



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1426 of 1999

**DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**REBECCA KALONDU MUJERA.....DEFENDANT**

**J U D G M E N T**

The Plaintiff bank, by an amended plaint filed on 3<sup>rd</sup> March, 2003 and dated 27<sup>th</sup> February, 2003 prays for judgment against the Defendant in the sum of Kshs.54,378,926.45 with interest on the said sum at the rate of 47% p.a. from 1<sup>st</sup> June, 2002 until payment in full and for costs of the suit with interest. The brief background of the case is that the Plaintiff bank, upon request by the Defendant, entered into a Hire Purchase Agreements and a Chattels Mortgage dated 6<sup>th</sup> December, 1994 and 8<sup>th</sup> December, 1994 respectively. Under the Agreement the Plaintiff advanced Kshs.7,599,677.40 for the purchase of a motor vehicle registration No. KAE 832B. By way of collateral security the Defendant deposited Kshs.1,105,050/- with the Plaintiff bank and mortgaged motor vehicle reg. No. KTM 568 in favour of the Plaintiff under the Chattels Mortgage. The Plaintiff's case is that the Defendant soon defaulted in the repayments of the Hire Purchase charges leading to the repossession and sale of the purchased vehicle. The Plaintiff contents that the amounts of Kshs.1,105,050/- and Kshs.375, 820, the fixed deposit credited into the Defendant's loan Account and the sum realized from the sale of the vehicle reg. No. KAE respectively, were insufficient to clear the outstanding loan balance. The Plaintiff soon filed this suit claiming Khss.54,378,926.45 with interest at 47% p.a. as aforementioned.

The Defendant filed a defence in which *inter alia* she denied owing the sum claimed. The Defendant pleaded that the sum claimed arose out of illegal charges, onerous and unlawful interest, penalties and other illegal charges and further that no proper accounts of the sum due has been rendered to the Defendant despite numerous requests. The Defendant did not defend the suit at the hearing and therefore the defence statement remained unsubstantiated and the Plaintiff's evidence unchallenged. In the case of **AUTAR SINGH BAHRA AND ANOTHER VS. RAJU GOVINDJL, HCCC NO. 548 OF 1998** (unreported) where the Hon. Justice Mbaluto stated at page 4 paragraph 4 as follows:

***“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1<sup>st</sup> Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”***

I have considered carefully the evidence adduced by the sole Plaintiff's witness, Elizabeth Wanjiku Hinga. I have also considered the written submissions filed by the Plaintiff's advocate.

The Plaintiff has shown through its witness, Ms. Hinga that the Plaintiff and the Defendant entered into a Hire Purchase Agreement and a Chattels Mortgage. Both documents were produced as exhibits. The money advanced to the Defendant by the Plaintiff was paid directly to the supplier of the purchased vehicle, less the Plaintiff's charges for the facility advanced to the Plaintiff. The Plaintiff has shown through documentary proof that the Defendant fell into arrears on the repayment and at one point requested for a re-scheduling of the loan repayment which the Plaintiff obliged. The Plaintiff has also shown that the Defendant admitted the default in writing and negotiated indulgencies severally for delayed repayments. The Plaintiff has gone on to prove amounts recovered from sale of the purchased vehicle after the Defendant failed to pay the amount due which at the time stood at Kshs.9,684,252/30.

I noted that the Plaintiff received three bids for the motor vehicle KAE 832B of Kshs.1,680,000/-, 1,775,000/- and Kshs.900,000/- respectively. The same vehicle was however sold for Kshs.200,000/- as a result of its poor state due to vandalization at Ken Fin Services where it had been stored. In addition the Plaintiff was paid Kshs.175,820/- by the Insurance as compensation for the vandalization.

I have also noted that the Plaintiff made no mention of what became of the vehicle KTM 568 which had been given as a security to the loan. As to the issue of interest, the Plaintiff has produced the Hire Purchase Agreement P. exhibit 2 which at clause 2 (c) and (f) stipulated as follows:

***"2. The Hirer agrees:-***

***(c) to pay interest on each Hire Installment not paid punctually at the ruling rate from the due date to the date of payment but this provision is without prejudice to the right of the Owner to terminate the hiring under the provisions of Clause 4 hereof.***

***(f) if the Hirer shall make default in the payment (within seven days from demand) of any sum due to or paid by the Owner under sub-clause (d) sub-clause (e) sub-clause (i) or sub-clause (j) of this Clause to pay to the Owner interest at the ruling rate on the sum demanded as aforesaid calculated from the date of the demand."***

The parties re-negotiated the terms of their agreement as contained in the Plaintiff's letter P. exhibit 7 dated September 6, 1996. As regards interest the re-negotiated agreement stipulated as follows:-

***"1. On a strictly without prejudice basis, we would be willing to consider rescheduling the outstanding loan balance subject to your acceptance of and compliance with the following terms and conditions.***

***(b) Interest:***

***Interest on the loan will be charged monthly in arrears at the rate of 30% p.a. on a monthly reducing balance basis. We reserve the right to vary the interest rate and/or the basis of computation thereon by giving seven day's notice.***

***(d) Default***

***In the event of any default, all the loan outstanding will become due and payable immediately and the arrears amount will attract interest at the then applicable ruling rate.***

***(f) Other conditions:***

***(i) Any arrears on the account will attract interest at the rate of 40% p.a. on reducing balance basis or at such other rate as may be determined by us from time to time."***

These provisions on interest gave the Plaintiff the right to vary the interest rate from time to time.

The Plaintiff's evidence is uncontrovereted that the Defendant defaulted in the repayments for the Hire Purchase loan facility a advanced to her and that the sale of the securities did not offset the outstanding amount. The amount outstanding comprises the principal sum of Kshs.9,771,444.60, interest of Kshs.45,547,640.25 and bank charges of Kshs.333,671,80 bringing the total sum to Kshs.54,387,926.45 as of 31<sup>st</sup> May, 2002 according to the Statement of Loan account, P. Exhibit.

I have agonized about the sum claimed in this case particularly the interest while taking into account that the amount loaned to the Plaintiff was a conservative amount of Kshs.7,599,677.40. Since the Defendant did not support its case in order to require an investigation of those issues, I have no alternative but to order judgment in favour of the Plaintiff as pleaded.

After a careful consideration of the evidence adduced before me in this case, and of the submissions by Counsel, I am satisfied that the Plaintiff has proved its case as pleaded in the amended plaint.

I therefore enter judgment in favour of the Plaintiff against the Defendant.

***(a) In the sum of Kshs.54,378,926.45.***

***(b) Interest on (a) at the rate of 47% p.a. from 1<sup>st</sup> June, 2002 until payment in full.***

***(c) Costs of the suit.***

**Dated at Nairobi, this 30<sup>th</sup> day of January, 2009.**

**LESIIT, J.**

JUDGE

**Read, signed and delivered, in the presence of:**

Mr. Otieno for Plaintiff

N/A for Defendant

**LESIIT, J.**

JUDGE