



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.1 OF 2014 (ELC NO.47 OF 2014)

BUSIA OUTGROWERS COMPANY LTD. ..PLAINTIFF/APPLICANT

VERSUS

1. KENYA SUGAR BOARD

2. NILE HAULIERS LTD.DEFENDANTS/RESPONDENTS

RULING

1. Central to the Dispute between the Plaintiff and the Defendants is a lease Agreement dated 31st January 2012 (**the lease Agreement**) entered between the Plaintiff and the 2nd Defendant. At this interlocutory stage this Court is asked by the Plaintiff to restrain the 1st Defendant from releasing a sum of Ksh.5,000,000/= to the 2nd Defendant paid as deposit under the terms of the lease Agreement.
2. The Plaintiffs request is in the Notice of Motion dated 28th July 2014 brought under the provisions of Order 40 Rules 1 & 2 of The Civil Procedure Rules and is couched as follows:

1. **That this application be certified urgent**
2. **That Service of this application be dispensed with in the first instance**
3. **That interim orders be granted restraining the first respondent, their agents, workers, employees and assignees from releasing Kshs. 5,000,000/- deposit to the 2nd respondent**
4. **That should the first respondent release the said deposit of Kshs. 5,000,000/- contrary to the provisions of Article 122 (xv) of the sale agreement dated 31st January, 2012, they be held liable and accountable to the applicant for the said sum.**
5. **That costs of this application be provided for.**

3. Through the lease Agreement, the Plaintiff leased out some machinery to the 2nd Defendant for hire at a consideration. That machinery included some tractors and trailers which were jointly registered in the names of the Plaintiff and the 1st Defendant as the 1st Defendant had financed their purchase: clause XV of The lease Agreement provided as follows:-

“The Lessee undertakes to pay the Lessor a sum of KSH. 5,000,000/= (Five million) at the concernment (sic) of the term herein created which sum shall be held by the Lessor as a Deposit. Upon expiry of the term hereby created and being no outstanding liabilities the said sum shall be reimbursed to the Lessee exclusive of any interest which shall be used by the Lessee.”

4. Sometimes business transactions do not turn out as planned on paper. From correspondence

shown to Court through various affidavits sworn by representatives of the parties herein a dispute arose in respect to the contract. The situation was described in a letter of 5th November 2013 from the Chief Executive Officer of The 1st Respondent Company to the Plaintiff. In it she says:-

5th November 2013

KSB/C/LOANS/14(b)/VOL.III/67

The General Manager,

Busia Outgrowers Company Ltd.,

P.O. Box 148

NAMBALE

Dear Sir,

RE: CANE TRANSPORT FLEET

Reference is made to the SDF funded cane transport fleet, the lease arrangement that you entered into with Nile Hauliers and the conversation Omuse/Onditi of today's date.

We also refer to the various communications in which you have accused Nile of breach of the terms of the contract. Nile in turn has made counter accusations and in our judgment it appears the two parties can no longer work together.

You have severally made requests to have the fleet managed directly by yourselves. You will recall that the loan for the fleet was approved subject to the units being leased out and in turn SDF loans being paid directly through Mumias Sugar Co. Ltd. As we formalize the termination of the contract with Nile and present our proposal for management of the fleet to the SDF Committee, we have requested Mumias Sugar Company Ltd., to have the units parked in secure premises at their yard until the matter of management of the fleet is determined.

By copy of this letter to Nile Hauliers we request that both parties jointly take inventory of the units before movement of the fleet to the allocated premises. Mr. Ainea Machio, Fleet Maintenance Officer has been nominated by Mumias Sugar Co. Ltd. to supervise the exercise.

We seek your cooperation in the matter and appreciate Mumias Sugar Co's kind assistance.

Yours faithfully,

R. MKOK, MBS

CHIEF EXECUTIVE OFFICER

Copy to:

The Director,

Nile Hauliers Ltd.

P.O. Box 1680-00606

NAIROBI.

The Managing Director,

Mumias Sugar Company Ltd.

Private Bag,

MUMIAS.

Attention: Mr. Koech”

5. Following this breakdown in relations, the machinery was removed from the custody of the 2nd Defendant and kept in the custody of Mumias Sugar Company under the instructions of the 1st Defendant. In the meantime matters appeared to have been unresolved and so this suit. The claim by the Plaintiff is in the Amended Plaintiff dated 28th July 2014. The long and short of the claim is that the Plaintiff is accusing the 2nd Defendant of breach of contract and prays for judgment as follows:
- a. **Judgment against the first Defendant that they release to the plaintiffs all transport machineries particularized above and which are currently in their (first Defendant) possession.**
 - b. **General damages against the first Defendant for loss of business at the rate of Kshs. 3 million per month until date when they return the machineries to the Plaintiff or until date for judgment hereof.**
 - c. **The first defendant be ordered to release the sum of Kshs. 5 million deposited with them by the second Defendant as per 8 above.**
 - d. **Judgment against the second defendant for payment of arrears of hire charges in the sum of Kshs. 25,805,452.33. dd)The Second defendant to compensate the Plaintiffs for tractor KBJ 588R valued at Kshs. 1.9 million**
 - e. **Interest at court rates on prayer (c) above upon date of judgment.**
 - f. **General damages against the second Defendant for unexpired period of lease**
 - g. **The Second Defendant do indemnify the plaintiffs against any claim, loss or damage directly or indirectly caused by second Defendants breach of any term expressed in the lease agreement.**
 - h. **Costs of this suit against the first Defendant and the second defendant jointly and severally.**
6. I now return to the clause of The Lease Agreement. Once the Deposit was paid by the 2nd Defendant to the Plaintiff, the Plaintiff transferred it to the 1st Defendant for purposes of opening a joint account. And although there was preparation made to open this joint account at Ecobank, Westlands Branch, it is not clear, from the documents before Court, whether the joint account was ever opened or remained solely with the 1st Defendant. As the relationship between the Plaintiff and the 2nd Defendant continued to deteriorate, the 2nd Defendant, in a written documentation, demanded the release of the deposit to itself from the 1st Defendant. Subsequently in a letter of 18th July 2014, the 1st Defendant wrote as follows to the Plaintiff,

July 18th 2014

KSB/CS/HCCC NO.1/14

The General Manager,

Busia Outgrowers Company Limited

P.O. Box 148

NAMBALE

Dear Sirs,

‘Without Prejudice’

RE DEMAND FOR KSH. 5,000,000/= DEPOSIT BY NILE HAULIERS HAULIERS LTD

We refer to the above matter and mentioned deposit by Nile Hauliers Limited pursuant to an agreement entered between yourselves and the said Company.

Nile Hauliers Ltd have written to the Board demanding for the release of the deposit in line with Clause 12.2 (XV) of the contract. Having fully met the terms of release the Board finds no reason to continue retaining the funds deposited by Nile Hauliers. Kindly confirm within the next 14 days of this letter, failure to which we shall proceed to release the said deposit to Nile Hauliers.

Yours sincerely,

R. MKOK MBS

CHIEF EXECUTIVE OFFICER”

That Notice triggered the Notice of Motion I am asked to determine. In the submissions by Counsel for the Plaintiff he presses the point that the 2nd Defendant is liable to them for accrued hire charges for the period the machinery was in their possession and that the Deposit is only refundable if no sums are due. Secondly the 2nd Defendant is yet to formally hand over the machinery to the Plaintiff. The Plaintiffs also argue that the 1st Defendant is merely holding the deposit in trust for the Plaintiff and is under no obligation to release the funds to the 2nd Defendant.

7. In response Counsel for the 2nd Defendant asked the Court to interpret clause XV as a deposit committing the 2nd Respondent to perform its duty under the lease agreement and once it became terminated the deposit was refundable. That the contract was frustrated and could not be performed. That there are no established liabilities against the 2nd Defendant owing to the Plaintiff. The 2nd Defendant also maintains that it is not guilty of any breach under the “frustrated” lease agreement.
8. The 2nd Defendant’s further position is that the Application is an abuse of Court process. It is argued that the claim by the Plaintiff is for damages and an injunction should not issue. That what the Plaintiff ought to have sought is an order for attachment before judgment.
9. Lastly the 2nd Defendant asked the Court to consider that the non-release of the money would prejudice its operations as it needs the capital to finance its operations. The Court was asked to find that the Plaintiff is not prejudiced at all and that the deposit should not be released to it as it is not financially sound. This Court must however straight away say that this latter issue should not arise as the application by the Plaintiff is not for the release of the deposit to itself. It is seeking that the 1st Defendant does not release the deposit to the 2nd Defendant. Simply that the deposit do remain with the 1st Defendant pending the hearing and determination of the suit.
10. The Plaintiffs claim against the 2nd Defendant are for the following orders:-

“dd) The Second defendant to compensate the plaintiffs for tractor KBJ 588R valued at Kshs. 1.9 million.

e)

f) General damages against the second defendant for unexpired period of lease.

g) The second defendant do indemnify the plaintiffs against any claim, loss or damage directly or indirectly caused by second defendants breach of any term expressed in the lease agreement.”

11. In respect to the deposit of Ksh.5,000,000/= it was made pursuant to clause XV of The lease agreement and it would be important to reproduce it again,

“The Lessee undertakes to pay the Lessor a sum of KSH. 5,000,000/= (Five million) at the concernment (sic) of the term herein created which sum shall be held by the Lessor as a Deposit. Upon expiry of the term hereby created and being no outstanding liabilities the said sum shall be reimbursed to the Lessee exclusive of any interest which shall be used by the Lessee.”

12. From the wording of the clause the sum shall, be refundable upon the expiry of the term created. The term of the lease was 24 months from 1st February 2012 and would have come to an end by operation of time by the time this suit commenced on 21st February 2014. The stance of The Plaintiff is that the 2nd Defendant breached the contract and seeks compensation and damages from it. That Stance is that at expiry of the term there were liability due to it from the 2nd Defendant.

13. The 2nd Defendant on the other hand argued the agreement was rendered incapable of performance by change of conditions. In the Replying Affidavit to the application sworn on behalf of 2nd defendant makes the following averments:-

11. That despite knowledge that the initial agreement had been abandoned the applicant wrote to Kenya Sugar Board asking that our lease association with the applicants be terminated

12. That as per the applicants wish we decided to end our relationship and the 1st respondent took possession of the said machinery that they kept at Mumias after inspecting the same and being satisfied that they were in good condition.

13. That since we had delivered the machinery as directed and the same had been inspected to satisfaction to the 1st respondent we waited for them to release our money so that we could continue with our normal operations with other parties who have contracted us in our area of cane transport.

What the 2nd Defendant is in effect saying is that the contract was terminated upon the request of The Plaintiff. A similar position had been taken earlier by the letter of 13th May 2014 by Its lawyers, Wanyama & Co. Advocates to The Chief Executive Officer Kenya Sugar Board. That letter reads:-

WANYAMA & COMPANY

ADVOCATES

The Chief Executive Officer

Kenya Sugar Board

P.O. BOX 51500-00200

NAIROBI

Dear Sir,

RE: DEMAND FOR KSHS. 6,487,000/-

OUR CLIENT : NILE HAULIERS

We act for the above named client and have instruction to write to you as follows;

That our client entered into a tractor lease management contract for the mutual benefit of yourselves and your loanee, M/S Boco, under the expected and prevailing conditions that changed shortly thereafter rendering the lease agreement incapable of performance as initially drawn. That your loanees with your approval hastened the termination of the said contract.

That under the contract our client made a deposit of Kshs. 5,000,000/- . To effectively perform the subject contract our client incurred costs of Kshs. 1,167,000/- to repair trailer ZB 8424 and paid Kshs. 320,000/- being repair costs left unsettled by the previous lessee. Our clients legal position continues to suffer to the tune of Kshs. 6,487,000/-.

Owing to the short spell of the contract and its abrupt termination our client was exposed to great losses. Withholding their funds above does not serve their interest when they should revert to the status quo ante the formation of the subject agreement by being given their money.

We are instructed to demand, as we do, that you forthwith and in any event within 7 days from the date hereof send to us the cheque of Kshs. 6,487,000/- for transmission to our client. In addition you shall pay to us Kshs. 640,000/- to cater for our demand notice fees and debt collection charges.

TAKE NOTICE that should our demand notice above expire unheeded, we have instruction to institute swift court proceedings against yourselves to enforce recovery at your own great risk of increased costs and all ensuing consequences.

Be guided accordingly!

Yours faithfully

WANYAMA & CO. ADVOCATES

C.C - Client (my emphasis)

14. Whether or not the lease determined by effluxion of time or by incident of termination is a matter the Trial Court will have to decide. That Court will also have to decide whether during its pendency, the 2nd Defendant breached the contract and whether there are sums owing by the 2nd Defendant in respect to the contract. What I am asked to now decide is whether or not the deposit should be released to the 2nd Defendant notwithstanding that the question of the 2nd Defendant's liability or otherwise is pending before Court for hearing and determination.
15. My simple reading of the Deposit clause is that the Deposit was in every sense some caution money from which the Plaintiff could draw any outstanding liability due to it from the 2nd Defendant at the end of the Contract. A dispute now arise as to whether such liability exists. But if for a moment it was to be accepted that the 1st Defendant is correct in its contention that the agreement was terminated, then the question to be asked is whether a reconciliation of accounts

was done at that point to establish indebtedness of either party. Going through the documents presented to Court, there is no evidence that such reconciliation was done at the termination of the Contract. Indeed the 2nd Defendant Itself, in Its letter of 13th May 2014 were demanding another Kshs. 1,487,000/- explained to have arisen as follows;-

“To effectively perform the subject contract our client incurred costs of Kshs. 1,167,000/- to repair tractor ZB 8424 and paid Kshs. 320,000/- being repair costs left unsettled by the previous lessee.”

- 16.I take the view that allowing the release of Kshs. 5,000,000/- to the 2nd defendant at this stage would be to defeat the very purpose for which the parties agreed that it be made. It is for that reason that I would allow the application of 24th July 2014. That application is granted with costs.
- 17.As explained to the Parties, this Decision could only be delivered on Notice to them as I was proceeding for my Annual Leave and thereafter for August vacation. That explains the apparent delay.

Dated, Signed and delivered at Busia this 1st day of October 2015

F. TUIYOTT

JUDGE

In the presence of :-

Oile C/clerk

Onsongo h/b for Balongo For Plaintiff/Applicant

N/A.....For 1st Defendant/ Respondent

N/A.....For 2nd Defendant/Respondent