REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 461 OF 2010

IMPERIAL BANK LIMITED …….....……...……. PLAINTIFF

VERSUS

FRANCIS K. GITAU T/A

BOMAS MOTOR MART …… DEFENDANT

R U L I N G

This application is brought by a Notice of Motion dated 18th November, 2010 and taken out under **Section 3A of the Civil Procedure Act; Order XXXV Rules 1 (1) (a), 2 and 8, and Order XII Rule 6 of the Civil Procedure Rules.** The Applicant thereby seeks an order that summary judgment be entered against the Respondent for Kshs.3,781,685.00 together with interest thereon as prayed in the plaint. In the alternative, the Applicant prays for judgment on admission.

The application is supported by the annexed affidavit sworn on 18th November, 2010 by Mary Wanjiru, a Legal Officer with the Plaintiff/Applicant. It is based on the grounds that:-

1. The Defendant is well and truly indebted to the Plaintiff in the sum of Kshs.3,781,685/= together with costs and interest thereon in the terms more particularly set out in the plaint filed herein.

2. The Plaintiff's claim herein is in respect of the amount outstanding and due from the defendants in respect of the financing of a motor vehicle registration number KBA 001 K.

3. The defendant in attempt to repay the monies due and owing to the Plaintiff issued a standing order in favour of the Plaintiff.

4. The defendant is truly and justly indebted to the Plaintiff.

5. The defence filed herein on 3rd September, 2010 consists of mere denials and does not sufficiently answer the Plaintiff's claim but serves the purpose of delaying the suit.

In opposing the application, the Respondent filed a replying affidavit

sworn on 26th January, 2011. He concedes in that affidavit that the Applicant advanced the facility to him for the purchase of the subject motor vehicle, Reg. No. KBA 001 K. He argues however that the motor vehicle was registered jointly in his business name and that of the Applicant. Pursuant to the facility agreement, he also effected the 36 months standing order in favour of the Applicant. However, without any default on the terms of the facility agreement, the Applicants threatened to repossess the motor vehicle if the log book was not forwarded to them before 26th March, 2009. The Applicants duly made good their threat and repossessed the subject motor vehicle on 25th March, 2009 before the notice had expired. Thereafter, the Applicant issued instructions for cancellation of the standing orders on/or about 10th July, 2009.

The Respondent denies having admitted indebtedness in this case. He refers to paragraph 17 of the Applicant's supporting affidavit in which the deponent avers that the issuance and subsequent cancellation of the standing order before the period set out in the agreement embodies an unequivocal admission by the Respondent of monies due and owing. The Respondent denies that this is an admission of indebtedness.

At the oral canvassing of the application, Mr. Maondo appeared for the Applicant while Ms. Kibara represented the Respondent. Although this application was filed in Court in November, 2010, it was not argued until March, 2011 by which time the new **Civil Procedure Rules** had come into force on December 17th, 2010 by virtue of Legal Notice No.151 of 2010. Under **Order 54** of the new rules, the **Civil Procedure Rules** as they existed previously were revoked under Rule 1 thereof and transitional provisions are provided for in Rule 2 as follows:-

2. In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done:

(a) If, and in so far as it is impracticable in any such proceedings to apply the provisions of these Rules, the practice and procedure heretofore obtaining shall be followed;

(b) In any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted.

It is my considered view that it is not impracticable to apply the provisions of these rules in this matter and that the said rules automatically govern these proceedings. For this purpose, **Order 36 Rule 1** which was raised by the Respondent, provides that:-

1. (1) In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or …

(b) …

where the defendant had appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

The Respondent in this matter has not only entered appearance, but has also filed a defence. Consequent upon his filing a defence, it is no longer competent for the Applicant to apply for judgment under this Rule. The matter should proceed to trial. I accordingly find that the application for summary judgment has no merit and it is hereby dismissed.

However, since the application was filed before the advent of the new rules, I think that it would not be fair to saddle the Applicant with costs. In the circumstances, I consider the fairest order to make in

terms of costs is that the same be in the cause.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 26th day of April, 2011.

L. NJAGI
JUDGE