

FIDELITY COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

WORLD IN TOURS & TRAVEL LTD. 1ST DEFENDANT

AZMINA HERNANDEZ JUMA 2ND DEFENDANT

JUDGMENT

The plaint was amended and filed on 14/1/2004. The plaintiff is a limited liability company incorporated in Kenya. The plaintiff has sued the first and second defendants arising out of breach of Hire Purchase Agreement dated 22/12/1994, whereby the first defendant hired the vehicle registration No. KAD 693 B on the terms set out in that agreement.

However, the first defendant committed breach of the said agreement. As at 31/1/1998, the first defendant was indebted to the plaintiff in the sum of Kshs.1,125,372/80 with interest accruing as per agreement at the rate of 40% p.a. The second defendant guaranteed the indebtedness of the first defendant in the sum of Kshs.1,737,000/=. At the trial it was said that a receiving order has been made against 2nd defendant, therefore the plaintiff has abandoned the 2nd defendant's case for the time being. This trial is in respect of first defendant. The plaintiff prays for Kshs.1,125,372/80 with interest at rate of 48% p.a. from 1/2/1998.

At the trial, the plaintiff's witness, Philip Muoka, described as Legal Officer gave evidence. He testified that the first defendant was a customer of the plaintiff and was offered a facility. The agreement was for hire charges to be paid every month for 23 months. It was hire purchase agreement dated 22/12/1994. In time the first defendant defaulted. The plaint was amended and claiming Kshs.1,125,372/80 at the rate of 48% with costs of the suit.

In cross-examination, he said Hire Purchase Agreement was signed by one person. Furthermore, he testified that the vehicle which was financed was repossessed and sold. The plaintiff closed its case. The defendant did not call any witnesses. By agreement both parties filed written submissions. Parties had filed a list of documents and no document was challenged, therefore all were admitted in evidence particularly the Hire Purchase Agreement entered into by the parties.

It is submitted that this agreement is not covered by the **Hire Purchase Act** and does not require registration. **Section 3** of that **Act** excludes agreements where the hirer is a corporation and where the finance is for more than Kshs.80,000/=. As for rate of interest, the parties agreed at 40% not 48%. The loan was for a fixed period. The court has no reason to interfere with the rate of interest agreed by the parties.

In reply the defendant submitted that there was not produced any documentary evidence of the contracts. Only reference was to the list of documents by PW1. On the issue of interest no evidence that the agreed rate was 40%.

I have perused the record. Plaintiff did produce a bundle of exhibits on oath and marked "PEX No.1". The exhibits were produced on oath and the first document is agreement of hire made on 22/12/1994. Clause 2 (c) where the rate of interest is stated as:-

40% p.a. or such other rate or rates as the owners shall in their sole discretion".

The agreement is properly signed by hirer owner and witnessed and stamped with revenue stamp and the hirers stamp. I have perused the record. It is clear this suit has been pending since 1998. The 1st defendant has not been able to bring any witnesses and therefore it would be unreasonable to continue

delaying the suit. The defendant relies on the statement of defence but it is to be noted that the statement of defence is only allegations not supported by sworn evidence.

The evidence of the plaintiff's witnesses remained unchallenged and it was not shaken in cross-examination. In the circumstances, I am of the view that the plaintiff's case has been proved on a balance of probabilities. I enter judgment for plaintiff in sum of Kshs.1,125,372/80 plus simple interest at the rate of 40% p.a. from the date of filing suit until payment in full.

The defendant shall pay costs of this suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 26th day of October 2009.

JOYCE N. KHAMINWA

JUDGE