



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 227 OF 2014**

**ECOBANK KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**MUFRANZA BUS LIMITED.....1<sup>ST</sup> DEFENDANT**

**FRANCOIS NSABABERA.....2<sup>ND</sup> DEFENDANT**

**EIPHANIE MUKARUGAMBWA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

[1] The Plaintiff herein, **Ecobank Kenya Limited** is a limited liability company incorporated in Kenya under the provisions of the **Companies Act, Chapter 486** of the **Laws of Kenya** (now repealed). It carries on business in Nairobi and elsewhere within the Republic of Kenya as a Banker, duly licensed under the **Banking Act, Chapter 488** of the **Laws of Kenya**. It filed this suit against the Defendants in connection with a facility that it granted the 1st Defendant at its request in the year **2011**, which the 1st Defendant had not fully serviced. According to the Plaintiff filed herein on **23 May 2014**, the 1st Defendant requested for and the Plaintiff acceded to the request for an Asset Finance Facility in the sum of **Kshs. 18,100,000/=** to enable it purchase two Volvo Prime Movers and two Axle Trailers from disclosed dealers.

[2] By the Letter of Offer dated **25 February 2011**, the Plaintiff granted the said Facility on the terms, inter alia, that:

[a] the Facility would be repaid in 60 equal monthly instalments of **Kshs. 437,757/=**;

[b] The Facility would be disbursed to the dealers directly upon receipt of documents evidencing registration of the financed units in the joint names of the Plaintiff and the Bank;

[c] The Facility would be secured by, *inter alia*, a Specific Debenture, Joint and Several Guarantees of the Directors of the Plaintiff and Joint Registration of the financed units in the names of the Plaintiff and the Bank; and

[d] The 1st Defendant's Statement of Accounts was and would be conclusive evidence of its indebtedness to the Plaintiff.

[3] It was averred in the Plaintiff that all the security instruments aforementioned were duly executed and the funds released in accordance with the Letter of Offer; but that, in breach of the terms of the Facility, the 1st Defendant defaulted in repayment, thereby causing the account to be in substantial arrears. That, in consequence thereof, the Plaintiff exercised its rights as reserved under the Debenture and repossessed the assets; which were disposed of at **Kshs. 12,900,000/=**. It was further the contention of the Plaintiff that even after crediting the aforementioned funds into the loan account, less the attendant expenses, the 1st Defendant still had a substantial amount outstanding. Accordingly, the Plaintiff resorted to the filing of this suit against the 1st Defendant as the principal borrower, and the 2nd and 3rd Defendants as Guarantors, for the recovery of the outstanding loan balance in the sum of **Kshs. 13,681,020.50**, which was the sum due as at **16 March 2014**, with interest at 23.5% until payment in full, as well as the costs of the suit.

[4] In response to the suit, the Defendants entered appearance and filed their joint Defence on **4 August 2014** through the firm of **Nyabena Nyakundi & Co. Advocates**. They conceded that the 1st Defendant did apply for an Asset Finance Facility from the Plaintiff to enable it purchase two Prime Movers; and that the Facility was accordingly granted by the Plaintiff. It was however the contention of the 1st Defendant that it was able to acquire only one Prime Mover **Registration No. KBP 221A** from **Auto Sueco Limited**; and that it was unable to collect the second Prime Mover **Registration Number KBP 321A** because it was in bad mechanical condition. Accordingly, it was

averred, the 1st Defendant wrote to the Plaintiff a letter dated **8 April 2011** and required it to seek reimbursement to the tune of **Kshs. 3,762,500/=** from the 2nd Defendant and thereby reduce the loan from **Kshs. 18,100,000/=** to **Kshs. 14,337,500/=**. It was further the contention of the 1st Defendant that it requested for a breakdown of the loan repayments based on the reduced amount, but that the Plaintiff never responded to the said letter.

[5] It was therefore the contention of the Defendants that the Guarantees were executed on the understanding that the Prime Movers would be of sound mechanical condition and fit for the purpose for which they were being purchased. The Defendants thus denied having defaulted in the payment of the facility, and contended that the contract between the 1st Defendant and the Plaintiff was frustrated by the Plaintiff's failure to demand a refund of the amount advanced to **Auto Sueco Limited**. It was further the contention of the Defendants that the repossession of the 1st Defendant's Prime Mover was not only illegal, but was also actuated by malice, in that the said Motor Vehicle was in Uganda at the time in connection with the 1st Defendant's business; and that the repossession therefore occasioned irreparable loss to the 1st Defendant. It was also the contention of the Defendants that the sale of the Prime Mover was below market value; a further indication that the Plaintiff did not act in the 1st Defendant's best interests.

[6] Along the way, the firm of **Nyabena Nyakundi & Company Advocates** sought the leave of the Court to cease acting for the Defendants vide their application dated **28 June 2017**; which application was allowed on **18 September 2017**. The suit was thereafter fixed for hearing on **13 December 2017** and, there being no appearance for or on behalf of the Defendants despite service, hearing proceeded *ex parte*. Accordingly, uncontroverted evidence was adduced on behalf of the Plaintiff by **Elizabeth Hinga (PW1)**, the Plaintiff's Head of Early Warning and Remedial Unit. She adopted the Witness Statement that she made on **28 May 2014** and testified that, at the 1st Defendant's instance, the Plaintiff granted the 1st Defendant an Asset Finance Facility for **Kshs. 18,500,000/=** in terms of the Letter of Offer dated **25 February 2011**. That Letter was exhibited at pages 1-6 of the Plaintiff's Bundle of Documents, produced and marked as the **Plaintiff's Exhibit No. 1**. It was the evidence of **PW1** that the terms set out in the Letter of Offer were acceptable to both parties, whereupon the 1st Defendant sealed the Letter of Offer signifying its acceptance, and proceeded to comply with the pertinent terms thereof.

[7] Thus, **PW1** testified that a Board Resolution was provided by the 1st Defendant which was exhibited at page 6(l) of the Plaintiff's Bundle of Documents; which resolution authorized the borrowing of **Kshs 18,500,000/=**. The 1st Defendant also provided a Debenture, Guarantee and evidence of joint registration as required. The Debenture appears at page 33-52 of the Plaintiff's Bundle of Documents, while the Certificate of Registration is at pages 13-14 of the **Plaintiff's Exhibit No. 1**. **PW1** also produced the Letter of Guarantee at pages 21-28 of the **Plaintiff's Exhibit No. 1**; and it is manifest that the Guarantee was provided by the 2nd and 3rd Defendants in their capacity as Directors of the 1st Defendant.

[8] It was further the evidence of **PW1** that the loan funds were not disbursed directly to the Defendants; but were paid to the dealers after the Bank received proof of payment of deposit by way of the documents at pages 53 to 56 of the Plaintiff's Bundle of Documents. Hence, the Plaintiff adduced evidence to confirm that the facility funds were fully paid to the dealers on behalf of the 1st Defendant. **PW1** further testified that, whereas the 1st Defendant was to repay the loan by way of monthly instalments in the sum of **Kshs. 437,757/=**, it did not honour this obligation; for which reason, the Plaintiff wrote to the Borrower and provided it with a termination and repossession notice, a copy of which appears at page 57 of the **Plaintiff's Exhibit No. 1**. **PW1** added that even this notice was not heeded by the Defendant. Consequently, the Bank repossessed the prime movers and sold them after due process was followed as to valuation; and that only **Kshs. 12,900,000/=** was realized from the sale.

[9] The Plaintiff placed reliance on the Statement of Accounts exhibited at pages 108-109 to demonstrate that all the funds that were channelled through the 1st Defendant's loan account were accounted for; and that **Kshs. 13,681,020.50** was indeed due as at **16 March 2014**. **PW1** accordingly urged that Judgment be entered in the Plaintiff's favour in the aforesaid sum of **Kshs. 13,681,020/50** together with interest at the rate of 23.5% per annum plus costs of this suit.

[10] In the light of the foregoing, the Plaintiff set out the following List of Issues for determination:

- [a] Whether the motor vehicle **Registration Number KBP 221A** from **Auto Sueco Limited** was at the time of the subject transaction of bad mechanical condition;
- [b] If 1 is in the affirmative, whether such condition does in law discharge the liability the Defendant's have towards the Plaintiff;
- [c] Whether the 1st Defendant breached the terms of the Asset Finance Agreement it executed with the Plaintiff;
- [d] Whether the 2nd and 3rd Defendants are liable as Guarantors for the sums claimed in the Plaintiff;
- [e] Whether the proceedings herein are an abuse of the court process in view of the proceedings filed in **HCCC Number 632 of 2012: Mufransa Bus Services Limited vs. Ecobank Kenya Limited**;
- [f] Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff; and
- [g] Whether the Defendants are entitled to the reliefs sought in the Defence.

[11] Having considered the Pleadings as well as the evidence adduced herein by the Plaintiff, there is no dispute that the 1st Defendant applied for and was granted an Asset Finance Facility of **Kshs. 18,100,000/=** by the Plaintiff. The purpose of the Facility was to enable the 1st Defendant purchase two Volvo Prime Movers and Two Axle Trailers from **Auto Sueco Kenya Limited** and **Super Hauliers Limited**, respectively. There is further no dispute that the Facility was repayable in 60 equal monthly instalments of **Kshs. 437,757/=**, effective 30 days from the date of disbursement. The Facility Letter further shows that the proceeds thereof were to be disbursed directly to the dealers, **Auto Sueco Kenya Limited** and **Super Hauliers Limited** upon receipt of copies of the motor vehicle registration documents and original receipts issued by **Kenya Revenue Authority** showing that the motor vehicles had been registered in the joint names of the 1st Defendant

and the Plaintiff.

[12] The parties were further in agreement that, as security for the Facility, the 1st Defendant was to avail, and did avail the following documents:

[a] A Specific Debenture for **Kshs. 18,100,000/=** which was created over the two Volvo Prime Movers and two Axle Trailers (at pages 33-52 of the Plaintiff's Exhibit No. 1);

[b] Joint Registration of the two Prime Movers and two Axle Trailers in the names of the 1st Defendant and the Bank;

[c] Transfer Forms (in duplicate) for the vehicles being purchased duly signed by the 1st Defendant;

[d] Joint and several instruments of Guarantee and Indemnity for **Kshs. 18,100,000/=** by the Directors of the 1st Defendant (pages 21-28).

[e] Demand Promissory Note for Kshs. 18,100,000/= (pages 17- 18 of Plaintiff's Exhibit No. 1);

[f] Letter of Lien and Set Off (at pages 19-20 of the Plaintiff's Exhibit No. 1);

[g] Credit Agreement for Kshs. 18,100,000/= (at pages 29-32 of the Plaintiff's Exhibit No. 1); and

[h] Unanimous Board Resolution authorizing the borrowing and the creation of security (at page 6(l) of the Plaintiff's Exhibit No. 1);

[13] There is also no denying that the 1st Defendant complied with the terms and conditions of the Facility including the various conditions precedent to drawdown; whereupon the funds were disbursed by the Plaintiff to the dealers and the units in question duly delivered to the 1st Defendant. The four units were:

[a] One new Volvo FH400 6x4 Prime Mover Registration No. KBP 221A;

[b] One used Volvo FH420 6x4 Prime Mover Registration No. KBP 321A;

[c] Two fully enclosed removable Trailers Registration Nos. ZD 5843 and ZD 5848.

[14] The Plaintiff has adduced uncontroverted evidence to show that the 1st Defendant defaulted in making the repayments as agreed; and that as a consequence thereof, the Plaintiff exercised its rights to have the motor vehicles repossessed and sold. According to the documents exhibited herein, the sale of **Motor Vehicle Registration No. KBP 221A** is said to have taken place on **3 May 2012** as per the letter dated **25 June 2012** (at page 82 of the Plaintiff's Bundle of Documents); while the letter at page 59 of the Plaintiff's Bundle of Documents confirms that **Motor Vehicle Registration No. KBP 321A** was sold to **John Kinyanjui Karanja** by public auction held on **6 June 2012**. Similarly, the letters dated **6 September 2012**, at pages 65-73 of the Plaintiff's Bundle of Documents, confirm that the **Trailer Registration No. ZD 5843** was also sold by public auction. Since there is no rebuttal of the Plaintiff's evidence that the net sum realized from the sale was insufficient to clear the outstanding loan balance, I would find and hold that the 1st Defendant owed the Plaintiff **Kshs. 13,681,020.50** as at **16 March 2014**.

[15] In the premises, there can be no doubt that the 1st Defendant is liable to the Plaintiff for the sum aforesaid; and that the 2nd and 3rd Defendants are similarly liable to the Plaintiff as the 1st Defendant's Guarantors. I note that the Defendants raised two valid points in their Defence, the first of which was that there is in existence a previous suit between the parties, being **HCCC No. 632 of 2012: Mufransa Bus Limited vs. Ecobank Kenya Limited & Auto Sueco Limited**; and therefore that this suit is an abuse of the court process. However, as indicated in paragraph 14 of the Defence, that was an issue that the Defendants ought to have taken *in limine*, but which was not taken. At any rate, the matter having proceeded *ex parte*, no evidence was adduced by the Defendants in support of paragraph 14 of their Defence; with the result that there is no material upon which the Court can base a finding that the previous suit is in connection with the same subject matter. Indeed, the Plaintiff did disclose the existence of that previous suit, but averred at paragraph 12 of the Plaintiff's Defence that in the previous suit, the 1st Defendant had sought to restrain it from exercising its rights under the Debenture. That averment has not been rebutted herein and therefore does suggest a dissimilarity in terms of the subject matter of the suits.

[16] The second issue raised by the Defendants was that the 1st Defendant was unable to collect the second prime mover **Registration No. KBP 321**, on the ground that it was in bad mechanical condition. In this regard, the Defendants made reference, at page 4 of their Defence, to a letter dated **8 April 2011** by which the 1st Defendant allegedly informed the Plaintiff of this matter and requested it to seek reimbursement to the tune of **Kshs. 3,762,500/=** from **Auto Sueco Limited**. Accordingly, it was the contention of the Defendants that their contract was frustrated by this fact, as well as the Plaintiff's failure to demand a refund from **Auto Sueco Limited**.

[17] Again, for the reason that no evidence was led by the Defendants, these allegations, which were denied by the Plaintiff, were not proven on a balance of probabilities. There was, likewise, no proof in connection with the Defendants' allegations that the repossession was illegal or actuated by malice; or that the units were sold at an undervalue. In the premises, there is a clear case for the invocation of **Section 107(1)** of the **Evidence Act, Chapter 80 of the Laws of Kenya**, which stipulates that:

***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

[18] Also pertinent are the provisions of **Sections 109** and **112** of the **EvidenceAct**. *Those two provisions state thus:*

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

...

*112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*

[19] It was upon the Defendant to prove the allegations made by them in their Defence. Thus, I would agree with and adopt the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, that:

**"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."**

[20] In the result, I would enter judgment in the Plaintiff's favour in the sum of **Kshs. 13,681,020.50** together with interest thereon at the rate of 23.5% per annum from **16 March 2014** until payment in full; as well as costs of this suit with interest thereon at court rates from the date of this Judgment until payment in full.

It is so ordered.

**SIGNED DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2018**

**OLGA SEWE**

**JUDGE**