



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Gachuhi, Akiwumi & Lakha JJ A)

CIVIL APPEAL NO 116 OF 1987

Between

FRANCIS WAINAINAAPPELLANT

AND

KENYA COMMERCIAL FINANCE CO. LTD.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 25th day of February, 1987

in

HCCC No 2539 of 1981)

JUDGMENT OF THE COURT

The appellant won a contract to supply Kenya Breweries with some agricultural produce. In order to accomplish this, he approached Farmtec to rent from them the required agricultural machinery namely, “two Lamborghini tractors and implements”. An agreement in this regard was entered into on 28th April, 1978, between Farmtec and the appellant. But the agreement was ceded to the effect that the respondent, which is not a bank, but a finance company had taken over the rights of Farmtec including the ownership of the agricultural machinery, under the agreement.

The relevant parts of the agreement are as follows. Under the heading “rental and period”, the appellant was to pay of course, to the respondent, an initial deposit of 67,402/50 followed by twenty monthly rentals of 13,480/= a month commencing on 30th July, 1978, and ending in March, 1980. The “total rental” is given in the agreement as 269,594/45. Clause of the agreement permits the appellant to terminate the agreement at anytime, by paying the respondent the total rental of 269,594/45 less any rental previously paid whereupon “the sole property” in the tractors and implements “shall revert” to the respondent and the appellant shall then in accordance with clause 9 of the agreement, deliver the tractors and implements to the respondent in good working order. The respondent on its part, has the reciprocal right under clause 8 (viii) of the agreement, to terminate the agreement if, *inter alia*, the appellant makes default in the payment of rentals, commits a breach of the agreement or abandons the tractors and implements whereupon, it shall be entitled to immediate possession of the tractors and implements and the appellant shall become liable to pay the respondent as agreed compensation, an amount which not unnaturally, is the same as that which the appellant would be liable to pay, if he terminates the agreement

under clause 7 thereof, namely, the difference between the total rental of 269,594/45 less any rentals paid by the time of termination. Clause 7 of the agreement which seems to have been overlooked by both parties as well as the Court in the trial that followed, is of some importance and is reproduced hereunder:

“The lessee may terminate this agreement at any time by paying to the owner the total rental noted in the schedule hereto, less any rentals previously paid, in which event the sole property in the equipment shall revert to the owner”.

As for the tenor of the agreement itself, we think that it can be stated right away, that its true intent was for the rental of equipment and which, upon its termination before it had ran its course, either by the appellant or by the respondent as a result of the default of the appellant, would give rise only to the payment of calculable agreed compensation by the appellant. The rental charged itself, as is notorious in such transactions, contains an element of profit to the owner of the equipment, since no owner of equipment in his right mind, would rent it out at a loss. Not surprisingly therefore, no provision was contained in the agreement for the payment of interest on the compensation that fell to be paid or otherwise, where the appellant was in breach of the agreement. And so, apart from the fact that a breach of the agreement by the appellant would not make him liable in addition to the agreed compensation payable by him under the agreement, to pay any interest on the amount of rental unpaid, there would also be no basis for saying that upon the breach of the agreement by the appellant, his transaction with the respondent became converted into a commercial loan with the respondent which, merely because it was a finance company and without any ado, attracted interest.

We have taken the trouble to set out above our interpretation of the relevant clauses of the agreement so that the suit that was brought by the respondent against the appellant in the High Court and the judgment given therein, can be better understood, appreciated and seen in their proper perspectives.

The respondent filed its plaint on 26th June, 1981, and nearly two years later, filed its amended plaint which then formed the basis of its suit against the appellant. In paragraph 3A of the amended plaint the respondent made the following averment that may at first appear rather curious:

“The plaintiff’s claim against the defendant is for Shs 190,956.70 together with accrued interest thereon at 14% pa from 26th June, 1981 to date being the amount of money due and owing by the defendant to the plaintiff in respect of the balance of lease-hire charges and accrued interest arising from a lease-hire agreement entered into between the plaintiff and the defendant in April, 1978 particulars whereof are well within the defendant’s knowledge.”

The effect of this was that the respondent was claiming firstly, the sum of 190,956.70 being the balance of rentals due and owing by the appellant together with accrued interest thereon, as opposed to interest that the Court may in the exercise of its discretion, award in respect of what it may find due to the respondent, at 14% within the context of the agreement. Secondly, the respondent claimed again, accrued interest arising out of the agreement. The position was not made any clearer by the wording of the reliefs which were sought in the following terms:

“(a) Shs 190,956.70 being the subject matter herein together with interest at 14% pa from 26th June, 1981 to date together with interest at court rates.

(b) Interest on the said sum of Shs 190,956.70 pa from 26th June, 1981 to date until payment in full together with interest at court rates.

(c) Costs of this suit together with interest thereon at court rates;”

However, the evidence led on behalf of the respondent at the ensuing trial, was to explain the somewhat confused claim contained in the amended plaint. This evidence which was given by Zephaniah Akumu Ogingo, the accounts officer of the respondent was to the effect that the agreement was rather for the purchase of the tractors and implements from Farmtec and that for this purpose, a loan was granted by the respondent to the appellant after he had paid a deposit of Shs 67,402/55 which was 40% of the purchase

price of the tractors and implements. The loan was then to be discharged by the payment of twenty monthly instalments of 13,480/= from 13th July, 1980. We think that here Mr Ogingo was mistaken as to the date. However, the appellant failed to keep up with the payment of rentals and the respondent first, re-possessed the tractors and implements in 1979, and lastly, in 1980 when after their valuation, the respondent had the tractors sold by public auction for a total sum of 58,000/= which, less auctioneer's charges, were credited to the appellant's account, and leaving outstanding yet to be paid by the appellant, the sum of 190,956/70. When the appellant failed to pay this sum, the respondent instructed its advocates to institute proceedings against the appellant for this sum of 190, 956/70 which together with interest, had by the end of September, 1985, amounted to 415,010/35. In explaining how this amount had been arrived at, Mr Ogingo gave the following revealing piece of evidence:

“After 20 months – ie after expiry of the lease agreement, the amount outstanding started accruing interest which is charged on daily balances and applied at the end of each month. The amount has increased because of monthly interest”.

It is clear that the respondent firstly, treated the agreement as if it was a loan agreement which it clearly was not, and charged interest on the unpaid rentals which it could not do under the agreement. It might have been different if the agreement had been a loan agreement which clearly it was not, or if there was evidence to establish that where an institution like the respondent entered into a contract like the agreement to rent out equipment, it was the accepted practice in the trade to convert the unpaid rental into a loan and to charge interest on it. Secondly, clause 8 (viii) of the agreement which we have already discussed, limits the respondents remedy to the agreed compensation stated therein, with no interest whatsoever accruing thereon, except that which may be awarded by the Court in pursuance of section 26 of the Civil Procedure Act, upon the respondent succeeding in its claim against the appellant for the agreed compensation. The claim of the respondent in its amended plaint and the reliefs sought therein with respect to accrued interest at the rate of 14%, can only be explained in the context of the respondent's deliberate distortion of the true intent of the agreement as shown by the evidence of its accounts officer.

But what was the appellant's defence to all this? It was simply that he had properly terminated the agreement in March, 1979, when he had informed the respondent's agent, a Mr Mbugua, that since, he could no longer achieve the object for which he had rented the tractors and implements, they should be collected by the respondent from a place where they had been left and which he had described to Mr Mbugua. In any case, he had paid all rentals that were due from him at the time. He claimed that he had not only complied with clause 9 of the agreement, but had also properly terminated the agreement, and owed the respondent nothing. The appellant also denied the respondent's claim for 14% accrued interest on the balance of unpaid rentals. The evidence given by the appellant at the trial followed these lines. We think that at this stage, we can again express our view on another important issue. It is this, that even if what occurred between the appellant and Mr Mbugua in March, 1979, can be said to amount to a proper delivery of the tractors and implements to the respondent, and which the learned judge of the High Court had not accepted, that would not amount to a proper termination of the agreement by the appellant. This can only be done in accordance with clause 7 of the agreement, by the appellant paying to the respondent the total rentals less any previously paid, which he never did.

It is now appropriate to consider the judgment of the learned judge which is the subject of the appeal before us. Having considered the evidence before her, the learned judge concluded, and we think that there was sufficient evidence before her to come to such a conclusion, that the appellant had not established that he had delivered the tractors and implements to the respondent as required by clause 9 of the agreement. Indeed, what the learned judge found and which upon our consideration of the evidence before her, we find to be more plausible, was that, far from the appellant having delivered the tractors and implements to the respondent, he had abandoned them, making it necessary for the respondent to employ a firm of private detectives to locate and retrieve them. The learned judge also found, we think, quite rightly, for the above reasons, that the appellant's contention that he had properly terminated the agreement under clause 9 was untenable. We would prefer to say, as we have already held, that since the appellant could only terminate the agreement under its clause 7 which he had not done, he could not be said to have terminated the agreement. His further contention that he owed no money under the agreement

since by the time of his alleged delivery of the tractors and the implements, he had paid all rentals then due, has only to be bated to be rejected. The appellant obviously, and for that matter, others to, ignored the effect of the important clause 7 of the agreement. Be that as it may, the learned judge went on to conclude correctly, that:

“Since I have found that the defendant’s alleged termination of the lease a hire agreement did not fall under clause 9 as was testified and submitted, the tractors were repossessed for non-payment of arrears of rent, thus invoking the provisions of clause 8 (viii) of the agreement, the lessee, (defendant) became liable to pay to the owner (plaintiff) as agreed compensation the difference between the total rental noted in the schedules and rentals paid to-date”.

Had the learned judge stopped there, she would not have been criticized as she was in the appeal now before us, that she wrongly gave judgment for a principal sum that consisted of a liquidated sum namely, the agreed compensation payable under the agreement, and accrued interest thereon at the rate of 14% which was not provided for under the agreement, and had then, in exercise of her discretion under s 26 of the Civil Procedure Act, ordered in addition, interest to be paid on the principal sum again at the rate of 14%.

As it is, the learned judge, having obviously accepted the conduct of the respondent as explained by Mr Ogingo, which as we have already noted, is not supported by the agreement or any trade practice, to convert the agreement into one for a loan wherein, interest at the rate of 14% was chargeable on the unpaid rentals, gave judgment for the respondent in the sum of Shs 190,956/70 together with interest thereon at 14% as at 30th September, 1985, in the total sum of Shs 415,010/34, plus further interest which the learned judge in her discretion may award, at the same rate of interest even though in this respect, the respondent sought interest only at court rates. The following is the relevant part of the judgment of the learned judge.

“When the above monies was not paid on demand, and when the lease hire period was over, the amount started accruing interest, as plaintiff is a financial institution.

Under these circumstances therefore, the plaintiff was quite entitled to charge interest as he did. The defendant, must appreciate that none of this would have happened, if he terminated the lease hire agreement in terms laid down in the agreement.

From the evidence I have considered in this case a whole I find that the plaintiff has proved his claim against the defendant, on a balance of probabilities and I find judgment for the plaintiff in the sum claimed in the plaint, ie Kshs 190,956/70, together with interest at 14% pa as at 30/9/85, making a total sum of Kshs 415,010/35, plus further interest (at same rate of 14%) and costs, till payment in full”.

The extracted decree is in the same terms.

The hearing before this Court, is the appeal by the appellant against the judgment of the learned judge of the High Court. His twelve grounds of appeal can be distilled into two main grounds. These are that the appellant had properly terminated the agreement by complying with clause 9 thereof, and that it was wrong for the learned judge to hold otherwise as she did, and to conclude that he appellant owed the respondent Shs 190,956/70. The other main ground was that since the agreement or anything else, did not provide for the charging of interest by the respondent on any sum due to it under the agreement, it was wrong for the learned judge to have given judgment for a sum that represented interest at the rate of 14% charged by the respondent.

Having regard to the views that we have already expressed, these two grounds can be dealt with fairly quickly. Apart from the fact which was accepted by the learned judge and with which, we find no fault, that the appellant had not complied with clause 9 of the agreement, it is our considered view that he did not terminate the agreement because he did not comply with clause 7 of the agreement. That being so, he owed the unpaid rentals of Shs 190,956/70 which was unchallenged, as claimed by the respondent. The

related ground therefore fails. The position is different with respect to the second ground. There being no provision in the agreement for the charging of any interest by the respondent on any amount that may be outstanding against the appellant for any breach of the agreement, or any proven circumstances from which this may be implied or inferred, the learned judge erred in giving judgment for the sum of Shs 415,010/35, a substantial part of which consisted of interest at the rate of 14% which the respondent had unilaterally charged on the outstanding amount of Shs 190,956/70. Judgment should only have been given for this latter sum and any interest which the learned judge could award under section 26 of the Civil Procedure Act.

But can it be said that the learned judge exercised her discretion properly in awarding interest under this legislation at the rate of 14% without giving any reason for doing so and not having been asked to do so, when what the respondent itself, had sought in this respect, was interest only at court rates? We can only think that the figure 14% must have had some mesmerizing effect on the learned judge. This Court had occasion in the case of *Shariff Salim and Simbarite Ltd v Malundu Kikava*, Civil Appeal No 15 of 1989 (unreported), to consider the exercise of a trial court's discretion in awarding interest under section 26 of the Civil Procedure Act. In the matter before this Court in that case, the trial judge had, without giving reasons why, simply ordered:

“costs and interest on the figure from the date of the suit until payment in full”,

when interest should only be given from the date of judgment. This Court held that notwithstanding the trial judge's wide discretion in the matter:

“...it is impossible to ascertain the reasons which compelled the judge to award interest from the date of filing suit and this leads us to the inevitable conclusion that the learned judge wrongly exercised his discretion”

We have in the present appeal, an analogous situation where we cannot ascertain the reasons which compelled the learned judge, without having any reasons for doing, and without having been asked to do so, to award interest at a rate other than that asked for by the respondent. We think in doing so, the learned judge wrongly exercised her discretion and should have awarded at least, with respect to the period after the date of the judgment, interest at the rate asked for.

In the result, the appeal fails save to the extent indicated above namely, that there shall be judgment for the respondent in the sum of Shs 190,956/70 together with interest thereon at 14% from the date of filing the suit to the date of judgment plus costs and further interest thereon, at court rates from the day of judgment until payment in full. The respondent shall have its costs of this appeal.

Dated and delivered at Nairobi this 14th day of March 1995

J.M GACHUHI

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JUDGE OF APPEAL

A.M AKIWUMI

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JUDGE OF APPEAL

A.A LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR