



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 415 OF 2015**

**CFC STANBIC BANK LIMITED..... PLAINTIFF**

**VERSUS**

**JAMES OBONDO ABEL T/A JASS ENTERPRISES..... DEFENDANT**

**J U D G M E N T**

1. By a plaint dated 28/8/2015, the plaintiff alleged that it had entered into a hire purchase agreement with the defendant dated 26/11/2014. That pursuant thereto, the plaintiff financed the defendant in the purchase of motor vehicle Mercedes Benz Axor Prime Mover and Trailer registration number KCB 618E and ZE 8761 (“the subject vehicle”) for Kshs. 8,240,000/-.
2. That the agreement stipulated that the financed amount was repayable in 48 equal monthly instalments of Kshs.235,640/- after 30 days from the date of payment. Despite the plaintiff performing its part of the agreement, the defendant took possession of the subject vehicle but failed to make the monthly repayment.
3. Efforts to trace the subject vehicle for repossession proved futile. As at 3/7/2015, there was due from the defendant a sum of Kshs. 9,721,804/25 which was attracting interest at 33% per annum.
4. In the premises, the plaintiff prayed for the disclosure where the subject motor vehicle was and the surrender thereof by the defendant. In the alternative, the plaintiff prayed for judgment for Kshs. 9,721,804/25 together with interest thereon at the rate of 33% per annum from 3/7/2015 until payment in full.
5. The defendant was served with process but failed to appear. Judgment in default was entered against him and the matter proceeded to formal proof with one witness testifying for the plaintiff.
6. **Simon Irungu**, a Legal Officer with the plaintiff, told the Court that the plaintiff had financed the defendant in 2014 for the purchase of the subject vehicle to the tune of Kshs. 8,240,000/-. That the said amount was repayable in 48 equal monthly instalments of Kshs. 235,640/-.
7. He further testified that the defendant subsequently defaulted resulting in a debt of Kshs. 9,721,804/25 as at 3/7/2015. That the plaintiff had attempted to repossess the subject vehicle but it was unsuccessful as the tracking device that had been put in the subject vehicle had been interfered with. As a result, the whereabouts of the vehicle was unknown. He produced as **PExh1** the plaintiff’s bundle of documents filed in Court on 31/8/2015.
8. The issues for determination are; was there any contract between the plaintiff and the defendant? Was it performed? has the plaintiff had proved its case to the required standard?
9. The plaintiff’s case was that there was a contract of hire between it and the defendant. In support of that contention, the plaintiff produced an Approval for Hire dated 31/10/2014 and a Hire Purchase Agreement dated 26/11/2015.
10. In the said documents, there was prove that the plaintiff financed the defendant to the tune of Kshs. 8,240,000/- for the purchase of Motor Vehicle Mercedes Benz KBC 618E and Trailer ZE 8761. The interest rate was agreed on the amount advanced as 16.5% per annum. However, overdue amount was to attract interest of 33% per annum. After the execution of the contract, the plaintiff duly financed the purchase and the defendant took possession of the subject vehicle.
11. The witness further produced a statement of account of the defendant. The same was for the period November, 2014 to July, 2015.

During the period, the defendant only paid a part sum of Kshs. 104,072/65. The statement showed that the outstanding balance as at 3/7/2015 was Kshs. 9,721,804/25.

12. Also produced was a letter from one **G. N. Muiruri, Auctioneer** dated 17/7/2015. In it, the Auctioneer advised the plaintiff that he had searched the subject vehicle within Nairobi and its environs but had been unable to trace it. That he had confirmed from the firm that had fitted a tracking system in the subject vehicle that the same had been interfered with. It was therefore difficult to trace the subject vehicle. A demand note dated 20/7/2015 was also produced.

13. All the aforesaid documents and evidence was uncontroverted and remained unchallenged. Where a party fails to call any evidence in rebuttal, the evidence tendered by the opposite party remains the truth or the factual situation.

14. In the case relied on by the plaintiff of **Esther Nduta Mwangi & Another v. Hussin Dairy Transporters Ltd Machakos HCCC No. 46 of 2007 (UR)**, Lenaola J. as he then was held: -

**“Although the defendant denied the accident but pleaded in the alternative that the accident was a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations. The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitur and produced documents including police abstract showing the date and place of the accident although no eye witness was called. However, since the doctrine of res ipsa loquitur was pleaded, the burden of proof shifted to the defendant to disprove the particulars of negligence attributed to him”.**

15. In the present case, the plaintiff produced the contract documents between it and the defendant. The statement of account showing the paltry sum paid as instalment by the defendant. It also showed that there was due on the defendant’s account as at 3/7/2015 a sum of Kshs. 9,721,804/25. The contract documents showed the rate of interest on arrears to be 33% per annum.

16. In this regard, I am satisfied that the plaintiff had proved its case on a balance of probability.

17. As regards the prayers sought, since the defendant did not appear and the whereabouts of the subject vehicle unknown, the main prayers will not suffice. The alternative prayers would in the circumstances be sufficient.

18. Accordingly, I enter judgment for the plaintiff against the defendant for Kshs. 9,721,804/25 together with interest thereon at the rate of 33% per annum from the date of filing suit until payment in full. The plaintiff will also have the costs of the suit together with interest thereon at court rate.

It is so decreed.

**DATED and DELIVERED at Nairobi this 25<sup>th</sup> day of February, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**