



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 5916 of 1990**

ARI CREDIT & FINANCE.PLAINTIFF

VERSUS

HENRY MIGINGO JURA..... DEFENDANT

J U D G M E N T

The Plaintiff, ARI CREDIT & FINANCE LIMITED sued the Defendant, HENRY MIGINGO JURA, on 23rd July 1990, for loan and or advances granted to it by the Plaintiff pursuant to a Lease Hire Agreement dated 22nd December, 1997. The Deposit Protection Fund applied and was granted leave to prosecute this suit under sections 228 and 241 of Company's Act and Winding Up Rules for and on behalf of the Plaintiff under liquidation. The leave was granted on 3rd July, 1998. The Plaintiff Company amended its plaint to reduce the sum claimed from Kshs.1,077,666/- with interest at 19% p.a. from 18th July, 1990 until payment in full to 734,530/-. The deduction occurred as a result of the sale of the tractors, the subject matter of the suit, repossessed from the Defendant by the Plaintiff's Agent, out of which 510,000/- was recovered. It is averred in the plaint that the Defendant bound himself to pay the debt, by signing a Promissory Note on 18th December, 1987. The Defendant had obtained a loan from the Plaintiff for the purpose of purchasing two new M.F. 375 tractors which it purchased. The Defendant was to repay the loan by 48 equal monthly installments but that he defaulted on the repayment.

The Defendant filed a defence dated 22nd July 1991 in which he denied paragraph 5 of the plaint, which pleads the terms and conditions of the plaint, and averred that the averment in the plaint was in breach and contravention of the clear and simple terms and conditions of the said Lease Hire Agreement. The Defendant also averred that part of the sum claimed was cleared and settled by installments, and the other part by way of set off upon the sale by auction of the suit tractors. The Defendant has also pleaded that the Plaintiff fraudulently sold his tractors, which loss he averred led to the deficit, if any. The particulars of fraud pleaded are as follows:

- (a) Failing to publicize the auction of the 2M.F. 375 tractors.
- (b) Failing to cause a notice of such auction to be.
- (c) Selling the said 2 tractors by private treaty and failing to do so by way of publication auction.

- (d) Failing to sell the said tractors to the highest bidder.
- (e) Underestimating the value of the said tractors
- (f) Failing to collect and or demand and receive the balances due to him from the successful bidder(s) at the auction, risks which were direct consequences of his conduct/acts.

The Defendant denied being served with a demand and or notice of intention to sue.

The Plaintiff's advocates filed a Statement of Issues dated 26th April 1994. The statement raises the following issues.

1. Whether the Defendant undertook and bound himself by a Promissory Note dated 18th December 1987 to pay to the Plaintiff on demand the sum of Shs.762, 000.00 in full together with interest at the rates of 18% p.a. as alleged in paragraph 5 of the Plaintiff.
2. Whether the allegations contained in paragraphs 5 of the Plaintiff are total breach and contravention of the terms and conditions of the alleged lease hire agreement as alleged in paragraph 3 of the Defence.
3. Whether the Defendant is in breach of the alleged lease hire agreement entered into on 22nd December 1987 as alleged in paragraph 6 of the Plaintiff.
4. Whether the Defendant fully complied with and acted in accordance with the terms and conditions of the alleged lease hire agreement as alleged in paragraph 3 of the Defence.
5. Whether the alleged debt was cleared and settled by installments as alleged in paragraph 4 of the Defence.
6. Whether the Plaintiff acted fraudulently as alleged and particularized in paragraph 5(a) – (f) of the Defence.
7. Whether the Defendant owes the Plaintiff the alleged sum of Shs.1,077,666/- with interest thereon at the rate of 19% per annum as alleged in paragraph 7 of the Plaintiff.
8. Whether the Defendant had due Notice of this suit.
9. Whether the Plaintiff is entitled to the prayers sought
10. Who is to bear the costs of this suit.

These are 10 issues in the Plaintiff' Statement of issues filed on 26th April 1994. I will adopt them as the issues in this case and consider each seriatim.

The Plaintiff called BEN BARGETUNY WABER, the Liquidation Agent of the Plaintiff Bank, as its sole witness. This witness testified that the Defendant entered into a Lease Hire Agreement with the Plaintiff bank on 22nd December, 1987. That in the said Agreement, the Defendant, who was the hirer, was to be financed with Kshs.762,000/- by the Plaintiff which money he was to use to purchase 2 tractors. Mr. Waber stated that indeed the Defendant signed the Agreement and received the money, which, under the agreement was to be paid in 48 equal installments with interest at 18% on the principle amount. Mr. Waber produced a Promissory Note dated 18th December, 1987 in which the Plaintiff bound himself to the Defendant bank to repay the facility with interest at 18%. Mr. Waber testified that the Defendant defaulted in repayment as evidenced in the Bank Statements of the Defendant's loan account, which was also produced in evidence. The Statement shows installments in the monthly sum expected of Kshs.21,715/- between February, 1988 to May 1988. There is one installment of Kshs.10,753/- which was half the sum expected. There are no further repayments until repossession of the tractors whereupon

the Defendant paid Kshs.70,000/- on 3rd March 1989. After that the Defendant paid Kshs.11,600/- on 5th October 1990. The tractors were repossessed and sold for Kshs.510, 000/-. Mr. Waber testified that the Defendant's loan was reduced by the sale sum and the outstanding balance of Kshs.734,530/- with interest at 19% p.a. and costs of the suit, was the Plaintiff's claim in the suit.

I have considered the evidence adduced by the Plaintiff's sole witness and submissions by counsel for the Plaintiff bank.

The first issue is whether the Defendant undertook and bound himself by a Promissory Note dated 18th December, 1987, to pay to the Plaintiff on demand the sum of Kshs.762, 000.00 in full, together with interest at the rates of 18% p.a. as alleged in paragraph 5 of the plaint.

The Promissory Note is document number 4 in the Plaintiff's exhibits. It is dated 18th December, 1987. It is for Kshs.762, 000/-. It states as follows:

"I/We promise to pay on demand to Ari Credit & Finance Limited or order the sum of Shs. SEVEN HUNDRED AND SIXTY TWO THOUSAND only from value received with interest thereon, from this date, at the rate of 18% per annum.

Nairobi this 18th day of December 1987.

Signed"

The signature on the document is similar to the Defendant's signature in the Lease Hire Facility Agreement and in various correspondences from the Defendant to the Plaintiff. This document bound the Defendant to pay the sum quoted to the Plaintiff.

Paragraph 3 of the defence is a replica of the second issue. The second issue is whether the allegations contained in paragraphs 5 of the Plaint are in total breach and contravention of the terms and conditions of the alleged Lease Hire Agreement as alleged in paragraph 3 of the Defence.

Paragraph 5 of the Plaint stipulates thus:

"By a Promissory notice dated 18th December 1987, signed by the Defendant, the Defendant undertook and bound himself to pay the Plaintiff, on demand, the sum of Kshs.762,000/- in full together with interest accruing therefrom at the rate of 18% per annum."

I have considered the Lease Hire Agreement to see whether the terms and conditions contained therein are contravened by paragraph 5 of the plaint. By the Lease Hire Agreement, the Defendant bound himself to pay the facility of Kshs.762, 000/- in 48 months, with interest at 18% p.a. calculated on the reducing balance. I do not see any terms and conditions in the Lease Hire Agreement which are contravened by paragraph 5 of the plaint.

Issue three is whether the Defendant is in breach of the alleged Lease Hire Agreement entered into on 22nd December 1987 as alleged in paragraph 6 of the Plaint.

There has been a slight amendment to paragraph 6 of the plaint, to the amount due from Kshs.1, 077,666/- to Kshs.734,530/- and from date due from 17th July 1990 to 21st November, 1990. The change was due to the credit given after sale of the tractors as explained in PW1's evidence.

Regarding the Defendant's breach, the Plaintiff has produced a complete statement of the Defendant's loan with it. It is clear from the statement that the Defendant did not pay 48 monthly installments to clear the loan facility advanced to him by the Plaintiff bank as contracted. The Defendant instead paid only four monthly installments, fell into arrears and finally failed to clear the loan as agreed. The Plaintiff's evidence that the Defendant was in breach of the Lease Hire Agreement dated 22nd December, 1987 was

clearly demonstrated by documentary proof which is uncontroverted.

The fourth issue is whether the Defendant fully complied with and acted in accordance with the terms and conditions of the alleged Lease Hire Agreement as alleged in paragraph 3 of the defence.

Paragraph 3 of the defence states thus:

“The Defendant denies the contents of paragraph 5 of the plaint and avers that the allegations contained therein are a total breach and contravention of the clear and simple terms and conditions of the said leasehire agreement and puts the Plaintiff to strict proof thereof.”

This is closely related to the third issue. It has been shown that the Defendant covenanted with the Plaintiff to pay the Lease Hire Loan facility through 48 monthly installments. It is shown that the Defendant only paid four consecutive installments and then went into arrears and that no payments were made to cover the said accumulated arrears. Clearly the Defendant did not fully comply with the terms and conditions of the Lease Hire Agreement.

The fifth issue is whether the alleged debt was cleared and settled by installments as alleged in paragraph 4 of the Defence.

In paragraph 4 of the defence the Defendant avers as follows:

“The Defendant specifically and expressly denies the allegation in paragraphs 6, 7 and 8 and state that part of the said sum was cleared and settled by installments and the other part by way of set off upon the sale by auction of the subject matter of the said leasehire agreement.”

In paragraph 6 of the plaint, the Plaintiff avers that the Defendant breached the Lease Hire Agreement through non-payment.

In paragraph 7 of the plaint the Plaintiff states the sum due to it from the Defendant.

In paragraph 8 the Plaintiff avers that it served the Defendant with a demand and notice of intention to sue and that in spite of both, the Defendant had neglected to pay the debt.

The answer to this issue is demonstrated in the Defendant’s Statement of Account with the Plaintiff. The Defendant did not pay the debt. The statement shows the sums due to the Plaintiff from the Defendant.

The Plaintiff has produced several letters of demand for sums due to it from the Defendant, sent to the Defendant before the sale of the suit tractors and before the suit were filed. Also produced were some letters from the Defendant to the Plaintiff bank requesting for indulgencies to pay the debt on re-negotiated terms. It is clear that the Defendant had been served with demand to pay the loan.

In regard to the notice of intention to sue the Defendant, I see no proof of any such notice having been sent to the Defendant.

The sixth issue is whether the Plaintiff acted fraudulently as alleged and particularized in paragraph 5(a) – (f) of the Defence.

The particulars of fraud as contained in paragraph 5 of the defense are as follows:

- (a) Failing publicize the auction of the 2M.f. 375 tractors.
- (b) Failing to cause a notice of such auction to be.
- (c) Selling the said 2 tractors by private treaty and failing to do so by way of public auction.

(d) Failing to sell the said tractors to the highest bidder.

(e) Underestimating the value of the said tractors.

(f) Failing to collect and or demand and receive the balances due to him from the successful bidder(s) at the auction, risks which were direct consequences of his conduct/acts.

First of all the Defendant did not substantiate any of these allegations as he never gave any evidence in the case. That notwithstanding the Plaintiff has produced newspaper cuttings of 6th October, 1989 from the Daily Nation and the Standard Newspapers showing the advertisement of sale of the two tractors MF 375 KYR 331 and KYR 335, 1987. They advertised the tractors for viewing by interested buyers and gave the telephone numbers where offers could be made. They were apparently sold through private treaty, details of which are not given.

Issue is whether sale by private treaty was fraudulent. The Lease Hire Agreement provided a clause in which the Plaintiff was registered as a joint owner of the two suit tractors. That means that the Plaintiff was a part owner of both tractors. As part owner the Plaintiff Bank had the power to dispose off the tractors through sale in a manner of its own choice. The sale by private treaty was one of the options open to it. It cannot be said that the Plaintiff's decision to sell by private treat was a fraudulent act as it was within its power to deal with the vehicles in the manner it deemed fit and proper to do.

The seventh issue is whether the Defendant owes the Plaintiff the alleged sum of Kshs.1, 077,666/- with interest thereon at the rate of 19% per annum as alleged in paragraph 7 of the Plaintiff.

The amount due to the Plaintiff was reduced in the amended plaintiff to Kshs.734, 530/-. The Plaintiff has by a Statement of Account demonstrated how this sum was arrived at. I have considered the said Statement of Account and I am satisfied that the Plaintiff has proved on a balance of probabilities that the Defendant owes it the sum claimed.

The eighth issue is whether the Defendant had due notice of this suit. I have gone through the documents produced in court by the Plaintiff. There is none among them that could serve as a notice of the intention to file suit to the Defendant. In answer to this issue therefore, I do find that no notice of intention to file suit was ever given to the Plaintiff.

In answer to issue nine whether the Plaintiff is entitled to the prayers sought and ten of who should bear the costs of the suit, I have found that the Plaintiff has proved its claim on a balance of probabilities. However, there is ample evidence to show that no notice of intention to sue was given to the Defendant. Notice of intention to sue was important. The Defendant may have paid the sum due had he been given the due notice. In the circumstances, the failure to give notice of intention to use, the Plaintiff will not get costs for the suit.

Having considered this case, I find in the Plaintiff's favour and find that the Plaintiff is entitled to judgment against the Defendant as prayed in the plaintiff in terms of prayer (a). Accordingly I enter judgment in the following terms:

The Plaintiff gets judgment in sum of Kshs.734,530/- together with interest thereon at the rate of 19% per annum from 19th July 1990 until payment in full.

Dated at Nairobi, this 11th day of July, 2008.

LESIIT,

J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Wambui for Plaintiff

No appearance for Mr. Olago Oluoch for Defendant

LESITT, J.

JUDGE