REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 512 of 2005

ALLIED CARDS LIMITED…..………......……………PLAINTIFF

VERSUS

JASWINDER SINGH ENTREPRISES……..1ST DEFENDANT

PERMINDER SINGH……………..…...……..2ND DEFENDANT

J U D G M E N T

By a plaint dated 24th May, 1993 and amended on 12th July, 1994, Allied Cards Limited (hereinafter referred to as the plaintiff), seeks judgment against Jaswinder Singh Entreprises (hereinafter referred to as 1st defendant) and Perminder Singh (hereinafter referred to as 2nd defendant), jointly and severally for:

(a) Kshs.4,402,332/10

(b) General damages for disnonoured cheques

(c) Interest from 22nd February, 1993 at reigning rates

(d) Costs.

The plaintiff's claim is grounded on an agreement entered into between the plaintiff and the 2nd defendant acting as an agent of the 1st defendant. The agreement entitled the 1st defendant to the use of credit card facilities provided for by the plaintiff. The terms of the agreement included liability to the plaintiff by the defendants for payment of all charges incurred by the use of the credit card. There was also a provision for payment of a service charge of 2.5% per month on any account balance of the defendants which remain unpaid at the end of 15 days from the date of the statements. It was contended that as at 22nd February, 1993, the defendants were liable to pay to the plaintiff a sum of Kshs.4,402,332/10. It is further contended that the 1st defendant issued several cheques to the plaintiff in an attempt to meet its liability to the plaintiff but the cheques were all dishonoured.

The defendants have responded to the plaintiff's claim through a defence dated 5th July, 1993 and amended on 19th October, 1994. It is contended by the defendants that the plaint does not disclose any cause of action against the defendants. The defendants denied having entered into any agreement as claimed in the plaint. It was contended that the 1st defendant entered into an agreement with Kenya Shell Ltd and BP Kenya Limited, each acting on its own behalf whereby, Kenya Shell Ltd and BP Kenya Ltd agreed to supply fuel to the 1st defendant on credit terms to be administered by means of an instrument called a Shell-BP Fuel Card.

It was maintained that there was no privity of contract between the plaintiff and the defendants, but that the plaintiff was acting as an agent or servant of Kenya Shell Ltd and BP Kenya Ltd. The defendant further contended that it was agreed orally that no interest or other charge would be levied. In the alternative, it was pleaded that service charge was provided for as a one time charge, and/or penalty for late payment. It was maintained that the alleged provision in respect of service charge, on a service charge, was not agreed and was in fact void, illegal, excessive, unconscionable and unenforceable.

The defendants further maintained that the agreement as alleged by the plaintiff was illegal and unenforceable as it is contrary to the Banking Act and is also against public policy.

The suit was substantially heard before Hon. Ochieng J., but had to proceed before me after Hon. Ochieng J. was transferred.

During the trial the plaintiff called one witness. The witness was Joel Gachuhi Kinyua, an accountant with Senator Cards Ltd. He stated that the plaintiff Company, Allied Cards Ltd changed its name to Senator Cards Ltd on the 17th September, 1992. He testified that the plaintiff company is a credit card company. He explained that cards are issued to applicants and are usable in recognized establishments. The plaintiff company settles the bills for the services rendered by the establishment. The cardholders are billed at the end of every month. The plaintiff also had an arrangement with Kenya Shell Ltd and BP Kenya Ltd, pursuant to which fuel cards would be issued to applicants and the plaintiff would administer the cards on behalf of Kenya Shell Ltd and BP Kenya Ltd. The witness testified that the 1st defendant applied for the fuel card and accepted the plaintiff's conditions. The 1st defendant was issued with fuel cards in 1988 which was to be used for 7 vehicles. The interest payable on the bills which were overdue was 2.5 % per month. The defendant was also issued with the plaintiff's credit cards. Sometimes in the 90s the defendants were experiencing problems in settling the bills. The plaintiff reduced the rate of interest from 2.5 to 2%. On the 8th February, 1991, the 1st defendant applied for a loan from Southern Credit Finance Ltd, for a sum of Kshs.2.6 million, intending to use the loan to pay an equivalent amount which was outstanding to the plaintiff. Southern Credit Finance Ltd did not however approve the loan applied for by the 1st defendant. The 1st defendant gave the plaintiff 24 post-dated cheques each for Kshs.104,166.65, all totaling Kshs.2,499,999.60. This was after reconciliation was done. The first 7 post dated cheques were honoured on their due dates, however, the 8th and 9th cheques were dishonoured despite being re-banked several times. The plaintiff did not therefore rebank the remaining post-dated cheques. The plaintiff used the proceeds of the seven cheques which were honoured to pay what was due to it from the defendants, and part of the amount outstanding on the fuel cards account. There was however a balance of Kshs.4,402,332.10 which was still due and outstanding on the fuel cards as at February, 1993.

The defendant offered to pay Kshs.2.5 million in full and final settlement but this was rejected by the plaintiff who made a counter offer to reduce the amount due to Kshs.3.2 million. The defendant then wrote to the plaintiff requesting for time up to 5th May, 1993 to make the payment. The defendant did not however pay the sum of Kshs.3.2 million or any other amount.

Under cross-examination, the plaintiff's witness admitted that the plaintiff company changed its name to Senator Cards Ltd before the suit was filed. The witness also admitted that contrary to the averments in the plaint there were no agreements for the credit card facilities signed by the 1st defendant or the 2nd defendant. He maintained that there was a fuel card agreement signed by the defendants which was in actual fact a credit card agreement. He maintained that the defendants were brought to court on the strength of the application for fuel cards which they had made. He explained that the agreement was between Shell, BP and the cardholder and the plaintiff was acting on behalf of Shell and BP. The witness identified an agreement dated 23rd June, 1986 signed between Shell BP and the plaintiff, pursuant to which the plaintiff was entitled to commissions on purchases made at the petrol stations using the fuel card. The witness conceded that the 2nd defendant had not signed any agreement with the plaintiff. Nevertheless he maintained 2nd defendant was acting on behalf of the 1st defendant and that he is the one who signed the cheques on behalf of the 1st defendant.

Under re-examination the plaintiff's witness explained that the 2nd defendant was a partner of the 1st defendant and signed the documents as such. It was for that reason that he was enjoined in the suit. He explained that plaintiff's responsibility in relation to the fuel cards, was to manage the cards by paying invoices raised by the petrol stations at which the card was used, and thereafter sending monthly bills to the cardholder. It was explained that the cardholder had no direct relationship with the petrol station nor were the petrol stations concerned whether the cardholder had paid or not. He explained that the card holders were not party to the agreement between the plaintiff and Shell/BP.

The defence did not call any evidence as the 2nd defendant whom it intended to call passed away. The parties counsel however exchanged and filed written submissions. The counsels also appeared before the court and highlighted the submissions.

It was submitted on behalf of the plaintiff that under Section 20(4) of the Companies Act, Cap 486, a change of name by a company does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

Relying on the case of *Shell and BP (Malindi) Kenya Ltd Vs Kings Motors Ltd*, (2004) KLR 574, it was maintained that the suit could not be defective because of the change of plaintiff's name from Allied Cards Ltd to Senator Cards Ltd. It was further maintained that the issue of the name not having been raised in the pleadings, it did not constitute an issue for determination by the court. It was maintained that the application for use of the plaintiff's credit card, which was signed by the 1st defendant and submitted to the plaintiff constituted the agreement. Hence the defendants were bound by the conditions stated in the application. It was maintained that the plaintiff having accepted the application and issued the defendants with the credit cards, it was party to the agreement. It was therefore submitted that there was privity of contract between the defendants and the plaintiff as the plaintiff was a principal party to the agreement.

Relying on *Re charge Card Services Ltd (1988) 3 All ER 702*, it was submitted that the credit card transaction, established two separate contracts. One contract was between the credit card company and the cardholder by which the card holder is provided with a card which enables him to pay the price by its use, and in return pay the credit company the full amount of the price charged by the supplier. The court was also referred to the case of *Royal Credit Ltd vs Samuel Madoka HCCC.No. 6240 of 1992*.

It was submitted that the 1st defendant utilized the credit facility availed to it through the use of fuel cards and that the 1st defendant had defaulted in the repayment of the amount owed in respect of the credit facilities. It was maintained that the 1st defendant through a letter signed by the 2nd defendant, admitted owing the plaintiff. The court was referred to the unchallenged evidence that the 1st defendant issued post-dated cheques towards payment of the outstanding amount. The court was also referred to clause 4 of the conditions of issue of the credit card, wherein a service charge of 2.5% per month was provided for. It was submitted that, that written agreement could not be varied through an oral agreement as pleaded in the defence.

Regarding the submissions that the service charge was void and illegal on the basis that there was a penalty, it was submitted that it was not the function of the court to rewrite contracts on behalf of the parties, or to mitigate what one party may consider to be an harsh term of the contract. In support of this proposition, the following cases were cited: -

- *National Bank of Kenya Ltd vs. Plastic Samkolit (K) Ltd (2002) 2EA 503*
- *HCCC No. 6420 of 1992 Royal Credit Ltd vs Samuel Madoka & Another*
- *HCCC No. 309 of 1994 Barclays Bank of Kenya Ltd Vs Hezron Anyona Khandiso*

It was submitted that in its letter dated 23rd April, 1993, the 1st defendant did not deny owing the

amount claimed by the plaintiff but merely offered Kshs.2.5 million in settlement.

Regarding the 2nd defendant it was submitted that being a partner in the 1st defendant's firm, he was an agent of the firm and therefore properly joined as a party. Sections 8 and 11 of the Partnerships Act Cap 29 were relied upon in support of this position. The court was urged to give judgment in favour of the plaintiff as claimed in the amended plaint.

For the defendants it was submitted that in order to succeed in his claim, the plaintiff had to prove that there was a valid contract between itself and the defendant. The plaintiffs had also to prove that it was entitled under that agreement to the amount claimed. It was submitted that the evidence was clear that at the time the plaintiff's suit was filed, there was no company called Allied Cards Ltd, and that no application was made to amend the plaint to reflect any new change in name. It was therefore maintained that the plaint was fatally defective and should be dismissed as the plaintiff Allied Cards Ltd, on its own admission is non-existent.

It was further submitted that the application for the credit card, relied upon by the plaintiff to form the contract upon which the suit is based, was neither signed by the plaintiff nor is it signed by the 1st defendant. It was therefore contended that the contract pleaded and relied upon by the plaintiff was non-existent. It was maintained that the correspondence between Southern Credit and the 1st defendant was irrelevant and of no use to the plaintiff as Southern Credit was neither a party to this suit nor a witness. It was noted that the dishonoured cheques were not produced in evidence. The court was urged to find that the plaintiff had failed to prove its case on a balance of probability as there was no evidence of the contract relied upon, nor particulars of the dishonoured cheques given. The court was therefore urged to dismiss the plaintiff's suit with costs.

On the 16th June, 1995, the parties filed a statement of agreed issue. The agreed issues were identified as follows: -

1. (i) Does the plaint disclose a cause of action against the first and/or the second defendant?

(ii) Is there privity of contract between the parties to this suit?

2. (i) Did the plaintiff enter into any agreement with the 1st defendant for the use of credit card facilities?

(ii) If the answer to 2(i) above is in the positive then (a) what were the terms of the said agreement? (b) was the agreement illegal, unenforceable and void?

3. Did the 1st defendant enter into an agreement with Kenya Shell Ltd and BP Kenya Ltd? If so what were the terms of the said agreement?

4. (i) Does the application of service charge in the circumstances of this case amount in law to a penalty?

(ii) Is an application of service charge on service charge enforceable in law?

5. (i) Do the defendants owe to the plaintiff a sum of Kshs.4,402,232/= as at 22nd February, 1993?

(ii) If the answer to 5(i) above is positive then what is the applicable rate of interest?

6. Which party is entitled to cost of the suit?

It is clear from the above issues, that the parties never specifically identified the validity of the plaint or the legal capacity of the plaintiff as an issue. Indeed I have carefully perused the amended plaint filed on 15th July, 1994 and the amended defence filed on 21st October, 1994, and I note that the defendants in

paragraph 1 of the amended defence admitted the plaintiff's description in the plaint.

Therefore the issue which was raised in the submissions of counsels, as to whether the plaintiff had the capacity to file this suit in its previous name of Allied Cards Ltd after having changed that name to Senator Cards Limited, though an interesting issue, was not raised in the pleadings. In *Galaxy paints Company Ltd vs Falcon Guards limited, (2000) 2EA 385* the Court of appeal had this to say: -

"*It is trite law and the provisions of Order XIV of the Civil procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX, Rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.*"

I am therefore constrained to make no finding on the legal capacity of the plaintiff or the validity of the plaint, as the issues were neither raised in the pleadings nor agreed by the parties as issues for determination by this court

In the amended plaint, the 1st defendant was described as a firm and the 2nd defendant as a servant or agent of the 1st defendant. This description was admitted by the defendants in paragraph 2(a) of the amended defence. The plaintiff produced a cardholder's application for Shell-BP fuel cards which was alleged to have been signed by the 2nd defendant on behalf of the 1st defendant. In the form, the 2nd defendant has indicated his position in the 1st defendant as the 'proprietor'. Section 7 and 8 of the Partnership Act states as follows: -

"*7. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.*

8. An act or instrument relating to the business of the firm, and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners:

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments."

Having examined the cardholder's application which was signed on behalf of the 1st defendant, by a person who described himself as a proprietor of the firm, I find no reason to doubt that the document was executed by a partner in the defendant firm. I am satisfied that that document was properly executed on behalf of the 1st defendant and is binding on the 1st defendant. Indeed, in paragraph 7(a) of the amended defence, the 1st defendant admits having entered into the agreement for supply of fuel through Shell and BP by means of a Shell-BP fuel card. I find that the document was signed by an agent of the 1st defendant.

From paragraph 4 of the amended plaint it is alleged that the plaintiff's cause of action was founded on the agreement entered into on 1st July, 1988 between the plaintiff and the 2nd defendant acting on behalf of the 1st defendant. On the evidence adduced by the plaintiff's witness there was no application or agreement for plaintiff's credit card signed by the defendants. The cardholder application signed by the 2nd defendant on behalf of the 1st defendant, was in respect of a Shell/BP fuel card. The application also referred to as agreement dated 1st July, 1988 was pages 4, 5 and 6 of plaintiff's bundle of exhibit. A perusal of this document shows that it was not an application for a general credit card or what plaintiff's witness referred to as a 'local senator card'. It was specifically an application for the use of the Shell-BP fuel card. A distinction was drawn between the plaintiff's credit card (or local senator card) and a Shell-

BP fuel card. The latter was described as a credit card administered by the plaintiff on behalf of Kenya Shell Ltd. The substance of the agreement between the plaintiff and Kenya Shell Ltd is captured in the letter dated 23rd June, 1986 from the plaintiff company to Mr. G.K. Chiuri of Kenya Shell Ltd. Under this agreement, the plaintiff was entitled to a commission of 1.5 % on the total fuel sales made through the card. This commission was paid to the plaintiff by Kenya Shell Ltd. The plaintiff was also required to sign an agreement with the participating Shell and BP Service Stations.

Coming back to the agreement of 1st July, 1988, it is clear from the document that the application was neither approved nor signed by the plaintiff. Clause 1 of the conditions of use found at page 6 of the bundle of exhibits shows that the agreement is between Shell-BP and the cardholder and that the plaintiff is acting on behalf of Shell and BP. Two pertinent questions arise; first, whether there is a binding agreement between the plaintiff and the 1st defendant based on that application, and secondly, whether there is privity of contract between the plaintiff and the defendant. Although on the face of the cardholder's application there is no approval or signature of the plaintiff, it is evident that the 1st defendant was given a Shell-BP fuel card which he used. This is evident from the letter of the 1st defendant dated 11th September, 1992, (See page 30 of plaintiff's bundle), and various correspondences and statements from the plaintiff to the defendant found at pages 32 to 41 in the plaintiff's bundle of exhibits. The plaintiff therefore, in accordance with the conditions of use of the fuel card, operated the credit card scheme on behalf of Kenya shell Ltd and BP Kenya Ltd. By accepting the application the issuance and use of the card by the 1st defendant it is clear that there was an agreement entered into partly in writing and partly by conduct. The plaintiff was therefore a recognized agent.

I concur with the advocate for the plaintiff that although the plaintiff was acting in the agreement on behalf of Kenya Shell and BP Kenya Ltd, the plaintiff was a principal party to the agreement to whom the 1st defendant was under specific obligations as provided in the conditions of use. I am satisfied that there was therefore privity of contract between the plaintiff and the 1st defendant.

The terms of the agreement are clearly stipulated in the conditions of use of the card. Clause 4 of the conditions provided for a service charge of 2.5% per month on any account balances which remain unpaid at the end of 15 days from the date of the statement of account. It was contended that the service charge provision was void and illegal as it was a penalty for failure to make payment for the fuel by the due date. It was also contended that the service charge was an excessive charge on account of interest and that it is unconscionable. It is clear that in signing the cardholder's application the 1st defendant accepted the conditions of use. The conditions clearly included the monthly payment of service charge on account of balances which remain unpaid after 15 days from the date of the account statement. The 1st defendant having accepted this term, and having enjoyed the benefit of the fuel card, it is too late for him to complain.

As was stated by the court of appeal in *National Bank of Kenya Ltd vs plastic Samkolit (K) Ltd* (supra)

"*A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved.*"

In this case there were no allegation of coercion, fraud or undue influence and the 1st defendant is therefore bound by the terms of the agreement. Clause 4 of the agreement also provided for monthly payment of service charge. Therefore, if the account continues to be outstanding the cardholder is under a duty to pay the service charge of 2.5% of the outstanding balance every month. These were the terms of agreement freely agreed to by the parties. They are neither illegal, void or unconscionable nor is the condition for the payment of service charge a penalty. The 1st defendant is therefore obliged to pay the service charge.

The plaintiff has exhibited statements showing that there was a sum of Kshs.4,402,332/10 due and owing from the 1st defendant as at 22nd February, 1993. Letters addressed to the defendants demanding this money did not elicit any response other than a letter dated 23rd April, 1993 in which the 1st defendant

offered to pay a sum of Kshs.2.5 million. In effect, the 1st defendant's letter dated 23rd April, 1993 (page 45 plaintiff's bundle of exhibits) admitted owing a sum of Kshs.2.5 million. In response to a counter offer, by the plaintiff to accept Kshs.3.2 million in full and final settlement the 1st defendant by a letter dated 27th April, 1993 (page 48) pleaded to be given up to 5th May, 1993 to pay the amount. In effect, the defendant once again admitted owing Kshs.3.2 million which he sought time to pay. In the amended defence, the 1st defendant claimed he had made full payments for all the fuel supplied. There was however no evidence in support of this.

I come to the conclusion that the 1st defendant has truly no defence to the plaintiff's claim. I am satisfied that the 1st defendant owed the sum of Kshs.4,402,332/10 as at 22nd February, 1993. Having failed to take advantage of the plaintiff's offer to accept the sum of Kshs.3.2 million in full and final settlement, the 1st defendant is liable to the plaintiff for the sum of Kshs.4,402,332/10.

I have considered the plaintiff's claim for general damages for dishonoured cheques. The particulars of the dishonoured cheques were not cited nor were they produced in evidence. For this reason, the plaintiff's claim in this regard cannot succeed due to paucity of evidence.

The plaintiff's claim was against the 1st and 2nd defendants jointly and severally. It is on record that the 2nd defendant died during the pendancy of his suit. No orders were sought or made for substitution of the 2nd defendant. For that reason, I will make no finding or orders against him.

The upshot of the above is that I give judgment as against the 1st defendant in the sum of Kshs.4,402,332/10 together with interest at court rates from 22nd February, 1993 until payment in full. I do also award the plaintiff costs of the suit.

Those shall be the orders of this court.

Dated and delivered this 17th day of June, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Bwire H/B for the Plaintiff

Simani for the defendant