



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 3 OF 2012

AHMED DAHIR SALAT.....PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint dated 19th January, 2012 filed on behalf of the plaintiff by Mose & Company Advocates. Though the plaintiff in person later purported to file an amended plaint dated 5th October, 2018, the same is not supported by leave of this court, and I will thus not rely on the same.

2. In the plaint dated 19th January, 2012 the plaintiff claimed that he entered into an asset purchase agreement with the defendant for the financing and purchase of a motor vehicle, Swaraj 29 seater Registration No. KBE 258 V through the plaintiff's bank account No. 29767729 with First Community Bank Garissa Branch, and that he initially was in partnership with Guled Kunow Mursal who after sometime opted to abandon the joint venture. It was also owned in the plaint that the plaintiff operated passenger transport business between Garissa- Masalani-Ijara routes and serviced the loan until the vehicle broke down and the plaintiff dutifully informed the defendant about his misfortunes, but in February 2011, the defendant instructed Dalali Auctioneers to repossess the said motor vehicle and sold it without the plaintiff's knowledge, and the defendant now insisted that the plaintiff was still in arrears, without accounting for the proceeds of sale of the vehicle and without due diligence, even though the defendant owed a duty of care to its customer (the plaintiff).

3. The plaintiff thus sought the following orders against the defendant:-

(i) A permanent injunction restraining the defendant, their agents, servants and/or employees from demanding any amounts from the plaintiff on claims of outstanding amount on A/C 29767729- First Community Bank, Garissa Branch.

(ii) A permanent injunction restraining the defendant, their agents, servants and/or employees from proclaiming, attaching and/or selling the plaintiff's movable and immovable assets on claims of an outstanding loan amount on A/C 29767729 – First Community Bank Garissa Branch.

(iii) General and exemplary damages.

(iv) Costs of this suit and interest at court rates.

(v) Any other or further relief that this Honourable Court may deem fit and just to grant.

4. The defendant in response to the allegations in the plaint, filed a defence dated 6th March, 2012 through Kanyariri & Associates Advocates.

5. In the defence, it was averred that by a Letter of Offer dated 1st December 2008, the defendant advanced Kshs. 2,598,023.40 to the plaintiff and by way of security a joint registration of motor vehicle KBE 258V was effected and a chattels mortgage over the said vehicle registered, and also that the defendant intended to raise a counterclaim.

6. With regard to paragraph 15 of the plaint, the defendant stated that the contents therein were false and misleading in that there was previous proceedings that is; PMCC No. 25 of 2011 at Garissa which the defendant appropriately dismissed.

7. The case proceeded through oral evidence tendered by witnesses. The plaintiff, Ahmed Dahir Salat testified as PW1. He stated that as Deputy Mayor of Garissa town he found that people had a transport problem and approached the CEO of First Community Bank who later became Governor of Garissa County (Nadhif Jama) for purchase of a vehicle for provision of passengers transport to Masalani and made a business proposal. The CEO told him to make the proposal to the Credit Department, which he did and they told him to go to CMC where he

was shown a bus which looked good and he was issued with an invoice which he took to the bank (defendant). The bank agreed to assist him in business and said that even if he encountered business problems, they would sit down with him to resolve the issue.

8. They told him to pay 18% down payment which amounted to Kshs.600,000/- for them to fund the purchase of the bus. He did so and he received the bus after a week in good condition with a speed governor and comprehensive insurance. They told him to open a special bank account to which he deposited money daily from the income of the bus and they recovered Kshs. 93,000/= per month for the loan amount which was payable for three (3) years.

9. He signed a Letter of Offer for Kshs. 3,193,409.30 on 18/11/2008. Though it was not mandatory for him to remit money every day, he did so and he paid eleven (11) monthly instalments without default, for the loan facility which was for 36 months and he handled minor mechanical problems. He stated that clause 6 (3) and (4) of the Letter of Offer was to the effect that in case of a problem, the parties would sit down to resolve the issue. According to him, the vehicle was a rare model which was not common in Kenya and spares not readily available, though small bolts could be obtained from other models.

10. When however, the hub of the rear axle was broken, he could not get the spare parts from Nairobi, not even from CMC. He then informed the First Community Bank and asked them to assist and they said they would call him. He later raised the matter with the bank's Asset Manager and Credit Manager.

11. He then learnt that CMC had found the spare and he bought it after 3 months and paid Kshs.76,000/= for it and repaired the motor vehicle, but then he saw people from Credit Department of the bank and when he enquired from Credit Manager of the bank in Nairobi, he was told that they were brokers or auctioneers who had been validly sent. The auctioneers said they wanted to tow the vehicle because he had defaulted for 3 months though the bank did not give him prior notice, and though he complained to the Bank Manager, they took the vehicle.

12. Later, after 5 months the Bank CEO Mr. Jama called him and when he went to meet him and discussed about default in payments, the said CEO stated that he did not know where the vehicle was. They then went together with the CEO to Nairobi with his lawyer and they were told that the vehicle had been sold for only Kshs.500,000/=, which he could have paid if he knew. When the Credit Department was asked for more details, they provided an outstanding amount with interest wrongly calculated for 25 months.

13. The CEO then tried to do "Maslah" amicable dispute resolution outside the terms of Letter of Offer but it did not work, thus the plaintiff came to court.

14. According to him the bank was unfair to him as through the vehicle was used elsewhere after the auction; the bank was demanding more money from him without being concerned about his interests. He complained that the bank initially persuaded him to sign the Letter of Offer but once he committed himself to the business, they did not help him. The bank was also unfair because they took his money, vehicle, and in addition wanted more money from him.

15. He asked the court to weigh the justice of the matter and give him redress and costs for the wrong actions of the bank.

16. In cross examination, he agreed that he signed the Letter of Offer and attached agreement and was bound by the clauses herein. He said he did not agree that he would continue paying even if the vehicle had broken down. When referred to clause 5 of the agreement, he agreed that the value of the transaction was Kshs.3,193,409.30.

17. He agreed also that the vehicle was to be operated by trained people and that he was responsible for maintenance of the vehicle. Though he agreed that he did not pay for 3 months, he denied that such was a default, though under clause 8 (2) (b) the amount became due and the bank could demand repayment. He agreed that the total sum for the vehicle including insurance was Kshs. 2.5 million which was paid by the bank. According to him, the Kshs. 3.1 million paid by the bank included his own Kshs.600,000/=. He agreed that the bank could auction the asset without informing him according to the Letter of Offer. He said that if there was a letter stating that the sale was for Kshs.700,000/= then the bank must have cheated him and the CEO.

18. He was aware that Garissa-Masalani-Ijara route was rough road. He agree also that the agreement did not entitle Nadhif Jama (CEO) to arbitrate in the matter. He agreed that, he had not produced a receipt from CMC for the purchase of the hub. According to him, he paid approximately Kshs.1 million for 11 months. He was not aware that interest accrued from the date of default.

19. In re-examination, he stated that the bank knew that the vehicle operated on the Masalani road, and that as there were four (4) police checks on that road, the vehicle could not operate without a licenced driver.

20. He said that as the road was bad, breakdowns were inevitable. He maintained that he informed the bank when he procured the hub.

21. He complained that the bank did not give him any communication in writing to pay under clause 8 (1) (2) (b) of the agreement but merely towed the vehicle. The bank merely sent him a demand letter after they had auctioned the vehicle. According to him, the bank was not fair.

22. PW2 was Guleid Kunow Mursal, who operated business from Nairobi. It was his evidence that the plaintiff approached him for 20% (Kshs.600,000/=) deposit for a bank loan saying he had talked to Nadhif Jamal former Governor Garissa County in order to purchase a vehicle.

23. Initially he refused, but next day the plaintiff came again and he agreed to give him the amount of Kshs.600,000/= for repayment in six (6) months. They agreed also to open a joint bank account and he went for pilgrimage to Mecca after transferring the money to that account. They also agreed that he would have a share of the vehicle after repayment to him of the Kshs.600,000/=.

24. Though the vehicle was new from CMC, he was not repaid nor informed of any problems by the plaintiff. He thus took elders to discuss the issue with the plaintiff after 11 months and the plaintiff paid him only Kshs.50,000/= and had not been repaid the outstanding amount after 8 years.
25. He was however phoned by the bank after 5 years about the transaction, and thereafter the plaintiff explained to him about the auction of the vehicle by the bank. It was his position that the court should also deal with the repayment of his money from the plaintiff.
26. He stated also that he had secured loans from the same bank, that is Kshs. 19,000,000/= on account of Jamil Bus Services, and also Kshs.43,000,000/= to invest in Maslah Bus Services operating between Nairobi and Mombasa and had repaid both. He emphasized that the plaintiff did not inform him that the bus was defective.
27. In cross-examination, he stated that they were not business partners with the plaintiff and was not aware of the specific terms of the credit facility between the plaintiff and the bank. He stated that it was in court that morning, that the plaintiff showed him a letter of repayment of Kshs.900,000/=. According to him, vehicle defects could be repaired within one (1) week. He said that he repaid the Kshs.18,000,000/= loan from First Community Bank in 3 years, and that he read carefully the terms in the agreement and signed with the bank and was aware that the outstanding amount would rise by 11% if he defaulted. He was aware of the processes if he defaulted for one (1) month.
28. That was the plaintiff's evidence.
29. The defendant called one witness DW1 Abdiaziz Farah Maalim a Relationship Manager with First Community Bank, Garissa Branch. According to him, Dahir Salat obtained credit facility from the defendant bank on 13/11/2008 for Kshs. 2,598,023.44 payable for 36 months (3 years), together with 18%. Of the amount, the plaintiff paid for only 7 months which was not consistent as in the 7th month he paid only half of the instalment.
30. According to him, in default of payment the bank gave a statutory notice to the plaintiff then applied the contractual recovery procedure as detailed in the Letter of Offer dated 1/12/2008, and made a recall of all the amounts disbursed. He stated that demand letter was issued to Dahir and adopted the witness statement of Molu Halkano.
31. In cross-examination, he stated that the bank statement relied upon by the plaintiff which reflected payments for 11 months were not stamped as official. He did not however know the reason why the bank did not bring to court the notice issued to the plaintiff before towing the vehicle. He acknowledged that there was a demand letter dated 8/11/2010 but stated that he did not know if it was sent to the plaintiff after the vehicle was towed and sold.
32. He stated that the bank had to operate on profit, but did not charge interest. According to him, a valuation was normally done before the auctioneers sold the asset within the valuation range.
33. In re-examination, he said that the 18% per annum was factored in the 36 months payment period, and the total amount payable herein would come to about Kshs.4 million. According to him, the bank claimed Kshs. 2.6 million as principal amount and profit. He said the customer was liable to pay for the shortfall from the auction sale.
34. That was the end of the defendant's evidence. The plaintiff then made oral submissions in court, and the defendant's counsel filed written submissions. I have considered both submissions.
35. It is not in dispute that the plaintiff obtained a bank credit facility from defendant for Kshs.2,598,023.44 to purchase a motor vehicle (bus) KBE 258V to operate in Garissa-Masalani-Ijara route in November 2008. The amount was subject to profit of 18% per annum for the payment period of 36 months. It is not in dispute that the plaintiff paid for sometimes and defaulted and the vehicle was towed by the defendant and auctioned.
36. The issues for determination are how much the plaintiff repaid? Secondly, whether the plaintiff was given prior notice of intention to repossess and auction the vehicle. Thirdly, whether the auction was conducted according to the contract and the law. Whether the plaintiff is entitled to the reliefs sought.
37. On how much the plaintiff repaid before default- the plaintiff said he paid for 11 months at the agreed rate, before defaulting after the vehicle suffered a major breakdown in the rear hub and he found it difficult to obtain the requisite spare part for the unique "SWARAJ" motor vehicle. The defendant stated that the plaintiff paid 6 full instalments and a 7th instalment only in part. The defendant was the record keeper of all the transactions of the account and the repayments, on which they were not candid. They merely challenged in evidence the bank statement of the plaintiff by saying it was not stamped. They had the primary burden to say how much was repaid as they were the record keepers and also the ones who claimed the plaintiff defaulted. They did not provide clear record. I find that the plaintiff repaid for eleven (11) months, as stated by himself at the agreed monthly rate.
38. The second issue is whether the plaintiff was given the statutory notice before the vehicle was towed and sold. It was agreed in evidence that commercially and contractually the plaintiff was entitled to be given notice before repossession and auction of the assets. Clause 8.2 (b) and (e) of the Agreement are relevant. The plaintiff maintained that he was only issued with notice after the auction of the motor vehicle, not before the repossession and auction.
39. The defendant on the other hand maintains that the defendant gave the requisite notice, but in any case had a contractual right to take possession and sell the asset without notice.
40. Again on this issue, the notice was to be issued by the defendant and the burden was on them to show on the balance of probabilities that

they so acted. They were also not candid in this respect. They did not specifically say how and when they dispatched the notice. Admittedly, the plaintiff knew that he was in default and he stated clearly that he had not paid for about 3 months which was a long period and the notice was to issue in case of default of only 1 month.

41. In my view, the Agreement required that notice be issued before repossession of the asset. That was not done by the defendant in breach of the Agreement and fair commercial practice. Even if the defendant had defaulted for 3 months, the notice was a pre-requisite before possession. The defendant did not give the prior notice to the plaintiff.

42. The third issue is whether the auction was conducted according to the law. It was for the plaintiff to show in what way the auction fell short of the legal requirements of the Auctioneers Act. He neither followed up the repossession of the vehicle nor showed interest in what happened thereafter. He is merely complaining now in court because the defendant wants to be paid the shortfall of the outstanding amount after the amount realized in the auction.

43. Auctions are conducted on market prices, which fluctuate. The plaintiff himself said that the motor vehicle was a rare model where obtaining spares could be a challenge. He says it was sold for Kshs.500,000/=. Though he said that he repaired it before repossession, he could not show any evidence of any such repairs. In my view, the auction was done properly according to the law.

44. Is the plaintiff entitled to the reliefs sought? The plaintiff has sought for issuance of permanent injunctions against demands and attachments on Bank A/c 29767729 First Community Bank Garissa for the loan, general and exemplary damages.

45. In his evidence, the plaintiff does not appear to have pursued the issue of award of damages. No evidence has been tendered to support damages either for pain and suffering or for commercial or opportunity cost. The claim for damages is thus not sustainable. I dismiss the same.

46. In my view, the injunctions sought against further claims by the defendant against the plaintiff are justifiable. The defendant having failed to comply with its own lending terms of prior notice, signed between it and the plaintiff, cannot use that default to claim more money from him. That is contrary to the rules of fair commercial practice. See **Vehicle & Equipment Leasing Ltd vs Jamii Bank Ltd [2017] eKLR** – where the need for fair commercial practice and prior notice was emphasized.

47. The defendant has relied on the case of **Francis JK Khatha vs HFCK [2005] eKLR** on requirements for issuance of injunctions relating to security – land. The case above could only relate to injunction sought against sale of the motor vehicle. The vehicle has already been sold, and is a non-issue.

48. The injunctions sought herein are not against the sale of the security (vehicle) but against further demands on the alleged amount owing to the defendant from the plaintiff. Since the defendant violated the terms of agreement by not issuing prior notice to possession and sale of the security, I will grant prayer (i) and (ii), as in my view the defendant cannot benefit from its own default.

49. Consequently, and for the above reasons, I allow the case in part. I decline to grant damages to the plaintiff. I however grant permanent injunctions as prayed for in (i) and (ii) of the plaint. The plaintiff is also awarded costs of the suit.

Dated and delivered at Garissa this 19th day of December, 2018.

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George Dulu

JUDGE