REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 1414 OF 1998

GOPITEX KNITWEAR MILLS LTD .....PLAINTIFF

VERSUS

KENYA KNITTING & WEAVING LIMITED ..... 1ST DEFENDANT

IDEAL AUCTIONEERS ..... 2ND DEFENDANT

J U D G M E N T

1. The title of this case will show that this case was filed in 1998. Its hearing was concluded 11th February 2019. This case was part-heard between November 2008 and May 2009 before the Late Justice Khaminwa (deceased). Justice Mabeya on 12th June 2012, after ordering the case to start *de novo*, commenced hearing. The Learned Judge concluded hearing the Plaintiff's case on 14th November 2013. Justice Mabeya was transferred from the Commercial & Tax Division Milimani and I took over this matter from the Learned Judge. I commenced hearing the defence case on 21st November 2018.

2. The matters relating to this case began to unfold in 1995. It is on 25th July 1995 that **Gopitex Knitwear Mills Ltd**, the Plaintiff, entered into a Sale Agreement with **Kenya Knitting and Weaving Mills Limited**, the 1st Defendant. The agreement was in relation to the 1st Defendant's purchase of the Plaintiff's three adjoining properties (hereinafter the properties namely **L.R Nos. 209/9266**, **209/9267** and **209/9268**). The purchase price for the properties was Kshs. 70 million. Part of the purchase price was paid, by the 1st Defendant, in form of machinery delivered to the Plaintiff whose value was stated in the Sale Agreement to be Kshs. 17.5 million.

3. The properties that the Plaintiff sold to the 1st Defendant was where the Plaintiff operated its factory of textile manufacturing. According to the Plaintiff's Director the Plaintiff decided to sell the properties because it was under pressure from mounting bank debt which was due to the bank's high interest rate, at 30% per annum. On concluding the sale of the properties the Plaintiff became a tenant of the 1st Defendant, on the properties. It is that tenancy/landlord relationship that has given rise to the dispute in this case.

4. The Plaintiffs' claims are injunction to restrain the 1st Defendant and 2nd Defendant (**Ideal Auctioneer**) form auctioning the Plaintiff's goods, machinery and tools of trade; general damages; and an award of Kshs. 35,019,780.

5. Although the 1st Defendant by its defence counter-claimed for Kshs. 2,955,169 being rent arrears plus other costs relating to legal fees and storage charges, the 1st Defendant's Director, Kamal Joshi, while being cross-examined stated he had no other claim against "him" meaning the Plaintiff. Later, on that Director being re-examined by his Learned Advocate he stated that the money owed to the 1st Defendant was eventually paid to his Advocate who released it to him. In what can only be termed as confusing evidence the Director on being further re-examined stated that the Plaintiff owed the 1st Defendant Kshs. 2,959,169.

ANALYSIS

6. The Plaintiff decided to sell its properties in order to clear its mounting bank debt. It is admitted by the parties that the Plaintiff's Directors and 1st Defendant's Directors were acquainted with each other for a long time. The 1st Defendant's Director stated that that acquaintance went back to 1965. It is not clear whether it is due to that familiarity that parties dealt with each other in a casual manner when it came to reaching an agreement to sell and purchase the properties. There is also evidence, in my view, that the Director of the 1st Defendant took advantage of perhaps the dire financial position the Plaintiff company found itself in. This is obvious from the Sale Agreement for the properties, dated 25th July 1995. In that agreement under clause 3(b) it provided:

"A sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000) paid in cash to the vendor."

7. Although that clause obviously shows that the Plaintiff (the Vendor) had been paid Kshs. 3.5 million in cash that was not the case. Indeed, payment of that amount did not take place until a month after the Sale Agreement was signed. The correspondence before Court shows that the Plaintiff, as result of that delayed payment of Kshs. 3.5 million, by the 1st Defendant, had to make request from its banker, the Delphis Bank Ltd, to extend its credit period.

8. The 1st Defendant through its letter dated 31st July 1995, the day it had given the Plaintiff an undertaking to pay Kshs. 3.5, requested for extention up to 31st August 1995. By that letter the 1st Defendant undertook to pay "modest bank charges for the delayed period". However, in later correspondence the 1st Defendant denied giving such undertaking.

9. The Plaintiff, perhaps as I stated before, because of their difficult financial circumstances did not seem to insist on its strict legal right, for example insisting on payment of that interest.

10. Why am I skirting around the main issues before Court? It is because my total understanding of this matter is that the plaintiff, through its Directors, were the underdogs and the 1st Defendant through its Director Joshi, was manipulative and in my view I would go as far as state, since I observed him, that he was/is a domineering character, and had an upper hand in the transactions with the plaintiff. I will demonstrate this by examining the transactions and correspondence between the parties.

11. There is the first incident of the 1st defendant, here it should read Mr. Joshi, who undertook to pay modest interest for delayed payment of Kshs. 3.5 million. The then Advocate acting for the 1st Defendant by letter dated 1st February 1996 had this to say on the issue of that interest:

> ***"At no time have our clients (1st Defendant) agreed to pay any default interest or any interest for that matter."***

12. The 1st Defendant through its letter dated 5th February 1996 on that interest wrote:

> ***"Your claim of Shs. 75,477 is not justified as at no time we had (sic) agreed to pay any interest charges. The letter dated 31st July 1995 was written to only accommodate you with your bank."***

13. Those two letters, of the 1st Defendant and its then Advocate, denied the Plaintiff interest due for payment of Kshs. 3.5 million, the amount which was recognized in the Agreement of Sale of 25th July 1995 as having been paid to the Plaintiff in cash.

14. Further the 1st Defendant, who on finalization of the sale of the properties became the Plaintiff's landlord provided in writing so many varying rental agreement, by letters, that even as I went through the evidence it left me dizzy in my mind. It does seem that 1st Defendant began to make offer for rental of those properties even before it completed paying the purchase price. Parties acknowledged that the 1st Defendant completed making that payment end of March 1996. This is even though the Sale Agreement provided the completion date to be 31st October 1995. It is also to be noted that the Agreement of Sale provided for interest payable at 20%. The 1st Defendant ought to have paid that interest for late payment but there is no evidence of such demand or of such payment.

15. The 1st Defendant by its letter dated 31st January 1996, this is before its final payment of the purchase price, offered the Plaintiff rental of the properties for a period of 5 years and 3 months to commence on 1st April 1996 to 30th June 2001. The rental was Kshs. 750,000 quarterly payable in advance.

16. By letter dated 8th February 1996, referenced KBJ/1351/02/96 the 1st Defendant offered rental to the Plaintiff, of the properties, for 5 years and 3 months at the rental of Kshs. 600,000 quarterly starting 1st April 1996.

17. By yet another letter again dated 8th February 1996, referenced KBJ/1549/02/96, the 1st Defendant offered the Plaintiff rental of the properties at the rent of Kshs. 1.2 million quarterly starting 1st April 1996.

18. Although the rental in each of the letters, above, began on 1st April 1996 the 1st Defendant changed the dates to 24th March 1996. This is seen from the letter dated 7th November 1996 by the 1st Defendant. In that letter 1st Defendant stated:

> ***"Kindly note that your DUE DATES of rent are 24th March, 24th June, 24th September and 24th December every year. In case we do not get your BANKERS DRAFT on these dates you are liable to pay Bank interest charges and profits."***

19. By that letter 1st Defendant demanded rental arrears for Kshs. 508,000, but it is not clear for what period, this was.

20. By yet another handwritten agreement between the parties dated 21st December 1996 the Plaintiff proposed to vacate the properties by 31st March 1997. The agreement provided that if the Plaintiff did not vacate on the 31st March 1997 the rental would be Kshs. 800,000 monthly. It was also agreed that all previous interest in respect to rent arrears would be waived.

21. Despite that agreement, that, that interest due as at 21st December 1996 was waived, the 1st Defendant wrote a letter to the Plaintiff dated 30th January 1997. In part that letter after confirming the agreement that the Plaintiff would vacate on 31st March 1997 stated:

"Rent. You have paid us rent on 29th January 1997 and are liable to pay Shs. 108,000 towards interest charges for late payment.

You have also paid us rent for the shop unit late and are liable to pay us interest of Shs. 33,300 plus Shs. 20,000 paid short.

As per lease conditions agreed you are liable to pay us the insurance premium which works to Shs. 184,975.

The effective date of your lease was 24th March 1996 hence you should vacate the building by 23rd March 1997. In case you would stay until 31st March you would be liable to pay us rent from 24th till 31st March for 8 days which works to Shs. 106,667.

You are therefore requested to send your cheque for the following:

1. Interest charge Shs. 108,000

2. Short rent paid Shs. 20,000

3. Interest on it Shs. 133,320

4. Insurance premium Shs. 184,975

5. Prorate Rent Shs. 106,667

Total Shs. 452,942

The above amount is already overdue and we request you to pay us immediately failing we would be debiting you INTEREST of Shs. 446/75 per day until full payment received."

22. A close examination of that letter reveals that he 1st Defendant reneged on the agreement of 21st December 1996. In that agreement interest was waived. In that agreement parties agreed the Plaintiff would vacate on 31st March 1997 not 24th March 1996 as the 1st Defendant, by its above letter unilaterally sought to set. The insurance claim was not supported by invoice and it is not clear where the rent of the shop came in since it is not supported by the letters for rental.

23. Following the chronology of the correspondence it does seem that the first Defendant wrote to the auctioneer, by letter dated 11th April 1997, after the Plaintiff wrote to it demanding spare parts of the machine sold by 1st Defendant and also demanded Kshs. 1.1 million which the 1st Defendant had promised to pay. That seems to have been the trigger for the 1st Defendant to instruct the auctioneer. By that letter to the auctioneer the 1st Defendant set out the following to be recovered by distress for rent against the Plaintiff:

a. Interest charge Shs. 141,300

b. Short payment of rent Shs. 20,000

c. Insurance premium Shs. 184,975

d. Rent for 8 days 24th-31st March 1997 Shs. 106,667

e. Rent for April 1997 Shs. 800,000

Total Shs. 1,252,942

24. The auctioneer by notice of distress distrained the Plaintiff's good twice. Once on 12th April 1997 when various machines were distrained, and secondly on 12th May 1997 when all the Plaintiff's machines at plots L.R. 209/9267 and 9268 were distrained. The notice stated the auction date would be on 30th May 1997.

25. Although the Plaintiff's said they were unaware of that distress that cannot be correct because their Advocate wrote a letter dated 14th April 1997 when the amount the subject of that distress was disputed.

26. In response the to the dispute 1st Defendant on 15th May 1997 provided the following account of amount due from the Plaintiff:

Rent for April Shs. 800,000

Interest Charges Shs. 141,300

Short payments Shs. 20,000

Insurance *Shs. 184,975*

Further rent *Shs. 106,667*

Total March ***Shs. 1,252,942***

Interest for April not paid *Shs. 37,588*

Rent for shop April *Shs. 50,000*

Rent for shop May *Shs. 50,000*

Rent for godown May *Shs. 800,000*

Shs. 2,190,530

Interest for may not paid *Shs. 65,716*

TOTAL ***Shs. 2,256,246***

27. By letter to 1st Defendant's Advocate dated 15th May 1997 the Plaintiff's Advocate asked for breakdown of that amount and stated that the Plaintiff had been advised by the Advocate to pay on without prejudice basis.

28. The Plaintiff, in absence of its Advocate reached an agreement with the 1st Defendant on 17th May 1997 where the Plaintiff admitted indebtedness to the 1st Defendant for Kshs. 2 million as full and final payment. Although the Plaintiff's Director, in evidence, stated he signed this agreement without understanding what he was signing there is no pleading to support that at all.

29. The 1st Defendant, although through its Director's evidence confirmed that by the time the agreement dated 17th May 1997 was signed the Plaintiff had vacated the properties, it nevertheless by subsequent letters gave account of Plaintiff's debt of amounts that was increasing. For example by letter dated 2nd February 1998 the 1st Defendant demand the amount:

a. August Amount outstanding *Shs. 3,149,320*

b. Interest for September 1997 *Shs. 102,353*

c. Interest for October 1997 *Shs. 105,680*

d. Interest for November 1997 *Shs. 109,114*

e. Interest for December 1997 *Shs. 112,660*

f. Interest for January 1998 *Shs. 113,072*

g. Interest for February 1998 *Shs. 116,747*

TOTAL ***Shs. 3,708,946***

30. By letter dated 20th April 1998 the 1st Defendant stated the Plaintiff's indebtedness stood at Kshs. 3,973,116. About a month later the auctioneer by its notification of sale stated the Plaintiff's debt was Kshs. 3,829,487.

31. The obvious question one would ask is how the debt was worked out. It seems that interest was being applied onto interest. The debt seems to be up, then down within a period of less than a month without explanation.

DETERMINATION

32. As stated before the 1st Defendant through his evidence at first indicated that it had no claim against the Plaintiff but later stated that the 1st Defendant was claiming Kshs. 2,955,169, claim was for lost rent legal fee paid for preparation of lease and for distress of rent.

33. In view of my analysis above I do find that the 1st Defendant has not proved as a balance of probability the claim for Kshs. 2,955,169.

34. In respect for legal fee for lease, there is no proof before me that a lease was prepared by Hamilton Harrison and Mathews Advocates. All that I have seen, done by that law firm was correspondences. That legal fee therefore is disallowed.

35. Similarly there is no proof before me that the auctioneer was paid by the 1st Defendant Kshs. 40,000 or Kshs. 80,000 claimed in the counter claim. Even if there was proof there is no evidence that the 1st Defendant was entitled to claim such charges since it does seem, from correspondence the auctioneer declined to proceed with the auction.

36. Further the 1st Defendant did not sufficiently prove it utilized the Plaintiffs rent deposit to repair the properties.

37. It follows that the 1st Defendant's counter-claim fails and is dismissed with costs.

38. The Plaintiff claims are for injunction to restrain auction of its properties; general damages caused by wrongful distress for rent; Kshs. 10,281,217 in respect to Value Added Tax (VAT) for machines sold to it by 1st Defendant; Kshs. 20,000,000 for spare parts for those machines; and Kshs. 2,352,000 being the value of the properties wrongly detained by the 1st Defendant at the properties. I will consider the heads of those claims individually.

DISTRESS FOR RENT

39. The Plaintiff has contended that the distress for rent was illegal.

40. Having considered the parties' evidence and submissions I do find that the distress of rent against the Plaintiff did not meet the statutory standards.

41. Section 4(1) of the Distress for Rent Act (the Act) makes it clear that distress can only be in respect to rent due. Not, as in this case, for insurance premium. Section 5 of the Act provides that distress can be within 6 months after the termination of the tenancy so long as the landlord retains the title or interest and during the possession of the tenant. In this case the Plaintiff vacated the properties in May 1997. The 1st Defendant instructed the auctioneer to advertise the sale of Plaintiff's goods by an advert dated 19th June 1998. That is more than 6 months provided under Section 5 above. More importantly what the auctioneer advertised for sale were not the items that were distrained by Notice of Distress dated 12th April 1997 and 12th May 1997.

42. The Court of appeal in discussing Section 5 of the Act in the case **C. Y. O OWAYO V GEORGE HANNINGTON ZEPHANIA ADUDA T/A ADUDA AUCTIONEERS & ANOTHER (2007) eKLR** had this to say:

> *"Further, **section 5** of the **Distress for Rent Act Chapter 293** is right on that point and deals, in our view, with the situation obtaining in this suit. It states:*
>
> > ***"Any person having rent in arrears and due upon a demise, lease or contract after the ending or determination of a demise, lease, or contract, may distrain for arrears after the ending or determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined:***
> >
> > ***Provided that distress under this section shall be made within the space of six months after determination of the demise, lease or contract and during the continuance of the Landlord's title or interest, and during the possession of the tenant for which the arrears became due."***
> >
> > > ***In this case, the tenancy appears to have been determined some six years before the subject distress and the tenant Claris was no longer in possession of the premises. Even if she had been in possession, her goods in the premises could only have been distrained within six months after the determination of the tenancy.***
> > >
> > > ***That the respondent instructed the auctioneer to distrain the appellant's goods after six years after the determination of the tenancy, was in itself illegal as such an action was time barred both under the Limitation of Actions Act (supra) and Distress for Rent Act (supra). That alone rendered the action of both the respondent and the auctioneer (deceased first appellant) illegal, and would have been enough ground for allowing this appeal on liability."***

43. In that case above the goods were cartered away by the auctioneer and were sold before the action was filed in Court. In this case the Plaintiff obtained an injunction and the auction was stopped. But according to the Plaintiff the auction advertisement led to the companies that were giving products to the Plaintiff on credit to withdraw that credit. The Plaintiff exhibited letters written to it by such companies whereby the credit was withdrawn. The Plaintiff through its witnesses testified, and it was not denied by the Defendants, that after the actions of the 1st Defendant and the auctioneer the company was unable to continue manufacturing textile and that presently the Plaintiff company is dormant.

44. The actions of the 1st Defendant and the auctioneers were undoubtedly illegal, contrary to the Act. I do find that the 1st Defendant and the auctioneers cannot escape liability. The 1st Defendant through its Director persistently bombarded the Plaintiff, with unrealistic demands for rent. The auctioneer allowed himself to be used by the 1st Defendant's Advocates to harass the Plaintiffs.

45. The evidence by Paresh Pradyuman Upadhay, the accountant, was that the Plaintiff lost Kshs. 274,372,402 as a consequence of the wrongful advertisement by the auctioneer of the auctioning of its goods. The accountant, unfortunately did not support such a huge claim with account or other supporting documents. Without that proof and because the Plaintiff's Directors did say that the Plaintiff company was, during that time, adversely affected by the imports of second hand clothes, commonly known as "mitumba" I find the claim for such a huge sum cannot be supported.

46. It is because of that I estimate the loss incurred by the Plaintiff is more realistically at Kshs. 15 million. Judgment will be entered jointly and severally against the 1st and 2nd Defendant for Kshs. 15 million. The Plaintiff in view of my finding that the distress was wrongful will be entitled to an injunction to stop any further distress.

VAT AND SPARE PARTS

47. The Plaintiff failed to prove that the 1st Defendant was registered to collect VAT. The 1st Defendant produced a Certificate of Registration for VAT which showed the 1st Defendant was registered on 24th September 2001. It follows that on 25th July 1995 when the 1st Defendant sold the machines to the Plaintiff there was no obligation to deduct or remit VAT. That claim for VAT fails.

48. The claim for spare parts also fails. This is because the agreement of 25th July 1995 did not obligate the 1st Defendant to provide the spare parts. That agreement did not provide, the state in which the machines purchased by the Plaintiff, were to be in. The undertaking by the 1st Defendant, Mr. Joshi, to provide the spare parts cannot bind the 1st Defendant. Further any other promises made by Mr. Joshi, as stated by the Plaintiff, would not be permitted to amend the written agreement. That is Agreement of Sale of the immovable properties. This was discussed in the case **UNIVERSAL EDUCATION TRUST FUND V MONICA CHOPETA [2012] eKLR** as follows:

> "In the book by Treitel entitled '***The law of contract***' the Learned author discussed parol evidence rule as follows:
>
> > ***"The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents."***
>
> The Defendant is forbidden by that rule from introducing, as she does in her defence and counter claim, verbal representation to alter written agreement. This was also the holding in the case **MUTHUURI VS NATIONAL INDUSTRIAL CREDIT BANK LTD [2003] KLR 145** where the Court held as follows:
>
> > ***"1. The history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties agreement.***
> >
> > ***2. No extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document."***

49. It follows that both heads of claims for VAT and spare parts fails.

CLAIM FOR PROPERTY DETAINED

50. The Plaintiff claimed that when it vacated the properties the 1st Defendant illegally detained various items, some of them being Volvo car, Lorry body, power factor unit, switchboard change-over switch and dismantled Dyer Stenter. These items were valued by the Plaintiff at Kshs. 2,352,000.,00.

51. The 1st Defendant did not deny that those goods were still at the properties. Indeed, the 1st Defendant has counter-claimed storage charges in respect to those items proving that they are there. The 1st Defendant through the evidence of Mr. Joshi stated that the Plaintiff had failed to collect those items.

52. I had opportunity to observe Mr. Joshi testify. I did not find Mr. Joshi to be a truthful or credible witness. I am inclined to believe that the 1st Defendant detained the Plaintiff's goods wrongfully since May 1997 to date. No doubt that the state of these goods have deteriorated due to passage of time. The Plaintiff is entitled to the claim under this head. It is pertinent to note that the 1st Defendant did not dispute the value of those items of property.

53. There shall therefore be Judgment for the Plaintiff against the 1st Defendant for Kshs. 2,352,000.

54. The Plaintiff having substantially succeeded in its claim shall be awarded costs of the suit.

CONCLUSION

55. In the end there shall be Judgment for the Plaintiff as follows:

Judgment against the 1st and 2nd Defendants jointly and severally for Kshs. 15 million with interest at Court rate from the date of this Judgment until payment in full.

a. Judgment against the 1st Defendant for Kshs. 2,352,000 with interest from the date of filing this suit until payment in full.

b. An injunction is hereby granted restraining the 1st and 2nd Defendants from selling or auctioning the Plaintiff's machinery and tools of trade.

c. The 1st and 2nd Defendant shall jointly and severally pay the Plaintiff's costs of this suit and of the counter-claim.

DATED, SIGNED and DELIVERED at NAIROBI this 17TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Judgment Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**