REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 525 of 2001

THE FIRST NATIONAL FINANCE LTD…….....……..PLAINTIFF

VERSUS

KUTUS AUTO HARDWARE LIMITED….....…….1ST DEFENDANT

RAJNIKANT D. PATEL…….....…….2ND DEFENDANT

HITEN R. PATEL…….....…….3RD DEFENDANT

J U D G M E NT

The Plaintiff's claim is for the recovery of sums which are said to have been given to the 1st defendant, under a Hire Purchase Loan Facility.

It is the plaintiff's case that on 8th May 1996, the 1st defendant applied for a Hire Purchase Loan Facility of KShs 6.7 million, which the Plaintiff approved.

Thereafter, the 1st defendant applied for a further loan facility of KShs. 2.0 million, on 6th December 1996. The facility was approved, whereupon the plaintiff advanced the funds to the 1st defendant.

As security for the two facilities, the 2nd and 3rd defendants, who were both directors of the 1st defendant, executed personal guarantees in favour of the plaintiff.

When the 1st Defendant defaulted in remitting the instalments which were payable monthly, the plaintiff issued notices to all the defendants, requiring them to repay the outstanding amounts. However, as all the defendants declined to pay-off the outstanding sums, the plaintiff instituted these proceedings.

In a joint Defence, the 2nd and 3rd Defendants denied liability. Their case was that the personal guarantees which they had executed were unenforceable, on the grounds that the principal contract between the plaintiff and the 1st defendant was illegal, invalid and a nullity.

It was also the 2nd and 3rd defendants' case that the guarantees were unenforceable due to the fact that

on 6th December 1996, the Plaintiff materially altered the original contract dated 6th December 1996, without the approval of the 2nd and 3rd defendants. The alterations to the principal contract are said to have discharged the 2nd and 3rd defendants from liability under their personal guarantees.

Meanwhile, the 1st defendant asserted in its Defence that the terms of the Agreement said to be dated 8th May 1996 were so unascertainable as to render the Agreement invalid and thus unenforceable. The uncertainty in the terms is said to stem, firstly, from the contention that, in law, there is no contract known as a "**Hire Purchase Loan Agreement."**

Secondly, if the Agreement was intended to be a Hire Purchase Agreement, the 1st defendant believes that it failed to fulfil the essential requirements of a hire purchase contract. The first of these requirements was said to be the need for the plaintiff to have been the owner of the lorry which was the subject of the alleged hire, whilst the 1st defendant should have been the person hiring the lorry.

However, in this case, it is common ground that the plaintiff was not the original owner of the lorry. If anything, the plaintiff and the 1st defendant became joint owners at the same time, as their names were placed onto the logbook for the vehicle, at the same time.

In my understanding the issues that need to be determined are as follows:

(i) Was there a valid Agreement as between the Plaintiff and the 1st Defendant?

(ii) If so, what was the nature of the relationship? In other words, was it a loan Agreement or a Hire Purchase Agreement?

(iii) Were the terms of the Agreement as set out in the Plaint?

(iv) Was there an Agreement between the Plaintiff on the one hand, and the 2nd and 3rd Defendants on the other hand?

(v) If so, was the Agreement or Agreements invalidated by the material alteration, by the plaintiff and the 1st defendant, of the Agreement dated 6th December 1996?

(vi) If the Agreement between the Plaintiff and the 1st defendant was void, is the 1st defendant entitled to a return of the money it had paid to the plaintiff under the said Agreement?

(vii) If so, how much would the 1st defendant be entitled to receive from the Plaintiff?

(viii) Is the Plaintiff entitled to the principal amount, interest thereon at 36% per annum and default interest at 1% per month, as prayed in the Plaint?

(ix) Who should pay the costs of this suit?

In support of the claim, the Plaintiff called one witness, CAROLL WANGARE KARIRU. She was a legal officer with the plaintiff, a position which she had held since December 1999.

She testified that the 1st defendant had approached the plaintiff for a facility. The said approach had been made through the 1st defendant's directors, who happen to be the 2nd and 3rd defendants in this case.

The two directors executed a letter of offer dated 8th May 1996, which confirmed that the plaintiff had approved the 1st defendant's application for a "**Hire Purchase Loan".**

Ms Kariru, who shall hereinafter be cited as PW1, testified that the facility approved by the plaintiff

was for KShs. 6.7 million, which was to be repayable within three years, by monthly instalments of KShs. 290,000/=.

PW1 also testified that the securities for the facility were personal guarantees executed by each of the two directors.

Subsequent to that first facility, the 1st defendant applied for another "loan facility" for KShs. 2.0 million This second application was by way of an application dated 11th November 1996. And, in order to secure the second facility, the 2nd and 3rd defendants executed personal guarantees and indemnities.

By July 1997 the two facilities were in arrears, and the plaintiff wrote to the 1st defendant on 8th July 1997, asking it to regularise the accounts.

When the accounts were still not regularised, the plaintiff, through its lawyers issued demand notices to all the three defendants. All the demand notices are dated 29th September 2000.

It is the plaintiff's case that the 1st defendant responded to the demand notice by offering proposals for paying-off the outstanding sums. However, PW1 readily conceded that even though there were proposals for repayment, the 1st defendant was disputing the balances reflected as outstanding in the statements of account which were maintained by the plaintiff. The records show that whilst the plaintiff was demanding KShs. 3,679,082/= as at 29th September 2000, the 1st defendant was offering to pay-off the perceived debt by KShs. 1,000,000/=. That offer was contained in the 1st defendant's letter dated 7th December 2000.

There is no dispute about the fact that as at 1996 when the facilities were granted to the 1st defendant, the plaintiff held a valid licence to carry on the business of banking. There is also no dispute about the fact that the plaintiff last held a valid licence to carry on banking business in 1999. In other words, after 1999 the plaintiff did not renew its banking licence.

According to PW1 the reason for the non-renewal of the licence was the fact that in December 1999 the plaintiff was acquired by Guardian Bank.

It is common ground that the said acquisition of the plaintiff, by Guardian Bank, did not imply that the plaintiff ceased to exist as a legal entity. The plaintiff continued to have a life of its own, as a subsidiary of Guardian Bank.

I hold the considered view that if the validity of the plaintiff was being questioned because it did not hold a valid banking licence after 1999 that would not hold water, as at the time the plaintiff contracted with the 1st defendant in 1996, it did hold a valid licence. Furthermore, the 1st defendant did not lead any evidence to show that the process of recovering money which may have been advanced to it would constitute "**banking practice"**, so as to require the plaintiff to be licensed before it could recover money which may otherwise be due to it.

Indeed "**banking business"** is defined at Section 2 of the Banking Act as being:

"**(a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;**

(b) the accepting from members of the public of money on current account and payment on and acceptance of cheques; and

(c) the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money."

Therefore, the process of recovery of money does not constitute banking practice.

Meanwhile, "**financial business" is** defined at Section 2 of the Banking Act, as follows;

"**(a) the accepting from members of the public of money on deposit repayable on demand or on expiry of a fixed period or after notice; and**

(b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money."

Any person who wished to carry on either "**banking business"** or "**financial business"** in Kenya is required to hold a valid licence.

It is common ground that as at the time the plaintiff provided financial accommodation to the 1st defendant, it had a valid licence. Thereafter, the plaintiff only continued to handle the processes for the recovery of debts which were outstanding on the difficult accounts. According to PW'1's undisputed evidence, the "**good accounts"** were taken over and managed by Guardian Bank. Therefore, I do hold that subsequent to December 1999 the plaintiff did not transact any banking business or financial business, so as to warrant a valid licence for that purpose.

However, even if the plaintiff did not require a valid licence for purposes of seeking to recover money from the defendants, that still begs the question as to the nature of the transaction that was entered into between the plaintiff and the 1st defendant. The defendants insist that the Agreement was for neither a Hire Purchase facility nor for loan.

The letter of offer dated 8th May 1996 makes reference to a "**Hire Purchase Loan."** For that reason, the defendants contend that there was neither a Hire Purchase Agreement nor a loan. It was a hybrid between the two.

However, the defendants then went on to assume that the Agreement was intended to be a Hire Purchase Agreement, but that it then failed to meet the requirements of such an Agreement.

It is noteworthy that PW1 always referred to the Agreement as a Hire Purchase Loan. The Letter of Offer also made reference to the same said Hire Purchase Loan. And, at clauses (2) and (5) of the said letter of offer, reference is made to "**loan/banking accommodation",** and to "**future loans/banking accommodation".**

At clause (5) (ii) of the letter of offer there is reference to;

"**the loan hereby approved is liquidated in full"**

It appears that both parties clearly understood the position to be that the plaintiff was giving to the 1st defendant a loan, of KShs. 6.7 million, which the 1st defendant was to utilise for the purchase of a lorry.

Both DW1 and DW2 categorically stated that the vehicle which the 1st defendant purchased did not originally belong to the plaintiff. The said vehicle was purchased from Crater Automobiles. Therefore, by the testimony of the defendants' witnesses, it is clear that they well understood the Agreement to constitute anything but a Hire Purchase Agreement.

Both DW1 and DW2 testified that the plaintiff made funds available to the 1st defendant, to enable the defendant purchase the vehicle from Crater Automobiles. And both DW1 and DW2 confirmed having willingly executed personal guarantees, as security for the money which the plaintiff had provided to the 1st defendant, for the purchase of the lorry.

After receiving the first sum of KShs. 6.7 million, the 1st defendant wrote to the plaintiff, on 11th

November 1996, making a "**request for additional loan facilities."**

That letter was signed by the 2nd defendant, in his capacity as a director of the 1st defendant. And the contents of the letter are significant. I will therefore set out herein a portion thereof:

"**11th November 1996**

THE CHAIRMAN

FIRST NATIONAL FINANCE BANK LTD

P. O. BOX 67681

NAIROBI.

Dear Sir,

RE: REQUEST FOR ADDITIONAL LOAN FACILITIES

Currently we have a loan facility vide account no. 0001 00007498 0611 with yourselves.

Further to this, we request an additional loan of Kshs. 2 million on existing loan of KShs. 6.7 million for TRADE-IN of lorry No. KAH 879E MITSUBISHI Fuso to Mercedes Truck Model 2524 (6x4) solo. The new loan is to cover the difference for TRADE-IN. We hereby loose about 2.0 million shillings.

We are borrowing the extra loan for changing the Fuso for a new Mercedes truck. The reason is that the truck financed was involved in a fatal accident. In the meantime we are arranging for KShs. 2.0 million to be deposited against new loan."

I hold the considered view that if there was any doubts about the nature of the transaction between the plaintiff and the 1st defendant, the same were cleared by this letter.

Evidently, the 1st defendant understood that the facility which the plaintiff had given to it was a loan. The said loan was for a sum of KShs. 6.7 million. The account number, of 0001 00007498 0611 is also specified in the letter. And that account is the very same one which has been adduced in evidence before me. Therefore there is ample proof to satisfy me that the Agreement in issue as between the plaintiff and the 1st defendant was for a loan. From as early as 11th November 1996, the 1st defendant well appreciated that fact.

Also, the 1st defendant well understood that the extra funding of KShs. 2.0 million was for an additional loan. Therefore, there does not arise any room for doubt about the nature of the relationship between those two parties.

Although the letter of offer was headed "**Hire Purchase Loan",** the parties clearly appreciated that the 1st defendant was getting a loan. And the terms for the settlement of the loan were clearly spelt out in the letter of offer. As those terms were contractual, the 1st defendant was bound by them. And, yes, the terms of the contract are as spelt out in paragraph 6 of the plaint. In other words, the plaintiff was to charge interest at the rate of 36% per annum. But if the repayments fell into arrears, the plaintiff became entitled to charge penalty interest at 1% per month, on the outstanding.

The defendant's witnesses readily conceded that the foregoing were the terms of the letter of offer.

Meanwhile, although the 2nd and 3rd defendants pleaded in their joint defence, an alleged material alteration to the Agreement, the defendants did not lead any evidence to prove any such alteration.

Therefore, I hold that the Agreement was not invalidated.

As regards the 2nd and 3rd defendants, they both conceded having executed personal guarantees and indemnities for both the original loan as well as for the further loan. They are therefore liable to the plaintiff on the basis of the terms of the said guarantees and indemnities.

It is noteworthy that in the guarantee instruments, the plaintiff is expressly cited as "**the Lenders"**; thus further fortifying my finding that the relationship as between the 1st defendant and the plaintiff was as between a borrower and a lender.

By virtue of the provisions of clause 6 (b) of the Guarantee, the guarantors were to continue being bound by the guarantee;

"**notwithstanding any amalgamation or merger that may be effected by the Lenders with any other company and notwithstanding any reconstruction by the Lenders involving the formation and transfer of the whole or any part of the undertaking and assets of the Lenders to any new company and notwithstanding the sale and transfer of the whole or any part of the undertaking and assets of the Lenders to another company……"**

Thus the fact that the plaintiff had been acquired by Guardian Bank did not dilute the liability of the 2nd and 3rd defendants under their respective guarantees.

In relation to the counterclaim lodged by the 1st defendant, no evidence was led to prove it, or if any was led it did not prove that the Agreement in issue was void. Also, the 1st defendant did not prove the amount of money which it had allegedly paid over to the plaintiff.

In any event, if any such money had been paid, such payment was legitimate as it was intended to help the defendants meet their obligations to the plaintiff. Therefore, there would be no reason to warrant an order directing the plaintiff to pay back such monies, if any, to the 1st defendant.

In conclusion, I would now proceed to answer the issues earlier herein set out, as follows;

(i) Yes, there was a valid Agreement as between the 1st defendant and the plaintiff.

(ii) The relationship as between the plaintiff and the 1st defendant was that of a Lender and a Borrower. It was not in the nature of a Hire Purchase Agreement.

(iii) Yes, the terms of the Agreement were as set out in paragraph 6 of the Plaint.

(iv) Yes, as between the plaintiff on the one hand and the 2nd and 3rd defendants on the other hand, there were agreements embodied in the guarantees and indemnities.

(v) No, the agreements between the 2nd and 3rd defendants, with the plaintiff were not invalidated by the alleged material alterations to the Agreement dated 6th December 1996. Indeed, there were no such material alterations.

(vi) No, the agreement between the 1st defendant and the plaintiff was not void. And the 1st defendant is not entitled to a refund of the money it had paid to the plaintiff.

(vii) The 1st defendant is not entitled to any refund from the plaintiff.

(viii) The plaintiff is entitled to judgement for the sum of KShs. 3,679,082.35. Accordingly judgement is granted in its favour in that sum together with interest at the rate of 36% per annum from 22nd September 2000 upto 10th April 2001, when the Plaint was filed in court. The Plaintiff is also

awarded the default penalty interest at 1% per month from 22nd September 2000 until 10th April 2001, when the Plaint herein was filed.

Pursuant to the authority bestowed upon this court by Section 21 (1) of the Civil Procedure Act, I find that I interest which should be payable from 10th April 2001, until payment in full, is at court rates. I hold the considered view that such rates are reasonable in the circumstances prevailing in Kenya at present.

(ix) The costs of the suit are awarded to the plaintiff against all the three defendants.

It is so ordered.

Dated and Delivered at Nairobi, this 9th day of October 2006.

FRED A. OCHIENG

JUDGE