ASL Credit Limited v Joyce Wangui Wachira T/A Paddy Distributors & another (Civil Case E129 of 2020) [2022] KEHC 10483 (KLR) (Civ) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL CASE E129 OF 2020

DAS MAJANJA, J

JULY 28, 2022

BETWEEN

ASL CREDIT LIMITED ..... PLAINTIFF

AND

JOYCE WANGUI WACHIRA T/A PADDY DISTRIBUTORS .... 1ST DEFENDANT

PATRICK NTHIGA MVUNGU ..... 2ND DEFENDANT

RULING

1. The Plaintiff's case as set out in the Plaint dated 9th April 2020 is that it entered into several Hire Purchase Agreements with the 1st Defendant for purchase of motor vehicles on diverse dates between the years 2015 -2016 for a total sum of KES 660, 359,941.00. The 2nd Defendant executed a personal guarantee and indemnity in favour of the Plaintiff to secure the 1st Defendant's obligations.

2. The 1st Defendant defaulted in loan repayments and as a result the Plaintiff issued a Notice of Default to the Defendants demanding payment of the outstanding sum. The Defendants failed to pay prompting the Plaintiff to file this suit where it claims the outstanding amount of KES 153,045,549.00 and Late Payment Charges on the principal sum at 5% per month from 1st April 2020 until payment in full.

3. The Defendants entered appearance and filed their Statement of Defence dated 1st July 2020 denying the Plaintiff's claim and praying that the suit be dismissed. They state that 1st Defendant has repaid a substantial part of the debt and that the outstanding amount ought to be settled by the sale of the repossessed motor vehicles hence the claim is unsubstantiated, frivolous and ought to be dismissed. The Defendants further aver that the Plaintiff breached the agreements by disposing of the motor vehicles at a throw away price and failing to account for the proceeds of sale which would have settled the entire debt.

4. The Defendants deny that it agreed to the interest rate claimed by the Plaintiff. They state that the interest rates claimed by the Plaintiff are unconscionably high, unjustified and illegal.

5. The Plaintiff has filed the Notice of Motion dated 19th October 2020 seeking to strike out the Statement of Defence and for judgment on admission as prayed in the plaint. The application is made, inter alia, under Order 2 Rule 15(1)(a), (b), (c) and (d) and Order 13 rule 2 of the *Civil Procedure Rules.* It is supported by affidavit of Daniel Wandera, the Plaintiff's Head of Legal, sworn on 19th October 2020. It is opposed by the replying affidavit sworn by the 2nd Defendant on 15th December 2020.

6. The Plaintiff's case is that when 1st Defendant defaulted in her repayment obligations, she requested for restructuring of the outstanding amount. That by a letter dated 7th November 2018, the 1st Defendant unequivocally acknowledged and admitted being indebted to the Plaintiff to the tune of KES 198,299,430.00 as at 31st October 2018 and took full responsibility to liquidate the same.

7. The Plaintiff avers that despite acknowledging her indebtedness and undertaking to settle the amount due and owing, the 1st Defendant issued cheques to the Plaintiff which were dishonoured on presentation. It states that this amounts to an admission of the debt. As regards the claim on interest rate applied on the principal amount, the Plaintiff contends that it is provided for in the Hire Purchase Agreements which the Defendants duly executed.

8. The Plaintiff therefore submits that the Statement of Defence does not disclose any reasonable defence, is a sham, without substance and groundless and does not raise any triable issues and it ought to be struck out.

9. In the response to the application, the Defendants contend that the application is misconceived as the Statement of Defence raises serious triable issues which can only be effectively and conclusively determined after a full trial when the parties' evidence would be tested by way of cross-examination.

10. The Defendants state that despite the negative impact of COVID 19 pandemic they made various payments between March and November 2020. They further state that they are ready and willing to pay any outstanding balance that may be agreed upon by the parties and/or determined by this court after hearing all parties. The Defendants urged the court to dismiss the application and give them a chance to be heard.

11. It is not in dispute that the parties herein entered into Hire Purchase Agreements. The Defendants also admit that they defaulted in the repayments and that the Plaintiff proceeded and repossessed the motor vehicles subject of the Hire Purchase Agreements. What appears to be in dispute is the interest rates charged by the Plaintiff. On this issue I agree with the Plaintiff that the rate of interest was part of the terms agreed upon the Hire Purchase Agreement which was within the Defendants knowledge. It is trite law that the court cannot re-write the parties contract unless the party seeking to avoid the agreement alleges and proves fraud, undue influence, coercion or any ground that would be available to avoid a contract. As the Court of Appeal stated in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* NBI CA Civil Appeal No. 35 of 1999 [2001] eKLR, "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge." In this case, the Defendants have not pleaded any grounds that would entitled them to avoid a valid agreement nor provided evidence in their deposition to support such a claim.

12. Order 13(2) of the *Civil Procedure Rules* deals with judgment on admission and provides as follows:

> 13(2) Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

13. The Plaintiff seeks judgment on admission on the basis of the 1st Defendant's letter dated 7th November 2018 and by virtue of the dishonoured cheques. The threshold for judgment on admission is that the admissions have to be plain and obvious. This was elaborated by the Court of Appeal in *Choitram v Nazari* [1984] KLR 327 as follows:

> For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. [Emphasis mine]

14. Looking at the letter dated 7th November 2018, the Defendants start by giving the Plaintiff a proposal while referring to the overdue account of KES 198,299,430.00 which upon calculation had reduced to KES 115,299,430.00. They further went on to request the late penalty charges to continue at 2% per month instead of 5% per month as per the contract. At paragraph 3, they state, 'We fully acknowledge the outstanding debt of KES 198,299,430.00 as at end of October 2018 and take full responsibility to liquidate the same at the soonest by liquidation of further securities together with interest till date of settlement.' The letter goes further to give proposals and requests for indulgence in respect to the amount owing.

15. I therefore find and hold that this letter constitutes an outright admission of debt, it is plain and obvious that the Defendants owe the Plaintiff. In the letter, the Defendants not only acknowledge the outstanding debt and the contractual interest, they also make commitment to settle the debt.

16. The Plaintiff has also produced a bundle dishonoured cheques whose reason for return was either 'insufficient funds' or 'payment stopped by the drawer'. Our courts have held that dishonoured cheques amount to admission of debt. In *Equatorial Commercial Bank v Wilfred Nyasimi Oroko* Ml Hccc No. 224 of 2011 [2015] eKLR the court held that, "A dishonoured cheque which was issued to the Applicant on a debt which is subject of the suit is also an admission of claim in the sense of the face of the above evidence, the court concludes that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques."

17. Though the general position is that dishonoured cheques amount to admission of debt, the court does not enter judgment automatically. According to the Court of Appeal for Eastern Africa when dealing with section 30 of the *Bills of Exchange Act* (Tanzania) which is in pari materia with our section 30(2)

of the *Bills of Exchange Act* (Chapter 27 of the Laws of Kenya) in the case of *Hassanah Issa & Co v Jeraj Produce Store* [1967] EA 55 it held that:

> [I]n this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled. [Emphasis mine]

18. The onus is thus on the Defendants to give reasons why judgment should not be entered on the dishonoured cheques. The Defendants contend that their mode of operation was to issue postdated cheques and thereafter agree with the Plaintiff on the time each cheque would be banked. The Defendants claim that during the meeting held on 3rd July 2018, it was agreed that the Defendants would surrender the financed motor vehicles for sale to recover the outstanding balance and the postdated cheques would not be banked. The Defendants state that it was on the basis of this agreement that they stopped the cheques from being paid but that the Plaintiff later banked them and used them in their application. In my view, this position does not ameliorate the Defendants' position as it merely confirms their indebtedness. The dishonoured cheques are evidence of admission of debt.

19. In conclusion, I find and hold that the admission of the debt based on the correspondence supported by the dishonoured cheques is clear, plain and obvious. There is no need to have a trial on matters which are admitted and not in dispute.

20. Turning to the issue of striking out the Statement of Defence under Order 2 Rule 15 of the *Civil Procedure Rules*, the general principle is that court should exercise great circumspection in striking out a pleading and that a pleading should not be struck out if it can be saved by an amendment (see *D.T. Dobie & Company (K) Ltd v Muchina* [1982] KLR 1). Looking at the Statement of Defence, it contains mere denials and since the Defendants have already admitted the debt, filing it was only a means to delay the court process.

21. For the reasons I have set out, I allow the application dated 19th October 2020 on the following terms:

    a. Judgment be and is hereby entered against the Defendants jointly and severally for the sum of KES. 153,045,549.00.

    b. The sum in (a) shall accrue Late Payment Charges at 5% per month from 1st April 2020 until payment in full.

    c. The Defendants shall pay the costs of the application and the suit.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

D. CHEPKWONY

JUDGE

Court of Assistant: Mr M. Onyango

CM Advocates LLP for the Plaintiff.

Nzavi and Company Advocates for the Defendants.