REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 565 of 2010

KENYA PLANTERS COOPERATIVE UNION

LIMITED (IN RECEIVERSHIP) ……..……. PLAINTIFF

VERSUS

KWA-MATINGI FARMERS CO-OPERATOVE

SOCIETY LIMITED ……..…….. 1ST DEFENDANT

TROPICAL FARM MANAGEMENT (K) LTD.....…..….. 2ND DEFENDANT

R U L I N G

1. The Application before court is the Plaintiff\'s Notice of Motion dated 20 December, 2011. It came before court under Certificate of Urgency as regards prayer No. 2 of the Application which sought to freeze the 1st Defendant\'s bank account with the Cooperative Bank of Kenya Ltd, Tala Branch pending the inter parties hearing of this Application. However, the substantial prayers in the Application are prayer no. 3 which seeks an order that the Defence and Counterclaim of the 1st Defendant herein dated 20 September, 2010 and filed on 23 September, 2010 be struck out and prayer no. 4 that Judgement be entered for the Plaintiff as prayed in the Amended Plaint dated 30 September, 2010. Prayer no. 5 asked for liberty to attach the funds of the 1st Defendant held in the said bank account as above. The Application was based on 3 grounds as follows. Firstly, that as at 8 July 2010, the 1st Defendant was indebted to the Plaintiff in the sum of Shs. 19,341,152.25. Secondly, that the 1st Defendant had admitted its indebtedness in writing and thirdly, that the 1st Defendant had irrevocably appointed the Plaintiff as its attorney to do in its name and on behalf of the 1st Defendant execute and do any acts and things which the 1st Defendant ought to do.

2. The Plaintiff\'s Application was supported by the Affidavit of **Harveen Gadhoke** sworn on 20 December, 2011, who described himself therein as the joint Receiver and Manager of the Plaintiff after being duly appointed by the Kenya Commercial Bank Ltd on 19 October, 2009. The deponent attached to his said Affidavit a copy of a statement detailing loans disbursed by the Plaintiff to the 1st Defendant for the period 25 July 2006 to 8 July 2010. He noted that as at the latter date the total amount owing including interest, was Shs. 19,341,152.25. Mr. Gadhoke stated that the Plaintiff\'s claim was founded on a Coffee Milling and Marketing Agreement dated 25 July, 2006 pursuant to which the 1st Defendant recognised its indebtedness to the Plaintiff and irrevocably appointed the Plaintiff as its attorney. The deponent further went on to say that the Counterclaim herein was founded on an allegation that there was some sort of agreement between the Plaintiff and the 1st Defendant, that the former would provide finances required by the latter to run its farms. He emphasised that there was no such agreement ever

entered into between the parties. Finally, Mr. Gadhoke stated that he had been advised by the Plaintiff\'s advocates on record that neither the Defence herein nor the Counterclaim disclosed any matters that were suitable to go for trial and basically that the Defence was a sham.

3. At this stage in this Ruling, it should be noted that an interim award was made by me on 21 December, 2011 freezing the funds held in the 1st Defendant\'s said account with the Cooperative Bank of Kenya pending the hearing and determination of this Application. That Order was discharged by my learned brother Mabeya J. on 17 January 2012. In the meantime, the court was informed that there were discussions as between the parties in relation to a settlement of the disputes between them. It was mainly for that reason that the Application (when it came back for hearing before me) was stood over until 30 July, 2012. On that day, Mr. Karungo appeared before me on the part of the Plaintiff and Mr. Mwendwa appeared for the 1st Defendant both making brief submissions as regards the Application.

4. Previous to that, **Mr. Joseph M. Luusa**, who stated that he was the Chairman of the 1st Defendant, swore a Replying Affidavit dated 12 January, 2012. The first thing that the deponent stated therein was that the 1st Defendant denied owing the sum of money alleged to be due or any money at all to the Plaintiff, referring to the Defence and Counterclaim filed herein to that end. Mr. Luusa admitted to a financing arrangement with the Plaintiff entered into in the year 2003 but maintained that the Plaintiff had breached the same leading to substantial loss to the 1st Defendant. Such loss was the subject of the Counterclaim in these proceedings. The 1st Defendant had never abandoned its claim against the Plaintiff for the breach of the said agreement and continued to demand an equitable settlement. However as a result of differences, the 1st Defendant did not receive further funding for its farming activities in the financial year 2004/2005. The deponent maintained that the money which the Plaintiff stated that the 1st Defendant had allegedly borrowed, had not been applied for, nor released, to the 1st Defendant. In this regard, the alleged loan or advance applications made to the Plaintiff, as well as the said agreement dated 5 May, 2005 annexed to the Plaintiff\'s Application (note that the Agreement attached to the Plaintiff\'s Affidavit in support of the Application was dated 25 July, 2006 see pages 6 and 7 thereof) had been executed by two persons namely Moses Muasya and Julius K. Mutniani, who were not officials and/or employees of the 1st Defendant.

5. The said Replying Affidavit did not go into detail as to whether the 1st Defendant accepted to be bound by the said Agreement or otherwise. What I gathered from Mr. Luusa’s said Affidavit was that because the loan applications had been executed by 2 persons who were not officials/employees of the 1st Defendant, the loan proceeds were not disbursed to the 1st Defendant. The deponent went on to say that the Plaintiff had never provided a full and detailed statement of account to the 1st Defendant. He maintained that some of the money that was being claimed in the statement of account annexed to the Affidavit in support of the Application, had been paid over to unknown third parties. He maintained that the said statement was misleading and inaccurate as it did not detail how the debt had arisen and how the money had been disbursed, together with details of the coffee delivered to the Plaintiff for marketing and sale in accordance with the provisions of the Coffee Act. Mr. Luusa stated that the 1st Defendant had delivered 4514 assorted bags of coffee to the Plaintiff for milling, marketing and sale for which the Plaintiff had failed to fully account for. He maintained that the debt in the suit was in existence before the said Agreement dated 26 July, 2006 and could not therefore be founded on the said Agreement as alleged by Mr. Gadhoke. Finally, the deponent had been advised by the 1st Defendant\'s advocates on record that firstly the Amended Plaint filed herein was incurably defective, as it did not disclose a cause of action against the 1st Defendant. Secondly, that the said Agreement dated 26 July, 2006 contained an arbitration clause in paragraph 22 thereof which the Plaintiff had chosen to ignore in favour of these proceedings.

6. Following upon an Order giving leave made by the court on 17 January, 2012, the Plaintiff filed a Further Affidavit again sworn by Harveen Gadhoke 27 January, 2012. Basically that Affidavit produced an exhibit totalling 219 pages marked as "HG 1". According to the deponent, the said exhibit comprised a comprehensive report prepared in his office giving full particulars of advances, repayments and outstanding balances as well as supporting documents in respect of each of the items involving the transactions as between the Plaintiff and the 1st Defendant. On page 1 of the exhibit, there is a statement detailing how the amount demanded by the Plaintiff of the Defendant of Shs. 19,341,226.90 was made up.

It was interesting to note therefrom, that the net principal outstanding debit shown as owing to the Plaintiff was Shs. 7,814,272.10 while the accrued interest on the running debit balance of the account was detailed at Shs. 11,536,954.80. The deponent also stated that he relied upon the Statement of the 1st Defendant\'s account with the Plaintiff from pages 204 to 219 of the exhibit. The total amount shown to be owing on the last page thereof (page 219), with Shs. 19,280,723.90.

7. In his submissions before me on behalf of the Plaintiff, Mr. Karungo told the court that the Defendant was indebted to the Plaintiff in the sum of Shs. 19,341,152.25 and had admitted the same. In that regard, he pointed to a letter dated the 21 June, 2010 from the Defendant to the Plaintiff which he maintained was an irrevocable admission of indebtedness. The Plaintiff also relied upon the fact that the Defendant had appointed the Plaintiff as its attorney whose duties would include the payment of liabilities. Counsel requested the court to look at the Coffee Milling and Marketing Agreement dated 25 July, 2006 at page 6 of the exhibit to the Supporting Affidavit. He particularly referred to clause 20 thereof at page 10. Counsel also stated that the Plaintiff relied upon the Supplementary Affidavit which detailed how the sums owed had arisen as well as detailing the supporting documentation. As regards the law involved, Mr. Karungo stated that he was relying on only one authority being that of **Diamond Trust Bank Kenya vs Peter Mailanyi & 2 Ors (2006) EKLR**, more particularly page 6 thereof as regards the decision of the Court of Appeal in **Industrial and Commercial Development Corp vs Daber Engineering Ltd (2001) EA 25** which read:

"Summary Procedure is applied to enable a Plaintiff to obtain a quick judgement where there is plainly no defence or where the defence is on a point of law and the court can see at once that the point is misconceived or, if arguable is plainly unsustainable, summary judgement will be given. Summary procedure should not be used for obtaining an immediate trial, the question must be short and depend on a few documents."

Counsel close his submissions by stating that the amount claimed by the Plaintiff is admitted and that there was no good reason why it had not been paid to date.

8. In turn, Mr. Mwenda for the Defendants relied upon the Replying Affidavit sworn by the 1st Defendant\'s Chairman – Joseph M. Luusa dated 12 January, 2012. He noted that the Application had been brought under the provisions of **Order 15 (1) (a) and (b)**. These rules required the applicant to show that the defence filed was scandalous, frivolous and/or vexatious. Counsel stated that in answer he would refer the court to the Amended Plaint, paragraph 4. That paragraph referred to an agreement entered into as between the Plaintiff and the 1st Defendant and was the basis of both the suit and the Application. He also asked the court to note paragraph 19 of the Amended Plaint in which the Plaintiff alleged that there had been a breach of the Agreement dated 25th July 2006 by the 1st Defendant as a result of it entering into an agreement with the 2nd Defendant. It was for that reason that the Amended Plaint claimed damages jointly and severally as against both Defendants. He noted that there was no averment in the Amended Plaint that the Plaintiff has supplied any goods etc to the 1st Defendant. Mr. Mwenda stressed that the basis of the Plaintiff\'s claim is the breach of the said Agreement.

9. Counsel maintained that the 1st Defendant, in its Defence, had shown issues by denying the contents of paragraph 19, 20 and 21 of the Amended Plaint. As per paragraph 5 of the Defence, the Agreement signed as between the Defendants in no way was irregular or caused any breach of the said Agreement with the Plaintiff. That alone was a sufficient issue for trial. Further, counsel maintained that the amount that the Plaintiff was claiming is not quantifiable. All that the Plaintiff was entitled to was damages for breach of contract. Mr. Mwenda's most pertinent submission was that in the exhibit annexed to the Supplementary Affidavit sworn by the Receiver/Manager of the Plaintiff on 27 January, 2012, all the documentation being invoices, statements etc relate to the years 2002 to 2004. The next submission made by counsel for the 1st Defendant was that it enjoyed the defence of limitation under the Limitation of Actions Act. He noted that there was no application by the Plaintiff to extend time as regards transactions more than 6 years old – that was another triable issue. The court was then referred to the prayers in the Amended Plaint and counsel noted that such were not in line with the Application before court. The trial court would have to determine as against which of the 2 Defendant judgement is to be entered into. Consequently, if the court struck out the 1st Defendant\'s Defence, counsel asked the question as to what

would happen to the shared liability?

10. Mr. Mwenda went on to say that in the 1st Defendant\'s Defence there was a Counterclaim which raised serious issues among them a breach of a financing agreement by the Plaintiff. He noted that the Plaintiff was seeking the striking out of the Defence but not the Counterclaim, which would survive in any event. That would not follow as per the provisions of **Order 15** relied upon in the Application. Counsel noted that the Agreement dated 25 July, 2006 had not been stamped under the provisions of the Stamp Duty Act. He maintained that the validity of the Agreement would then be challenged. Furthermore the said Agreement had not been sealed by the Plaintiff Corporation. He also drew the court\'s attention to the fact that at paragraph 32 of the said Agreement there is an arbitration clause and, in counsel\'s opinion, this matter should have been taken to arbitration.

11. Mr. Mwenda further drew the attention of the court to the Replying Affidavit in which the deponent thereof had stated that some of the monies which were advanced by the Plaintiff had never reached the 1st Defendant. He pointed to an application for loan at page 13 of the attachment to the Supporting Affidavit which had been signed by one Moses Muasya ostensibly as treasurer of the 1st Defendant as well as Julius K. Muthani who designated himself as Company Secretary. The deponent of the Replying Affidavit had stated that these persons were unknown to the 1st Defendant. In fact, counsel stated, the said Moses Muasya was an employee of the Plaintiff and thus could not have been the treasurer of the 1st Defendant. Again this was a triable issue. Counsel then referred the court to the attachment to the Replying Affidavit which detailed coffee deliveries to the Plaintiff. He maintained that the Plaintiff\'s statement of account did not reveal credit entries for the sale of such deliveries. He submitted that there seemed to be no relationship as between the documentation exhibited by the Plaintiff to its 2 Affidavits and that submitted by the 1st Defendant.

12. Turning to the said letter dated 21 June, 2010 to which counsel for the Plaintiff had referred, Mr. Mwenda noted that the contents of the entire letter showed that there was a dispute between the parties as to what amount was owed to the Plaintiff. He maintained that the claim by the 1st Defendant in its Counterclaim was real and there were discrepancies as per the said letter of amounts owed or otherwise. Finally, the said Coffee Milling and Marketing Agreement does not quantify the amount of debt to be recovered from the 1st Defendant. There is no Schedule thereto detailing the amounts owed in 2006. It was not clear from the Agreement as to what the 1st Defendant must pay. However, counsel noted that in the conditions for loan it was detailed that monies advanced by the Plaintiff would be recovered from the same year\'s coffee crop. For all these reasons, counsel submitted that the Defence was not scandalous, frivolous and/or vexatious. It raised triable issues and counsel submitted that the striking out of pleadings should only be entertained in the clearest case. Where there are triable issues, the same should be given an opportunity of being aired.

13. To Mr. Mwenda’s submissions, Mr. Karungo offered no reply, to my mind, not surprisingly. In this court\'s opinion Mr. Mwenda’s submissions opened a Pandora’s box of triable issues. For myself however, both the Amended Plaint herein as well as the Supporting Affidavit to the Application, detailed that the Plaintiff\'s claim is based on the said Coffee Milling and Marketing Agreement of 25 July, 2006. If that was the case, the Plaintiff will be hard put to explain just why the documentation at pages 1 to 218 of the exhibit to its Supplementary Affidavit refers to monies advanced and goods supplied to the 1st Defendant in the years 2003 to 2005 before the said Agreement came into being. I am also surprised to see that the interest accrued on the running and debit balance of the 1st Defendant\'s account with the Plaintiff far exceeds the net principal outstanding debit. I note that interest has been debited right from the year 2003. What is not explained by the Plaintiff is what is the interest rate applied? Certainly, the said Agreement dated 25 July, 2006 is silent in that regard. Was there a previous agreement as between the Plaintiff and the 1st Defendant which the court has not had sight of? Further, I have perused the said letter from the 1st Defendant to the Plaintiff dated 21 June, 2010 at page 3 of the attachment to the Supporting Affidavit. Although that letter is headed:

"RE: SOCIETY DEBT WITH K. P.C.U. (K) LTD 12,060 5299.85. (Twelve million, sixty five thousand, two hundred ninety nine, eighty five cents only)",

the body of the letter contains no admission that the said sum is owed. On the contrary, the body of a letter raises a number of issues while admitting that some monies are owed to the Plaintiff. Certainly the amount as contained in the heading does not match with the Plaintiff\'s claimed amount of Shs. 19,341,152.25.

14. I have also perused the sole authority referred to me by counsel being the **Diamond Trust** case (supra). I would go rather further than counsel for the Plaintiff in terms of referring to other cases detailed in that all embracing authority. For instance, in **Haas vs Wainaina (1982) KLR 17 the Court of Appeal** is detailed as holding inter-alia:

"That upon an application for summary judgement, the procedure laid down in Order XXXV of the Civil Procedure Rules has to be followed. The court must either enter summary judgement for the applicant or give leave to the Defendant to defend either conditionally or unconditionally. The Court has no power to dismiss such an application."

Further, in the case of **Gurbaksh Singh & Sons Limited vs Njiri Emporium (1985) KLR 695**, again the **Court of Appeal** held:

"(a) summary judgement for a Plaintiff may be granted under Order XXXV rule 1 (a) for inter-alia a debt or liquidated demand with or without interest unless the Defendant shows he should have leave to defend the suit under Order XXXV rule 2 (1).

(b) Summary judgement should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained on a mere matter of arithmetic.

(c) a liquidated claim is one that needs no further enquiry as to how much ought to be claimed."

The Court of Appeal explained the rationale behind summary procedure applications further in the case of **Continental Butchery Ltd vs Nthiwa (1989) KLR 573** citing with approval the decision of **Newbold P.** in **Zola and Anor. vs Ralli Brothers Ltd & Anor. (1969) EA 691** at **P. 694** that:

"Order XXXV is intended to enable a Plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by delaying tactics of the defendant."

15. As regards the above guidelines, what is the position in this case? The amount of the claim in prayer 3 is in the alternative to the injunctions asked for in prayers 1 and 2 of the Amended Plaint and is for judgement in the amount of Shs. 19,341,152.25. That figure agrees with the sum as claimed in the Application. However that figure has never been admitted by the 1st Defendant at least, not in the correspondence that I have perused. I consider that taking into account the facts that I have picked up on in paragraph 13 above, as well as the considered submissions of the 1st Defendant\'s counsel, I think that there are triable issues in this matter not just one but many. I note the Court of Appeal\'s guideline that a liquidated claim is one that needs no further enquiry as to how much ought to be claimed. In this matter I consider there to be considerable further enquiry pertinent to the case. The conclusion to the above is that I refuse the Plaintiff\'s Application by way of Notice of Motion dated 20 December 2011 for judgement to be entered for the Plaintiff and I give leave to the 1st Defendant to defend this suit unconditionally. In the circumstances I award the costs of the Application to the 1st Defendant.

DATED and delivered at Nairobi this 4th day of October, 2012.

J. B. HAVELOCK
JUDGE