Vehicle and Equipment Leasing Limited v NCBA Bank Kenya Plc (Civil Case 390 of 2018) [2022] KEHC 12148 (KLR) (27 April 2022) (Judgment)

Neutral citation: [2022] KEHC 12148 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 390 OF 2018

F TUIYOTT, J

APRIL 27, 2022

BETWEEN

VEHICLE AND EQUIPMENT LEASING LIMITED .... PLAINTIFF

AND

NCBA BANK KENYA PLC .... DEFENDANT

JUDGMENT

[1] It would be surprising that two parties, each fairly sophisticated in their respective trade, would disagree on almost every aspect of a contract entered between them.

[2] The plaintiff is a vehicle and equipment leasing company which has adopted a business model that entails seeking credit facilities from financiers for purposes of purchasing assets such as vehicles and equipment for onward leasing to third parties for rental income and economic gain. Sometime in the year 2014, the plaintiff obtained banking facilities from the defendant for the purchase of 291 Toyota motor vehicles. These were to be purchased from Toyota Kenya Ltd (Toyota) for onward leasing to Tsusho capital Kenya Ltd (Tsusho). In turn, Tsusho would lease the motor vehicles to the Kenya government for use by the National Police Service. The plaintiff contemplated that the rental proceeds from that lease was sufficient not only to repay the loan granted by the defendant but also to make a profit.

[3] Alongside that arrangement, the bank advanced a credit facility to the plaintiff of USD 3,000,000.00 to finance the purchase of factory equipment and motor vehicles for onward lease to ask Athi River Mining Ltd. Although this second facility is not the subject of this dispute it features from time to time for reasons that will become apparent shortly.

[4] The arrangement between the borrower and the bank was reduced into an elaborate contract that was comprised of various documents. The first and which the plaintiff posits to be the foundational contract is the letter of offer dated 2nd of January 2014. I shall however be suggesting that the letter of

offer dated 23rd February 2015 is not without significance! For the Tsusho lease, the bank advanced a credit facility of Kshs. 2,000,000,000.00. As a condition precedent to the disbursement of the facility the defendant was to receive, inter alia, the following documents; a vehicle and asset finance agreement, a deed of assignment of all rights over the financed vehicles, a deed of assignment of receivables from Tsusho, an undertaking by Tsusho to the remit quarterly rent to the defendant, a letter of comfort from Toyota, a sublease contract and rental addendum between the borrower and Tsusho, a copy of the relevant tender award document by the government of Kenya and joint registration of the vehicle in the names of the plaintiff and the defendant.

[5] Following through the facility letter, the plaintiff and the defendant entered into a vehicle and asset finance agreement dated 6th January 2014, a deed of assignment of vehicles dated 6th of January 2014 and a deed of assignment of receivables dated 20th March 2014.

[6] It is the case of the plaintiff that timely repayment of the facility would be predicated upon timely payment by the government of Kenya to Tsusho. If the payment by the government would be late so would be by Tsusho to the bank. As happened, and this would be common ground, the payment from the government was often late. This resulted in the plaintiff's account falling into arrears. In the face of this reality the borrower was forced to renegotiate the facility. The outcome of those negotiations was an agreement by the bank to restructure the asset facilities. The restructure was contained in a facility letter dated 15th February 2018 (the restructured facility). I had earlier made mention of the letter of offer dated 23rd February 2015 which did not receive the prominence from the parties that it perhaps deserved. The restructured facility makes reference to this letter and the supplemental letters of 15th October 2015 and 20th September 2016.

[7] In that facility letter, asset finance I (AFI) now restructured the restructure asset finance I (RAFI) was sanctioned at a limit of Kshs. 181,114,000.00 (equivalent to USD 1,754,128.00) and the asset finance II (AFII) now restructured asset finance II (RAFII) at Kshs. 792,318,207. The stated purpose of the restructuring, in respect to RAFII to was to facilitate the rescheduling and rebooking of all the existing past due debts and Insurance Premium Finance (IPF) loans as at 31st January 2018. These loans facilitated purchase of motor vehicles for leasing to the government of Kenya (National Police service). Regarding repayment, the letter provided that, without prejudice to the bank's right to make demand at any time and provided that no event of default had occurred, the restructured AFI and AFII would be repaid in a bullet payment after 12 months from the date of the structure and the residual loan in 6 months. Interest was to be computed on reducing balance basis, and debited and payable monthly by way of compound interest. Of importance was that unless otherwise expressly varied in this latter offer, all other terms and conditions of the existing letters of offer remained unchanged and would continue to apply.

[8] The plaintiff contends to have understood the new arrangement to be a 12-month moratorium on payment of the principal debts for both facilities running from 31st January 2018 to 30th January 2019. The plaintiff alleges breach of the restructuring agreement by the bank in various ways. Each of these allegations shall be interrogated.

[9] It is also the plaintiff's case that the bank denied it access to its account by ignoring its instructions for payments despite the accounts being in funds and debited charges citing insufficient funds. This is said to be a breach of duty by the bank.

[10] The bank is accused of unfair banking practice, and oppressively and aggressively detaining the plaintiff's fund. It being alleged that the bank purported to exercise its right of set off and lien on an account that was not in arrears and in the absence of a due debt, freezing the plaintiff's account, denying the plaintiff access to its account, converting and utilizing the plaintiff's funds to set off debt's

prematurely, operating the plaintiff's account to advance self-interest and applying charges on the basis of insufficient funds. A notable loss that the plaintiff claims to have suffered from the conduct of the bank is that the rental payments made into its account included VAT payments and it now faces a tax demand of Kshs. 262,605 ,158.19 made by KRA in a letter of 12th June 2019.

[11] The opening and existence of account no. 7208040077 troubles the plaintiff who alleges that it was a clandestine account opened by the bank in which a sum of Kshs. 78,464, 637.00 was diverted. The borrower states that it only came to discover about it from withholding tax certificates issued to it by KRA.

[12] Sometime in September 2018, National Police Service returned the leased vehicles to Toyota. The borrower and the bank are not agreed on the circumstances in which this happened. Notable for now, is that the exact date of return forms an interesting discussion. But in respect to the preparation for the return, the plaintiff states that early, on 6th June 2018, it sought to access funds to enable it repaint the motor vehicles which had the Kenya police brands in advance of the disposal as it would take 2 years to ready the vehicles for disposal in the secondary market but that the bank ignored the request. On 20th July 2018, it again wrote to the bank informing the bank that it had remarketed the vehicles. In paragraph 30 of its pleadings the plaintiff refers to these as repossessed vehicles, an issue that has attracted some debate.

[13] The plaintiff cites clause 9 (iii) (c) on the role of Toyota. It provides that Toyota would issue a letter of comfort confirming that it would hold the vehicles in its yard upon expiry of the lease and assist the borrower sell them in case of need. The plaintiff asserts that the promise was not for Toyota to hold the assets indefinitely or to assist the bank to dispose them. The borrower complains that notwithstanding that it advised the bank that it had received numerous offers and bookings for all the 291 vehicles, the bank frustrated the process and failed to allow the sale of the vehicles by the plaintiff. That as a result the assets are depreciating as the bank continues to pile interest on the loan. The plaintiff emphasizes that had the bank disposed of the assets within reasonable time then it would have realized sufficient funds to settle the account.

[14] The plaintiff states that on 5th September 2018, it wrote to the bank complaining that it had been denied access for purposes of confirming whether the return conditions had been met and that it was the duty of the bank to ensure that the vehicles had been refurbished by Tsusho in compliance with the lease agreement. Apparently frustrated with the conduct of the bank, the plaintiff moved the court through an application dated 15th October 2018 in which it sought orders for disposal of the vehicles at market value and in a ruling of 25th January 2019, the court made an order in those terms directed at the bank.

[15] Moving on to February of 2019, there is letter dated the 14th day of that month in which Tsusho informs the plaintiff that in regard to refurbishment and release of the vehicles it should refer the matter to its financiers. There is also another letter of 21st February 2019. The plaintiff construes the two letters to be that Tsusho was not willing to meet its contractual obligations on the basis that the bank had repossessed the motor vehicles and that it could not refurbish the motor vehicles in the absence of authorization of the bank. That it was not until 6th march 2019, that the bank granted Tsusho access for refurbishment purposes.

[16] On 13th February 2019, the bank published an advertisement in the "Daily Nation" newspaper for the sale of the vehicles. The plaintiff states that the bank never had any real intention of selling the vehicles as they were not refurbished so as to fetch their real value. That in a bid to ensure that the disposal was done in a fair manner, the borrower chose to run a counter advertisement on 15th February 2019 (perhaps also on 18th February 2019 see D Exhibit 2 page 181) advising the public of the true value

of the assets. Further, it instructed Regent Valuers to value the 285 vehicles and they returned a total market value of Kshs. 1,468,595,361.00.

[17] Still on disposal or lack of it, the plaintiff complains that the bank rejected its request that QuipBank Trust be appointed as sales agents in the process. Further, that in the letter of 8th April 2019, the bank stated that it was not willing to appoint Quipbank as a sales agent and it was not willing to appoint any sales agent at all. In that letter, the plaintiff sees an admission. It construes the bank's offer to attend to the replacement of motor vehicle batteries as caused by a premature repossession of the vehicles.

[18] That in a bid to ameliorate the waste on the vehicles, the plaintiff sold 6 motor vehicles at market value. The court was invited to compare this with a supposed refusal by the bank to dispose of the vehicles at market value, a position said to have been held by the bank.

[19] That in the face of a second application to Court by the borrower, dated 30th July 2019, the bank and the borrower entered into a consent of 6th August 2019 in which the bank undertook to dispose 272 motor vehicles within 45 days from the date of the consent but that the bank went back to its indolent ways and has not disposed any vehicles.

[20] In addition, the borrower complains that the bank erroneously reported it for listing with the Credit Reference Bureau (CRB) which has resulted in it being denied funds by other financiers and dented its reputation and that of its directors as not being credit worthy.

[21] In a further amended plaint dated 10th July 2020 the borrower prays for the following raft of orders;

a) A declaration that the Defendant's acts of freezing the Plaintiff's Bank A/c No. 72080040014 domiciled at the Defendant's Upperhill Branch and denying the Plaintiff access to the said account as illegal and in breach of contract of operating the said account.

b) Principal Debits and the Additional debits entries made by the Defendant on the Plaintiff's Bank Account No. 7208040014 during the pendency of the 12 months moratorium period was unlawful and was done in breach of the terms of the restructuring agreement dated 15th February 2018;

c) A declaration that the Defendant should not charge any interest on the Plaintiff's loan accounts from the date of possession to the date of the determination of this suit;

d) An order for the Defendant to compensate the Plaintiff for the charging of any interest and particularly default charges and penalties to the tune of Kshs. 9,111,198.80 from February 2018 to date;

e) A declaration that the Plaintiff disposed the motor vehicles below the market price;

f) That the Defendant compensate the Plaintiff Kshs. 187,370,000.00 being the difference between the sale price of the motor vehicles and the actual market value of the motor vehicles plus any additional variance in valuation from the date of filing this suit to the date of judgement;

g) A declaration that the Plaintiff is not indebted to the Defendant by dint of the manner of the attachment of the motor vehicles, the loss occasioned by the Defendant and the variance between the valuation price and the sale/disposal price;

h) The Defendant be compelled to pay the Plaintiff the cost of insurance procured for the attached motor vehicles being Kshs. 50,126,870.00;

i) In the alternative a declaration that the Bank should credit the depreciation value of the repossessed and detained motor vehicles from the date of repossession to the date of disposal;

j) An order of mandatory injunction directing the defendant to lift the orders of freezing the Plaintiff's Bank A/c No. 7208040014 domiciled at the Defendant's Upperhill;

k) An order of permanent injunction restraining the Defendant from unlawfully freezing any of the Plaintiff's Bank Account including but not limited to No. 7208040014 domiciled at the Defendant's Upperhill or interfering with the Plaintiff's operations thereof unlawfully.

l) An order for the Defendant to refund to the Plaintiff Kshs. 384,233,278.00 and any other funds inequitable debited in the course of these proceedings by the Bank and being the funds unlawfully withdrawn, seized and debited by the Defendant in breach of the terms of the restructuring agreement dated 15th February 2018;

m) An order for compensation for Kshs. 26,400.00 being the cost for the charges for bounced cheques;

n) That Honourable Court be pleased to issue an order of mandatory injunction directing the Defendant to dispose of all the 291 financed motor vehicles that's held by the Defendant's employees, agent and servants, at an agreed market value for purposes of crediting the funds to the Plaintiff's loan account;

o) That the Defendant cater for the cost of storage and any other attendant costs incurred in the repossession and detention of the motor vehicles;

p) An order for general damages for loss of business opportunity and business reputation as a result of the conduct of the Defendant in breaching the Restructuring Agreement;

q) Aggravated damages for the Defendant's negligence in the manner in which it handled the Plaintiff's loan account leading to the business suffering losses in operational income and the loss suffered by the Plaintiff in settling the Value Added Tax obligation that ought to have been settled by the Defendant; and

r) General damages for breach of duty of care owed by the Defendant to the Plaintiff.

[22] In defence, the bank contends that under the deed of assignment of receivables, the plaintiff assigned to the defendant all receivables under the lease agreements and the term "secured obligation" in that deed meant the aggregate of all sums which were then or from time to time due, owing or incurred by the plaintiff to the defendant in connection with or arising out of any finance documents or otherwise agreed to be paid by the plaintiff. Further, that the defendant was entitled at its discretion, at any time and without notice to the plaintiff to debit any account of the plaintiff for the payment of the secured obligation. By dint of that deed, the plaintiff also agreed that any moneys received or recovered by the defendant would be placed by the defendant in a suspense account until the defendant was satisfied that the secured obligation had been paid and discharged in full.

[23] The bank states that account 7208040014 was treated as the collection account and the moneys received by Tsusho were credited there. However, when the plaintiff claimed the right of access to in the moneys to that account, the bank opened a new collection account 7208040077. Then on, receipts from Tsusho were credited into this account. The bank applied moneys received in the two accounts towards what it perceived to be the secured obligations.

[24] On the return of the vehicles to Toyota, the bank argues that in accordance with the terms of the deed of assignment and a letter of comfort issued by Toyota dated 27th January 2014, the vehicles were returned at the end of the leases to Toyota who held them on its behalf. It denies frustrating the sale of the returned vehicles.

[25] In regard to the advertisement placed by it on 13th February 2019 in the Daily Nation, the bank states that its effort to sell the vehicles was frustrated by the plaintiff placing two counter advertisements on 15th February and 18th February 2019. And suggesting that the sale of the vehicles must be related with refurbishment of those vehicles, the bank cites the lease agreement between the plaintiff and Tsusho as providing that on the expiry of the leases Tsusho would refurbish the vehicles and put them in a condition fit for sale. The bank argues that it was the duty of the plaintiff to ensure that this was done or in the alternative to carry out the obligation itself. The bank denies preventing the plaintiff access to the vehicles or obstructing Tsusho or the plaintiff from refurbishing the vehicles. The bank asks me not to construe the letter of 6th March 2019 as an admission that Tsusho required its authority to grant access of the vehicles to the plaintiff.

[26] It is the case of the bank that the plaintiff has at all times been aware of the progress or lack of progress of the refurbishment and it was a deliberate abuse of court process for the plaintiff to seek and obtain an order for sale of the vehicles well knowing that they were not in a suitable state for sale.

[27] The bank explains why it was not prepared to have Quipbank as its agent. It states that Quipbank is a subsidiary or related to the plaintiff. It holds that it was not under any obligation to appoint Quipbank or indeed any other agent. The bank nevertheless avers that it has at all times endeavoured to include the plaintiff in the sales process and released 36 vehicles to Quipbank which only managed to sell 6.

[28] On another aspect of the sale, the bank states that it tried to sell the vehicles at the market value. It understands the market value to be the price that the market was prepared to pay. It denies that it has ever refused to sell the vehicles at market price. And further denies that the valuations by Regent represent the market value. The bank states that it had made and continued to make strenuous attempts to sell the vehicles and denies having delayed in the sale of the vehicles.

[29] The bank maintains all payments it received were assigned to it under the deed of assignment and it was not obliged to make any enquiry as to the nature or sufficiency of the payments. In particular, it contends that it had no obligation in respect of any liability of the plaintiff to pay VAT as all taxes were the sole responsibility of the plaintiff.

[30] In the amended defence, the bank explains why it agreed to the consent order of 6th August 2019 to sell the vehicles within 45 days and then justifies why it was not able to. So as not to paraphrase, I reproduce the reasons and justification as pleaded. As for its reasons for agreeing to sell, the bank notes that: -

> “ a) Based on the offers received and negotiations which were on going many of which were not concluded.
>
> b. In the belief that the plaintiff would ensure the refurbishment and re-registration of the vehicles.
>
> c. In the belief that QuipBank Trust Limited would continue with the sale of the vehicles in its possession
>
> d. Before the defendant became aware of the extent to which the market was being flooded by vehicles which had been returned by the Kenya Government/ Police at the expiry of various different lease arrangements financed by other

banks through the plaintiff and similar leasing arrangements by Tsusho Capital Kenya Limited, in addition to vehicles being sold by various NGOs and multinational organisations."

And as for its justification for why it was unable to sell the vehicles within that time frame, the bank, in paragraph 25P, states that: -

" a) The large number of vehicles formerly leased to the Kenya Government/Police that had come on the market since 2018 due to the termination of similar leasing arrangements by the plaintiff financed by Equity Bank Limited and Co-operative Bank of Kenya Limited and other leasing agreements by Tsusho Capital Kenya Limited with its own finance, in addition to vehicles being sold by various NGOs and multinational organisations.

b) The return by QuipBank Trust Kenya Limited of 30 vehicles following its letter of 13th August, 2019.

c) The failure of QuipBank to complete the purchase of 60 vehicles pursuant to its letter of 27th August, 2019.

d) The failure of the plaintiff to enforce the return provisions in the lease agreements between the plaintiff and Tsusho.

e) The delay in completing the re-registration of the vehicles. The defendant's letter to the plaintiff of 5th July, 2019 was an attempt by the defendant to get the plaintiff to honour its obligations to change the registration of the vehicles. The re-registration of the vehicles was not the responsibility of the defendant.

f) The delays experienced in transferring vehicles to the purchasers."

[31] The bank avers that the plaintiff failed to make payments in accordance with the agreements and following such continued default, the defendant was obliged to file reports with the CRB. In regards to default the bank contends that the moratorium came to an end on 15th February 2019 and the plaintiff owes it Kshs. 520,672,119.28 with further interest from 16th February 2019.

[32] Each side called two witnesses. Charles Wahome (PW1) and Wang'ombe Gathondu (PW2) for the plaintiff and Dr. Jacob Ogola (DW1) and Nelson Nyoike (DW2) for the defendant. As it is clear to this Court that a determination of this dispute substantially turns on documents, it is needless for me to rehash the evidence of these witnesses. Instead, aspects of their evidence as will relate to the issues that need resolution will be highlighted and discussed.

[33] When I distill the pleadings, the facts and the arguments, I see the controversy between the parties falling under two broad heads; alleged breaches of the restructure agreement as relates to interest charged, access to accounts and application of moneys paid into the accounts as an issue and matters around the return or repossession of the vehicles and their sell or attempts to sell as another.

Of The Terms Of The Restructure Agreement And Related Issues.

34. Under this heading the court sees the following as requiring determination:

(a) What facility letters constitute the restructure arrangement.

(b) Which accounts were the subject of the restructure.

(c) Was unlawful or uncontracted interest charged?

(d) Did the bank unlawfully block the plaintiff's access to account No. 7208040014.

(e) Was the moneys received from Tsusho misapplied by the Bank.

[35] It is common ground that vide a facility letter dated 20th January 2014 (D Exhibit 1 page 1 to 16), the bank granted the plaintiff two asset facilities. The facility that dominates this dispute is AFII which was restricted to RAFII. In fulfillment of the terms and conditions of the letter of 2nd January 2014, as regards facility AFII, the plaintiff and the bank entered into a vehicle and asset finance agreement dated 6th January 2014 (D Exhibit 1 page 17 to 24). The plaintiff executed a deed of assignment dated 6th January,2014 of all rights under the motor vehicles (D Exhibit pages 25 to 28) and a deed of assignment of receivables dated 20th March, 2014 (D Exhibit 30 to 48).

[36] The restructure of both facilities was contained in a facility letter dated 15th February, 2018 (D Exhibit 1 pages 74 to 79). In page 5 of that letter is this important term;

> " save as hereby expressly varied, all other terms and conditions of the Existing letter of offer remain unchanged and will continue to apply." (my emphasis)

[37] The opening line of the letter of restructure, defines the "existing letters of offer" to be the letter of offer of 23rd February 2015 and supplemental letters of offer dated 15th October 2015 and 20th September 2016. For now I note, although it has been suggested by both parties that the primary letter of offer was that of 2nd January 2014, the restructuring letter makes no reference to that letter. Walking backwards from the restructuring letter, the facility letter of 20th September 2016 (D Exhibit 1 pages 68 to 73) was itself a restructure of past facilities. The details of that restructure are unnecessary for deciding this matter but an important term in the letter is a similar term as that in the restructure letter of 15th February 2018. It saves all other terms and conditions of the existing letters of offer in so far as it does not expressly vary them.

[38] In the facility letter of 20th September 2016, the "Existing letters of offer" are the letter of offer of 23rd February 2015 and supplemental letter of 15th October 2015. Skipping the supplemental letter of 15th October 2015, I move on to the letter of offer of 23rd February 2015 (D Exhibit pages 49 to 63). As explained by DW1, this letter of offer is substantially the same as that of 2nd January 2014. To be noted is that the latter facility letter does not refer to the facility letter of 2nd January 2014. Parties here make reference to the letter of 2nd January 2014 as though it was the facility letter which was the subject of restructure. I, however, hold that the letter of restructure of 15th February 2018 restructured the facilities that were offered through the letter of 23rd February 2015. As it plays out in the evaluation of the evidence, the parties insistence to the letter of 2nd January 2014 and not of 23rd February 2015, does not count for much.

[39] Critical to this dispute, is that at page 4 of the letter of 23rd February 2015, a condition precedent appears in the following words;

> " The Bank continues to the following security documents." (sic)

> The security documents listed thereunder in respect to AFII are on all fours those in the letter of 2nd January, 2014. It therefore seems to me that the word "hold" was accidently omitted after the word continues and for the reason that there is no disagreement between the parties that the security documents which include the two deeds and the vehicle and

asset finance agreement continue to cover the restructured facility, I have no hesitation in finding that an intention of the letter of 23rd February, 2015 was that the existing securities and undertakings given pursuant to the first facility letter would continue to be in place.

[40] A discussion of this matter must however be in reference to the facility letter of 23rd February, 2015 and not that of 2nd January, 2014 as suggested by parties. So to the first question, the facility(restructure) letter of 15th February 2018, the letter of offer of 23rd February 2018 and the supplemental letters of offer of 15th October 2015 and 20th September 2016 constitute the contract in respect to which this dispute revolves.

[41] As to which accounts were restructured, the defendant's counsel submitted that it only applied to AFI and AFII and was categorical that it did not include accounts in relation to insurance premium financing (IPF). The plaintiff's counsel passionately argues that the IPF was part of the restructure and draws my attention to the restructure document itself.

[42] In respect to the purpose of the letter of restructure, the letter itself is unequivocal;

> " RAF I Facilitate rescheduling and rebooking of all the existing past due loans as at 31st January, 2018. Those loans facilitate purchase of factory equipment and motor vehicle for leasing to Athi River Mining Limited.
>
> RAF II Facilitate rescheduling and rebooking of all the existing past due and IPF loans as at 31st January 2018. These loans facilitate purchase of motor vehicles for leasing to the Government of Kenya (National Police Service)"

[43] In so far as that is the purpose expressed, I would agree with counsel for the plaintiff that the rescheduling and rebooking includes the IPF loans. What is clear to this court nevertheless is the RAFII is a different facility from the IPF and this becomes apparent shortly. Critical for the next part of discussion is whether the moratorium on repayment which was undoubtedly in respect to RAFI and RAFII extended to the IPF loans.

[44] The repayment clause of the restructure letter reads;

> " The Bank at its sole discretion may recall any and/or all facilities limits approved at any time and all amounts drawn and outstanding under the Facilities an all interest and other sums payable in respect of the Facilities shall immediately become due and payable on demand. However, without prejudice to the Bank's right to make demand at any time and provided that no event of default has occurred (as outlined in this Letter), it is agreed that:
>
> (a) The Restructure Asset Finance I and II Loan Facilities shall be repaid in a bullet payment after 12 months from the date of restructure.
>
> (b) The residual loan shall be repaid in six months."
>
> (my underline)

Explicitly therefore is that it is only RAFI and RAFII loan facilitates that enjoyed the 12 months' moratorium.

[45] Yet they can be an argument for plaintiff that the demand letter of 19th February, 2019 by the bank (D Exhibit 1 page 98 & 99) demonstrates that the all other loans enjoy the 12-month respite. The opening words of that letter reads;

> "We refer to the credit facilitates granted to you by the bank and which were subsequently restricted pursuant to a facility letter dated 15th February, 2018 wherein you covenanted to repay the same in a bullet payment of 12 months from the date of the restructure and wherein the facility matures on 15th February, 2019.
>
> The moratorium has now expired we now call upon you to make immediate payment of the sum of Kshs. 520,672,119.20 due as at 15th February, 2019 made up as follows."

[46] The amounts called up were not just the Asset Finance Loans but also the corporate term loan, the Premium Finance Loan and the non-personal loan. There is no suggestion that the corporate term loan and the non-personal loan were also part of the restructure. As for the Premium Finance Loan, though part of the restructure, the repayment clause that granted the moratorium did not extend to it. Clearly then if the impression the demand letter gives is that all facilities enjoyed the moratorium, then it is an impression that is at odds with the express terms of the facility letter.

[47] If my view needs fortification, then I find it in the further amended plaint. In paragraph 17 of that pleading the plaintiff suffers no illusion that the 12 months' moratorium was only for RAFI and RAFII. The plaintiff pleads: -

> "That on 15th February 2018, the Bank taking cognizance of the delays occasioned by the National Treasury in said disbursements, and after negotiations with the Plaintiff, the Bank agreed to restructure the asset facilities in the following terms:
>
> a) AF-I, now Restructured Asset Finance-I (RAF-I), was restructured to a sanctioned limit of USD 1,754,128.00
>
> b) AF-II, now Restructured Asset Finance-II (RAF-II), as restructured to a sanctioned limit of Kshs. 792,318,207.00
>
> c) The purpose of the restructuring was to facilitate rescheduling and rebooking of all existing past due loans as at 31st January 2018 which loans had facilitated the purchase of factory equipment and motor vehicles for leasing to Athi River Mining Ltd and the Government of Kenya, National Police Service, respectively.
>
> d) That the Restructured Asset Finance I and II was to be repaid in a bullet payment after 12 months from the date of restructure.
>
> e) The residual loan was to be repaid in 6 months
>
> f) Interest on the Asset Finance Facilities as to be debited and payable monthly
>
> g) That the existing Letters of Offer was to be varied by the terms of the restructure and in the event of conflict the terms of the restructure shall apply."
>
> (my underline)

[48] Now that the Court does not doubt that the only facilities which enjoyed the moratorium were RAFI and RAFII, the next issue is easily resolved.

[49] A grievance by the borrower is that during the moratorium, the bank unlawfully seized funds paid into its account and in breach of clause 11 of the deed of assignment of receivables (D Exhibit 1 page 40 and 41) and towards repayment of the principal debt, additional interest repayment and interest on the principal debt.

[50] A debate that came to fore was the meaning to be assigned to the word "secured obligation" in the context of the moratorium. Counsel for the plaintiff submits the secured obligation arose out the finance documents and that the deed of assignment defined the finance documents as the facility letter or any letter of offer or agreement regulating the banking facilities granted to the plaintiff as may be reviewed or varied.

[51] Counsel argued that the restructure letter was comprehensive on what was to be paid and when it was meant to be paid and contends that the effect of restructure was;

(a) All past due loans were rescheduled and as at the date of restructure there was no default.

(b) There was a 12 – months moratorium on the repayment of the principal debt.

(c) The plaintiff was only expected to repay interest in the intervening period.

[52] That to demonstrate that the defendant was well aware of its contractual limitations, the bank only debited interest on the loan in respect to RAFI and not once did it make any principal debit or additional debit therein.

[53] For the bank, it was submitted that the secured obligation meant the aggregate of all sums (including principal and interest) which was not limited to payments which had become due, but extended to payments which were to fall due in future or which were contingent. Counsel for the bank submitted that the effect of the two facility letters, the vehicle and asset finance agreement and the two deeds of assignment was that:

(a) All vehicles and receivables were assigned to the Bank.

(b) The borrower was obliged to open a collection account.

(c) The defendant had a right to debit all moneys or liability whatsoever whether present or future, actual or contingent to plaintiff's accounts.

(d) The bank had the right to carry out set offs in respect of all moneys.

(e) The bank had the right to retain money's received under the assignment receivables in a suspense account and was not obliged to release such moneys for use by the plaintiff.

[54] The repayment clause in the restructure agreement has to be reproduced again so as to bring the controversy into focus: -

> " The Bank at its sole discretion may recall any and/or all facilities limits approved at any time and all amounts drawn and outstanding under the Facilities an all interest and other sums payable in respect of the Facilities shall immediately become due and payable on demand. However, without prejudice to the Bank's right to make demand at any time and provided that no event of default has occurred (as outlined in this Letter), it is agreed that:
>
> (a) The Restructure Asset Finance I and II Loan Facilities shall be repaid in a bullet payment after 12 months from the date of restructure.

(b) The residual loan shall be repaid in six months."

[55] There is however clause 2 of the Deed of Assignment of receivables dated 20th March 2014 and which continues to be held as a term of the facility letter of 23rd February 2015 and subsequent revisions. Clause 2 on covenant to pay provides that in pursuance of the agreement, the assignor (the plaintiff) covenanted to pay the bank the secured obligation on demand. The secured obligation being defined as:

> " Means the aggregate of all sums (including principal, interest, fees, commission, costs, legal costs on a full indemnity basis, charges duties, expenses, taxes or otherwise): -
>
> (i) Which are now or shall from time to time be due, owing or incurred by the Assignor to the Bank whether alone or jointly or jointly and severally with any other person and whether present, future, actual or contingent and whether as principal, surety or otherwise under or in connection with or arising out of any Finance Documents or otherwise agreed to be paid by the Assignor including any amount due and under any indemnity given to the Bank in respect of any matter whatsoever;
>
> (ii) Which the Assignor may be or become liable to pay to the Bank whether in Kenya or elsewhere on any amount or otherwise or in any manner howsoever and whether in respect of moneys advanced or paid to or for the use of the Assignor on, before or after the execution of this Assignment or in respect of cheques, bills, notes or other negotiable instruments signed, drawn, accepted or indorsed by or on behalf of the Assignor and discounted, paid or held by the Bank in the course of business or otherwise or for any other payments, credits or advances made to, or for the use or accommodation of or on behalf of the Assignor pursuant to or in respect of or under any letters of credits, trust, receipts, guarantees, indemnities or other documents or instruments established, opened, given or made by the Bank for the Assignor and held by the Bank and all moneys or liabilities whatsoever whether present or future, actual or contingent; and
>
> (iii) Which the Assignor shall incur or shall be liable to the Bank in any manner howsoever and whether as principal, surety or otherwise including (but without prejudice to the generality of the foregoing) all usual and customary commission discount and banker's charges, stamp duty, legal costs, charges and expenses howsoever incurred by the Bank in relation to the preparation, execution, completion, perfection, registration preservation, realization or enforcement of this Assignment (or any other Finance Document), such legal costs, charges and expenses to be paid on a full indemnity basis together with interest in all cases aforesaid from the due date up to the date of full payment, both before and after judgement."

[56] As to what is assigned to the bank, those were so provided in clause 3.1 to be: -

> " For the consideration aforesaid, the Assignor as beneficial owner: -
>
> Hereby Assignsand agrees to assign absolutely to the Bank free from any Security Interest, by way of first legal assignment all the Assignor's present and future rights, titles, interests and benefits in, under and arising out of: -

(i) The contracts, including all Contract Proceeds and all interests or rights which may accrue in respect thereof;

(ii) The Receivables;

(iii) All moneys (whether principal, interest or otherwise) from time to time standing to the credit of and accruing due on the Proceeds Account; and

(iv) The proceeds of any payments or other moneys which may at any time be received by or payable to the Assignor under or in connection with the Contracts, whether on account of any claim, award and judgement made or given or to be given under or in connection with the Contracts, the Receivables or otherwise."

[57] In express terms it was agreed that the deed of assignment will constitute and be a continuing security for the payment and repayment of the whole of the secured obligation. Counsel for the plaintiff suggested, and I agree, that the deed of assignment cannot be construed in isolation of the facility letter. Counsel then submits that it cannot be that the letter of offer states that "debit only that which is due and owing" and the secondary agreement being the deed of assignment allegedly authorizes the bank to debit what it wants and when it wants.

[58] On my part, I am unable to see any tension or incoherence between the deed of assignment and the letter of offer. Once the deed of assignment assigned all receivables to the bank, then any money's received by the bank under the contract between Tsusho and the borrower was assigned to the bank for as long as a debt was still outstanding to the bank from the borrower. Yet, because there was a 12 month moratorium from the date of restructure, the borrower would not be in default of repayment of the principal if no money was received by it before the end of the period. That said, if the borrower received any money from Tsusho then all that money would be applied towards repayment of the facility. It is for this reason that it is easy to see why one cannot compare the situation here with that in RAFI because no monies were coming in from Athi River before the end of the moratorium!

[59] Attention turns to the issue of a collection account under clause 15(d) of the facility letter of 23rd February, 2015. Under this clause, the borrower was required to open a collection account with the bank. It is the position of the bank that prior to 20th January 2019, the plaintiffs current account No. 7208040014 was treated as a collection account. This Court accepts the argument by the bank that the account first credits on 2nd January, 2015 was an inward payment from Tsusho. When one looks at the statement to that account (D exhibit paragraph 252 to 302), the substantial credits are without a shadow of doubt from Tsusho and some from Toyota and loan principal drawdowns. On the debit side are in respect to principal interest, addition interest or loan pay-offs following restructure.

[60] It does seem the case, as submitted by the bank and not refuted by the borrower, that it was not until 27th April, 2018, that a cheque was issued by the borrower in this account. This and other cheques that followed were (at least, a majority) dishonored because the bank took the position that all payments into the account had been assigned to it under the deed of assignment of receivables. To be deduced therefore is that from 2nd January, 2015 to 24th April 2018, a period of three (3) years, both parties had treated this account as a collection account. This is because even the plaintiff did not expect to access the money. Is it no little wonder then that on various dates between 24th April 2018 and 9th June 2018 (P exhibit 1 page 2 to 25), the plaintiff requests, as opposed to instructs, the bank for access to the funds in that account.

[61] The evidence is that a loan repayment account is 7208040077 was opened by the Defendant on 31st October, 2018. All receivables from Tsusho were henceforth credited into this account. The bank explained that it was forced to open the account when the plaintiff, in an apparent change of position, made attempts to access the funds in the current account. Although the plaintiff contends that it was unlawful for the bank to open this account, that contention falls flat on the bank's defence that it did so in exercise of its power of attorney given by Clause 9.1 of the deed of assignment of receivables.

[62] So on the issue of whether the Bank unlawfully blocked the plaintiff from accessing funds from this current account, I give an answer in the negative.

[63] On the question of unlawful charge of additional and default interest, it helps to recall the case pleaded by the plaintiff. In paragraph 21 of the amended pleadings, the plaintiff assails the bank for charging default interest yet the account had just been restructured with a new drawdown doing away with any pre-existing arrears. The pleading underscores that the bank gave the plaintiff a 12-month moratorium on the payment of the principal debt for both RAFI and RAFII so running from 31st January, 2018, and that it was only after the maturity date being 30th January, 2019, that the plaintiff was contractually expected to make a lumpsum/bullet payment on the principal debt. As I understand it therefore, the plaintiff's complaint of an unlawful charge of default interest was in respect to RAFII.

[64] Two issues emerge. First, this complaint cannot relate to the other accounts, including the Premium Finance which, as I have held earlier, did not enjoy the moratorium. Second, in its main submissions, counsel for the plaintiff argues that from the bank's own statement (D exhibit 1 pages 110 to 114) it is apparent that the bank charged additional interest. For RAFII is a statement for Account MG 181970042 (D Exhibit 1 page 113). I see three entries of additional interest charge on 28th February 2019 (Kshs. 35,638.85), on 28th February, 2019 (178,194.35) and on 13th March, 2019 (Kshs. 463,305.43). This does not further the case of the plaintiff because all these debits are made after the lapse of the moratorium, which ended on 30th January 2019. Indeed, the plaintiff's own summary of additional interest charged (P Exhibit 5 page 7) belies that any additional interest was charged during the moratorium.

[65] A further attempt to demonstrate an unlawful charge of additional interest is a table drawn in the plaintiff's supplementary submissions. This information is extracted from the statement of account No. 7208040014. There is for instance a charge of additional interest of Kshs. 62,046.80 on 13th February 2018. Against that appears a reference PDMG 141980068:117. The trouble is that the plaintiff does not connect this entry with RAFII which is the subject of grievance. How is the court to know that this additional interest was in respect of RAFII and not any of the other 4 loan accounts which were outside the moratorium? I agree with counsel for the bank that the onus of proof was on the plaintiff and it failed to discharge it in this aspect.

[66] As I conclude on this part, the plaintiff in its submissions raised an issue of the delay in effecting the moratorium by 6 months. This Court need not address this matter at all as it was not pleaded and did not fall for determination within the renowned rule in Odd Jobs v Mubia [1974] EA 476. Parties must learn to walk within the bounds of the cases they demarcate and plead.

Return Or Repossession And Refurbishment Of The Vehicles

[67] In this part of the decision, the court shall determine the following issues: -

i. What was the effect of the letter of comfort dated 27th February, 2014?

ii. Was release of the vehicles to Toyota a return or repossession of the vehicles?

iii. Was there a delay in the refurbishment of the vehicles, and if so, who was to blame?

[68] As a condition precedent to grant of AFII and persisting to RAFII, was a;

> " Letter of comfort by Toyota Kenya Limited confirming that they shall hold the vehicles in their yard upon the expiry of the lease and assist the borrower to sell them in case of need."

[69] PW2, Wang'ombe Gathondu speaking for the plaintiff, told court that the plaintiff informed Toyota of the requirement of the letter and Toyota submitted it to the bank. That when the plaintiff eventually saw the letter of comfort, it had a flaw which the plaintiff pointed out to the bank. He was not aware whether this was done in writing. The supposed flaw in the letter is apparent when it is reproduced in its entirety. It reads as follows: -

27 February 2014

Senior Manager

Credit Documentation Unit

Commercial Bank of Africa Limited

O Box 30437 – 00100

NAIROBI

Dear Sir

Re: Letter Of Comfort For The National Police Service Lease Vehicles

We refer to the vehicles specifically leased from Vehicle and Equipment Leasing Limited to Tsusho Capital Kenya Limited for the National Police Service.

The Return Conditions spelt out in the Master Lease Agreement between the National Treasury and Toyota Kenya Limited, provide for the vehicles to be returned to Toyota Kenya Limited at the end of the lease period. We as Toyota Kenya Limited will hold the vehicles on your behalf and if required assist you in their disposal, on terms to be agreed at the said end of lease.

Yours sincerely,

Peter Wanjala

GM, Business Planning

For: Toyota Kenya Limited

[70] In the letter, Toyota undertakes that upon return of the vehicles to it, it would hold them on behalf of the bank and assist the bank in their disposal, if so required. This is unlike what the facility letter stipulated would be the purport of the letter. In the facility letter, the borrower was required to obtain a letter of comfort by Toyota confirming that it (Toyota) would hold the vehicles in its yard upon the expiry of the lease and would assist the borrower in selling the vehicles, "incase of need". The assistance was not to the bank!

[71] Even if the effect of the difference of the letter of comfort and the facility letter was significant, still I would have to hold that by conduct, the plaintiff appears to have accepted the terms of the letter of comfort as couched. For one, there is no documentary evidence that, at any time before the suit, it protested that the letter of comfort was not in tandem with the expectations of the facility letter.

Further, and this is important, is that in a letter dated 5th September, 2018 the plaintiff appears to accept that the vehicles ought to be returned to Toyota. It reads;

> " Further, we are not in a position to maintain responsibility for assets to which we have denied access, and as such, your agent Toyota shall be responsible to receive the vehicles from our client Tsusho Capital and verify the return conditions as having been met."

This letter only protests denial of access to the vehicles but acknowledges that Toyota is an agent to the bank.

[72] And I must say that the letter of comfort was in sync with the vehicle and asset finance agreement and the deed of assignment of assets which assigned the vehicles to the bank, to remain the property of the bank for as long as the facility was outstanding.

[73] It is evident from the letter of comfort that the vehicles would be returned to Toyota at the end of the lease period. An issue arising is whether the return of the vehicles to Toyota was a return at the end of the lease or premature attachment/repossession.

[74] In a letter of 9th March, 2018, the bank informs the plaintiff that it had sought Toyota's enforcement of the letter of comfort. Quite clearly if the return was an act of repossession, then the bank would be in breach of contract because the instructions to enforce the letter of comfort was within the moratorium period, which ended on 30th January, 2019. However, the bank submits, and there is no contrary argument, that the letter of comfort was a contractual requirement and there was no element of repossession or seizure or attachment in the bank requiring Toyota to hold the vehicles on their return.

[75] The return of the vehicles was provided for by clause 15 of the lease agreement (P Exhibit 3 pages 1-19) between the plaintiff and Tsusho in the following terms;

> " On the termination date or earlier termination of the Rental addendum for whatever reason the lessee shall at its sale cost and expense immediately return the vehicles in good and proper working order and condition to the lessor or the lessors appointed agent in accordance with the return conditions set out in Appendix II."

Appendix II were the return conditions whose terms took precedence over the lease on the question of return.

[76] The plaintiffs make the point that the end of lease meant after the motor vehicles had been refurbished, presumably after all return conditions had been met. The plaintiff contends that the bank invoked the letter of comfort before the end of the lease period as the return conditions had not been met. Counsel poses the question "how would the return conditions be met yet Tsusho had returned the motor vehicles to Toyota at the instruction of the bank and for the purposes of disposal?"

[77] This argument has not been easy to follow if for only one reason, it seems to be pegged on "end of lease provisions" in the lease agreement between the plaintiff and Tsusho yet it has to be remembered that the vehicles were leased by Tsusho from the plaintiff for onward leasing by Tsusho to the National Police Service. The letter of comfort makes reference to the return conditions spelt out in a master lease agreement between the National Treasury and Toyota Kenya Limited and not to the return conditions of the lease between the plaintiff and Tsusho. In so far as the master lease agreement was not placed before this court, there is no way of this court assessing the veracity of the argument advanced by the plaintiff. That would be the end of the issue in regard to this aspect of the controversy as the complaint by the plaintiff would be unproven.

[78] If, however I am wrong and that the return conditions and therefore the end of lease has to be construed in the context of the lease agreement between the plaintiff and Tsusho, crucial it would be the terms upon which the bank sought to enforce the letter of comfort. On this the only document available to Court is the letter of 9th August 2018 of the bank informing the plaintiff that it had sought enforcement of the letter of comfort. In that letter the bank rehashes that the letter of comfort provided for vehicles to be returned to Toyota Kenya at the end of lease. There is no evidence that the bank invoked the letter of comfort in any other way than expressly contemplated therein.

[79] And I have mulled over whether the bank ought to have produced a copy of the instructions it gave to Toyota enforcing the terms of the letter of comfort. This is because an argument could be set up that because the instructions would be in special knowledge of the bank then section 112 of the *Evidence Act* placed a burden on the bank to prove the actual contents of those instructions. In the end however, I came to the conclusion in the circumstances of this case no such burden arose. This is because it was never pleaded by the plaintiff that the bank invoked the letter of comfort in a manner that was inconsistent with the undertaking that was contained in the letter of comfort itself. Never mind that the plaintiff had raised a separate grievance that the terms of the letter of offer were not those that the facility letter contemplated. The Court concludes that the bank did not have an obligation to produce the actual letter or instructions invoking the letter of comfort.

[80] If, as proposed by the plaintiff, the end of lease means that it is only after the motor vehicles had been refurbished in accordance with the return conditions agreed between it and Tsusho, then in terms of the letter of comfort invoked by the bank the vehicles could only be returned by Tsusho to Toyota after the return conditions had been met. And because it is common ground that the onus to meet the return conditions under that agreement lay with Tsusho, it would have to be Tsusho to ensure that those conditions are met before the vehicles were returned to Toyota unless it can be shown that the bank frustrated or blocked Tsusho from carrying out this duty. In this regard, there is the letter of 12th February 2019 (P Exhibit 1 page 35 and 36) from the plaintiff to Tsusho addressing the question of return of the leased vehicles. The letter reads: -

12th February 2019

The General Manager

Tsusho Capital Kenya Limited

BOX 4705-00506

Nairobi, Kenya

Attention: Takashi Yamaguchi

"Advance copy via email"

Dear Sir,

Re: Return Of Leased Vehicles

> Lease Agreement Dated 15Th November 2013 – Vehicle And Equipment Leasing Limited And Tsusho Capital Kenya Limited – Cba Financed Vehicles
>
> Reference is made to the above subject matter, the lease agreement dated 15th November 2013 and our various correspondences on the subject matter.
>
> Pursuant to the letter of comfort from Toyota Kenya Limited, they are required to hold the assets on behalf of Commercial Bank of Kenya hereinafter the Bank at the expiry of the

lease. The lease is however considered to have come to an end upon return of the vehicles having satisfactorily met their return conditions in accordance with the terms of the lease agreement.

In light of the above and in order to actualize the end lease procedures as per the lease contract, its essential that we carry out inspection of the assets to ascertain their conformity with the return conditions. The units that will have met their return conditions are to be handed over to Toyota whilst those that will not have met the said return conditions are to be refurbished and subsequently handed over to them. Please note that the preferred colours for the vehicles is beige.

On completion of the fabrication process, the leases of the particular assets will be considered to have been spent. Please note that all costs related to storage of the units upon compliance of the return conditions will be borne by CBA and/or their agent.

Kindly keep us updated on the refurbishment and handover of the vehicles for our records.

Thank you.

For and on behalf of Vehicle and Equipment Leasing Limited

Susan Muthoni

Legal Risk And Compliance Department

Cc: The Director

Commercial Bank Of Africa Limited

[81] Pleaded expressly by the plaintiff in paragraph 12A of its amended reply to the amended statement of defence, and supported by the evidence on record, is that Toyota started to receive the vehicles on 11th September, 2018. The plaintiff grieves that the bank stood in the way of the repainting and refurbishment of the vehicles. On 6th June, 2018, PW1 advises the bank that:

> "The vehicles are currently in police colours and you are aware you cannot drive or sell the police branded vehicle. We will be receiving more than 200 vehicles and it takes approximately 28 days to paint each vehicle, in case we don't plan in advance, it will take in two years to have the vehicles ready for secondary marker. Any delay will lead to cash flow problems to finance the facility."

[82] There is evidence that in another communication of 6th April, 2018 (D. Exhibit 1 page 28) the plaintiff requested for funds for purposes, inter alia of repainting and rebranding NPS motor vehicles. The funds sought would be part of receivables assigned to the bank and as already held by this court, the bank was under no obligation to allow the plaintiff to access the funds. Again it is unclear to this Court why the plaintiff was seeking these funds when it was Tsusho which bore the responsibility of refurbishing the vehicles, an issue the court shall discuss in greater detail presently.

[83] Building up on its grievance against the bank, counsel for the plaintiff submits that, in a meeting of 28th August, 2018, parties held a meeting where it was resolved that the plaintiff would undertake the inspection of the units and be involved in the enforcement of the return conditions. It is said that

despite this resolution, the plaintiff was denied access to the vehicles. In a letter of 5th September, 2018, the plaintiff complains that:

> " Further, we are not in a position to maintain responsibility for assess to which we have denied access, and as such, your agent shall be responsible to receive the vehicles from our client Tsusho Capital and verify the return conditions as having been met."

This letter would be six days before Toyota started to receive the first vehicles and it is not possible that the plaintiff had been denied access by Toyota at least as of this date.

[84] In the letter of 12TH February 2018 (P Exhibit 1 pages 35 & 36) the plaintiff writes to Tsusho requesting it to meet the return conditions. Tsusho responds on 14th February, 2019 (P Exhibit 1 page 37) and states on this issue;

> " For the refurbishment and release of vehicles, please refer the matter to your financier."

On 20th February, 2019 (P Exhibit 1 page 69) the plaintiff's advocates write to the bank's advocates demanding that the return conditions be met. There seems to be no response to this letter.

[85] On 21st February, 2019 (P Exhibit 1 page 74) Tsusho writes to the plaintiff as follows regarding the issue of refurbishment;

> " On the matter of refurbishment, we find it improper for you to claim that we have deliberately left out the refurbishment of the vehicles financed by CBA and relating the matter with High Court Civil Case 390 of 290 which we are not party to. We want to categorically state that we are fully aware of our obligations under The Lease as demonstrated by our handling of the vehicles from the other financiers."

[86] On 6th March, 2019 (P Exhibit 1 page 83) the bank writes to Tsusho;

> " We wish to clarify that he representatives of Vehicles and Equipment Leasing Limited should be allowed access to motor vehicles that have been returned from the National Police Service Contract (NPS 1) and that you should work with the representatives of vehicles and Equipment Leasing Limited towards the completion of your contractual obligation for the refurbishment of the motor vehicles. We wish the refurbishment to be completed as soon as possible so that the vehicles can be disposed of."

[87] Do these set of circumstances make the bank culpable for any delay in the refurbishment of the vehicles?

[88] At the outset, it is clear that the obligation to refurbish the vehicles and to meet the return conditions regarding its lease with the plaintiff lay squarely on Tsusho. The provisions of the lease agreement (P Exhibit 3 pages 1 – 19), firmly places that responsibility on Tsusho. Clause 7 (c) requires Tsusho to bear the cost of removing its logo and any distinctive marks on the vehicles at the end of the term. Clause 15 requires it, on termination of the lease, at its sole cost and expense to immediately return the vehicles in good and proper working order and conditions in accordance with the return conditions.

[89] Tsusho itself was well aware of this responsibility. On 21st February, 2019 (P. Exhibit 1 page 74), it says of refurbishment,

> " We want to categorically state that we are fully aware of our obligations under the lease as demonstrated our handling of the vehicles from the other financiers."

[90] As correctly submitted by the bank, PW2, on behalf of the plaintiff, acknowledged that the responsibility to carry out refurbishment and repainting of vehicles was on Tsusho. Further admission comes from the plaintiff's own advocates, no less, in their letter of 20th February, 2019 (Plaintiff Exhibit 69) in which they state;

> " Do note that the cost to refurbish the motor vehicles should not and cannot be transferred to the prospective bidders/purchaser or VAELL as this cost was one that was to be catered by Tsusho."

[91] An observation can now be made. It is unclear why the plaintiff would at one time be seeking release of some of the assigned funds for purposes of carrying out refurbishment which was a responsibility of Tsusho.

[92] Moving on, does the evidence suggest that the bank instructed Toyota or Tsusho to refuse access to the plaintiff. Whilst it is true that at some point Tsusho referred the plaintiff to the bank on the issue of refurbishment and release of the vehicles, it is not clear why it did so because the author of the letter of 14th February 2019 was not called to explain himself. The plaintiff asserts the letter to be the evidence that the bank was responsible for refusing it access and it was upon it to prove as much. The Court was not told why the author of that letter could be called by the plaintiff.

[93] The letter of 6th March, 2019 by the bank does not help matters for the plaintiff because I agree with counsel for the bank that it was merely a clarification to Tsusho that the plaintiff should be allowed access and that Tsusho should work with the representative of the plaintiff towards completion of the contractual obligation for refurbishment. It is not an admission by the bank that it was responsible for any denial of access to the plaintiff.

[94] So on the issue whether the bank was culpable for any delay in the refurbishment of the vehicles, the answer is in the negative.

The Disposal Process

[95] The highlights of the disposal process can be set out. Apparently unhappy about the pace of the disposal of the motor vehicles, the plaintiff moved Court in a motion of 15th October, 2018 for a mandatory injunction that the defendant sell the vehicles. As an aside it needs to be noted that this application was made just about one month after the National Police Service had started to receive the vehicles and as it played out at trial when the plaintiff was well aware that the vehicles had not been refurbished by Tsusho and the sales could not happen immediately. And so the plaintiff's assertion at the interlocutory session that, "if the bank exercised its duty of care, it would have disposed of the repossessed assets whole current value is significant to settle the loan obligation the plaintiff has with the bank" may have been less than candid, at least at the date the assertion was made on 15th October 2018.

[96] Anyhow, in a ruling dated 25th January, 2019, the court ordered that the bank do dispose of all the 291 motor vehicles held by their employees, agents and servants at market value for purposes of crediting the funds to the plaintiff's loan account.

97. In reaching this decision the court had reasoned: -

> "21. Yet the Condition precedent d(ab) required V and E Leasing to execute a Deed of Assignment of all the Rights under the Motor Vehicles to be financed to the Bank. While neither of the Parties told Court whether that Deed of Assignment was taken, Counsel for V and E Leasing, while arguing the Motion, informed Court that the Vehicles were registered in the name of the Bank. Presumably in the joint names of V and E Leasing and the Bank as required by Condition precedent d(al). It also being conceded that there is an outstanding debt, the Bank still has an interest in the Vehicles and it may not be untoward that Toyota Kenya holds the Vehicles to the Order of the Bank. Indeed prayer 9 of the Motion which seeks an Order to compel the Bank to sell the Vehicles pending the disposal of the main suit can be construed as a tacit acknowledgement by V and E Leasing that the Bank has Rights over the Vehicles. Yet again V and E Leasing have an interest over them as they are the owners.
>
> 22. The issue, therefore, need not be vexing because Counsel for the Bank acknowledged that the Vehicles can be sold in an orderly manner as agreed by the parties. It would benefit both sides if this was done sooner rather than later. For that reason this Court shall grant Prayer 9."

98. Again unhappy with the pace of things, the plaintiff moved court through an application of 30th July, 2019 to compel the bank to implement the order of 25th January, 2019. In this second application, the plaintiff assailed the bank as being indolent in the sale process and in an affidavit sworn by Pauline Wambui for the plaintiff, she stated that the bank should be compelled to sell the vehicles on or before 31st August, 2019. In response to this application, DW1 who sworn an affidavit on 5th August, 2019 stated;

> " The refurbishment of the vehicles is now complete but there are still some vehicles for which the registration has not yet been changed from Government to private which has to be come before the vehicles can be sold. It is hoped to complete process this week."
>
> 46. The sale process which the defendant is about to start is;
>
> (a) A public advert through a daily newspaper giving interested purchases 14 days to inspect the vehicles and submit written bids for the vehicles.
>
> (b) Opening and evaluation of the bids and confirmation of the successful interested purchases will be carried out within 3 days of expiry of the 14-day period.
>
> (c) The successful interested purchases will be required to make full payment and complete the purchase within 14 days of notification of the successful bid."

[99] It would have to be in the set circumstances set out in the affidavit of DW1 that the parties entered a consent dated 6th August 2019 for the defendant to sell the vehicles within 45 days.

[100] What did the defendant do to comply with the order?

[101] Quipbank Limited is an asset bank company which acclaims expertise in the valuation and disposal of motor vehicles. PW2 told court that Quipbank is the disposal arm of the plaintiff and the two have common shareholding. The plaintiff invited Quipbank to work with the bank in the disposal of the motor vehicles.

[102] PW2's testimony was that it was only in March, 2019, after the court ruling 25th January 2019, that he and his team were able to gain access to the vehicles and undertook to inspect the 291 motor vehicles. It was on this inspection that it became apparent all motor vehicles had been neglected, dusty and with dead engines; the motor vehicles still had National Police Service colors and Government number plates.

[103] Quipbank took the position that the bank had forestalled the refurbishment process but this court has already discussed this aspect and exonerated the bank.

[104] When the bank published an advertisement on 13th February, 2019 for the disposal of the vehicles, the plaintiff chose to do a counter advertisement on 15th February, 2019. The plaintiff defends this counter advertisement as advise to the public of the true value of the motor vehicles. Subsequently on 20th February, 2019, the plaintiff forwarded to the bank valuations of the motor vehicles.

[105] Although the plaintiff's position had been that Quipbank be appointed as an agent for the disposal of the motor vehicles, the bank on 8th April, 2019 (P Exhibit 1 page 98) wrote to the plaintiff that it was not willing to make the appointment. Quipbank boasts that notwithstanding the stance of the bank, it (Quipbank) sold 6 vehicles at market value and as per the valuation done by the bank's valuers.

[106] The plaintiffs case is that even after the Court order of 6th August 2019, the bank reverted to its indolent ways and it and Quipbank, being frustrated by the bank in the disposal chose to return whatever motor vehicles it had to the bank and to pull out of the disposal process.

[107] The bank, perhaps not unexpectedly, would have its own version of events. The bank states that it had throughout intimated that had no objection to the plaintiff using Quipbank to assist in the sale of the vehicles but it was unwilling to appoint Quipbank as its agent or to pay it commission. That in a letter of 13th August 2019 (D Exhibit 2 page 213) QuipBank acknowledges that 36 vehicles were released to it as a selling agent for the plaintiff but that through a letter of 24th June, 2019, (P Exhibit 1 pages 105 to 107), the plaintiff repudiated its role in the sale of the vehicles. That however, in entering the consent of 6th August, 2019, the bank believed that Quipbank would continue to sell the vehicles.

[108] On 23rd August, 2019 (D Exhibit 2 page 220), the plaintiff informed the defendant that it had received various requests from its clients for lease and rental business for the Dutro 300 Truck and Land Cruisers. They wanted those released to it and that bank proceeds with disposal of HINO GT 500 trucks "which should be adequate to cover all our outstanding obligations with yourselves." The bank thought this to be unreasonable in the absence of any market for the HINO 500 trucks.

[109] That on 27th August, 2019 (D Exhibit 2 page 221) Quipbank made a bid to purchase 60 vehicles. The bank accepted the bid (D Exhibit 2 page 224) but Quipbank has so far not completed the purchase.

[110] Overtime, the bank made progress, albeit slow, in the sale of the vehicles. The sales were made through its business team and agents namely; Leaky Auctioneers, Hilda Kaguju, Karen Automart, George Muriithi, Toyota Kenya Ltd. and Smart Auto Ltd. A schedule prepared by the defendant and filed in a supplementary bundle of 26th October, 2020 showed that 270 out of the 291 vehicles had been sold, 9 were unsold and 12 were either written off or under repair as a result of accidents. In his written statement, Mr. Ogola stated the prices which the bank had sought were considered too high

by potential purchaser because the vehicles were 5 years old; concerns about mechanical soundness of the vehicles after lengthy use by the police and flooding of the market of similar vehicles.

[111] In its closing arguments, the plaintiff submit that the defendant was Indolent in the completion of the sales and it was not until 4th October, 2019, said to be 1 year 5 months after attachment that the bank deemed it fit to appoint a sales agent, to wit Leakey Auctioneers to dispose the motor vehicles. Further that the bank should not blame Quipbank for its inability to sell the vehicles expeditiously because the primary obligation for disposal was on the bank. That as at 12th July, 2018, only 36 vehicles out of 291 had been released to Quipbank and Quipbank was able to sell 6 vehicles at market valued in less than a month in the absence of the bank's support and in the presence of extreme hindrance from the bank.

[112] For the bank, it was submitted that the defendant tried to involve the plaintiff in the sale process until the plaintiff repudiated any involvement and further that the plaintiff obstructed and frustrated the sale process by its counter advertisements of 15th and 18th February, 2019.

[113] This Court examines the period after the consent because circumstances in regard to the disposal on the date prior to the consent has been discussed. It is true that by this time the plaintiff had through the letter of 24th June, 2019 repudiated its role in assisting in the disposal of the vehicles. That said, Quipbank, an agent of the plaintiff, still held on to some vehicles which had been released to it for sale. On 13th August, 2019, (D Exhibit 2 page 213), however, 7 days after the consent, Quipbank writes to the bank returning 30 units citing the following challenges on disposal.

(a) Difficulty in accessing the assets for viewing as clients wanted specific numbers which were held at KVM.

(b) Clients' hesitation to purchase vehicles without plates.

(c) Lack of a clear structure on commission on disposal.

(d) Lack of support.

(e) Lack of facilitation in marketing to create visibility.

[151] It has to be said however that the bank could not be responsible for some of the challenges cited. As Quipbank was the agent of the plaintiff and not the bank, then it is the plaintiff and not the bank which would have paid any commission and provide support and facilitation. As to the issue of the number plates, this has to do with the return conditions for which Tsusho was responsible and not the bank. Regarding access to the assets, the vehicles has been assigned to the bank and the bank would have discretion as to where the vehicles would be stored. Quipbank must have known of this when it offered to assist in the sales.

[152] PW2 explained that the plaintiff instructed Quipbank to return the vehicles after the bank committed to dispose of all the vehicles through the consent. Yet I have to say that having offered to assist in selling of these vehicles, it did not need the bank to commit to dispose of them. It is difficult to follow the argument.

[153] Let me turn to the reasons proffered by the plaintiff as to why it was unable to complete the purchase of 60 vehicles. PW2 states that it had sought a facility from the bank but it could not meet the terms of the bank. As to why it could only resort to the defendant bank and not others, the witness told court that Quipbank was in financial distress and that if it approached other financiers who had no visibility of the source of revenue, then the request would not be accepted. The plaintiff does not make the case that the bank had an obligation to grant the facility and it is difficult to see how the bank is to blame

for the failed transaction. In any event the offer and acceptance of the bid was not conditional upon the bank financing the transaction.

[154] Lastly, the defendant states that the sale of the vehicles was not an easy sale. Amongst the reasons given why it was a hard sale was due to over flooding of the market in July, 2019, attributed to the release of similar vehicles into the market, partly because the 2nd phase of the Government's vehicle leasing program had term had come to an end. That this was the position was conceded by no less the plaintiff's own witness (PW2) who made reference to an overlap in the market of vehicles from the 2018 leases and those from the 2019 leases.

[155] All said and done, the plaintiff has been unable to proof indolence or lethargy in the manner in which the bank disposed of the vehicles. In that event the bank was not guilty of breach of a duty it owed to the plaintiff.

Undervaluation

[156] In a witness statement of 26th October, 2020, DW1 gives an update of the sales of vehicles as at 16th October, 2020. As at that date 270 units out of 291 had been sold, 12 were damaged vehicles (either written off or under repair) and while 9 units were unsold. The plaintiff complains that the vehicles have been sold at an undervalue. The plaintiff states that as at the date the parties entered the consent, on 6th August, 2019, the bank was willing to dispose of the vehicles on the basis of the valuation reports issued by Regent and AA valuers. Those reports were produced by the plaintiff (P Exhibit 3 pages 20 to 104) without calling the makers.

[157] For the bank, it understood its duty in selling the vehicles as being that set out in the famous decision of C*uckmere Brick Co. Ltd & Anor v Mutual Finance Ltd* [1971] 2 ALL ER 633.

[158] This Court is told that Cuckmere was cited with approval by the *Court of Appeal in Kenya Commercial Bank Ltd v Osebe [1982] KLR 296* and *J. K. Industries vs Kenya Commercial Bank Ltd & Another* [1987] eKLR.

[159] The issues are;

(i) Was there a promise by the bank to dispose the vehicles on the basis of valuations by Regent and AA?

(ii) If so, did the bank breach the promise?

(iii) If the answer to (i) is in the negative, did the bank sell the vehicles at the market value at the time they were sold.

[160] Counsel for the plaintiff submits that the bank had through its advocates conceded that the motor vehicles would be disposed of on values in the valuation by Regent Valuers. This proposition is drawn from the letter of Mr. Fraser S. C. dated 30th October, 2018 (D Exhibit 1 page 80) in which counsel partly says-:

> " As confirmed by our client's emails of the 24th October, the vehicles that have been returned are in the process of being valued by Regent Valuers. Once the valuations are available our client will support your clients acting in the sale of the vehicles as long as the price being obtained is reasonable in line with the valuations."

[161] Time passed and there were developments between that date and on 12th February, 2019 when Mr. Fraser wrote another letter which is referred to by counsel for the plaintiff (D Exhibit 1 page 92). A

significant development is that this Court had made an order requiring the bank to dispose of 291 motor vehicles at market value for the purpose of crediting the funds in to the plaintiff's loan account. Mr. Fraser says, amongst other things,

> " If your client has any valuations for the vehicles please immediately make these available."

[162] Valuations undertaken by Regent and AA were subsequently sent by counsel for plaintiff to counsel for the defendant on 20th February, 2019 (D Exhibit page 102 & 103) and 25th February, 2019 (D Exhibit page 109). In both letters counsel for the plaintiff emphasizes that the valuations were to guide the bank in the disposal process.

[163] What position does the bank hold on these valuations? Mr. Ogola's evidence was that the valuations were not authorized by the bank or requested by the bank and it does not accept that these valuations represent the market value of the vehicles at the time and in the market conditions in which the vehicles were to be sold.

[164] In its submissions, the bank argues that the position it took and still takes, is that in the letter by its advocates of 12th July,2019(P Exhibit 1 pages 113– 115) that: -

> " We wish to emphasize to you that the order relates to market value which is the price that can be obtained in the market."

[165] It does seem to this Court that the Bank through its advocate's letter of 30th October, 2018, took the position that the sale of the vehicles had to proceed on the basis that the price being obtained is reasonably in line with the valuations by Regent, so that even if the bank now insists that it did not authorize the valuations, they had acknowledged the importance of those valuations in the letter of 30th October, 2018. The valuations were to be a guide to the prices which the vehicles would be sold, being those "in line with the valuations".

[166] Whether the bank then reneged on this position has to be taken in the context of what happened after the valuations were undertaken and passed on to the bank. The plaintiff's counsel sent the last set of valuations to the bank's counsel through a letter of 25th February, 2019. I have taken time to study the various valuation reports produced by the plaintiff herein (P Exhibit 3 pages 20 – 104). In some reports, the date of inspection is not available, but others show that inspection was done on various dates in October, 2018, November, 2018 and July, 2019. Logically, those forwarded to the defendant's counsel on 25th February 2019 could only be for the inspections done before this date. I was unable to trace evidence of when those of July 2019 were sent to the bank, if sent at all.

[167] Critical nevertheless is that as at 25th February, 2019, the vehicles may not have been a position to be sold as refurbishment and renumbering had not been completed and this may well not have been complete until just before the date of the consent of 6th August 2019.

[168] In that consent, the parties agreed that the bank was to sell the motor vehicles within 45 days. Counsel for the plaintiff submits;

> " At this stage my Lord, the bank was willing to dispose the vehicles on the basis of the valuation reports issued by Regent and AA Valuers."

[169] In his testimony to Court DW2 explained why the bank was not able to sell the vehicles within 45 days of the consent. One reason he proffered was that there was a large number of vehicles formerly leased to the Kenya Government/Police that had come into the market since 2018. On 19th November, 2019 (D

Exhibit 2 page 231) Leakey's Auctioneers who had been appointed by the bank to assist in the disposal process wrote to the bank admitting that the pace of disposal was slower than expected. It attributes that slow pace to inter alia: -

> " In the recent times, there is a very high supply of similar models in the market, therefore reducing the demand."

[170] Commenting on this aspect, PW2 for the plaintiff, states in re-examination that the issue of flooding was something that could have been avoided by all players in the disposal process. The witness explained the issue of flooding further. He explained that phase 1 of the vehicle leasing commenced in 2014 and ended in the year 2018. A second phase commenced a year later, in 2015, and would terminate in 2019. The evidence of the witness was that if the plaintiff had been allowed to sell in 2018 then the sale of the vehicles would not overlap with those coming out of the market in 2019.

[171] Yet the witness makes a further contention that even if there was flooding of the market, the prices of the vehicles would hold given their nature and attractive features. This contention by the witness will turn out to be important when the Court attempts to answer the question whether the bank sold the vehicles at an undervalue. For now, it is enough to observe that at the time the vehicles were valued in 2018, the market had not suffered the over flooding that was present in 2019. A second matter, emerging from the evidence, is that the plaintiff has not been able to demonstrate that it was the bank not Tsusho who had failed to meet the return conditions to enable the vehicles to be sold, bearing in mind that the obligation to meet the return conditions was with Tsusho.

[172] The plaintiff produced a table showing the differences in valuations undertaken by its valuers and prices at which the units were sold by the bank when the sales eventually happened (See P Exhibit 4.1 and P Exhibit 5.3). The table shows a difference in value of Kshs. 414,500,000/= The plaintiff's counsel submitted that the loss it suffered as a result of undervalue is Kshs. 414,500,000/=.

[173] It is common ground that the duty of the bank in selling the vehicles was that stated in the English decision of *Cuckmere Brick Co.* (Supra) to be;

> " I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

[174] This is the position and has been endorsed by the Court of Appeal in *Kenya Commercial Bank Ltd* (supra) and *J. K. Industries* (supra).

[175] For the plaintiff to prevail on this limb of claim it needed to establish that the bank sold the vehicles at below the market value. The plaintiff sought to rely in the valuation reports prepared by Regent and AA. The bank thought that to be of minimum, if any, probative value as the makers did not give evidence and sought reliance in the decision of *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR. There, the Court of Appeal endorsed a proposition from the decision in *Jimnah Munene Macharia v John Kamau Erera C.A 218/1998* (ur) that failure to call a loss assessor to produce a claim report which was admitted in evidence rendered such report of minimal, if any, probative value. This is what the Court said: -

> " In the first place the evidence of the assessors was not properly on record as the maker of the document was not called and therefore the figure was of no validity. Even if it had been

properly on record, it showed that the insured produced all available and relevant documents in support of the claim and the assessors confirmed that liability for the insurer validly engaged. The difference in the figures was not because the stock and equipment were not stolen but because of their valuation after depreciation. At all events there was nothing in the evidence of the claims manager to show that the difference in the figures stated at the police station, the insurance claim form or in the plaint was wilful and fraudulent exaggeration. For our part we consider it, at best, no more than a variance of estimated values of an otherwise honest claim. Indeed, as we will show presently, it was worse than that. We find no evidence of fraud, intentional or otherwise."

[176] There is a second and somewhat related issue. The valuations were admitted and produced in trial by consent of the parties. Yet the law seems to be that unless the parties expressly admit the contents of a document produced by consent, the mere production of a document by consent is not in itself proof of the contents of the documents. In this regard the Court of Appeal in *Prafulla Enterprises Limited v Norlake Investments Limited & Another* [2014] eKLR stated;

> "In our view, the fact that documents are produced by consent of the parties to a suit is not in itself proof of the contents of these documents. It only means that parties agree that those are the documents the contents of which are to be canvassed, or are in controversy but as to the proof of the same contents, witnesses are required to be produced and to be examined and cross-examined on the same contents unless the parties categorically admit the contents."

[177] In assessing what probative value to give, if any, to the reports, it is not without significance that although they may not have been procured and prepared at the behest of the bank, the bank had on 30th October 2018 (D Exhibit 1 pages 80) agreed that the sales would proceed at prices that were reasonably in line with the valuations. I would then take it that, as at the time the reports were forwarded to the bank, the bank did not challenge the valuations, then the bank accepted the valuations as reflecting the market value as at the date of the valuations.

[178] Yet the sales did not proceed in 2018 or early 2019 in circumstances in which, I have found, the bank was blameless. The common evidence is that in 2019 there was an important change in the market, the flooding of vehicles from phase 2 of the vehicle leasing programme. While the plaintiff maintained that this would not have an impact on the market prices, the defendant was of a contrary view.

[179] It is, I hold, in an occasion like this where the makers of the documents should have been called to shed light of the market prices in the changed environment. It is those experts who would be able to, for instance, assert that market prices reflected in their valuations of 2018 still held to mid-2019 and beyond notwithstanding the glut in the market.

[180] This has to be one instance where the party who has chosen not to call its expert witness must contend with a verdict that the expert's report, though produced by consent, is of little probative value in resolving the true matter in controversy. The plaintiff has to rue with the outcome that it has failed to prove that the vehicles were sold at an undervalue.

[181] And let me add this. The evidence of the bank was that in negotiating the sales it was guided by the advice on market conditions and values given by Mr. Nyoike of Universal Assessors and Valuers. His evidence came under heavy fire from counsel for the plaintiff. His qualifications were questioned. He was assailed for using desktop values instead of values arrived at on actual and individual inspection of vehicles. The Court restrains itself from commenting on the qualification or competence of Mr. Nyoike or on the credibility of his opinion. This is because as it is the plaintiff who asserted that the

vehicles were sold at undervalue and having failed to provide proof thereof it was needless for the defendant to defend the sale price it had achieved.

Of Kra Issues

[182] The plaintiff complains that as it could not access its bank account, it could not settle the VAT obligations that would be declared to KRA by Tsusho Capital as paid to the plaintiff leading to a demand of tax of Kshs. 262,605,158.19. This is without merit, because as held earlier, the proceeds from Tsusho has been assigned to the bank for as long as the plaintiff was indebted to the bank.

[183] From the evidence of PW1, the payment received from Tsusho did not segregate rentals and VAT. The obligation to pay VAT fell on the plaintiff and it is not demonstrated that the plaintiff advised the bank of the Tax element in the receivables or sought that it be paid from the assigned receivables.

CRB

[184] The complaint on CRB must similarly fail.

[185] Regulation 18(1) and (2) of the Credit Research Bureau regulations 2013 reads:

> " 18.
>
> (1) Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer's non-performing loan and any other negative information and may include details specified in sub-regulation (4).
>
> (2) An institution licensed under the Banking Act shall in addition to exchanging the information required under sub-regulation (1), exchange positive information of their customers with Bureaus."

[186] The bank is under a statutory obligation to report. And as the evidence has revealed, it cannot be said that the information shared by the bank to CRB on the plaintiff was inaccurate as there was default by the plaintiff after the end of the repayment holiday.

Finally

[187] Having examined the evidence before me and the relevant law, I come to a conclusion that the plaintiff has failed to prove its case on the threshold set by law and its entire claim must fail. The plaintiff's case is dismissed with costs to the defendant.

DATED AND SIGNED THIS 26TH DAY OF APRIL 2022.

F. TUIYOTT

JUDGE

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Muraguri for Plaintiff.

Mr. Fraser (SC) for Defendant.

Court Assistant: - Nixon