



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

Civil Suit 1541 of 2001

AYAZ HUSSEIN MUKHI.....PLAINTIFF

VERSUS

F. K. MOTORS (KENYA) LIMITED.....1ST DEFENDANT

MOHANNED FAZAL KARMALI.....2ND DEFENDANT

J U D G M E N T

Ayaz Hussein Mukhi, the plaintiff herein, has come to this court seeking judgment against the 1st defendant, F. K. Motors (K) Limited, as Principal Debtor in the sum of Kshs.3,709,070/=, in the alternative the plaintiff seeks judgment for the sum of Kshs.3,709,070/=, against Mohamed Fazal Karmali as guarantor.

As per the plaint filed on the 9th October 2001, the plaintiff's cause of action arose from 3 agreements as follows: -

(i) a Deed of Assignment made on the 6th April 2000, between the plaintiff, the two defendants and the Trust Bank Limited, pursuant to which the Trust Bank Limited agreed to offset the sum of Kshs.6,409,070/=, it owed to the plaintiff by crediting the 1st defendant's account with the Trust Bank Limited, thereby reducing the 1st defendant's liability to the Trust Bank Limited;

(ii) an agreement dated 6th April 2000, signed between the plaintiff and the 1st defendant wherein the 1st defendant acknowledged its indebtedness to the plaintiff under the Deed of Assignment and agreed to liquidate the sum of Kshs.6,409,070/=, by monthly installments of Kshs.250,000/=, on the 15th day of each month with effect from 15th April 2000;

(iii) a guarantee dated 6th April 2000, signed between the plaintiff and the 2nd defendant in which the 2nd defendant in consideration of the arrangement by the Deed of Assignment and the agreement to liquidate the debt by monthly installments agreed to guarantee the payment to the plaintiff in the sum of Kshs.6,409,070/=.

The 1st defendant defaulted in the making of the monthly installments as a result of which the plaintiff demanded payment of the sum of Kshs.3,709,070/=, which was the balance outstanding, but neither the Principal Debtor nor the guarantor paid the money, thereby rendering this suit necessary.

In their joint defence filed on the 7th November 2001, the two defendants denied the plaintiffs claim. It was contended that the suit was misconceived and bad in law as against the 2nd defendant as there was no privity of contract between him and the plaintiff and that he was therefore, wrongly enjoined in the suit.

As regards the 1st defendant, it was denied that deposits of Kshs.6,409,070/=, were credited to the 1st defendant's account at Trust Bank Limited. It was contended that the deposits were not credited to the account as they had not matured. It was further contended that the Deed of assignment was frustrated when Trust Bank Limited went under liquidation.

The 1st defendant further denied that it had any liabilities at Trust Bank Limited, that was to be reduced by crediting the plaintiff's deposits held at the Bank. It was also contended that the agreement dated 6th April 2000, between the plaintiff and the 1st defendant was invalid and void for want of execution by Trust Bank Limited. Finally, it was denied that the 2nd defendant executed any guarantee allowing Trust Bank Limited to offset the amount the 2nd defendant owed to the plaintiff by crediting the 1st defendant's account. No list of agreed issues was signed by the parties.

Consequently, the court framed the issues in accordance with Order 14 Rule 5 of the Civil Procedure Rules. These were the 8 issues proposed by the plaintiff and a ninth one added by the court. The issues were as follows: -

1. Is there privity of contract between the second defendant and plaintiff?
2. Did the first and second defendants enter into agreements with the plaintiff including guarantee between the plaintiff and second defendant all dated 6th April, 2000?
- 2 (a) If so, whether the agreement is invalid and void for want of execution by Trust Bank Limited.
3. Is the balance due from the 1st defendant to the plaintiff under the agreement dated 6th April, 2000 still outstanding? If so, how much is outstanding?
4. Did the second defendant guarantee payment to the plaintiff for amounts due from the 1st defendant to the plaintiff?
5. Is the plaintiff entitled to judgment in the amount claimed in the plaint from the 1st and 2nd defendants?
6. Is the plaintiff entitled to costs of the suit?
7. Was the amount of Kshs.6,409,070/=, credited by Trust Bank Limited into the account of the 1st defendant to reduce its liability?
8. Was the Deed of Assignment subject to a scheme of arrangement adopted by the creditors of Trust Bank Limited?
9. Was the guarantee executed by the 2nd defendant?

In his evidence before the court the plaintiff testified he had deposits totaling Kshs.8,011,337/90, with Trust Bank Limited, at the time it went into liquidation in 1998. Under the scheme of arrangement which was agreed with Trust Bank Limited, the plaintiff was offered shares, in the Bank worth 20% of his deposits and the balance of his deposit i.e. Kshs.6,309,069/90, transferred to the account of 1st defendant to offset the debt of 1st defendant at the Bank following a Deed of Assignment signed between the plaintiff and 1st defendant. The plaintiff produced a copy of a resolution signed by the 1st defendant's directors resolving to accept the assignment. Plaintiff also produced a copy of the Deed of Assignment

dated 6th April 2000, which was duly signed by the plaintiff, the 1st defendant and Trust Bank Limited. He also produced the agreement dated 6th April 2000, duly signed by the plaintiff and the 1st defendant and the guarantee duly signed by the 2nd defendant. It was the plaintiff's evidence that there was a sum of Kshs.3,709,070/32, due and owing to him from the 1st defendant in respect of which 2nd defendant was liable under the guarantee.

Assumpta Nyambura an employee of Trust Bank Limited (in liquidation), confirmed that the Bank had a scheme of arrangement pursuant to which the Bank depositors agreed to assign part of their deposits to Debtors of the Bank. She identified the Deed of Assignment signed between the plaintiff, 1st defendant and Trust Bank Limited as one such arrangement. She confirmed that the assigned amount was credited to the account of the 1st defendant. She identified a letter written by Trust Bank Limited, liquidation agents, confirming that the 1st defendant's account was credited with the money.

At the close of the plaintiff's case no evidence was offered on behalf of the defendants. The defence counsel however submitted that the plaintiff's case was not proved as the scheme of arrangement referred to by the plaintiff's witness was not produced in court nor were any statements of the plaintiff's account or the 1st defendant's account produced in court to confirm that the 1st defendant's account was debited with the amount allegedly assigned.

For the plaintiff, it was submitted that the scheme of arrangement did not involve the defendants as it was between the Bank and its depositors. The court was urged to consider the properly executed agreement placed before it.

From the evidence placed before this court, it is evident that by virtue of the Deed of Assignment dated 6th April 2000, the plaintiff did enter into an agreement with the 1st defendant and Trust Bank Limited, pursuant to which the plaintiff assigned its deposits with the Bank to be credited to the account of 1st defendant. The Deed of Assignment which was produced in evidence is properly executed by all the parties. This Deed of Assignment read together with the agreement dated 6th April 2000, (also produce), which was duly executed by the plaintiff and the 1st defendant, confirms that the amount assigned was Kshs.6,409,070/=. The two agreements are re-enforced by a copy of the Resolution signed by the 1st defendant's directors resolving to accept the assignment. The above agreements are clear and the failure to produce the Bank's scheme of arrangement did not at all negate the liability of the respective parties under these agreements.

The defendants maintained that the assigned sum was not credited to the 1st defendant's account as the amount had not matured. Nevertheless, P.W.2 who is an officer from the Bank, did confirm that the amount was actually paid from the plaintiff's deposits with Trust Bank Limited, into the 1st defendant's account, to reduce 1st defendant's indebtedness with the Trust Bank Limited. She identified the payments into the 1st defendant's account on the temporary statement which was also produced in evidence. I do believe and accept the evidence of P.W.2 which is further supported by the letter from the Bank confirming receipt of the deposits into 1st defendant's account. Since the deposits were to reduce the 1st defendant's indebtedness to the Bank, there was no way the Bank could credit 1st defendant's account if the deposits were not released.

As regards the amount outstanding from 1st defendant to the plaintiff, there was only the evidence of the plaintiff regarding what was paid and the balance outstanding. Noting that the defendants offered no evidence to challenge the plaintiff's evidence, I believe and accept plaintiff's oral evidence that the 1st defendant defaulted after making some payments and that there was a balance of Kshs.3,709,070/=-, still due and owing after taking into account the payments made and the value of a motor-vehicle also offered in payment.

As regards the 2nd defendant, it is clear from the guarantee which was produced in evidence and

which was duly signed by the 2nd defendant that he did guarantee payment of the debt by 1st defendant to the plaintiff. Since the 1st defendant defaulted in the payment of the debt, the 2nd defendant is liable to make good the guarantee.

Although the plaintiff has sued the two defendants jointly, he has not sought judgment against the two defendants jointly and severally but has sought judgment against the Principal Debtor and in the alternative, judgment against the Guarantor. Thus, the court can only enter judgment against one or the other but not both.

As per the above findings, the 1st defendant who is the Principal Debtor, has defaulted in the repayment of the money owed to the plaintiff and there is a sum of Kshs.3,709,070/=, which is due and owing. It follows that the plaintiff is entitled to judgment against the 1st defendant. Nonetheless, the contract of guarantee signed between the plaintiff and the 2nd defendant gave the plaintiff the right to recover the amount due and outstanding from the 1st defendant upon default by the 1st defendant against the 2nd defendant .

The liability of the 1st defendant having arisen by virtue of his default to repay the debt, the 2nd defendant is liable to make good its guarantee to the plaintiff. Accordingly, I find it appropriate to give judgment in favour of the plaintiff against the 2nd defendant. The plaintiff shall further have costs of this suit against both defendants.

Those shall be the orders of this court.

Dated, signed and delivered this 29th day of November 2007.

H. M. OKWENGU

JUDGE