



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY COURTS
CIVIL CASE NO. 208 OF 2010

NIC BANK LIMITED.....PLAINTIFF

VERSUS

RAWFORD LIMITED.....1ST DEFENDANT

STANLEY MUIGURI MUTHAMA.....2ND DEFENDANT

CHARLES GITONGA KALUNGE.....3RD DEFENDANT

R U L I N G

Before the court is a Notice of Motion dated 16th July 2010. It seeks *inter-a-alia* that summary judgement be entered for the Plaintiff against the Defendant in the Plaintiff.

The brief history of the application as per the Plaintiff and Defence is that pursuant to a Hire Purchase Agreement made on 21st December 2006, executed and performed at Nairobi between the Plaintiff and 1st Defendant, the Plaintiff financed the 1st Defendant a sum of Kshs.3,290,000/= towards the purchase of a motor vehicle in terms of the said Agreement, wherein the 1st Defendant covenanted to repay the same in 35 equal monthly installments of Kshs.112,450/= and a final installment of Kshs.114,266/= with effect from 13th March 2007 together with interest thereon at the rate of 7.68% p.a. and late payment interest of 30% p.a. and such other charges as detailed in the Plaintiff's General Terms and Conditions.

By a Guarantee and Indemnity dated 10th February 2007, the 2nd and 3rd Defendants jointly and severally undertook to indemnify the Plaintiff against any losses that may be suffered by the Plaintiff arising from breach of the said Hire Purchase Agreement by the 1st Defendant.

In breach of the Hire Purchase Agreement the 1st Defendant failed and/or neglected to service or repay the loan advanced on the terms agreed upon and has persisted in such default.

Further in breach of the Guarantee and Indemnity Agreement the 2nd and 3rd Defendants have failed and/or neglected to indemnify the Plaintiff despite demand thereof.

The Plaintiff's claim against the Defendant jointly and severally is for the sum of Kshs.4,037,493.93 being an amount now due and owing by the Defendants to the Plaintiff as at 6th January 2010 in respect

of the loan advanced to the 1st Defendant and guaranteed by the 2nd and 3rd Defendant and which amount continues to accrue interest at 30% p.a. until payment in full, particulars whereof are well within the Defendant's knowledge.

The Defendant's filed their joint Defence and denied the claims in the Plaintiff. The Plaintiff now alleges that the said Defence is a sham meant to delay the due process, is an abuse of the court and should be dismissed and summary judgement entered.

In support of the application, the Applicant representative one H. Maina has sworn an affidavit dated 16th July 2010 with annexures which include the Hire Purchase Agreement ("HM 1"), Guarantee and Indemnity ("HM 3") and Monthly Statements ("HM 4").

The application was served upon the Respondents on 16th February 2012 and an affidavit of service was filed in court on 13th March 2012. The Respondents have not opposed the application.

It is submitted for the Applicant that pursuant to a Hire Purchase Agreement dated 21st December 2006 and executed between the Plaintiff and the 1st Defendant the Plaintiff financed or loaned the 1st Defendant a sum of Kshs.4,048,016 towards the purchase of a motor vehicle on the terms and conditions of the said Hire Purchase Agreement. The 1st Defendant was to repay the said loan in 35 equal monthly installments of Kshs.112,450/= and a final installment of Kshs.114,266/= with effect from 13th February 2010. By a guarantee and indemnity dated 10th February 2007 the 2nd and 3rd Defendants guaranteed and undertook to indemnify the Plaintiff against any losses of failure of the 1st Defendant to repay the loan. The 1st Defendant duly failed to comply with its commitments under the Hire Purchase Agreement and the 2nd and 3rd Defendants also failed and neglected to indemnify the Plaintiff despite demand. It is submitted that the defence filed for the Defendants is a sham and should be dismissed.

I have considered the application. The averments in the supporting affidavit are corroborated by the annexures thereto. The application is not opposed. However, under Order 36 an application for summary judgement cannot be allowed by court where a party has entered appearance and filed a Defence. The proper procedure where a Defence has been filed is to apply to strike it out on legally valid grounds. This prayer has not been made in the present application. However, the Applicant has also cited Section 3A of the Civil Procedure Act. This section allows the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In the instant case the Defence is clearly a sham and is intended to delay the suit and abuse the process of this court. Further the Defendant has chosen not to respond to this application. This court cannot in all fairness allow this matter to proceed to full trial when even the Defendant cannot show interest in it at this stage.

Accordingly, I allow the application and herewith enter summary judgement for the Plaintiff as follows:-

- a) Kshs.4,037,493.93.
- b) Interests therein at the court rates as from 7th January 2010 until payment in full.
- c) Costs of the suit.
- d) Costs of the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 18TH DAY OF APRIL 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Wambua H/B for Njuguna for the Plaintiff

N/A for the Defendants

Teresia – Court clerk