



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.320 OF 2016

DIAMOND TRUST BANK KENYA LTD.....APPELLANT

VERSUS

JUMA MUCHEMI & PARTNERS LTD.....1ST RESPONDENT

GATHARU JUMA.....2ND RESPONDENT

KIMANI MUCHEMI.....3RD RESPONDENT

JUMA MUCHEMI.....4TH RESPONDENT

MARY W. MUCHEMI.....5TH RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment of the Honourable A. Lorot H.R (Senior Principal Magistrate) delivered on 5th March 2015 in Milimani Chief Magistrate's Civil Case number 227 of 2009)

1. *Diamond Trust Bank Kenya Limited (the Bank)* is the appellant in this matter *James Juma Muchemi & Partners Limited, Gathairu Juma, Kimani Muchemi, Juma Muchemi* and *Mary W. Muchemi* are the Respondents in this appeal.

2. The Bank's claim before the Chief magistrate was for judgement against the respondents for **Ksh.1,326,782.74**. After full trial the learned trial Magistrate dismissed the Bank's claim and awarded costs to the respondents. This appeal has been filed by the Bank against that dismissal.

3. This court being the first appellant court has a duty, which is often referred to. This duty was stated in the case **Selle & another vs Associated Motor Boat Co. Ltd & others (1968) EA 123** Viz:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif-vs-Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

4. The Bank by its plaint filed before the trial court on **19th January 2009** sought judgement against all the respondents for **Ksh.1,326,782.74** plus interest of 24% per annum from **19th November 2008** until payment in full.

5. The Bank's claim as pleaded in the plaint is based on a hire purchase agreement, No.008HPLC 063330, dated **13th November 2006**. By that agreement the Bank was letting on hire purchase to the 1st respondent a new motor vehicle make FAW model CA 1080 registration No.KAW 698N. That the terms of the hire purchase were; purchase price **Ksh.2,786,000** plus interest at 8% per annum flat payable by 24 monthly instalments of Ksh.134,657. The instalments were to commence on **13th December 2006**.

6. The Bank further pleaded that the agreement expressly provided for:

a) That the 1st respondent would pay to the Bank by way of hire rentals for the motor vehicle the sum of Ksh.2,786,000/= in terms of paragraph 3 herein above, whether the said sum had been previously demanded or not;

b) The 1st respondent would pay additional interest of 16.48% over and above interest charged to the loan on any one instalment not paid punctually;

c) If the 1st respondent defaulted in payment of any instalment then the total amount of the hire purchase together with interest due thereunder would become immediately payable; and

d) In case of such default by the 1st respondent the Bank would be at liberty to terminate the Agreement repossess and dispose of the motor vehicle.

7. The hire purchase facility was guaranteed by the 2nd to the 4th respondents. The said respondents by instrument of guarantee and indemnity dated 13th November 2006 guaranteed to pay the Bank all the sum of money which would at anytime be owed to the Bank by the 1st respondent.

8. It was pleaded in the plaint that the 1st respondent breached the hire purchase agreement by defaulting in the payment of the instalment in the payment of the instalments. The Bank proceeded to exercise its right under the hire purchase agreement and repossessed the vehicle on or about June 2007.

9. The Bank sold the motor vehicle for Ksh.1,580,000 which amount on being credited into the 1st respondent's account left the amount of Ksh.1,326,782.74 outstanding. This is the amount the Bank sought to recover from the respondents.

10. The claim was denied by the respondents.

11. The respondents through their defence pleaded that the Bank had breached its duty of care owed to the respondents. The particulars of that breach were that the Bank sold the vehicle at half its price; that the Bank delayed in selling the vehicle leading to its depreciation in value; that the auction sale was not sufficiently advertised; and the Bank loaded unreasonable costs of the auctioneers into the respondents account.

12. During the trial the Bank and the respondents each called one witness.

13. The Bank's witness testified in chief in line with the plaint but on being cross examined and being questioned whether there was a contractual rate of interest he referred to a letter of offer not part of the documents admitted in evidence. He was however permitted to submit the letter dated 26th September 2006.

14. That letter provided interest chargeable was 8% flat and additional interest of 16.48% chargeable on any arrears. In his evidence the witness stated that the letter was part of the hire purchase agreement. But on being cross examined the witness accepted that the hire purchase agreement did not make reference to the letter.

15. The witness further testified that when the vehicle was repossessed the Bank was unable to sell until a year later because the bid made in auctions that were set up were low.

16. Evidence for the respondents were led by the 2nd respondent.

17. He testified that indeed the 1st respondent entered into hire purchase agreement in respect of the vehicle. The vehicle was valued at Ksh.3,375,000 by the **Automobile Association of Kenya (AA)**. That the 1st respondent made five repayments to the Bank totalling Ksh.673,280. The Bank repossessed the vehicle in June 2007 and did not sell it until the year 2008. He said that the Bank did not advertise that sale.

18. The Learned trial Magistrate, as stated before, dismissed with costs the Bank's case. The Learned Magistrate made that finding on the following basis set out in his considered judgement:

“I have considered the submissions presented by both parties in advancing their respective arguments. I have also gained sight of the agreement. There is no mention of interest, at least not on the copy introduced in evidence by the parties. Where did the plaintiff get the interest computation from? The hire purchase agreement was at a flat rate. There is no mention of the 16.48% per annum interest as claimed. I understand that a court of law cannot rewrite the terms of a contract for the parties. Parties are bound by the four corners of their agreement unless it is shown that there is coercion, fraud, undue influence or a mistake. The plaintiff claims that the letter of offer constituted an integral component of the hire purchase agreement. This is however not mentioned in the hire purchase agreement, the primary document giving rise to the transaction herein.

There is also that bit that the vehicle was sold a year after it was attached. This particular action by the plaintiff reeks malice. The plaintiff has created a certain set of circumstances and then commences action to reap benefits from this set of circumstances. The plaintiff is trying to bake its cake and eating (sic) it.

I am convinced that there is no merit in the suit by the plaintiff. The letter of offer was not an inclusive term of the hire purchase agreement. There was no mention of interest in the hire purchase agreement. The motor vehicle having been attached was sold much later, depreciating in value.”

ANALYSIS AND DETERMINATION

19. Although the Bank has presented five grounds of appeal essentially the Bank by this appeal seeks the finding of this court that the trial court erred in failing to consider the terms the letter of offer was integral part of the hire purchase agreement. It will be recalled that the letter provided for 8% rate on the loan and 16.48% interest rate on arrears.

20. Parties are bound by their pleadings. The Bank only pleaded the hire purchase agreement. The hire purchase agreement made no mention of the offer letter. The offer letter, however, had the following clause:

“.....acceptance of and compliance with the following terms and conditions:-

1.
2.
3.
4.
5.
6.

a) Hire purchase documentation over the vehicle in our standard form.”

21. That clause incorporated the hire purchase agreement. The hire purchase agreement however did not incorporate the letter. The banks pleadings only related to the hire purchase agreement. The Bank did not pleading in the plaint the letter. The Bank is bound by its pleadings. This was reiterated by the Court of Appeal in the case **Dakianga Distributors (K) Ltd V Kenya Seed Company Limited [2015] eKLR** where the Court engaged in detailed discussion on pleadings, thus:

“In Libyan Arab Uganda Bank for Foreign Trade and Development & Anor V Adam Vassiliadais[1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in Jones V National Coal Board [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

This Court in **Independent Electoral and Boundaries Commission and Anor V Stephen Mutinda Mule & 3 others** (supra) cited with approval the decision of the Supreme Court of Nigeria in **AdetounOladeji (NIG) Limited v Nigeria Breweries PLC** SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the situation.”

22. The hire purchase agreement, which was pleaded by the Bank, did not have the rate of interest chargeable and did not state the instalments payable by the 1st respondent. That being so the 1st respondent could not then have been in arrear when the vehicle was repossessed. In arrears of what, one would ask, since there was no amount stated as the repayment instalment. There was also no interest applicable.

23. It follows that, just as the respondents pleaded in their defence, there was no basis of the Bank repossessing the vehicle. The repossession that took place was without a Legal basis. The Bank, in view of the fact it did not prove default clause in the guarantee, ought to have sued the respondents and thereafter if it obtained judgment to execute the same.

24. The trial Court cannot be faulted for having not considered the offer letter. It was not pleaded. The Bank was bound by its pleadings.

25. It follows, therefore there is no merit in this appeal and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Appellant

..... for the Respondents

MARY KASANGO

JUDGE