REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 132 OF 2012

NYANGE BUSINESS LINKS LIMITED..................PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED........DEFENDANT

JUDGMENT

Background

1. The plaintiff is a company fronted by one Dominic Muthuri. It had purchased machinery from defendant some time in 1995 which machinery had been repossessed from another company known as Meru Edible vegetable oils Ltd. The terms of purchase entailed an offer of security by the plaintiff which consisted of three parcels of land belonging to Duncan Muthuri who was and is still a director of the company. The said properties are L.R. No. Abothuguchi/Ruiga/415, L.R No. Abothuguchi/Ruiga/1485 and L.R No. Abothuguchi/Ruiga/60 (herein after identified as the suit properties).

2. A dispute arose concerning the contract. This culminated in the stoppage of the loan payments by the plaintiff as from 1999. In 2011, defendant embarked on the process of realizing the security by issuing a notice for sale to the plaintiff, hence the filing of this suit.

Plaintiff's case

3. Dominic Charles Muthuri gave his testimony herein for and on behalf of the plaintiff and also adopted his statement dated 3.7.2012 as his evidence. PW1 testified that he was aware that Meru Edible oils was under receivership and when he saw the advertisement of the machinery, he became interested, bided for the same and won the tender. PW 1 avers that the purchase price was Shs. 851,750 and he paid the required down payment of Shs.260,000 (30% of the purchase price). He then entered into a loan agreement with defendant on 19.2.1996 where the amount mentioned for the loan is Shs.937,800. He accepts that his suit properties were the securities.

4. PW 1 avers that what was disbursed was Shs. 591,000 plus working capital of Shs.269, 392. By December of 1999, PW 1 claims he had paid a total sum of Kshs.941,000.

5. PW 1 further states that soon after the installation of the machines, he discovered that the same were faulty and were 10 years old. The machines could not function. PW 1 tried to liaise with defendant as well the country of Japan where the machinery had emanated from, but he learnt that there were no spares for the machinery as the said machinery were out of the manufacturing field. The filter of the machine was also made of cast iron and it broke into pieces.

6. PW 1 further testified that he had discovered that the machines were overly valuated when he was purchasing them. On this point, he had gotten an invoice from Meru Edible oils and therein he discovered that machines had been purchased at a price of Shs.302,000.

7. PW 1 testified that he complained to Kenya Industrial Estate (KIE) Meru Office and Nairobi head office regarding the incorrect figures that were being loaded into his account. He also complained of the fact that the machines were malfunctional and that they were not properly evaluated.

8. PW 1 testified that a Mr. Kariuki and a Mr. Mwaniki who were managing directors of defendant at different times had agreed that there were miscalculations on the figures. Another officer of defendant had then allowed the machinery to be valued at Shs. 500,000 instead of Shs.851,000.

9. By March 1999, PW 1 avers that he had paid a total sum of Shs.941,000 which he calculated as the initial deposit of Shs.260,000 and a further total sum of Shs.681,000.

10. By the time the defendant wanted to sell PW 1's property, the amount being claimed was Shs.1,614,127. Defendant had however

allowed plaintiff to pay Shs.761,000 which PW 1 flatly refused claiming that he had paid all the debt in full even though the machines did not become operational.

11. Against this background plaintiff opted to return the machines to defendant unceremoniously (he dumped them at the offices of defendant).

12. In support of his case PW 1 produced the following documents in his list of 3.7.2012 as exhibits:

(i) Plaintiff exhibit 3: Letter of offer dated 24.01/1995

(ii) Plaintiff exhibit 4: Letter dated 14th November 2001

(iii) Plaintiff exhibit 6: Statement account

(iv) Plaintiff exhibit 7: Demand letter dated 17.6.2011 and response dated 13.10.2011.

(v) Plaintiff exhibit 8: Defendant letter dated 28th September, 2011 and reply thereto dated 13th October, 2011

Plaintiff had stated that what he referred to as Plaintiff exhibit 1 (loan agreement) and Plaintiff exhibit 2, loan account were to be produced by defendant. These documents were indeed produced by defence. I did not see any documents marked as plaintiff exhibits 9, 10 and 11 as indicated by plaintiffs.

13. In his plaint filed on 3.7.2012, plaintiff seeks the following orders:

(a) An order of permanent injunction against the defendant its agents and/or anyone working under its behest restraining them from selling, converting, alienating and/or interfering in any manner whatsoever with land titles Nos L.R Abothuguchi/Ruiga/1415, Abothuguchi/Ruiga/60 and Abothuguchi/Ruiga/1485

(b) An order for declaration that all the debt owed by the plaintiff to the defendant has been repaid and/or the debt is statute barred and frustrated.

(c) Any other order be made for the ends of justice

(d) **Costs and interests of the suit**.

<u>Defence case</u>

14. One Suzzy Kinegene is the one who testified for and on behalf of the defendant. She identified herself as a special project disbursement officer of the defendant. She also relied on her statement filed on 26.4.2017 as her evidence. She testified that in Dec 1994, plaintiff successfully bided for the machinery which had been repossessed from Meru Edible Oils. On 19.2.1996, defendant advanced to plaintiff a credit facility of Shs.937,800 to enable the plaintiff purchase the machinery in order to set up an edible vegetable oil production plant.

15. According to DW 1, plaintiff was required to pay 30% of the purchase which was Shs.260,000 and the balance thereof Shs.591,750 was to be paid by the plaintiffs company as a loan.

16. The security offered by plaintiff was the three parcels of land (suit parcels).

17. DW 1 in her statement, averred that the total amount which was disbursed was Shs.983,800-see paragraph 7 of defence witness 1's statement. From March 1999, plaintiff apparently defaulted and by then plaintiff had apparently paid a total sum of Kshs.681,000.

18. Eventually, defendant took the path of realizing the security and hence issued the statutory notice to plaintiff on 17.6.2011. By then the outstanding amount was shs.1.614,127.

19. According to DW 1, they were thereafter approached by PW 1 to negotiate on the issue and it was mutually agreed that the debt could be reduced to shs.761,000. However PW 1 had reneged on this agreement.

20. DW 1 has emphasized that defendants actions throughout the process of recovery of the outstanding amount has been in good faith.

21. In support of their claim, defence produced the following documents as exhibits.

(i) Defence exhibit 1: Copy of letter dated 29th August 1994

(ii) Defence exhibit 2: Copy of letter dated 22nd September 1994

(iii) Defence exhibit 3: Copy of letter dated 17th January 1995

(iv) Defence exhibit 4: Copy of letter dated 24th January 1995

(v) Defence exhibit 5: Copy of loan agreement dated 19.2.1996

(vi) Defence exhibit 6: Copy of charge dated 19th February 1996 over property title No. Abothuguchi/Ruiga/1485

(vii) Defence exhibit 7: Copy of charge dated 19th February 1996 over property title no. Abothuguchi/Ruiga/60

(viii) Defence exhibit 8: Copy of charge dated 19th February 1996 over property title no. Abothuguchi/Ruiga/1415

(ix) Defence exhibit 9: Copy of statutory notice dated 17th June 2011

(x) Defence exhibit 10: Copy of letter dated 28th September 2011

(xi) Defence exhibit 11: Copy of letter dated 13th October 2011

Determination

22. I have taken into account all the arguments of the parties including the pleadings and the rival submissions. I must state from the onset that it is not clear as to how the statement of defence came to be filed on 28.3.2017 several years after the suit was filed. I have not seen any court order allowing this piece of pleading. Nevertheless, none of the parties raised this issue by the time the actual trial commenced on 9.10.2017. That being the case, I'll let the issue rest and I will proceed as if the statement of defence is properly on record.

Issues not disputed

23. It is not disputed that the three suit parcels of land were the security in respect of whatever sums of money which were advanced to plaintiff. It is also not disputed that plaintiff had received the machines but has since returned them to defendant. It is also not disputed that by March 1999, plaintiff had paid at least shs.681,000 though plaintiff adds that the amount of shs.260,000 paid earlier should be taken into account to give a sum of shs.941,000.

24. It is also not in dispute that plaintiff did not make any further payments after March 1999.

Issues for determination

1. What were the terms of the agreement between plaintiff and defendant?

2. Whether the purchased equipment was overvalued.

3. Whether the machines were functional or not?

4. Accounts.

5. Whether the relief sought by either party should be granted.

What were the terms of agreement between the parties?

25. Both parties have availed one document a letter of 24.1.1995 (Plaintiff-exhibit 3 which is Defence-exhibit 4) showing that the value of the machinery was shs.851,750 and that plaintiff was required to pay 30% of purchase price which was shs.260,000. The balance of the money was to be advanced as a loan by defendant. Clause 6 of the said letter states that once the amount of Shs.260,000 was paid and securities executed then the assets were to be released to M/S Nyange business links Ltd. The machines were indeed released to plaintiff and it follows that plaintiff had by then paid the shs.260,000.

26. The loan agreement was then made a year or so later on 19.2.1996. This is where the dispute on figures started to emerge. Defendant insists that the principal sum advanced was Shs.937,800 computed as Shs.637,800 as first disbursement, then shs.269,392 as working capital and shs.30608 as expense for feasibility studies. Defendant also avers that the shs.260,000 was not to be factored in computing repayments. Plaintiff on the other hand avers that the figure of shs.937,800 was in error and that what should have been reflected is the price for purchase of the machinery (shs.857,750) less the 30% deposit paid (Shs.260,000).

27. I have carefully looked at the documents availed by the parties. In particular, I have scrutinized the detailed loan agreement of 19.2.1996 produced as D- exhibit 5 whereby from page 16 of the defence bundle the figures are itemized. The shs.637,800 is listed under machinery and equipment including installation etc. It means that whereas the loan advanced for machinery was in the strict sense to be Shs.591,750 (Shs.851,750 – 260,000), there were more additional costs. I am not able to discern the rest of the figures computed as continuation of schedule B on page 17 of the bundle. However, plaintiffs account no. 702-0441 had an opening balance of Shs.637,800 confirming that this amount was disbursed, before 10.5.1996 when a further disbursement of Shs.269,392 was made. A further sum of shs.30,608 was disbursed on 16.5.1996. These figures give a total sum of Shs.937,800. The figures are captured in the statement of account produced as D exhibit 13.

28. The 3 documents titled as CHARGE produced as D. exhibit 6, 7 and 8 also clearly indicate that the principal sum was Shs.937,800. Considering that by then, plaintiff had already effected the payment of Shs.260,000, then I have no doubts that this amount had already been factored in. If the sum of shs.260,000 was meant to clear the loan, then surely the figure of Shs.937,800 could not have been indicated. I have no doubts that the sum advanced was Shs.937,800.

Was the purchased machinery overvalued?

29. This is an issue that is neither here nor there. It was not raised at time of purchase. No valuation report was availed by plaintiff and as such the court disregards this claim.

Whether the machines were functional or not?

30. Defence claims that the machines were sold on where is as is basis and that they were new.

31. It is necessary to find out what KIE stands for Kenya Industrial Estate was established **to facilitate development and incubation of micro small and medium enterprises (MSMES) country wide by establishing industrial parks, providing credit and business development services (BDS) in a sustainable manner.** From this introduction, it is apparent that KIE's role goes beyond lending. It has a primary role to see that projects kicked off as per their mandate. That is why it was even a term of the agreement that they had to see to it that the project was commissioned. Clause 2.7 of the agreement (D-Exhbit 5) states that: **"The lender shall undertake to, supervise and offer advice to the company on matters pertaining to the implementation and operations of the project for which services the company shall pay to the lender a supervision fee at the rate of 1% per annum of the total loan approved and disbursed. Such supervision fee shall accrue soon after the project is commissioned and shall be payable in monthly installments. In the event of such fee not being paid within the month when it falls due, the amount that shall be due and payable shall be debited to the loan account and shall attract interest as is chargeable on the term loan".**

32. Under the part headed PARTICULAR CONVENANTS in section 4 of D-EXHBIT 5, the plaintiff with the agreement of the lender had undertaken "**to carry out the project and to conduct the company's business with due diligence and efficiency and in accordance with the sound engineering, financial, technical, managerial business practices".**

33. Further clauses in the covenant stipulated that plaintiff undertook to:

> **"To permit authorized representatives of the lender or its financiers to inspect the site works and construction (if any) included in the project and any other properties or equipment owned or operated by the company to examine any books and records of accounts, contracts, orders, invoices, studied reports or other documents relating to the project or to any expenditure in connection therewith or the progress of construction maintenance and results of operation of the project or otherwise to the operations and financial condition of the company".**

And,

> **"Promptly to inform the lender of any events or conditions which delay completion of the project or which are likely to have a substantial adverse effect on the company's profit or business".**

34. Plaintiff has emphasized that the machines malfunctioned. DW 1 did admit that the machines were shipped into the country in January 1983 and were handed over to Meru Edible oils. They were then repossessed in 1994. They were definitely over 10 years and by the time of repossession, plaintiff had given an account of how he informed the defendant of the defects in the machine. The filter had even broken down into pieces as it was made of cast iron. PW 1 also gave an account of how he made efforts to contact the manufacturers of the equipment in Japan and he was informed that the machines were out of manufacturing field as they were over 10 years old.

35. From the foregoing, I am inclined to believe that defendant had a major role to play in ensuring that the business took off and was running otherwise why were they even charging a tidy sum of Shs.30,608 for feasibility studies. If the machinery was no longer in sound engineering conditions then it meant that the business was no longer viable and defendant was aware of this. The case of **National Bank of Kenya Ltd versus Pipelastic Sankolit (K) Ltd & another (2001) eKLR** cited by defence is therefore not applicable herein. The court is not re-writing the contract for the parties. It is simply discerning the terms of the agreement based on the documents availed and the conduct of the parties. Defendants cannot therefore ignore the fact that the machinery became malfunctional and obsolete and could not be used in any sustainable manner.

<u>Accounts</u>

36. Whether defendant is owed any monies by plaintiff? Is the claim stale? is the induplum rule applicable?. On this point, the court will first examine the validity of the statutory notice dated 17.6.2011 as this appears to be what sparked off, the filing of this suit few months thereafter. The notice reads as follows:

> **"We regret to inform you that you have defaulted in the repayment to ourselves of the loan advanced to you by ourselves and consequently, as at 17/6/2011, the account will be outstanding at Kshs.1,614,127/= which sum continues to accrue interest. We hereby require you to pay us the amount now owing and secured under charges made between yourself on the one part and ourselves on the other part and registered against the title to the property known as LR No. Abothuguchi/Ruiga/1415, Abothuguchi/Ruiga/60, Abothuguchi/Ruiga/1485. Take notice that if the stated amount together with interest thereon presently accruing at the variable rate of 15% per annum calculated on reducing balance is not paid to us, we will, at the expiry of three (3) months from the date of service upon you of this notice, exercise our statutory power of**

sale over the charge property by public auction for recovery of monies owed to us without further notice. Please note that any part payment made by you hereafter will be accepted by us on account and without prejudice to this notice and any agreement or compromise to settle the amount outstanding will not in any way be deemed to be a waiver of our right arising out of this notice".

37. The question is, what was this outstanding amount and what was the interest that plaintiff was supposed to pay?. I have already outlined salient feature of the terms of the covenant in the agreement of 19.2.1996, particularly the issue of defendant being in the know on the performance of the project.

38. I have already established that plaintiff had brought to the attention of the defendant that the machines were not working.

39**.** Section 8 of the agreement (Defence Exhibit 5) sets out detailed terms of EVENTS OF DEFAULT as follows: **"In any of the following events, the lender may by notice to the company declare that the principal amount of the loan then outstanding to be due and payable immediately in which case the lender's security shall become enforceable and all sums due by the company (read plaintiff) to the lender under this agreement shall become payable forthwith ……… if the company shall make default in the payment of any instalment of principal monies owing in respect of the loan or interest thereon or any others payable in accordance with this agreement for a period of 14 days after the same shall have become due whether legally demanded or not….".**

40. Defendant admits that by 1999, plaintiff had made payments of shs.681,000. He never made any further payments. Even the statement of account of the plaintiff (page 29 of defence bundle) reflects that payments were only made up to 1999. It follows that defendant had a contractual obligation to follow the **events of default.**

41. It was therefore irregular unlawful and contrary to the terms of the agreement for the defendant to have waited 11 years to embark on the process of realization of security. It also follows that the figures in the second part of exhibit 13, the statement of account running from 3.12.2003 to 31.1.2011 are uncalled for and unjustified.

42. In the case of **Zumzum investment limited versus Atlam Group International K. Ltd & another HCCC130/12 (Mombasa)**, it was held that **"A chargee needed to inform the chargor the extent of the chargor's default and the amount that needed to be paid to rectify the default"**. The default having occurred in 1999, then that was when defendant ought to have explained to the plaintiff the extent of default. The upshot of my findings is that the statutory notice issued on June 2011 by defendant is **invalid and the figures in the statement are stale.**

43. What then was outstanding by the time of default in 1999?. DW 1 was not clear on what was outstanding by then. In her testimony DW 1 told the court that plaintiff did make some payments of the loan. As at 1999, he had paid Shs.681,000 she then went on to state that "**I am aware that interest was waived up to 1997 by KIE**". She again stated that "**What happened is that there was a waiver which is in the statement, Shs.156,066.** Further evidence of DW 1 is that "**We considered the amount of loan disbursed, plus interest, less payments by the client and the interest that was waived. The interest that was waived came about when the client complained that the machines had broken down and during that time interest was being loaded to the account". The company decided to waive the interest during the breakage of the machinery that is how we got the balance as at 1999. The balance outstanding at the time of default was Shs.1,614,127. The balance outstanding as at 1999 31st December was Shs.698,321 (This was money plus interest as at 1999 less payments). The payments were Shs.681,000. The balance also had taken care of the interest waived of Shs.156,066. The amount paid had been removed from the balance via credit note".**

44. This evidence does not explain precisely as to how the figure of Shs.698,321 was arrived at. The statement of account (D- Exhibit 13) does contain the figure of the closing balance of Shs.698,321 as at 31.12.1999. It also does contain the figure of Shs.156,066 which is the alleged waived interest. This is however not enough. The waiving of interest and the variations of the records ought to have been reduced into writing as an addendum or a variation to the original agreement of 19.2.1996. It was not enough for defendant to just load figures in plaintiff's account without proper explanation especially when it emerges that plaintiff had complained on a raft of issues including valuation and malfunctioning of the machinery and the defendant had presented itself as if it was negotiating or varying the terms.

45. The upshot of this is that there was no certainty as to what was the outstanding amount by the time plaintiff failed to make any further payments in 1999.

46. In the in-duplum rule, interest stops running when the unpaid interest equals the outstanding capital amount see case of **John Kamuyu & another vs Safaric M' Park Motors HCCC No. 1013/99 Nairobi** as well as the case of **Scholastica Nyaguthii Muturi vs Housing Finance Co. of Kenya Ltd & another HCCC no. 10 of 2010 (Nairobi).**

47. In the present case the court has already considered the figure of 1.614, 127 cited in the statutory notice as invalid and that there is no certainty of what was owing by 1999. It follows that the in-duplum rule is not applicable herein. However, had there been certainty about the figures, I would have considered defendant as a financial institution as contemplated within the meaning of **section 44 A of the Banking Act**. This is because one of the core business of Kenya Industrial Estate to provide credit and in doing so it does request for securities and sets payment terms in a manner just like any other financial institution.

Relief

48. I have carefully analyzed the facts of the case and the history thereof. It is not lost to this court that the machines which had been given to Meru Edible Oils stayed in boxes unused for a period of over 10 years until 1994 when defendant sought to sell the same to plaintiff after repossession. Neither Meru Edible Oils nor plaintiff appears to have benefited from the machines yet KIE received monies from plaintiff, the same amounting to Shs.260,000 plus Shs.681,000 to give a total of Shs.941,000 yet plaintiffs plant did not become operational, notwithstanding that KIE has a major role of promoting indigenous entrepreneurship. I am therefore in agreement with plaintiffs

submissions that defendant merely treated the plaintiff as a cash cow which it milked to the extent of even denying the calf the milk.

49. I also find that the cases cited by the plaintiff **Scholastica Nyaguthii Muturi vs HFCK & another HCCC no 10/2010 (Nairobi)** and **Rajnkantkhetshi Shah vs Habib Bank A.G Zurich HCCC No. 246 of 2011 (Nairobi)** are relevant especially on the prayer to declare that all monies have been paid.

50. It is also not lost to this court that in the statement of defence filed on 28.3.2017, defendants have not made any counter claim. They are merely seeking to have the suit dismissed. If defendants believed that they had any claim against plaintiffs, this was the opportunity to do so. I am not persuaded that defendant has any claim against the plaintiff. I however blame plaintiff for holding onto the machines for too long. He could have tried to mitigate the situation by returning the machines in 1999 when he stopped the payment or when he realized the machines were not operational

51. **Final orders:**

I proceed to give final orders as follows:

(i) It is hereby declared that the agreement between the parties herein stands as frustrated.

(ii) It is hereby declared that plaintiff does not owe defendant any monies any more.

(iii) An order is hereby issued for the discharge of land parcels no. Abothuguchi/Ruiga/1415, Abothuguchi/Ruiga/60 and Abothuguchi/Ruiga/1485 and titles to revert back to DOMINIC CHARLES MUTHUURI.

(iv) The defendant is at liberty to take over the machinery dropped at their yard by the plaintiff.

(v) Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Marete for defendant

Kithinji holding brief for Otieno C. for plaintiff present

HON. LUCY. N. MBUGUA

ELC JUDGE