



CFC Stanbic Bank Limited v Blackstone Mining Group Limited & 2 others (Civil Suit 332 of 2015) [2022] KEHC 12770 (KLR) (Civ) (26 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12770 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT 332 OF 2015
A MSHILA, J
AUGUST 26, 2022

BETWEEN

CFC STANBIC BANK LIMITED PLAINTIFF

AND

BLACKSTONE MINING GROUP LIMITED 1ST DEFENDANT

WILFRED KASHONGA SARONI 2ND DEFENDANT

CAROLINE WANJIKU KAGO 3RD DEFENDANT

JUDGMENT

1. The plaintiff filed a Plaint dated July 8, 2015 and averred that through a hire purchase agreement (the agreement) dated December 27, 2013, the 1st defendant sought financing for the amount of USD 194, 727 for the purchase of Doosan Crwlr Excavator registration number KHMA 985C and was granted the same under the terms and conditions contained in the said hire purchase agreement and the loan was guaranteed by the 2nd and 3rd defendants on the same date.
2. According to the agreement, the 1st defendant was to pay back the principal with a flat interest rate of 5.57% per annum in 4 years through 47 monthly instalments of USD 4,980 and a final instalment of USD 5, 080.
3. In breach of the agreement, the 1st defendant defaulted, failed and/or neglected to service the same occasioning its accounts to be in arrears. Further, the defendants have frustrated the plaintiff's attempt to repossess its property by moving it around the country despite being informed by the plaintiff of its intention to do so.
4. The plaintiff stated that the defendants have taken the machine out of the country without its written consent thus committing further breach of the agreement.



5. The defendant was in arrears for the amount of USD 169, 680.83 as at July 2, 2015 with default interest rate in the agreement being 20.25% per annum. The plaintiff prayed for judgment against the defendants for:
 - a. An order compelling the defendants to retrieve the machine from outside the country and bring it within the borders of Kenya.
 - b. An order compelling the defendants to permanently cede possession and avail the machine to the plaintiff.
 - c. An order stopping the defendants from selling, transferring, transporting or otherwise dealing with the machine in any manner that would serve to deprive the plaintiff of its right to immediate possession.
 - d. The balance of the loan amount, if any that remains after disposal of the machine.
 - e. Costs of this suit
 - f. Any order or further relief that the Court may deem fit and just to grant.
6. In the alternative, the plaintiff prayed for;
 - a. The sum of USD 169, 680.83 being the deficit of the loan amount with interest accruing at the flat rate of 5.57% per annum on the principal loan amount of USD 194, 727.
 - b. Default in interest on the above accruing at the rate of 20.25% per annum.
 - c. Interest on (a) and (b) above at court rates until payment in full.
 - d. Costs of this suit.
 - e. Any other or further relief that the court may deem just and fit to grant.
7. The defendants filed a Statement of Defence dated April 26, 2017 and they admitted that they had indeed entered into a hire purchase agreement dated December 27 2013 for financing for the purchase of Doosan Crwlr Excavator registration number KHMA 985C but the 2nd and 3rd defendants denied being guarantors of the same.
8. The 1st, 2nd and 3rd defendants denied that the interest rates agreed upon were at 5.57% per annum as alleged and further that they had fully paid the loan as agreed between the 1st defendant and the plaintiff.
9. They further denied defaulting, failing and neglecting to service the hire purchase as agreed. That there are no arrears remaining with regard to the hire purchase agreement.

Plaintiff's case

10. The plaintiff submitted that the terms of the hire purchase agreement provided that the 1st defendant was to pay back the principal with a flat interest rate of 5.57% per annum or such other rates per annum as the owners shall determine in its sole discretion from time to time and at a further interest rate of 20.25% per , on all over-due hire rentals or other payments from the due date to the actual date of payment and the same was to be repaid over a period of 4 years through 47 equal monthly installments of USD 4,980/- and a final installment of USD 5,080/-.
11. The plaintiff produced Statements of Account of the defendant from December 4, 2013 to June 30, 2015, demonstrating that the defendant was in arrears of USD 169,680.83 being the deficit of the loan



amount with interest accruing at the flat rate of 5.57% per annum on the principal loan amount of USD 194,727/- as at June 30, 2015.

12. Further to the above, the plaintiff also produced in court, documentary evidence clearly showing that the defendants entered into agreements, were obligated to make payments and fell into arrears thus necessitating this instant suit. On the contrary the defendants have not brought any proof before the court to show that they settled the facility afforded to them by the plaintiff.
13. Moreover, under clause 6 of the hire purchase agreement, the plaintiff had a right in case the defendant(s) breached any term of the hire purchase agreement, to immediate repossession of the said vehicle and retake and resume possession of the same and the defendants shall thereupon no longer be in possession of the vehicle with the consent of the owner.
14. It is clear that the defendants defaulted in payment of the hire rentals as agreed in the hire purchase agreement. It was the plaintiff's submission that the terms and conditions of the hire purchase agreement were binding upon the parties and as cited in the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the Court of Appeal stated:

“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.”
15. It was the plaintiff's case that it therefore follows that given that the 1st defendant had breached the agreement as submitted under Issue 1, then the plaintiff had a right to repossess the motor vehicle.
16. The plaintiff submitted that it had stated its case and proved the same therein. The plaintiff prayed that the court grants it the cost of this suit as prayed in the Plaint as provided under section 27 (1) of the *Civil Procedure Act*.

Defendants case

17. The defendants called no witness and did not file written submissions to this suit.

Issues for determination

18. Having considered the Plaint, Statement of Defence, the annexures and PW1's testimony; the court frames the following issues for determination:
 - a. Whether the plaintiff has proved its case on a balance of probabilities?
 - b. Whether the plaintiff is entitled to the costs of the suit?

Analysis

19. On February 24, 2022, Simon Irungu Mwangi (PWI) the legal officer with the plaintiff's bank, testified that the 1st defendant approached the plaintiff sometime in the year 2013 with a proposal for a hire purchase facility to enable it procure a Doosan Crwlr Excavators at a price of USD 194,727.00. The said facility was guaranteed by the 2nd and 3rd defendants.
20. He further testified that the plaintiff upon consideration and due diligence, approved the facility by purchasing the Excavator for the 1st defendant.
21. It is trite law that whoever alleges existence of some fact has the onus of proving the same. The plaintiff in this case had the onus to prove that it not only extended a loan facility to the defendant but it was required to prove that the defendant failed to repay and as well as the default amount.



22. The plaintiff produced the hire purchase agreement dated December 27, 2013 and it was duly executed by the parties and it is not in dispute that the parties entered into the agreement for the purchase of the above-mentioned machine.
23. The plaintiff produced Statements of Account proving that the 1st defendant did indeed default in paying the monthly instalments for the machine. PW1 testified that the 1st defendant's default resulted in a deficit of USD.169, 680.83. Under the agreement clause 2(d), the default attracted a default interest of 20.25 per annum.
24. The 2nd and 3rd defendants guaranteed the loan amount vide the guarantee dated December 27, 2013. As guarantors, it was their obligation to step in and pay the sums due from the 1st defendant. They bound themselves to ensure payment by the 1st defendant of all the hire purchase instalments and sums due under the hire purchase agreement. They are accordingly just as liable to the plaintiff as the 1st defendant as was held in *Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd* (*supra*), the Court of Appeal made the point thus:

“A contract of guarantee binds the person giving a guarantee to honour its terms irrespective of any dispute that may be existing between the parties to the transaction for which the guarantee was given. A guarantee is therefore an accessory contract by which the guarantor undertakes to be answerable to the promisee for the debt or default of another person whose primary liability to the promise must exist.”

25. The defendants in their defence denied owing the plaintiff any amount but other than the mere denial, they did not produce any documentary evidence to refute the plaintiff's claim against them. In addition, the defendants denied that the interest rates agreed upon was at 5.57% per annum as alleged. The Court notes that in the approval for hire purchase finance facility letter dated November 21, 2013 one of the terms was that interest rate would be charged at the rate of 5.57% flat plus 3% per annum on reducing balance. The same has been signed in acknowledgement by the 1st defendant.
26. This court associates itself with the decisions of the following cases. In the case of *Trust Bank Limited vs Paramount Universal Bank Limited & 2 others* [2009] eKLR the court stated;

“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

27. In the case of *Karuru Munyororo vs. Joseph Ndumia Murage & another* [1988] eKLR the court held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

28. In *Janet Kapbiphe Ouma & Another vs Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 the Court stated as follows;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of



the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

29. The court is satisfied that the plaintiff has proved its case on a balance of probabilities.

Findings and determination

30. In the light of the forgoing this court makes the following findings and determination;

- i. This court finds that the plaintiff proved its case to the desired threshold;
- ii. Judgment is entered in favour of the plaintiff against the defendants jointly and severally in the sum of USD 169, 680.83 with interest accruing thereon at the rate of 8.57% per annum.
- iii. The plaintiff shall have costs of this suit;

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

HON A MSHILA

JUDGE

In the presence of;

No appearance by Ayisi for the plaintiff

Lucy-----Court assistant

