REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL SUIT NO. E437 OF 2019

BETWEEN

STANBIC BANK KENYA LIMITED ..... PLAINTIFF

VERSUS

ATI FREIGHT KENYA LIMITED ..... 1ST DEFENDANT

KENYA RAILWAYS ..... 2ND DEFENDANT

JUDGMENT

Background and Introduction

1. The Plaintiff's cause of action is as set forth in its Plaint dated 3rd December 2019. The Plaintiff, (hereinafter 'the Bank') contends that it extended various financial facilities to the 1st Defendant, including Hire Purchase Agreements dated 20th May 2015 and 14th December 2016, pursuant to which the 1st Defendant acquired on hire purchase 205 and 50 containers respectively.

2. The Bank further contends that the advances under the facilities were secured by a Debenture registered on 27th April 2016 for the sum of USD 1,500,000 and an All-Assets Supplemental Debenture dated 28th November 2016 securing a maximum sum of USD 2,500,000. By virtue of these securities, the Bank asserts that it holds a first fixed charge over the 255 containers acquired under the hire purchase arrangements.

3. It is the Bank's case that the 1st Defendant breached the terms of the facilities by failing, refusing, and/or neglecting to service the facilities. The Bank contends that such default entitles it to exercise its contractual and proprietary rights of repossession over the charged containers. The Bank accordingly claims the sum of USD 1,332,919.25 and KES 17,183,432.92 from the 1st Defendant together with possession of the containers as against the 2nd Defendant, who has refused to release them on account of alleged unpaid charges by the 1st Defendant, notwithstanding demands made by the Bank.

4. The Bank relies on this Court's finding (Majanja, J), delivered on 31st August 2020, wherein the Court found sufficient evidence of indebtedness, acknowledged the Bank's security interest in the containers, and confirmed that the 2nd Defendant was deemed to have notice of the Bank's proprietary rights. The Court however declined to issue summary judgment only because the full statement of accounts had not been produced at that stage.

5. The Bank now asserts that the accounts were subsequently produced at trial. Accordingly, it maintains that the evidentiary threshold has been met, and that judgment ought now to be entered in its favour for the outstanding sums together with possession of the containers, in vindication of its proprietary rights under the securities.

The 1st Defendant's Case:

6. The 1st Defendant's case is set out in its Statement of Defence dated 22nd February 2021. The 1st Defendant denies that it was advanced the financial facilities as alleged by the Bank. It contends that no such facilities were extended to

it, and that the Bank's claim is therefore unfounded.

7. In the alternative, and without prejudice to the foregoing denial, the 1st Defendant asserts that if any such advances were indeed made, it is not in default of the terms thereof, that it has duly performed its obligations under the agreements alleged and has not committed any breach that would entitle the Bank to the reliefs sought.

The 2nd Defendant's Case:

8. The 2nd Defendant's case is contained in its Statement of Defence dated 25th February 2020. It acknowledges having entered into a concession agreement dated 23rd January 2006 with M/S Rift Valley Railways (hereinafter 'RVR'), under which RVR was to provide concession services to it. That agreement remained operational until 31st July 2017 when it was terminated by consent of the parties in accordance with its terms.

9. The 2nd Defendant explains how it came to transact with the 1st Defendant by default, how the 1st Defendant failed to fulfil its obligations, and how

arrears began to accrue in respect of agreed payments. By the time of filing its Defence, the arrears stood at KES 46,529,697/- being cargo movement charges and further costs in demurrage calculated at the rate of USD 200 per container per day, together with interest at 10% per week.

10. The 2nd Defendant therefore claims against the 1st Defendant, on this account, a further USD 1,342,811,213.85, for the period between 13th October 2018 and 15th January 2020 and states that further charges and interest continue to accrue. It relies on ***Sections 60 and 61 of the Kenya Railways Act, Cap 397***, and contends that the charges and interest are statutory and that the law provides for seizure in case of non-payment. It further contends that both the 1st Defendant and the Bank acknowledged its claim for KES 46,529,697/- for cargo movement, citing email correspondence and a letter dated 20th January 2020 annexed to the replying affidavit of **Stanley Gitari** sworn on 27th May 2020.

11. In response to the Bank's claim, the 2nd Defendant denies that it was ever served with any demand for

the release of the containers. It avers instead that the Bank's letter dated 23rd September 2019 merely directed it to hold the containers to the Bank's order while recovery options were pursued against the 1st Defendant. In view of this, the 2nd Defendant maintains that no statutory notice specific to release of the containers was served, that the notices issued were for preservation, and that no cause of action lies against it. The 2nd Defendant further contends that by statute it has a lien over the containers and that the Bank's suit against it is not sustainable in law.

12. The 1st Defendant also filed a Defence to the 2nd Defendant's Cross-Claim dated 22nd February 2021. In that Defence, the 1st Defendant denied entering into any contract of storage with the 2nd Defendant and denied owing the amounts claimed. It therefore sought dismissal of the cross-claim with costs.

The Hearing:

13. During the hearing, the Bank called **Mr. Amos Mugambi**, its Recoveries Manager, who testified in support of its case. The 1st Defendant called its director, **Mr. Vinay Singh**, while the 2nd Defendant

called **Mr. Eric Njoroge**, its General Manager Operations, who also testified in support of their respective cases. The evidence tendered by the witnesses was consistent with the pleadings and documentary material placed on record by the parties. In the circumstances, I do not consider it necessary to reproduce the testimony in detail. I shall, however, refer to the relevant portions of the evidence as and when they arise in the course of the analysis that follows.

Analysis and Determination

14. Having considered the pleadings filed by the parties, the evidence adduced, and the submissions made, the following issues arise for determination:

i. *Whether the Bank has proved its case against the 1st Defendant;*
ii. *Whether the Bank's debentures confer a first fixed charge and priority rights over the containers;*
iii. *Whether the 2nd Defendant has any lawful right to detain the containers as against the Bank;*

iv. Whether the 2nd Defendant is entitled to its cross-claim and set-off against the 1st Defendant in respect of KES 46,529,697/- and USD 1,342,811,218.85, and whether it is entitled to indemnity or contribution should liability to the Bank be established.

(i) Whether the Bank has proved its case against the 1st Defendant:

15. Jurisprudence is well settled that parties are bound by the bargains into which they freely enter, and it is not the province of the Court to rewrite or interfere with contractual arrangements duly executed between them. This principle was affirmed in ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] eKLR*** where the Court of Appeal emphasized that the role of the court was to enforce contracts as made, save where vitiating factors are established.

16. It is against this backdrop that I turn to the first issue for determination, an enquiry as to whether the Bank advanced financial facilities to the 1st Defendant, and whether the 1st Defendant is

indebted to the Bank in the sums claimed. The Bank asserts that the facilities were duly extended and remain outstanding, while the 1st Defendant maintains, in categorical denial, that no such facilities were advanced to it and if any advances were indeed made, then the same have been repaid in full and no indebtedness subsists.

17. The Bank pleads that it entered into two Hire Purchase Agreements with the 1st Defendant; the first dated 20th May 2015 and the second dated 14th December 2016.

18. In respect of the Agreement dated 20th May 2015, the Bank produced an Asset Finance Facility Letter dated 1st March 2016. The 1st Defendant has sought to impeach reliance on that letter on the ground that it was not specifically pleaded in the Plaint. I find, however, that this objection is without merit. While it is true that the Bank did not expressly plead the facility letter as a distinct document, it did plead the Hire Purchase Agreement of 20th May 2015, which was the culmination of the said letter of offer. In the circumstances, the facility letter forms part of the

chain of documentation leading to the Hire Purchase Agreement and is properly admissible as evidence in support of the pleaded agreement.

19. The purpose of pleadings is to give fair notice of the case a party is required to meet. The Bank's pleadings, by expressly citing the Hire Purchase Agreement of 20th May 2015, sufficiently alerted the 1st Defendant to the contractual foundation of the claim. The facility letter, though not separately pleaded, was ancillary to and explanatory of the agreement pleaded. To exclude it on the basis of technical pleading would elevate form over substance and defeat the ends of justice.

20. Accordingly, I hold that the Bank was entitled to rely on the Asset Finance Facility Letter dated 1st March 2016 in support of its case, as the said letter was integral to the Hire Purchase Agreement pleaded and executed between the parties.

21. Additionally, the 1st Defendant contends that the Hire Purchase Agreement is defective in form, in that while the cover page bears the date of 20th May 2015, the execution page reflects the date of 20th May 2016. The 1st Defendant argues that this

discrepancy leaves uncertainty as to the actual date of the agreement and casts doubt on its validity. I equally find this contention to be untenable and insufficient to permit the 1st Defendant to disown the agreement.

22. The Court must look beyond superficial inconsistencies and ascertain the substance of the transaction before it. The evidence demonstrates that although the agreement was prepared with a cover date of 20th May 2015, the operative execution by the parties took place on 20th May 2016. The discrepancy in dates whether a clerical error, does not affect the validity of the agreement. What is material is that the 1st Defendant was fully aware of the agreement, participated in its execution, and derived benefit therefrom.

23. I therefore hold that the Hire Purchase Agreement was validly executed on 20th May 2016, notwithstanding the cover date of 20th May 2015, and the 1st Defendant is bound by its terms.

24. That said, the Facility Letter expressly indicated that the facility extended was for USD 1,500,000

and that the purpose of the facility was to facilitate the refinance of containers for use in the 1st Defendant's business. The loan was to be repaid in 48 months from the date of the initial draw down and would attract interest at the rate of 8.75% (the Bank's USD base rate at the time) +3.25%.

25. **Clause 2(i)** of the facility letter further imposed upon the hirer the obligation to insure the vehicles and/or machinery with an insurance company approved by the Bank. In compliance with this requirement, the Bank produced a Cover Note for the period 29th April 2016 to 28th April 2017. The insured parties under that policy were expressly stated to be both the Bank and the 1st Defendant. The 1st Defendant has not denied the existence of this cover, nor has it offered any alternative explanation as to why the policy was taken out, in an attempt to discredit the Bank's account.

26. The Cover Note specifies that the insurance was for 250 special containers. However, the accompanying schedule lists 205 containers, which corresponds with the averment at paragraph 5 of the Plaint.

27. By virtue of **Clause 2(iii)** of the offer letter, the parties further agreed that although the loan had been approved in USD, the financing would be effected in the currency of receivables as per the contracts between the borrower and its debtors. In his testimony, DW1 confirmed that the disbursements were made in USD. On the strength of the Agreement, it is therefore evident that both parties were fully aware of the provision governing currency of disbursement, and that the Bank retained the contractual prerogative to determine the extent of USD financing. The 1st Defendant, having executed the Agreement and received disbursements in USD, cannot now be heard to challenge the validity of the arrangement or to deny the Bank's discretion in that regard.

28. **Clause 2(iv)** of the facility letter imposed upon the Borrower the obligation to provide duly completed Hire Purchase finance documentation in the Bank's standard format, together with payment of KES 500.00. It is pursuant to this requirement that the Hire Purchase Agreement dated 20th May was executed. **Clause 1** of the said Hire Purchase Agreement expressly confirmed that it was entered

into between the parties for the purpose of hiring vehicles, equipment, and accessories. The Agreement designated the Bank as the "owner" and the 1st Defendant as the "hirer" of the said vehicles and machinery.

29. As to whether this facility was in fact disbursed to the 1st Defendant, the Bank has produced Statements of Account in respect of Account No. *****2657. The Statement appearing at **page 236** of the Bank's Trial Bundle confirms a loan disbursement in the sum of USD 1,500,000 on 20th May 2016. This entry is consistent with the terms of the Facility Letter and the Hire Purchase Agreement, and it provides documentary proof that the facility was actually advanced.

30. PW1, the Bank's Recoveries Manager, confirmed that the Statement of Account produced in evidence did not expressly disclose whether the account in question was denominated in USD or Kenya Shillings. The Bank did not tender any explanation to the Court regarding this omission, nor did it clarify whether such omission accords with established banking practice. In the absence of any justification, I am left to consider the

Statement of Account on its face value. Taken together with PW1's testimony, the evidence corroborates the Bank's position that the facility was duly disbursed to the 1st Defendant

31. The second Facility Letter produced by the Bank is dated 3rd October 2016. It constituted a Vehicle and Asset Finance Facility limited to USD 1,000,000, the purpose being to refinance containers for use in the borrower's business operations. The terms of repayment were clearly stipulated. The facility was to be amortized over forty-eight (48) months and was to attract interest at the rate of 8.75% per annum (being the Bank's prevailing USD base rate at the time) together with a margin of 1.25%.

32. Pursuant to the said offer letter, the parties executed the Hire Purchase Agreement dated 14th December 2016. That Agreement was for the hire of vehicles and equipment, and it was accompanied by a schedule of fifty (50) containers, duly signed and stamped by the 1st Defendant. The number of containers tallies with the averments pleaded by the Bank.

33. The Bank's documentary evidence further demonstrates that this second facility was disbursed on 15th December 2016, as reflected in the account statements for Account No. *****5378 at **page 252** of the Bank's bundle of documents. That far, the evidence leaves no doubt that the facilities were duly advanced and that the amounts under both agreements were disbursed to the 1st Defendant. The next issue for determination is whether there remain any outstanding amounts due and owing to the Bank under these facilities

34. My attention was drawn by the 1st Defendant to the entry at **page 262** of the Statements of Account produced by the Bank. That entry shows that as at 18th January 2019, Account No. *****5378 reflected a credit balance of 463.43. Upon careful scrutiny of the statement, and tracing the transactions from the point of disbursement of the second facility on 15th December 2016, it appears that the said facility had been fully serviced by 18th January 2019.

35. I have equally examined Account No. *****2657, into which the disbursement of USD 1,500,000

under the first facility was made. The statement for that account, as at 18th January 2019, also confirms a credit balance of 3,658. This evidence, taken together, and in the absence of any further evidence to the contrary being produced by the Bank, demonstrates that both facilities had been repaid in full by 18th January 2019.

36. From where then does the Bank get the remaining outstanding amounts? The account statements produced at page 501 of the Bank's documents show that as at 31st August 2021, Account No. *****8876 reflected an outstanding balance of Kshs 24,758,898.57. Paragraph 13 of the Plaint clarifies that this claim arises from a business term loan denominated in USD and an overdraft facility in Kenya Shillings, operated through Accounts *****4006 and *****8876. These sums do not relate to the Hire Purchase Agreements earlier discussed.

37. The Court observes that the circumstances surrounding the alleged outstanding facilities have not been specifically pleaded in a manner that would enable the 1st Defendant to adequately

respond to the averments. No letter of offer, duly executed by way of acceptance, has been produced in respect of the two facilities in question. In the absence of such documentation, I am unable to satisfy myself as to the existence of the facilities or the contractual terms governing them. It is further noted that the demand letter dated 8th April 2019 which was relied upon by the Bank, was directed at these two facilities, and not at the Hire Purchase financing agreements.

38. Consequently, the claim for USD 1,332,919.25, Kshs. 17,183,432.92, together with any interest thereon, is unsustainable and accordingly fails.

(ii) Whether the Bank's debentures confer a first fixed charge and priority rights over the containers and Whether the 2nd Defendant has any lawful right to detain the containers as against the Bank:

39. The Bank sought to rely on the Debenture dated 22nd March 2016 in support of its claim over the 225 containers. The 2nd Defendant, on its part, asserts a lien over the same containers on account of alleged unpaid charges. The question that arises

is whether the Bank's Debenture confers priority rights over the containers, and whether such rights prevail against the 2nd Defendant's claim.

40. **Clause 1.1** of the Debenture makes clear that it was issued in consideration of the Bank agreeing to make advances to the Company, more particularly set out in the facility letter dated 1st March 2016. The Debenture created a first fixed charge over the financed assets, including the containers, up to the security limit of USD 1,500,000. In principle, therefore, the Debenture would confer priority rights upon the Bank in the event of default, entitling it to enforce its security by way of repossession or sale.

41. However, as already determined, the 1st Defendant had fully serviced the facilities by 18th January 2019, with the accounts reflecting credit balances. In the absence of proven default, the Bank cannot invoke the enforcement provisions of the Debenture. The priority rights conferred by the Debenture were contingent upon default, and where no default exists, the Bank's claim to repossess the containers cannot be sustained. Accordingly, while the Debenture did confer a first

fixed charge and priority rights over the containers, those rights are not presently enforceable in the absence of default. The Bank's prayers for repossession and delivery of the said containers as against the 1st and 2nd Defendants therefore fails.

(iii) Whether the 2nd Defendant is entitled to its cross-claim and set-off against the 1st Defendant in respect of KES 46,529,697/- and USD 1,342,811,218.85:

42. The cross-claim raised by the 2nd Defendant against the 1st Defendant was premised upon an Agreement allegedly entered into on 21st July 2016, pursuant to which the 2nd Defendant agreed to transport containers containing edible oil as cargo, on the instructions of the 1st Defendant. The 2nd Defendant contends that the 1st Defendant breached the Agreement by failing to pay the agreed transport charges, and that the 1st Defendant eventually ceased operations, leaving a number of containers in the 2nd Defendant's yard. On this basis, the 2nd Defendant claims demurrage and further asserts a lien over the containers in its possession.

43. In response, the 1st Defendant filed an Amended Response to the Cross-Claim in which it categorically denied entering into any contract with the 2nd Defendant as alleged, and further denied any indebtedness to it. The 1st Defendant contends that the 2nd Defendant improperly included bills that were transacted with RVR, which were not due to the 2nd Defendant. Additionally, the 1st Defendant asserts that the 2nd Defendant had retained containers belonging to the 1st Defendant and had placed them into daily commercial use without rendering an account of the revenues derived therefrom. It is further alleged that, in the course of such use, some of the containers had been involved in accidents and had been damaged.

44. On the strength of these assertions, the 1st Defendant sought for accounts to be taken against the 2nd Defendant in respect of 388 containers, for any sums allegedly due to the 2nd Defendant to be offset against amounts found due to the 1st Defendant, and for the restoration of the damaged or vandalized containers.

45. It is important to note that the existence of the Agreement between the 1st and 2nd Defendants is not in dispute, having been expressly admitted by both DW1 and DW2 in their testimonies. DW1, in particular, confirmed that the Agreement for the transportation of edible oils was entered into subsequent to the exit of RVR from the train freight services and the assumption of those services by the 2nd Defendant. He further acknowledged that the 1st Defendant was unable to discharge certain monetary obligations owed to the 2nd Defendant under the Agreement. However, DW1 disputed the accuracy of the sums being claimed, maintaining that the amounts claimed by the 2nd Defendant were exaggerated and not reflective of the 1st Defendant's true indebtedness.

46. From the evidence presented by the 2nd Defendant, it is clear that the communication dated 18th August 2017 from its Managing Director was addressed, among others, to the Managing Director of the 1st Defendant. The purpose of the letter was to inform stakeholders that the 2nd Defendant had assumed ownership and

operational responsibility for freight train services with effect from 1st August 2017. The letter expressly stated that any cargo loaded onto wagons as at that date would henceforth be payable to the 2nd Defendant (and not to RVR).

47. This communication was subsequently reinforced by a circular dated 18th September 2017, which reiterated the same position. The 1st Defendant does not deny receipt of either the letter or the circular.

48. This evidence becomes highly relevant, particularly in light of the 1st Defendant's contention that it had been billed for items that ought to have been billed by RVR prior to the termination of the concession. That argument cannot stand. The communications of August and September 2017 clearly established that the 2nd Defendant had formally taken over freight operations from RVR, and that all cargo loaded thereafter was payable to the 2nd Defendant.

49. More importantly, the 2nd Defendant's bundle of documents further demonstrates that the statements sent to the 1st Defendant, and for which

payment was demanded, relate to the period between April 2018 and December 2018, which is well after the termination of the RVR concession. Accordingly, the evidence shows that the charges claimed by the 2nd Defendant were not improperly attributed to it, but arose squarely within the period when it had assumed responsibility for freight operations. The 1st Defendant's argument that it was billed for RVR's obligations therefore runs afoul of the documentary record and cannot be sustained.

50. As regards the applicability of the Meter Gauge Railway Tariff Notice No. 1, ***Section 13(2)(f) of the Kenya Railways Corporation Act*** expressly empowers the Corporation to prescribe charges, dues, rates, or fees for any service performed by it, or for the use by any person of the facilities provided by the Corporation. This statutory framework forms the basis upon which tariff notices such as Meter Gauge Railway Tariff Notice No. 1 are issued and enforced. In the absence of any agreement produced by the 1st Defendant to demonstrate that the parties had contracted to waive or vary such charges, I find no merit in the

argument advanced to refute the statements of amounts due. That contention must therefore fail.

51. Further, contrary to the averments of the 1st Defendant that it had not received accounts from the 2nd Defendant, the correspondence exhibited by the 2nd Defendant demonstrates otherwise. The evidence shows that the 1st Defendant was not only aware of the amounts claimed, but that statements of account were sent to it on more than one occasion, accompanied by reminders issued between June 2018 and March 2019.

52. While DW1 denied the existence of any agreement on storage charges, I note that at no time did the 1st Defendant raise the issue with the 2nd Defendant or query the inclusion of such charges in the statements of account. On the contrary, the evidence indicates that the 1st Defendant did settle some of the amounts after repeated reminders. Taken together, the evidence shows that the charges by the 2nd Defendant were properly imposed, communicated, and partly settled. The denial of liability by the 1st Defendant is therefore

inconsistent with the evidence, an afterthought and cannot be sustained.

53. Finally, the 1st Defendant contends that the 2nd Defendant had been engaging in business activities with the containers presently in its possession. DW1 testified that the 2nd Defendant had been using the containers to service the 1st Defendant's former customers. DW2 candidly admitted in his testimony that indeed, the 2nd Defendant had leased the containers in order to recover the debt allegedly owed by the 1st Defendant.

54. Upon further examination, DW2 confirmed that the 2nd Defendant was actively using the containers to transport goods for third parties for a payment. He further acknowledged that this practice had been ongoing since 2018. Significantly, DW2 conceded that the 2nd Defendant has not rendered any account to the 1st Defendant to demonstrate the sums realized from such commercial use, nor has it disclosed what amounts, if any, remained outstanding to date.

55. Accordingly, I do find that the 1st Defendant has established sufficient basis for the taking of accounts. The 2nd Defendant, having admitted to commercially utilizing the containers and deriving revenue therefrom, is under an obligation to account for such use. Without proper accounting, the debt claimed cannot be accurately ascertained, and the assertion of a lien or demurrage charges over the containers is equally undermined.

56. With respect to the claim by the 1st Defendant for restoration of vandalized and damaged containers, I find that the claim remains speculative and has not been substantiated by credible evidence. No documentary proof, inspection reports, or independent valuation was tendered to demonstrate the extent of the alleged damage or to link such damage directly to the 2nd Defendant's use of the containers.

57. While DW1 alluded to accidents involving some of the containers, no particulars were provided as to the nature of the accidents, the specific containers affected, or the costs of repair. In the absence of such evidence, the Court is unable to ascertain the

validity or quantum of the alleged loss. For this reason, the claim for restoration of vandalized and damaged containers fails.

Disposition

58. Accordingly, and for the reasons stated:

i. The Plaintiff's claim against the Defendants is hereby dismissed with costs.

ii. With respect to the 2nd Defendant's cross claim against the 1st Defendant for cargo movement charges of Kshs 46,529,697 as at October 2018 plus interest and demurrage charges plus interest from 13th October to 15th January 2020 amounting to USD 1,342,811,213.85 and a lien over the containers, the same shall be subject to proper accounts.

iii. The Court directs that the 2nd Defendant shall render a full and accurate account of all revenues received from the commercial use of the containers in its possession from 2018 to date.

iv. Any sums found due to the 1st Defendant upon the taking of such accounts shall be set off against amounts claimed under Order (ii).

v. Save for the order directing the taking of accounts and set-off as provided herein, all other cross-claims advanced by both parties are dismissed.

vi. The 1st Defendant's claim for restoration of vandalized and damaged containers is likewise dismissed.

vii. The 1st and 2nd Defendants shall bear their own costs of the cross claim.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *12TH* DAY OF *MAY 2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Ms Chege for Ogunde for the plaintiff
Mr Njoroge for Mutei for 2nd defendant
Court Assistant: Lillian & Gloria