

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE NO 2042 OF 1985

LONRHO EAST AFRICA LIMITEDPLAINTIFF

VERSUS

CONSOLIDATED CITY VENTURES.....DEFENDANT

JUDGMENT

May 30, 1989, A Rauf Judge delivered the following judgment

Acting upon the agreements dated February 20, 1975 between the defendant and the Pan Africa Insurance Company Limited (to be called the company), and dated March 6, 1975 between the defendant, MortorMart Investments corporation Limited (to be called Chargor) and the company respectively, a Charge dated 6th March, 1975 was created on the Bruce House as security for the repayment of the loan of Kshs 15,000,000 advanced by the company to the defendant.

The charge was varied by a variation document dated March 29, 1975. It was transferred to the plaintiff on December 20, 1984 in consideration of the plaintiff's repaying the entire loan of Kshs 3,919,577.50 then outstanding to the company on behalf of the defendant. The present suit is based on the obligation of the defendant to pay the loan to the company which was fully paid by the plaintiff under the aforesaid Deed of Transfer. The defendant honoured his obligation under the original charge up to the December 31, 1980 at the proportion of 51% by itself and 49% by a sister company East African Tanning Extract Company Limited (to be called EATEC). These proportions were subsequently varied as to 35.7% by the defendant and 64.3% by EATEC. Only one payment was made on June 30, 1981 under the new arrangement. The plaintiff alone, having taken over the charge under the aforesaid transfer, paid the entire balance of Kshs 3,953,819 from December 30, 1981 to December 20, 1984. It now claims from the defendant this balance with interest as on the filing of the suit amounting to Kshs 4,162,500, together with interest at court rates until payment in full and costs etc.

In the defence the defendant denied that it borrowed any money from the plaintiff and averred that the plaintiff was not a party to the charge or its variation; hat it was released and discharged from all obligations by the company vide its letter dated January 7, 1985 (Exh A); and that the defendant was not a party to the Transfer of The Charge etc.

The plaintiff called Mr.Newman its director, as the sole witness. He testified to the effect that the plaintiff, the defendant, EATEC and Kenya Industrial Investments Limited (KII Ltd) and the company were linked through their common chairman Udi Gachaga. The loan in question was raised to finance the operations of another company, Nanyuki Textiles Ltd, which failed. The plaintiff had to step in to repay the loan under the security of the Transfer of charge. There was an internal arrangement between the plaintiff, defendant and EATEC that the repayment would be made in the proportion of 51% by the defendant and 49% by the EATEC. This was again varied to 35.7% and 64.3% respectively. He, however, did not produce any document emanating from any of the parties involved to show how and why they were varied. Apart from just saying that as a result of indemnities and counter indemnities under various charges and securities he failed to come out with convincing evidence on this issue. He also failed to elaborate why, in the end, the plaintiff decided to claim 100% of the loan. He confirmed that had the defendant continued to pay its contribution at the rate of 35.7% until the full repayment of the loan, there would have been no cause of action against it.

Mr Hewett in his submissions contended that the transfer of charge put the plaintiff in the steps of the company; that the letter of January 7, 1985 (Ex A) was not admissible in evidence because it was written after the transfer; and that it was an unregistered document relating to the interest in land. He relied on sections 32,38.39 and 47 of the registration of Titles Act for his arguments.

Mr Le Pelley argued that Ex A was not required to be in writing. He did not seem to seriously contend his client's liability under the Transfer of the charge, but submitted that Ex A operated as an effective and valid discharge of the loan. He, however, ended his submissions with urging the court that if I was against him on all his points then his client's liability should be restricted to only 35.7% of the amount paid by the plaintiff and not 100% as claimed in this suit. He also referred to sections 130 and 132 of the Transfer of Property Act.

Having carefully considered all the arguments and having perused the pleadings and the authorities cited to me, I find that the plaintiff did indeed step in the shoes of the company for the rights and obligations under the Charge. Having discharged the loan it has a recourse to the defendant who is the original borrower. I find that Ex A does not operate as a discharge of the loan for the reason that it was issued by the company after the plaintiff's right had crystallised under the transfer on December 20, 1984. Furthermore I find that Ex A is a dubious and highly vague document. It lacks any details as to which liability was discharged. It has no details about the subject matter showing that it does appertain to the transactions in question. The company might have had several ... With the defendant or some of them might have been the subject of this latter. Secondly it is an unilateral declaration of discharge since there is no copy of the letter dated December 18, 1985 referred to therein produced to relate the contents of Ex A to the claims in the suit. The letter lacks the heading of the subject at the top. In effect while I admit Ex A in evidence, I do not find it operates a discharge. It is too vague to be of any consequence in this suit.

I, however, find that the issue of proportions of liability is left unexplained by Mr Hewett or Mr Newman. Both indicated that it ceased to be relevant after the 1st default on February 31, 1981. Why and how that happened was not explained. Mr Newman conceded that if the defendant had continued paying at 35.7% till the end it would have thereby fully met its obligation. Whatever internal consideration has gone into this arrangement I am unable to discern any cogent reason to educe that it is irrelevant to the matter before me. Mr Newman simply alluded to the possibility of some document being in existence relating to this arrangement. But none was produced. If one is allowed a guess it may be said that the arrangement fell through when the parties fell out either because of changes in the top management of the various corporate bodies involved or because of business reverses.

However, without indulging in speculation, I find that the defendant's liability is to be determined on the basis of 35.7% as submitted by Mr Le Pelley, which according to my calculation comes to Kshs 1,486,012.50. Consequently I enter judgment for the plaintiff for Kshs 1,486,012.50 with costs and interest..

Dated and delivered at Nairobi this 30th day of May , 1989

A RAUF

JUDGE