that the evidence of Mr Onono as uncontroverted and that the amount owed by the company is Ksh 27,188,808.32.

15. The Bank has admitted that it instructed the auctioneer to attach the vehicles stated in the Nyeri case. The Bank did not prove under what legal authority it instructed that attachment to be done prior to the appointment of the receiver manager. The Bank had no legal authority to attach these vehicles save with a court order or save the receiver manager attaching. In that regard the plaintiffs, that is Suryakala and the company do succeed in their claim that the attachment of the vehicles was unlawful. But having succeeded what relief do they seek is not clear. I will deal with that later on.

16. It should be noted that the receiver managers were appointed by the Bank and on doing so they took possession from the auctioneer of the attached vehicles. They proceeded to sell the vehicles and so restitution of those vehicles cannot be ordered.

17. Before determining if the plaintiffs are entitled to any relief in view of my finding that the attachment was wrongful, I need to touch on the appointment of receiver managers.

18. The receiver managers were appointed on 14th February 2006. The plaintiffs have alleged that no notice was served before the appointment of receiver managers. I beg to differ with those allegations. The company was sent a demand dated 27th January 2006 for the settlement of Ksh 43,495,663.45. The address used in that demand, that is P. O. Box No. 1042 Nyeri, is the address reflected in the letters the company wrote to the Bank and are in the bundle of documents before court: for example on pages 446 and 447. The company, therefore, had notice of the debt. The appointment, by the Bank, of the receiver manager was lawful. I have also perused the receiver's report and have considered the evidence of Robert Baraka Habwe and I am satisfied that there was no illegality in the sale of the subject vehicles. The report clearly shows the challenges the receiver encountered in finding buyers especially because of the state of those cars, and I am satisfied that nothing untoward occurred with regard to the receivership and the realisation of the company's assets, that is the subject vehicles.

19. Getting back to the wrongful attachment of the vehicles by auctioneers on instructions of the Bank prior to appointment of the receiver. The company through its Nyeri Case prayed that the court do grant any relief the court deems fit and just to grant. Since the subject motor vehicles were sold, that was in the year 2006, the only relief the court can award is one of general damages for the wrongful act. The court cannot order for reimbursement of the value of those cars, as the plaintiff sought because; firstly the only value given to the court was the one produced by the receiver which was not what the company sought and secondly because as I found the receiver since they were empowered by the debenture to sell assets of the company the court cannot order reimbursement. I will therefore order the bank to pay general damages of Ksh 2 million for wrongfully attaching the vehicles.

20. The company and Suryakala were not able to prove entitlement to declaration that the company was not indebted to the Bank or that the Bank should be ordered to issue discharge of the charge over the property. Those claims failed for lack of proof and because Mr Onono did confirm that the company was indebted to the Bank and the company's directors did acknowledge there was a debt.

21. Accordingly because the entire claims have not succeeded I will only award the plaintiffs half of the costs of this suit.

CONCLUSION

22. In the end the judgment of this court is:

(a) A declaration is made that Nelion Soap Industries Ltd is indebted to Guaranty Trust Bank Kenya Limited Ksh 27,188,808.32 as at 31st July 2005. Interest at Bank's rate is applicable from that date.

(b) Guaranty Trust Bank Kenya Limited shall pay general damages to Nelion Soap Industries Limited of Ksh 2 million for the wrongful attachment of the motor vehicles which amount attracts interest at court rate from the date of filing HCCC 5 of 2006 until payment in full.

(c) The plaintiffs in HCCC No. 72 of 2009 and HCCC No. 5 of 2006 are awarded half the costs of those suits to be taxed by the Deputy Registrar of this court.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE