REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 481 OF 2009

AFRICAN BANKING CORPORATION LTD.....PLAINTIFF

VERSUS

JATCO TOURS & TAXIS CO. LIMITED.....1ST DEFENDANT

DANIEL MUTUA MUOKI.....2ND DEFENDANT

DANCAN MWANGI NJIRANI.....3RD DEFENDANT

RULING

On 29th July 2011, I gave my decision in the Plaintiff's Notice of Motion dated 2nd July 2010, brought under **Order V1 Rule 13(1)(b)** and **(d)** and **Order X11 Rule 6** of the **Civil Procedure Rules (2009 Revised Edition)**, seeking orders that the Defendants Statement of Defence be struck out and judgment be entered for the Plaintiff as prayed in the Plaint. Alternatively, that judgment on admission be entered against the Defendants in the sum of KShs. 4,039,646/-. This now is my substantive ruling in the matter. The court notes that the date of the said application was erroneously stated to have been 25th July 2010, and the error is hereby corrected.

The Plaintiff avers that, pursuant to an application for finance, made by the 1st Defendant on or about 24th August 2005, culminating in a letter of offer dated 5th September 2005, the Plaintiff entered into an asset finance contract for KShs. 24,000,000/= with the 1st Defendant under which the Plaintiff financed the 1st

Defendant's purchase of 21 Chevrolet Area vehicles (hereinafter referred to as "the subject motor vehicles"). Additionally, by separate instruments of Guarantee and Indemnity dated 5th September 2005, the 2nd and 3rd Defendants separately and voluntarily guaranteed the observance of the 1st Defendant's obligations, including the payment of the sums due. The Guarantee and Indemnity are annexed to the Supporting Affidavit and marked K6(a) and K6(b) respectively.

According to the Plaintiff, the loan was advanced to the 1st Defendant on 7th October 2005 in the sum of Kshs 23,908,500.00/= as evidenced in the bank statement marked as annexture K9. This much is admitted in the Reply Affidavit of the 2nd Defendant sworn on the 15th of September 2010.

The Plaintiff further states that the 1st Defendant defaulted in the payment of the agreed monthly instalments of KShs. 836,667/=, whereupon, the Plaintiff exercised its right of repossession and sale of the subject motor vehicles excluding four. The repossessed vehicles were sold and the proceeds of the sale applied towards the debt owing from the 1st Defendant. However, a substantial amount of the sum is said to have been left due and owing to the Plaintiff.

In their defence, the Defendants have denied the existence of the asset finance agreement but have admitted that the Plaintiff advanced the loan to the 1st Defendant in the sum of KShs. 23,908,500/=.

In my Ruling of 29th day of July 2011, it held that this was not a case where summary judgment on the entire sum claimed can issue in favour of the Plaintiff. My decision was reached after perusing the various documents and affidavits filed for and against the application as well as the pleadings and upon due consideration of the written submissions filed by the opposing sides and the authorities cited.

It is trite that the power to strike out pleadings under **Order V1 Rule 13 (1)** of the **Civil Procedure Act** cannot be exercised in any case where triable issues arise. Although the 1st Defendant, both in its defence and submissions filed, admits being indebted to the Plaintiff, it denies that it is indebted to the Plaintiff to the tune of KShs.15,360,215.48 plus interest at 2% per month from 19th June 2009 as stated in the Plaint.

In paragraph 4(v) of the Statement of Defence as read with paragraph 10(c) thereof, the Defendants aver that the attachment and sale of the 1st Defendant's 17 motor vehicles by the Plaintiff was irregular, unlawful and malicious as the Plaintiff did not await for the expiry of the 7 days notice it had given to the 1st Defendant vide its letter dated 21st April 2008, (annexture "DMM 4B"of the Replying Affidavit). Further, the Defendants have submitted that Messrs Pyramid Auctioneers had already been instructed to repossess the vehicles by an earlier letter dated 15th April 2008, (annexture "DMM 4A" to the Replying Affidavit) which had not been revoked. The Defendants complain also that the repossessed vehicles were sold by the Plaintiff at prices far below the offers received from the Defendants, and that the interest charged on the advances was illegal and merely calculated to unjustly enrich the Plaintiff.

It is well settled that the power to strike out pleadings under **Order V1 Rule 13(1)** should be exercised with extreme caution as was held in **KELLAWAY V BURY 1892 66 LT, 600,** wherein Lindley LJ stated that:

"it has been said more that once that the rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution."

Paragraph 6 of the Plaint states that the under the loan agreement, Plaintiff would advance to the 1st Defendant a loan facility to a maximum sum of
KShs 24,000,000/= to purchase vehicles, whose ownership would only pass to the 1st Defendant upon full payment of the loan. The loan amount was to be repaid by the 1st Defendant in 36 equal instalments of KShs. 836,667/=. Interest was variable at the discretion of the Plaintiff without need for notice. An additional default interest at the rate of 2% per month was to be charged on any overdue instalment continually until the outstanding loan was fully paid.

In their Statement of Defence, the defendants contend that the monthly repayments were calculated upfront inclusive of principal and interest. They aver also that the Plaintiff was under a legal obligation to provide, make and maintain accurate, true and proper entries in the account statement which they did not do.

The Letter of Offer dated 5th September 2005, (annexture "K3)" states that the loan was payable by *"36 (thirty six) equal monthly instalments of KShs. 836,667/= (Eight hundred thirty six thousand six hundred sixty seven only) inclusive of principal and interest."* It also provided for a default interest of 2% per month on any overdue instalment. The terms of this letter which were duly accepted by the 1st Defendant provided the right of the Plaintiff to vary and/or alter the rate(s) of interest and/or additional interest and/or commissions/other bank charges/fees and/or the basis of calculating of any of them in its sole discretion and without notice to the Defendant. Any failure by the Plaintiff to advise the Defendant or any of its guarantors of any such changes was not to prejudice in anyway the recovery by the Plaintiff of interest and/or commission/other charges/fees charged subsequent to any such change.

As a general rule the court will hesitate to interfere with the terms and conditions of a contract between contracting parties who have agreed to be bound by the same. However, the court will always try to decipher the intentions of the contracting parties to ascertain whether indeed there was consensus. With regard to the nature of this contract entered between the Plaintiff to the Defendants under the Letter of Offer, the same appears to have been varied by the various Hire Purchase Agreements, none of which provided for default interest.

The Guarantee and Indemnity signed by the 2nd Defendant, Daniel Mutua Muoki (annexture K6a) contains no mention of the principal sum guaranteed by the 2nd Defendant, although it appears to have been executed under seal. The Guarantee and Indemnity executed by the 3rd Defendant expressly provided the sum of KShs. 24,000,000/= as being principal sum secured by the Guarantee as regards the 1st Defendant's loan.

In paragraph 9 of their Statement of Defence the Defendants contend that repossession was irregular, unlawful and malicious, firstly because, as stated by the 1st Defendant, the hire purchase agreement was to run for 36 months commencing the 1st day of November 2005. The 1st Defendant further avers that the Plaintiff unlawfully repossessed the motor vehicle on or about the 31st day of April 2008, at a time which the 1st Defendant had paid a total of KShs. 19,868,854/= against the Principal amount of Kshs 23,908,500/= leaving a balance of Kshs 4,039,646/= only, which the 1st Defendant had (7) seven months to repay. This being the case, it is apparent that the repossession of the said motor vehicles was somewhat premature.

In Paragraphs 10 and 11 of the Statement of Defence the Defendants state that the Plaintiff had, prior to the date on which notice of repossession of motor vehicles was to take effect, instructed Messrs Pyramid Auctioneers/Mariwanga G. Agencies to repossess and sell the motor vehicles which attracted a forced

sale value of KShs, 200,000/=. This was done in total disregard of an offer vide their letter offer made by the Defendants, dated on 2nd March 2008, to sell the vehicles, having identified potential buyers of four of the units at KShs 350,000/= each. While this court acknowledges the Plaintiff's right to repossess and sell the said motor vehicles, it notes that the Plaintiff refused to respond to the opportunity offered by the 1st Defendant to mitigate losses and participate in the motor vehicle sales for better proceeds.

In paragraph 13 of the Statement of Defence, the Defendants contend that the Plaintiff failed to render a true and proper statement of the 1st Defendant's account. This could probably be so, given that the terms of the Hire Purchase Agreement and the Letter of Offer were in conflict, particularly as regards the interest rates chargeable. Flowing from this, the Defendants have therefore stated in paragraph 14 of the Statement of Defence that the sums to be paid (and for which the motor vehicles were repossessed) were unfair and prejudicial to the 1st Defendant.

As is demonstrated above, the Defence filed does contain several triable issues and is neither a sham nor an abuse of the process of the court. I do not consider it suitable for striking out. However, in view of the clear admission that a sum of Kshs. 4,039,646.00 was outstanding when the motor vehicles were repossessed and sold, and there being no evidence tendered by the Defendants to show that the same was ever paid, I hereby enter judgment in respect thereof.

Accordingly, the alternative prayer No.3 of the Notice of Motion dated 2nd July 2010 is hereby allowed and judgment in the sum of KShs. 4.039,646.00/= entered in favour of the Plaintiff against the Defendants jointly and severally as admitted in paragraph 9 of their Statement of Defence. Since the judgment in this sum is sought in the alternative, the court takes a legal presumption that the said sum is to be paid in full and final settlement of the Plaintiff's claim. Additionally, I grant interest on the said sum at court rates from the date of this judgment until payment. The Plaintiff shall have costs of the suit with interest thereon at court rates.

DATED, SIGNED AND DELIVERED at NAIROBI THIS 29TH DAY OF SEPTEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:
Mr. Imende holding brief for MS Ondongo **For the Applicant**
No Appearance **For the Respondent**