REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 149 OF 2019

NIC BANK LIMITED.....1ST APPLICANT

AUCKLAND AGENCIES.....2ND APPLICANT

NDUTUMI AGENCIES.....3RD APPELLANT

VERSUS

MOMBASA WATER PRODUCTS LIMITED.....RESPONDENT

(Being an appeal from the judgment of the Honourable E. K. Makori, Chief Magistrate, in the original Mombasa CMCC NO. 292 OF 2016, MOMBASA WATER PRODUCTS LIMITED V Nic Bank Ltd & 2 others, delivered on the 27th June 2019)

BY WAY OF CROSS-APPEAL

MOMBASA WATER PRODUCTS LIMITED.....APPELLANT

VERSUS

NIC BANK LIMITED.....1ST RESPONDENT

AUCKLAND AGENCIES.....2ND RESPONDENT

NDUTUMI AGENCIES.....3RD RESPONDENT

JUDGMENT

1. The suit before the trial court was a claim by the respondent counter-claimant by which it sued the Appellants as a banker and auctioneers instructed by the bank to carry out repossession of the suit motor vehicles Reg. Nos. KBY 469R and KBY 410R. The substratum of the suit in the further amended plaint was that as a customer of the bank sought and was afforded a financial accommodation in the aggregate of Kshs 30,000,000 to avail working capital and for hire purchase finance for the two motor vehicles.

2. According to the plaintiff, the approval of the facility was made conditional upon the respondent providing an undertaking from one Ocean Freight (EA) ltd to pay the 1st appellant for the vehicles by monthly installments, which undertaking was availed on the 20th march 2014 giving specific sums to be paid to the 1st appellant within definite periods. In the same pleading he plaintiff maintained that he had as at February 2016 he had paid kshs 18,959,455.28 for KBY 469R and Kshs 8,910,499.59 for KBY 410R and therefore there was no sum outstanding as at the date of repossession. The other complaint by the respondent was that the 1st appellant unilaterally and without consent opened an account number 1002866567, in the respondent's name, into which money was transferred from the respondents accounts Number 1000002271 and later such moneys amounting to kshs 77,529,396.17 was withdrawn from such account again without the respondent's consent or participation.

3. It was additionally pleaded that despite the fact that payment was up to date, the appellant unlawfully listed the respondent with Credit Reference Bureau and repossessed the two motor vehicles and thereby visiting upon the respondent not only dent to reputation but also financial damage and particularised losses. It was then asserted that the ensuing repossession was unlawful for among other things; no sum was outstanding; the appellant did not bother to enforce the undertaking or notify the respondents of default by the person obligated under the undertaking to pay. Once the suit was filed interlocutory orders were issued and the same were duty complied with by the appellant.

4. Based on such pleadings, the respondent made a whopping 24 prayers which included a declaration that as at the date of repossession there were no outstanding due installments, and therefore that the repossession was unlawful; an injunction compelling release of the motor vehicle and one restraining from alienating the suit motor vehicles and an order compelling the 1st appellant to expunge the respondents

name from the records of Credit Reference Bureau. There were then enumerated several prayers for special damages for loss of use of the motor vehicles; recovery of repossession charges; costs of repairs; assessors fees; photographer's fees; recovery of auctioneers fees; refund of sums not accounted for and general damages. The respondent also sought recovery of costs of the suit as well as interests on damages and costs.

5. For the appellants, a joint statement of defence was filed and later amended in which the description of the parties as well as the bank-customer relationship was admitted it being stressed that the dispute involved two hire purchase agreements entered between the parties pursuant to which agreements tow motor vehicles were financed and registered in the joint names of the respondent and the 1st appellant the effect of which was to vest the ownership thereof upon the appellant until the respondent paid the financed sum in full. The undertaking by Ocean Freight (EA) was acknowledged as having been duly received but the undertaking only constituted a guarantee but did not constitute the said guarantor as the person obligated by absolving the respondent as the principal debtor. An assertion was hen made that in breach of the terms of the hire purchase agreement, the respondent defaulted in making the installment payments thus necessitating the repossession which was deemed lawful and contractual. On the **Take On Account,** the appellant maintained that the same was a system account operated for purposes of debiting any default and that the contractual terms permitted its creation and operation

6. Regarding listing by Credit Reference Bureau, it was averred that that was a demand of the law the moment the respondent fell into arrears as at 7th march 2016. The claim for special and indeed any damage was said not to lie because the same was a contractual remedy agreed between the parties and that no prior notice was due to the respondent and therefore all the particulars of illegality and fraud were denied in toto it being stressed that the title to the two motor vehicle vested upon the Appellant until the debt was paid in full. Consequently the appellant termed the suit misconceived, bad in law and abusive of the court process and could not attract or merit any of the remedies sought but otherwise a candidate for dismissal.

7. Based on such pleadings, the matter proceeded to hearing where each side called a witness in support of respective cases. The evidence by the two witnesses largely reiterated the witness statements filed and placed all reliance on the documents filed which documents were largely common. At the close of production of evidence, both sides filed written submissions. The appellant's submissions are found at pages 772-783A while those by the respondent are at pages 740-771.

8. In his reserved judgment delivered on the 27.6.2019, the court found in favour of the respondent, holding in effect that the undertaking given to the 1st appellant by ocean Freight (EA) Ltd was binding upon the appellant and that the appellant ought to have pursued the satisfaction of the irrevocable undertaking instead of resorting to repossession. The court then proceeded to enter judgment for the respondent in the sum of **Kshs 9,112,000** together with declarations in terms of prayers 1,2,3,4 & 5 as well as costs and interests.

9. It is that judgment the appellants now challenge in whole by the memorandum of appeal dated 23.07.2019 and setting out 15 ground while the respondent also filed a cross-appeal dated 26.07.2019 raising 3 ground of cross-appeal. I have had the benefit of perusing the two memoranda and I see the cross-appeal to raise just two grounds but truncated into three. The grounds are that; the trial court erred in finding that the suit vehicles were subject to wear and tear and that reduced the sum claimed by half and secondly that there having been payment of 2/3s of the debt the right to repossession did not vest upon the appellant.

10. The appellants on their side have set out the 15 grounds but the same can, for ease of analysis, be regrouped and condensed into four broad grounds as follows:-

> i) What was the effect, purport and value of the undertaking by Ocean Freight (EA) ltd dated 20.3.2014 between the 1st appellant and the respondent? *(Grounds 3,4,5,6,7,8,&9)*
>
> ii) Was the award of the special damages merit on the evidence led and the contract between the parties? *(Grounds 10, 11 & 12)*
>
> iii) Did the trial court discharge its duty to the parties by properly and exhaustively analysing the evidence led and submissions offered in line with the applicable law? *Grounds 13, 14 & 15)*
>
> iv) Was the respondent in arrears of the installments thus subject to repossession and bound for reference to the Credit Reference Bureau? (grounds 1&2)

11. The determination of this matter would revolve around the determination whether or not the letter of offer and its conditions were intended by the parties to be and made an integral and fundamental term and covenant between the parties. Once that question is determined, one way or the other, the answers to all the issues I have isolated from the memoranda would get answered because as crafted and litigated at trial, the dispute was wholly documentary and no facts need importation from any source beyond the common documents. That duty would entail, this court as a first appellate court, reviewing and re-appraising the entire record at trial [1] and seeking to find if the trial court in reaching the conclusion it came to did consider any irrelevant matter or failed to take into account any relevant matter [2]. Short of that the court must be convinced that in coming to its decision the trial court came to a conclusion that that was not supported by evidence, contrary to the evidence led or just perverse[3].

12. I commence my analysis of the material before the court below by looking at what were the covenants between the parties regarding payment of the sums advanced. I do consider the contract between the parties to have been initiated by the letters of offer dated 19th march 2014 and 9th April 2014 (pages 34 and 892 of the record) and concluded with the two Hire purchase agreements dated 11.4.2014. The letters not only demanded an unequivocal undertaking for payment of an aggregate of Kshs 30,000,000 but also prescribed the language and matters to be covered by enclosing a template for the desired undertaking. The purpose of the facility offered was disclosed as ' **acquisition of vehicles and for working capital purposes?**. The following day, 12.04.2014, the guarantor, Ms ocean freight (EA) ltd complied with the demand and provided the undertaking in the desired words and terms. The operative words I find were cardinal to the 1st appellant as to make it confortable to extend the accommodation to the respondent was the undertaking **to „pay up to a limit of Kshs 30 million?** by RTGS to the benefit of definite accounts and that the guarantor had irrevocably confirmed and undertaken that it would be **„solely liable and responsible for <u>full</u> <u>compliance</u> with the undertaking.?**(Emphasis provided).

13. It is of note that the two '**Hire Purchase Agreements?** were on standard forms and made no specific reference to the undertaking as one of the conditions and security upon which the facility was to be extended save that there is at page 151 of the record of appeal another template parties did not identify with clearly refer to the said undertaking. I will resolve whether the failure to give the history of the transaction and its core foundation meant that such terms and foundation had become otiose and wholly irrelevant.

14. The records reveal that on 15.10. 2015 there was a default in making the installments and the appellant reminded the guarantor of its obligation to pay. By a letter of that date the appellant demanded that the guarantor pays the outstanding installments for July, September and October. The records further show that that demand was indeed acknowledged by the guarantor by a letter dated 3.11.2015(I was unable to see a copy of this letter from the record) as disclosed in the letter by appellant dated 16.11.2015. That letter repeated the demand for outstanding installments and threatened legal action against the guarantor if compliance was not made within 14 days.

15. The tenure and consistency by the appellant in demanding a specific undertaking from the guarantor, notifying the guarantor of the default and giving notice of intention to sue to enforce the terms of the undertaking lead me to conclude and find that the appellant's understanding of the structure of its contract with the defendant was that the payment to it for the two Hire Purchase agreements was the sole responsibility and obligation of the guarantor and not the respondent. That was the gist and substratum of the respondent's suit with I find to have been in consonance with the documents evidencing the contract between the parties.

16. In his determination, the trial court studiously and painstakingly did an indepth analysis of the evidence in the documents produced before him made the following conclusion on the effect, purport and value of the undertaking by Ocean Freight (EA) ltd:-

> **"the intentions of the parties, that is the plaintiff and the defendants, were that: In making the irrevocable undertaking, Ocean Freight (EA) Ltd was brought in this matter in black and white to solely and irrevocably be liable and responsible for full compliance with the undertaking herein. And that ocean Freight (EA) Ltd was to fully indemnify the 1st defendant for any losses or damages the 1st defendant were to suffer in case of failure in repayment (*sic*) Ocean Freight (EA) Ltd therefore became part and parcel of the arrangements between the plaintiff and the 1st defendant-hence the trail of letters before repossession"**

17. Can it be said with any amount of candour that the finding in the above excerpt was erroneous, based on no evidence or against the weight of evidence to justify my reversal? I do not think so. Instead I do find that the trial court was on point in the appreciation of the law on how to interpret a contract in the finding that the undertaking was part and parcel and indeed an integral term of the contract between the parties. The law binds me to give respect to the conclusions of the trier of fact and not to be too eager to reverse the same In **Susan Munyi V Keshar Shiani**, Civil Appeal No. 38 of 2002, the court of appeal underscored that restraint on appellate court in the following words

> **"As a first appellate court, our duty of course, is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."** (Emphasis provided

18. In her written submissions as highlighted in court, which I consider to have demanded and attracted great industry, Ms Mburu Advocate, took the position that, the undertaking was overtaken and rendered inconsequential once the Hire Purchase Agreement was executed because its terms were never imported into the said Agreement. The appellant deemed the undertaking as a pre-negotiation communication which could not be invited in construing the ultimate agreement. Counsel cited to court the decision of the court of appeal in **Fidelity Commercial Bank Ltd vs Kenya Grange vehicle Industries Ltd (@)!&)eKLR** for that proposition and the decision in **Oilfield Movers Ltd vs Kenya Energy Services Ltd & Another (2019)** for the proposition of the law that *an entire agreement clause* is to preclude a party to a written agreement from going behind the agreement and into pre-negotiation correspondence to get an explanation or excuse to run away from a concluded bargain.

19. I read the two decisions to reiterate the general rule that pre-negotiation correspondence are, in general, not to be invited in construing the consequent contract when reduced into writing. However, the court of appeal in the same decision of **fidelity commercial bank (*supra)** also restated the trite position that the rule on exclusion has its own exceptions. The court said:-

> **"Today, it cannot, therefore, be argued that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document. In other words, it must first be determined that the terms of the parties? agreement are wholly contained in the written document. Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the relevant evidence. See** Savings and Loan Kenya Limited V. Mayfair Holdings Limited **Civil Appeal 152 of 2006 and** Twiga Chemicals Industries Limited V. Allan Stephen Reynolds **Civil Appeal No. 300 of 2006.**
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> **The letter of 22nd March, 1999 was clearly an application for a hire purchase facility by the respondent on behalf of Takrim in which the former offered to repurchase the two financed buses in the event of default by Takrim. The respondent suggested that should the appellant accept its offer, its liability, could be limited to the balance of the loan. It requested that in addition to its undertaking, Takrim be made to provide two to four additional logbooks (for buses or trucks) as security; and that its guarantee would only be due upon the Takrim failing to pay arrears of maximum of 2 installments less recoveries that the appellant would have made from other securities and guarantees provided by Takrim.**

20. Properly guided and bound by the decision by the court of appeal, I do find that in this case the undertaking was indeed a distinct and

separate agreement from the hire purchase agreement but was the very foundation upon which the hire purchase could rest and without which there would have been no agreement. This finding is derived from the very express intention by the appellant in the letter of 19.3.201. Owing to its centrality to this decision I must now reproduce the text of that letter here. The letter by the appellant's Ellie Mwamburi, General manager, coast, reads:

> **"as discussed and agreed, NIC Bank Limited will extend banking facilities to Mombasa Water Products ltd, "the customer" up to a maximum limit of 30 million (Kenya Shillings Thirty Million Only) for acquisition of vehicles and for working capital purposes. This arrangement will be possible if you can obtain an unequivocal undertaking from Ocean Freight (EA) limited as per the attached format"** (Emphasis added)

21. Reading that letter persuade me, on its very candid words that it would not have been possible to extend the facility if the guarantee was not obtained. The record reveals that this was not the very fast transaction between the parties. One may add there was exhibited to court, page 551 of the record of appeal, a letter dated 24.8.2010 by the appellant to the respondent undertaking to pay the sum of 105,000,000 over a period of 60 m0nth. I make the inference that obligation on the appellant to pay the respondent on account of the guarantor was the source of comfort by which the undertaking from ocean Freight was readily sought and accepted. When so accepted, a valid contract of guarantee was clinched and the appellant was in law, under the doctrine of estoppel, encoded in section 120 of the Evidence Act, barred from running away from its bargain. This is what the court of appeal observed in the case of Fidelity commercial bank Ltd (supra) when the court remarked:

> **"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.**
>
> **The duty of the guarantor is created by the guarantee document itself and not the terms of the underlying contract".**

22. I finally conclude that there was a valid contract of guarantee between the appellant and the said ocean freight by which the two agreed that it was sole responsibility to pay the hire purchase facility together with any losses, therewith associated, was upon the guarantor alone. That is the covenant I see the appellant to have been pursuing when it made a demand and threatened legal action towards enforcement. It thus goes without saying that if the liability and obligation was upon the guarantor solely then the respondent was absolved from any such obligation and therefore there was no right upon the appellant to seek to repossess as they did. In doing so they wronged the respondent and therefore all losses directly flowing from such wrong were due to be made good by the wrongdoer.

23. The foregoing conclusions lead me to the finding that the undertaking was a valid contract the appellant validly and voluntarily entered into and the trial court was apt on the law in finding that the appellant was bound by his bargain. Accordingly, I find ground 3,4,5,6,7,8 &9 of the appeal to lack merits and therefore dismiss the same

24. As said before a determination of the issue would give the general direction of the other isolated issues. This, I reiterate, flows from the fact that if the debt was due and payable by the guarantor then it mattered not that the hire purchase account was in arrears. The appellant had recourse insecurity in the guarantee and not the respondent. For that reason, I do find no reason to fault the trial court's finding that the respondent had no arrears and that it's listing with Credit Defence Bureau was wrongful.

25. In my view the decision of the trial court was elaborate, considered all the material it was bound to consider in a painstaking fashion and thus I am unable to find that it failed to discharge its duty to the parties. Accordingly grounds 13, 14 & 15 of the appeal, which I consider fairly general and not succinct, cannot succeed but are hereby dismissed.

26. Having come this far , I am left with those ground of appeal challenging award of special damages which ties with the grounds 1 & 2 of the cross appeal. I will there determine grounds 10, 11 & 12 of the appeal together with those two ground of the cross-appeal. But, before doing so as the conclusion, I must deal with ground 3 of the cross-appeal.

27. Ground 3 of the cross-appeal faults the trial court for failure to hold that there having been payment of 2/3s of the hire purchase obligations, there was no right upon the appellant to repossess pursuant to section 20, consumer protection act. This ground is the kind that should not have found itself in this appeal had the cross appellant heeded the law that a court's decision must be bases upon and only upon pleaded matters or matter left by the parties for determination by the court . in this matter section 20 of the consumer protection act was never pleaded in the plaint with the consequence that the appellant never addressed it in its amended defence and it thus followed that no evidence could be led on it and none was so let. That being the case, the court was never invited to make a determination on it and could not, in law, be expected to address it. it is essentially a wild-card whose presence on the table would not only be pre-judicial but also trample upon all the dictates of pleadings and principles of natural justice including the right to a fair hearing. In **Ushago Diani Investment Limited v Jabeen Manan Abdulwahab [2018] eKLR,** the Court Of Appeal in allowing an appeal observed thus:

> **"As for the issues of *estoppel* and constructive trust, we cannot help but note that they were neither pleaded nor raised at the trial court. As such, they are being raised for the first time in this appeal. We find that considering the same would cause prejudice to the respondent who did not have an opportunity to tender evidence to counter those allegations at the trial court. Moreover, the trial court was not given an opportunity to address its mind on the same. Our position is fortified by the case of *Sarah Jelangat Siele vs. Attorney General & 3 Others* *[2018] eKLR* where we held:**
>
> > **"It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court?s determination. See this Court?s decision in Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385. However, a court may base its decision on an unpleaded issue if in the course of the trial the**

issue has been left for the decision of the court. An issue is deemed to have been left for the court?s decision when a party addresses the court and leads evidence on the issue. See Vyas Industries v Diocese of Meru [1976] eKLR."

28. On the basis that there was no violation of the consumer protection act pleaded and evidence led on it, that ground of cross appeal was wholly misconceived and is hereby dismissed.

29. I now come to the final issue on which I pose the question whether the award of special damages was merited or erroneous. In the Amended plaint, prayers vi up to xviii were in the nature of special damages allegedly occasioned by the repossession I have determined to have been wrongful. The main thrust of the appellant's challenge on the award is that it was contractually entitled to repossess because of default by the respondent and that, therefore, the respondent in being awarded the losses was getting rewarded for own fault. Having come to the determinations above, it is now not open that I find a justification without thereby contradicting myself. I find no merit in grounds 10, 11 & 12 of the appeal which I thus dismiss.

30. However, in making the awards for prayers vi, vii, viii and ix, the trial court made these remarks:-

"the defence did not controvert or call evidence to state the contrary. The defence took an illegal and un-procedural action on the plaintiff hence this figure should be awarded.

However taking into account the so many days as calculated, it is to be noted that these vehicles are not continuously in use there are wear and tear and days of rest. I will provide and enter judgment for half of the days hence awards in prayers vi, vii, viii and ix…

Total award for loss of use in prayers 6, 7, 8, and 9at half the days thereon totals 8,622,000…"

31. The court can only reverse a decision by the trier of facts if the same is based on no evidence or when it be contrary to the evidence tendered. Here I do agree with the trial court that the respondent proved the loss and in fact DW1 admitted all the particulars of claim but insisted on the appellant's right to repossession. However I am unable to agree with the trial court when it discounted one half of the days to cater for repair period and rest days. That finding was based on no evidence at all. But even if such discounting was to be made reasonably, it can't be half of the entire period. Doing so would mean that such vehicle only work for six months in a year. Granted that wear and tear are expected to be intrinsic in a motor vehicle and that even the vehicle crew need rest days off, the rest days must not be mutually exclusive for the days of repairs. In my view, being a first appeal, mandated to make own independent determination, I do find the discounting by the trial court to be overly onerous and unjust. I do set the allowance of half and substitute the same with an allowance 20%.

32. The sum claimed and prayed for under prayers vi, vii, viii and xi aggregated at Kshs 17,244,000. While that is the loss suffered at the hands of the appellant, I discount 20% to take care of rest days and for repair together with costs of such repair had the vehicle been in use. After subjecting the sum to such discounting, I get the sum of Kshs 13,795,200. There was also an award of kshs 480,000 said to have been for repairs/spares and loss of insurance usage. While it is true that documents were availed in proof thereof, I take notice of the fact that an insurance cover can be suspended or canceled and refunds effected. In this matter the plaintiff had the duty to mitigate own losses by reporting to the underwriter about repossession and requested for the suspension of the cover. Having failed to do such basic obligation, he cannot be rewarded for his failure. Of that sum I disallow the sum of 98,000, pleaded as loss of insurance usage. That leaves a balance of kshs 382,000

33. In conclusion the appeal fails entirely and is dismissed with costs to the respondent/cross-appellant. On the cross appeal I do find merit in grounds 1 &2 with the consequence that the decision of discounting a half of the loss of loss of user is set aside and in its place substituted a judgment discounting such loss by 20% . the cross appeal having succeeded, the costs thereof are to the respondent/cross appellant

34. In summary, judgment is entered for the respondent against the appellant as follows:-

i)	**Prayer v**	**Kshs 80,000/**
ii)	**Prayers vi, vii, viii & ix**	**Kshs 13,795,200/**
iii)	**Repair cost/spare loss of**	**Kshs 382,000/**
	Total	**Kshs 14,177,200/**

34 This sum, which I have substituted for the sum awarded at trial, shall attract interests at court rates from the date of the suit till payment in full.

Dated and signed this 13th day of April 2020

P J O Otieno

Judge

Delivered and signed at Mombasa this 23rd day of April, 2020

E Ogola Judge

[1] Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR ;Selle & Another v Associated Motor Boat Company Limited & others (1968) EA 123

[2] Kiruga V Kiruga & Another (1988) KLR 348

[3] Makobe V Nyamoro (1983) KLR 403