



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 226 OF 2009**  
**DIAMOND TRUST BANK KENYA LIMITED..... PLAINTIFF**  
**VS**  
**MEENAKSHI KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**  
**ASHOK DHANJIBHAI PANCHAL.....2<sup>ND</sup> DEFENDANT**  
**MEENASHAK ASHOK PANCHAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 16<sup>th</sup> March 2009, the plaintiff claims from the defendants a sum of Kshs. 3,671,013.83 together with interest at the rate of 18% per annum from 31<sup>st</sup> January 2009 until payment in full. The plaintiff also claims costs of the suit together with interest thereon at court rates from the date of judgment until payment in full.
2. The plaintiff's case is that by a Hire Purchase Agreement number 008HPL0071530004 dated 30<sup>th</sup> May 2007, the plaintiff let to the 1<sup>st</sup> defendant a used motor vehicle Mercedes Benz Prime Mover registration Number KAQ 744G AND CMC Tri Axle Semi Trailer registration number ZC 0817 on hire purchase terms for the sum of Kshs. 1,300,000/- and Kshs. 900,000/- respectively, together with interest thereon at 8% per annum. The facility was to be repaid in 24 equal monthly installments of Kshs. 106,333/- per month inclusive of interest. In default, the 1<sup>st</sup> defendant would pay additional interest of 16.48% per annum on any installment not paid punctually. In addition, by a letter of offer of facility dated 21<sup>st</sup> May 2007, the plaintiff extended to the 1<sup>st</sup> defendant an overdraft facility of Kshs. 2,200,000/- secured by a lien over the defendant's fixed deposit of a similar sum held with the plaintiff's Capital Centre Branch. Both the hire purchase facility and the overdraft were further secured by a Deed of Guarantee executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in favor of the plaintiff.
3. It is the plaintiff's case that there having been default on the hire purchase facility, it repossessed the Prime Mover and the semi-trailer and sold the latter for Kshs. 500,000/-. The prime mover could not be disposed of as it was repossessed in a sorry state of disrepair. Proceeds from sale of the semi trailer were applied to reduce the hire purchase loan balance but could not fully settle the arrears hence as at 30<sup>th</sup> January 2009, the amount due under the hire purchase facility was Kshs 948,035.56. With regard to the overdraft facility, the plaintiff claims that as at 14<sup>th</sup> November 2008, the facility was overdrawn to the tune of Kshs. 4,719,968.02. This constrained the plaintiff to liquidate the 1<sup>st</sup> defendant's fixed deposit of Kshs. 2,365,221.58 leaving a shortfall of Kshs. 2,354,746.44. The plaintiff's claim therefore is comprised

of the sum of Kshs. 948,035.56 due and owing under the hire purchase agreement and the sum of Kshs. 2,722,948.24 due and owing under the overdraft facility as at 31<sup>st</sup> January 2009, together with interest and costs.

4. In response to the plaintiff's claim, the defendants filed a defence on 24<sup>th</sup> July 2009 in which they admit having obtained the two facilities and having secured them as aforesaid. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants however deny having defaulted as claimed in the plaint and add that if there was such a default, the same was not notified to them by the plaintiff as required under the guarantee agreements between them and the plaintiff. On its part, the 1<sup>st</sup> defendant avers that the repossession of the prime mover and trailer was not motivated by default on its part but by fraud and ill will on the part of the plaintiff's officers. The defendants therefore pray that the plaintiff's suit be dismissed with costs.

5. Upon close of pleadings, the plaintiff served upon the defendants its witness statement and bundle of documents it wished to rely on at the trial. The matter was fixed for hearing on 17<sup>th</sup> November 2011 but was adjourned at the request of counsel for the defendant who told the court that he needed time to file the defendants' witness statements and bundle of documents. The matter was then fixed for hearing on 9<sup>th</sup> February 2012 when there was no appearance for the defendants. Neither had counsel for the defendant filed any witness statements and/or bundle of documents. As the court was satisfied that the defendants had been duly served with the hearing notice and had, anyway, been aware of the hearing date the same having been fixed in court in their presence, the court directed that hearing do proceed *ex parte*.

6. The plaintiff called one witness, Ms. Elizabeth Hinga, the plaintiff's Head of Debt Recovery Unit. In her evidence, Ms. Hinga confirmed that the plaintiff had extended an overdraft facility of Kshs. 2,200,000/- to the 1<sup>st</sup> defendant on the terms and conditions set out in the letter of offer of facilities dated 21<sup>st</sup> May 2007. The facility was secured by a lien over the 1<sup>st</sup> defendant's fixed deposit of Kshs. 2,200,000/- held with the defendant's Capital Centre Branch. It was further secured by a Deed of Guarantee dated 31<sup>st</sup> December 2007 and executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She told the court that by a further letter dated 21<sup>st</sup> May 2007, the plaintiff agreed to advance to the 1<sup>st</sup> defendant a hire purchase loan of Kshs. 2,200,000/- to finance the 1<sup>st</sup> defendant's purchase of a used prime Mover Registration No. KAQ 744G and a trailer registration number ZC 0817. There having been breach in servicing both facilities, the plaintiff retired the 1<sup>st</sup> defendant's fixed deposit and applied the proceeds to reduce the overdraft. Upon application of the fixed deposit on the overdraw position, the debt outstanding stood at Kshs. 3,379,626.58 as at 31<sup>st</sup> March 2010. With regard to the hire purchase facility, the prime mover and the trailer were repossessed. The former fetched a mere Kshs. 300,000/- on 9<sup>th</sup> November 2009 as the same had been vandalized and most of its parts removed. The latter was sold for Kshs. 500,000/-. Ms. Hinga told the court that as at 31<sup>st</sup> January 2009, the amount owing on the hire purchase facility was Kshs. 948,035.55 together with interest at the rate of 18% per annum until payment in full. Ms. Hinga produced the plaintiff's bundle of documents filed on 16<sup>th</sup> November 2011 in support of her evidence. This court has duly reviewed each of the 18 documents produced and whose admissibility has not been contested.

7. I have studied the defendants' defence in the light of the evidence tendered by the plaintiff. In my considered view, none of the averments in the defence are capable of controverting the plaintiff's claim against the defendants. The defence makes express admissions of the 1<sup>st</sup> defendant's borrowing under the two facilities. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants do not deny having guaranteed the two facilities. Neither do the defendants claim having repaid the loans as agreed or at all. The only defence that arises is that the repossession and sale of the prime mover and the trailer was actuated by fraud and ill will on the part of the plaintiff and/or its servants or agents. Fraud must be proved by way of evidence, which evidence has not been tendered. In the premises, the court is unable to ascribe any value to the allegations of fraud or ill will on the part of the plaintiff.

8. The plaintiff has adduced substantial and clear evidence in support of its claim against the defendants. On the basis of such evidence, and on the basis of the documents produced in support of that evidence, I

find that on a balance of probabilities, the plaintiff has proven its case against the defendants. The plaintiff's suit therefore succeeds.

9. Accordingly, I hereby enter judgment for the plaintiff against the defendants, jointly and severally as prayed in the plaint, for the sum of Kshs. 3,671,013.83 together with interest thereon at the rate of 18% per annum from 31<sup>st</sup> January 2009 until payment in full. I also award costs of the suit to the plaintiff together with interest thereon at court rate from the date of this judgment until payment in full.

10. Those shall be the orders of this court.

DATED, SIGNED and DELIVERED in Nairobi this 19<sup>th</sup> day of April 2012.

**J. M. MUTAVA**

**JUDGE**