REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALITY AND TAX DIVISION

CIVIL SUIT NO. 256 OF 2002

GUARANTY TRUST BANK (KENYA) LIMITED……PLAINTIFF

-VERSUS-

MACADAM QUARRY LIMITED……..……..1ST DEFENDANT

GOPAL MAVJI PATEL…….…....2ND DEFENDANT

LALJI MAVJI PATEL……...3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a Plaint dated 28thFebruary 2002, amended in 10th December 2012 and re-amended on 23rd August 2018, seeking for judgment against the Defendants jointly and/or severally as here below reproduced:

a) Kshs. 56,337,693.70 as at 22nd October 2001.

b) Interest on a) above at the rate of 11% per annum from 23rd October 2001, until payment in full.

c) Overdue interest on a) at the rate of 45% per annum from 23rd October 2001 until payment in full.

d) Costs.

e) Interest at a rate of 36% per annum compounded and debited daily on (a) and at Court rates on (b) (d) above until payment in full.

f) Any other further relief this Honorable deems fit to grant.

2. The Plaintiff's case is that, at the express joint and several request of the Defendants, it agreed to grant the 1st Defendant banking facilities and/or financial accommodation in the form of Hire Purchase, in the principal sum of Kshs. 46,657,000 exclusive of Hire Purchase option to purchase charges.

3. The facility was based on a letter of offer dated 25th June 1999 and partially varied by a subsequent letter dated 26th July 1999, both of which were duly executed by and/or on behalf of the 1st Defendant signifying acceptance of the terms and conditions therein.

4. That the agreed terms and conditions stipulated therein included but were not limited to the following:-

a) That the Hire purchase facility was for the purpose of assisting the 1st Defendant hire seven (7) units of 16 Ton Nissan Diesel Trucks, 1997 make model; CWA 12 SHR being registration number KAJ 658 G, KAJ 347 H, KAJ 345H,KAJ 346H, KAJ 349H and KAJ 348 H;

b) That the banking facility was to be secured by way of among others a Standard Hire Purchase Agreement, the registration of the motor vehicles in the joint names of the 1st Defendant and Plaintiff, a general debenture on the entire assets of the 1st Defendant and joint and several guarantee and indemnity by the 2nd and 3rd Defendant as directors of the 1st Defendant;

c) That the 1st Defendant would repay the banking facility by 47 monthly rental installment of Kshs. 1,400,000 and a final rental installment of Kshs. 1,423,180;

d) That the rate of hire charges was calculated on the basis of a minimum rate of 11% per annum which was however subject to change at the sole discretion of the Plaintiff; and

e) That in default of remittance of any sum due and payable default and/or overdue interest was to be chargeable and payable on the unpaid amount at the rate of 45% per annum from the due date to the date of payment in full.

5. It was pleaded that by way of Debenture instrument executed on 14th October 1999, the 1st Defendant charged all its assets and rights of a proprietary nature including all plant, machinery, equipment and vehicles set out in the schedule attached thereto in favour of to the Plaintiff, to secure the repayment of the credit facilities.

6. In addition, the 2nd and 3rd Defendants jointly and/or severally executed a Guarantee and Indemnity, dated 12th July 2009, to inter alia, guarantee the due payment of all monies that shall be owing and due from the 1st Defendant to the Plaintiff.

7. Consequently and pursuant to the letters of offer and based on the Commercial Hire Purchase Agreement executed by the parties, the 1st Defendant was allowed to take seven (7) units Nissan Diesel Trucks being registration numbers; KAJ 658G, KAJ 350H, KAJ 347H, KAJ 345H, KAJ 346H, KAJ 349H and KAJ 348H on hire purchase terms for the principal price of Kshs. 46,657,000.

8. It is reiterated that, it was an agreed term of the agreement that the 1st Defendant would pay the Hire Purchase price punctually by way of monthly rental installments in the manner set out in the letters of offer and would be liable to pay interest on any overdue and unpaid sum payable under the Hire Purchase Agreement. That if any rental or other sum payable remained unpaid after the expiry of 14 days of becoming due, the Plaintiff would be at liberty to terminate the Agreement and repossess the hired motor vehicles.

9. The Plaintiff averred that the 1st Defendant defaulted in repayment of the financial facilities as scheduled, in total breach of the Agreement and thereafter, pursuant to the provisions of the Hire Purchase Agreement the Plaintiff terminated the agreement and repossessed the seven motor vehicles. The vehicles were then disposed of and the net proceeds applied toward reduction of the balance outstanding on the 1st Defendant's account.

10. However the net proceeds of the sale did not fully extinguish the 1st Defendant's indebtedness and left an outstanding amount of Kshs. 56,337,693.70 as at 22nd October 2001, which continues to attract interest at the rate of 11% per annum and a further overdue interest at the rate of 45% per annum lastly applied on 22nd October 2001 until payment in full.

11. However the Defendants filed a statement of defence on 6th May 2002, and denying every allegation made in the plaint. In particular, the 1st Defendant denied, that it requested the Plaintiff for a financial accommodation by way of hire purchase as alleged in paragraph 5 of the plaint or at all. Similarly the 2nd and 3rd Defendants denied that, they jointly and/or severally agreed to guarantee the payment of all monies that shall be owing to the Plaintiff by the 1st Defendant in respect of the alleged Hire Purchase Agreement entered between the Plaintiff and the 1st Defendant.

12. Even then, 1st Defendant averred that, on a "without prejudice basis", it executed a Debenture in favour of the Plaintiff and gave its machineries and assets as security for the loan advanced to it by the Plaintiff. In the alternative and on "without prejudice basis" the 2nd and 3rd Defendants averred that, they gave a Guarantee and indemnity to the extent of the money that was to be advanced to the 1st Defendant as indicated in the Debenture.

13. However, the Plaintiff breached the agreement by recalling the loan and selling the securities without appointing the Receiver Manager as stipulated in the Debenture. Therefore the Defendants denied that they were indebted to the Plaintiff in the sum of Kshs. 56,337,693, as at 22nd October 2001, as alleged and/or the Plaintiff is entitled to levy 36% per annum on the alleged claim and sought the suit be dismissed with costs to the Defendants.

14. At the hearing of the suit on 18th December 2018, the Plaintiff called one witness but the Defendants did not call any witness. The Plaintiff's witness, Mr. Charles Amanga, relied on the statement he filed and the documents in support of the case. In particular he drew the court's attention to the letter of offer and the Hire Purchase Agreement. He testified that the agreement was terminated due to non-payment of the installments. In cross examination he stated that, the motor vehicles were not valued at the time of hire but were valued after repossession.

15. The parties filed the following agreed issues for determination:

a) Whether the Plaintiff at the express, joint and several request of the Defendants agreed to grant the 1st Defendant banking facilities in the form of Hire Purchase in the principal sum of Kshs. 46,657,000.

b) If the answer in paragraph 1 above is yes then what were the terms and conditions of the Hire Purchase Agreement?

c) Whether by an instrument of debenture made in writing on 14th October 1999, the 1st Defendant charged to the Plaintiff all its assets and rights of a proprietary nature?

d) Whether in consideration of the financial accommodation referred to in paragraph 1 above, the 2nd and 3rd Defendants jointly and/or severally covenanted by way of an instrument of guarantee and indemnity dated 12th July 1999 the due payment of all monies that would have been owing from the 1st Defendant to the Plaintiff?

e) Whether the 1st Defendant was in breach of the Hire Purchase Agreement referred to in paragraph 1 above?

f) If the answer to paragraph 5 above is yes then was the Plaintiff entitled to terminate the Hire Purchase Agreement?

g) If the answer to paragraph 5 above is yes, then was the Plaintiff entitled under Hire Purchase Agreement to repossess and dispose the seven motor vehicles the subject of the hiring and thereafter apply the net proceeds thereof towards the reduction of the balance outstanding on the 1st Defendant's Hire Purchase account with the Plaintiff?

h) Whether the Plaintiff disposed of the plant, machinery and equipment charged under the instrument referred to in paragraph 3 above with the express approval and formal consent of the 1st Defendant?

i) Whether the sales referred to in paragraphs 7 and 8 above fully extinguished the 1st Defendant's indebtedness to the Plaintiff?

j) Whether the 1st Defendant's Hire Purchase account with the Plaintiff stood at Kshs. 56,337,693.70 as at 22nd October 2001?

k) Whether the 1st Defendant's Hire Purchase account with the Plaintiff continues to attract interest at the rate of 11% per annum and a further overdue interest at the rate of 45% per annum last applied on 22nd October 2001?

l) Whether demand and notice of intention to the Defendants was issued?

m) Is the Plaintiff entitled to the prayers sought in the plaint?

16. However, after considering the final submissions, alongside the evidence adduced, I find that the following issues have arisen for consideration;

a) Whether the parties herein entered into a valid Hire Purchase Agreement, if so,

b) What were the terms and conditions thereof?

c) Did the Defendants satisfactorily perform their contractual obligation under that Agreement and/or did the Plaintiff breach the agreement?

d) Is the Plaintiff entitled to the reliefs sought?

e) Who will bear the costs of this suit?

17. In regard to the first issue, I have considered the documents produced by the Plaintiff and I notice a letter dated 25th June 1999 from the Plaintiff to the 1st Defendant, in response to the Defendant's letter dated 15th June 1999. The Plaintiff indicates that, it is agreeable to extending to the 1st Defendant, a Hire Purchase Facility of up to Kshs. 46,657,000, on the terms set therein. A memorandum of acceptance was attached to this letter of offer and it is signed by the Defendants' directors on the 12th July 1999, accepting the Hire Purchase Facility on the terms set therein.

18. I also notice that, on 26th July 1999, the Plaintiff wrote to the 1st Defendant in relation to the partial modification of the letter of offer dated 25th June 1999. According to the contents of the letter of 26th July 1999, the amount, the payment of rentals and the security clauses were varied. Again the 1st Defendants directors signed a memorandum of acceptance after the variations. Subsequently, the Plaintiff and 1st Defendant entered into a formal Hire Purchase Agreement executed on 23rd July 1999.

19. It suffices to note that the documents referred were produced by the Plaintiff, but have not been denied or rebutted by any contrary documents or evidence by the Defendants. I am therefore convinced that, indeed the Plaintiff and 1st Defendant executed the letter of offer, memorandum of acceptance and Hire Purchase Agreement, which crystallized into the contractual relationship between the Plaintiff and the 1st Defendant. The 1st Defendant denial of relationship is less than candid. In that regard issue as (a) herein is answered in the affirmative.

20. The next question is whether the parties fully discharged their obligation under the agreement. Before I deal with this issue, I note that from the documents produced that, indeed on 12th July 1999, the 1st Defendant signed a delivery receipt acknowledging receipt of the subject goods being; seven units Nissan Diesel trucks; whose Chassis/Serial No. are indicated. It is therefore clear that the 1st Defendant took possession of the Hire Purchase goods.

21. The Hire Purchase letter of offer stipulated that the 1st Defendant was to make monthly installments of Kshs. 1,400,000 for 47 months and a final installment of Kshs. 1,423,180. It does occur from the statement of 1st Defendant's account produced that only two credits were paid into the account after the disbursements of the facility of Kshs. 46,657,000. The first credits of Kshs. 5,600,000 was made on the 29th

December 1999, five (5) months after the disbursements, and the other credit of Kshs. 2,748,188.28, was effected as a transfer on 3rd August 2000.

22. The correspondence produced by the Plaintiff herein, reveal that on 25th July 2000, the firm of Messrs Kipkorir Titoo & Kiara Advocates, wrote to the 1st Defendant a demand letter for the immediate payment of Kshs. 10,038,827.53, owing to the Plaintiff as at 1st June 2000. It is not clear from the documents produced whether the 1st Defendant responded to this letter. It is therefore evident the 1st Defendant was in default of timely payment of the monthly installments as per the terms of the Hire.

23. I note from clause 7 of the Hire Purchase Agreement that, the owner (in this case the Plaintiff) was entitled to terminate the agreement, if inter alia, any rental or other sum payable under the Hire Purchase Agreement, to the owner remained unpaid after the expiry of 14 days of becoming due. Therefore, the Plaintiff was entitled to treat the Hire Purchase Agreement as terminated.

24. Further, the termination clause 8.2, placed liability on the Hirer to pay the owner of the goods, any arrears of rental accrued due at the date of termination, the cost of all repairs required to be done to the goods to put them in a condition consistent with the performance of the Hirer's obligations there under, and damages (if any) for prior breach thereof.

25. In addition to these provisions, I find that the general principles of Hire Purchase entitle the owner of the goods to repossess them so long as there is default on repayment of the sums due, and/or there is breach of the agreement. Upon lawfully repossessing the goods, the owner can sell the same to recover the amount owing and due.

26. Indeed, it is noteworthy that on 22nd August 2000, the 1st Defendant wrote to the General Manager of the Plaintiff's Bank stating as follows:

> *"We also refer to our various meetings and correspondence and hereby:*
>
> *a. Irrevocably authorize you to sell by private treaty all the movable assets that are charged to yourselves in pursuance to the Debenture dated October 14, 1999.*
>
> *b. Allow yourselves to post your security guards in our premises until such time that you have finalized the above sale."*

27. This authority given to the Plaintiff by the 1st Defendant to exercise its right under the Debenture is a clear sign of acknowledgement of the debt. As stated herein, the motor vehicles were repossessed and according to the evidence adduced, motor vehicle registration number KAJ 345 H was sold for Kshs 1,120,000. This was based on the valuation report dated 11 June, 2005, prepared by AAR of Kenya.

28. It is also on record that, the other six motor vehicle were repossessed by Westminster Merchants following the issuance of a court order and inspected as per the inspection reports produced at pages 28 to 33 of the Plaintiff's list of documents dated 11th June, 2005. The reports indicate the probable value of each motor vehicle.

29. The Plaintiff testified that these motor vehicles were sold for various sums of money as indicated in the 1st Defendant's statement and of paragraph 14 of the statement of Charles Amanga. It is also in evidence that relying on the letter from the 1st Defendant referred to herein dated 22nd August 2000, the Plaintiff sold the 1st Defendant's plant, machinery and equipment charged under the debenture dated 14th October, 1999, as evidenced by the Sale agreement, dated 17th April, 2001, between the Plaintiff and M/s Virji Vishram Patel &Sons. However, the proceeds of the sales did not discharge the 1st Defendant from liability.

30. However as already stated, the Defendant did not adduce any evidence at the hearing to rebut the Plaintiff's evidence or support of its pleadings. The defendants however dealt with the same in the submissions but the Defendants cannot therefore turn submissions into evidence and argue that, under section 5(4) of the Act, no person is entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement and the owner cannot not be entitled to enforce any right to recover the goods from the hirer and no security given by the hirer in respect of money payable under the agreement or given by a guarantor in respect of money payable under a contract or guarantee relating to the agreement has not been registered. Furthermore, that, there is no valid Hire Purchase Agreement produced by the Plaintiff as the same was not registered and therefore, it is not enforceable as against the hirer and the guarantors.

31. The Plaintiff submitted that, in the absence of the evidence, the Plaintiff's case is uncontroverted and cited several authorities to support the argument. In particular reference was made to the case of; *CMC Aviation Ltd. vs. Cruisar Ltd. (No. 1)[1978]KLR 103; [1976-80] 1 KLR 835*, where Madan, J (as he then was) stated that:

> *"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."*

32. In deed the law is settled that pleadings contain statement of facts subject to proof. (see; *Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989, Mohammed & Another vs. Haidara[1972] E.A 166, Edward MurigaThrough Stanley Muriga vs. Nathaniel D. Schutler Civil Appeal No. 23 of 1997)*

33. The question that arises is whether the Defendants are liable and/or whether the Plaintiff should be granted the orders sought. The Court has already found that the 1st Defendant was in default of the hire purchase monthly installments. The 2nd and 3rd Defendants have not disputed the averments that they executed a Guarantee and Indemnity dated 12th July, 1999, to cover the Hire Purchase Facility. A copy thereof was produced.

34. It suffices to note that, the demand letter dated 25th October 2000 served upon the 1st Defendant was also copied to 2nd and 3rd Defendants as Guarantors. They did not respond to that letter. It is trite law that, acting as Guarantors they undertook to pay the debt if the Principal Debtor did not pay. In that case they are jointly and severally liable to pay the sum claimed.

35. In that regard, i concur with the write up in the text on "The Law of Guarantees" by Geraldine Andrews & Richard Millet 2nd Edition, at page 156: -

> *"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point".*

36. Finally, I shall deal with the specific prayers in the Plaint. The Defendants alleged in the submissions that the Plaintiff's claim under prayer (1) ought to have been based on clause 8.2 of the Hire Purchase Agreement which states as follows:-

> *"If the Hiring is determined under clause 6 or 7 above the Hire shall become liable to pay to the owner (in addition to all the sums (if any) in respect of which the Hire shall be indebted to the owner,*
>
> *(i) The cost of all repairs required to be done to the goods to put them in a condition consistent with the performance of the Hirer's obligations.*
>
> *(ii) Damages (if any) for prior breach hereof.*

37. Yet the Plaint filed does not show the accrued rentals, cost of repairs and damages for breach of the Hire Purchase Agreement. That the documents in support of the Plaintiff's claim do show the valuation of the Motor Vehicles. As already stated herein and with utmost respect, the Defendants cannot adduce evidence through submissions.

38. Be that as it were, I am guided in this matter by the statement of accounts produced and found at page 34 of the Plaintiff's documents and I find that, after all the sums made, and/or realized from the sale of them motor vehicles and other assets pursuant to the Debenture are taken into account, there is outstanding balance is Kshs. 56,337,693.70. This statement has not been denied and/or rebutted by contrary evidence, thus the sum of Kshs 56, 337,693.70 is proved.

39. As regards the interest, the Defendants again through the submissions argued that, the interest levied after termination of the Hire Purchase agreement of 56% p.a. is unconscionable and illegal. That there is no basis at all for continued levy of interest after the Hire Purchase Agreement was terminated. Therefore, interest levied by the Plaintiff is contrary to the clear provisions of Section 44A of the Banking Act (CAP 488) Laws of Kenya and the guidelines of the Central Bank.

40. However the Plaintiff stated that clause 3.3 of the Agreement makes provisions for interest on overdue sums payable under the Agreement. I note that the provisions of clause 3.3 states that, if the Hirer makes default in payments due under the contract then interest s charged in accordance with the provisions of clause 2.3.1. That clause does not show the applicable interest rate. It is blank. I realize that the 45% interest rate is provided for in the letter of offer but not in the Hire Purchase agreement. The letter of offer cannot override, even then 45% interest rate in view of capping is unconscionable. Therefore the basis of the overdue interest rate is not established.

41. The upshot is that, judgment is entered in favour of the Plaintiff as against the Defendants jointly and severally, as prayed for, plus interest at the rate of 11% from the date of filing to date of full payment.

42. Costs of the suit are awarded to the Plaintiff.

43. It is so ordered.

Dated, delivered and signed in an open court, this 28th day of March 2019.

G.L.NZIOKA

JUDGE

<u>In the presence of:</u>

Mr. Kimani for the Plaintiff

Ms. Nyamweya holding brief for Ms. Ndege for the Defendants

Dennis …….Court Assistant