



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

HCCC NO. 723 OF 2000

DIAMOND TRUST BANK OF KENYA LTD.....PLAINTIFF

- V E R S U S

MOHAMMED NOOR AHMED.....DEFENDANT

R U L I N G

This application is brought by way of a chamber summons dated 11th March, 2004. It is expressed to be made under O.VI Rules 13 (1) (b), (c), (d) and 16, and O.L. Rule 3 of the Civil Procedure Rules, and seeks the following orders-

1. THAT the defendant's statement of defence be struck out.
2. THAT judgment be entered in favour of the plaintiff against the defendant as prayed in the plaint.
3. THAT the costs of the application be provided for.

The application is based on the grounds that the plaintiff's claim is a liquidated one founded on a hire-purchase agreement between the parties; that the defendant defaulted in the performance of his covenants thereabout and that he is well and truly indebted to the plaintiff; that the defence filed by the defendant is not capable of resisting the plaintiff's claim and the same is a sham or otherwise frivolous, vexatious and/or an abuse of the court process; and that it is therefore fair and just that judgment be entered as prayed in the plaint. The application is also supported by the annexed affidavit of ELIZABETH WANJIKU HINGA, the company secretary of the plaintiff.

In opposition to the application, the defendant filed a replying affidavit in which he avers that while initially he dealt with the plaintiff as a sole trader, he subsequently incorporated his business, changed all his accounts and dealings with the plaintiff into the name of the company, and thereafter dealt with them as a director of the company. He further states, on advice from his advocate, that the hire purchase agreement is invalid as it does not meet the legal requirements of the Hire Purchase Act, and that the account exhibited in Ms. Hinga's affidavit shows that he has overpaid, and that he does not owe the plaintiff the sum claimed or any other sum. He therefore contends that he has a good defence to the claim and that the statement of defence should not be struck out.

At the hearing of the application, Mr. Luseno appeared for the applicant while Mr. Kopere represented the defendant. Mr. Luseno argued that the defence herein was filed inordinately late in contravention of a

court order and also of the rules. The defendant/respondent had issued cheques which were dishonoured, and that this demonstrates that the defence is frivolous and vexatious. Counsel further submitted that there was no breach of the Hire Purchase Act as the said Act does not apply to hirepurchase agreements in which the hire-purchase price exceeds Ksh.300,000/= as was the case in this matter. Mr. Luseno then referred the court to a string of cases establishing, inter alia, that when there is a consent, the courts will not normally interfere, and the circumstances in which they may interfere; the remedy of a litigant where a consent order has not been complied with and that the court cannot exercise its discretion in favour of a party who has not been candid.

In his response, Mr. Kopere for the defendant/respondent argued that the application was fatally defective in that the applicant had come to court by a chamber summons under O.VI Rule 13, and yet the provision for summary judgment was provided for in O.XXXV which required an application to be made by a Notice of Motion. He submitted that by applying under O.VI Rule 13, the applicant could get pleadings to be struck out, but could not obtain judgment. Mr. Kopere further submitted that the hirepurchase agreement relied on by the plaintiff was null and void as it had not been registered pursuant to S.5 of the Hire-Purchase Act, and that it had not been stamped under the Stamp Duty Act until after the matter had been filed in court. He also submitted that the right person to be sued was not the defendant but Manura Hauliers Limited of which the plaintiff was only an agent as its managing director.

Another point raised by counsel was that on the basis of the account submitted by the plaintiff/applicant itself, the defendant appears to have paid much more than he should have paid, and that this was not a clear case for summary judgment. As for the plaintiff's failure to file the defence by paying the court fees forthwith, Mr. Kopere submitted that the plaintiff was not prejudiced and he thereupon urged the court to find that this was not a proper case for summary judgment.

To the above responses, Mr. Luseno replied that one can obtain judgment under O.VI Rule 13; that non-registration of a hire-purchase agreement does not affect the validity of the contract between parties; that failure to stamp a document was curable by stamping the document as was done in this case; and that there was no evidence that the defendant had transferred his liability to his company after incorporating the business.

After hearing the respective counsel for the rivals, the first point to be determined is whether there was inordinate delay by the defendant in complying with the consent order as to the filing of the defence. It is notable that the defence in this matter is dated 30th July, 2003. On 21st November, 2003, an order was recorded by consent of the parties as follows-

“By consent, the ex parte judgment entered herein on 16.4.02 is set aside for want of service.

The defendant/applicant to pay the DH thrown away costs and auctioneers expenses Sh.30,000/= all inclusive in 21 days from today.

The annexed defence to the present chamber summons is deemed filed and served on payment of due court fees forthwith.”

The envisaged court fees were paid on 16th February, 2004, and that was when the defence was deemed filed and served as per the consent. This was almost three months after the date of the consent order. The plaintiff/applicant contends that the filing of this defence was not “forthwith” in terms of the consent and that therefore it was done in contravention of the court order and the rules.

I agree with Mr. Luseno that the defendant did not act forthwith in the contemplation of the consent order. Black's Law Dictionary, 6th Edition, defines the word “forthwith” as follows-

“Forthwith. Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch...”

From the perspective of this definition, the filing of the defence almost three months from the date of the

consent was not forthwith. Such a period can hardly be defined as immediate, direct, prompt, or without delay. There was delay. Was it reasonable delay?

If we were to borrow a leaf from O.VIII Rule 1, a defendant has seven days within which to serve a defence after filing it. In this instant case, the defendant was, by consent, required to file its defence forthwith. In my view forthwith means immediately, or right away. Where a defendant does not serve its defence within 7 days of filing, such a defence is liable to be struck out. That being the case, a delay of almost three months is inexcusable and the fate of the defence is to have it struck out.

The second point to consider is the one raised by the defendant on the failure to comply with the provisions of the Hire-Purchase Act as to the registration of the hirepurchase agreement therein. The answer to the issue as to whether or not the failure to register a hire-purchase agreement invalidates such an agreement depends on whether or not the particular agreement falls within the province of the Hire-purchase Act. In this regard, section 3 (1) of the Act is educative. It states as follows-

“This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of three hundred thousand shillings other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated; but that monetary limitation does not apply so as to affect the definition of “hire-purchase business” in section 2 (1).”

The hire-purchase price under the agreement which is the subject matter of this suit is Ksh.2,100,000/=. After adding accessories and hire charges and after deducting the deposit paid, the balance of hire came to Ksh.1,704,223.20, a figure to which I shall revert shortly. This figure is well over Ksh.300,000/= which is the ceiling beyond which the Hire-Purchase Act does not apply. For that reason, the agreement in this suit is not governed by the Hire-Purchase Act, and therefore it does not fall to be registered under S.5 of that Act. I find that there is no breach of that section. In similar circumstances in **DIAMOND TRUST BANK OF KENYA LTD., v. JASWINDER SINGH ENTERPRISES**, Civil Appeal No.285 of 1998, Owuor J.A., said-

“I am satisfied that the agreements in question are not subject to the provision of the Hire-Purchase Act for the reasons I have given... It follows that the relationship between the parties were solely governed by the terms and conditions as set out in the agreements. It was therefore not necessary to register the agreements in terms of section 5 (1) of the Act...”

In the same case, the court also considered the lot of a document which is not stamped in consonance with the requirements of the Stamp Duty Act. Mr. Kopere raised this point in similar fashion to the one raised before the Court of Appeal in the case cited herein above. In response to the argument that the agreements before that court could not be enforced because they contravened section 31 of the Stamp Duty Act, Owuor, J.A. said-

“...it suffices to state that sections 19(3), 20, 21 and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped. The course open... was as in the case of Suderji Nanji Ltd. vs. Bhaloo[1958] E.A. 762 at page 763 where Law, J., (as he then was) quoted with approval the holding in Bagahat Ram vs. Raven Chond (2) 1930 A.I.R. Lah 854 that: ‘before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty...

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity’.”

I wish to adopt these words in toto and hold that failure to stamp a document is not, per se, fatal. It is curable by allowing the party seeking to rely on the unstamped document an opportunity to have it

stamped. Mr. Kopere's stand on that point equally fails.

The third issues that Mr. Kopere took was that the applicant could not obtain judgment under O.VI Rule 13 because the provision for summary judgment is to be found in O.XXXV, under which an applicant should move the court by a Notice of Motion. The application in this matter was by way of a chamber summons. With respect to learned counsel, it is possible to obtain judgment under O.VI Rule 13 (1). A quick look at that Rule reveals that the same reads, in so far as is relevant to this ruling-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a)...

(b)...

(c)...

(d)...

and may order the suit be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

These words mean what they say. Upon striking out a defence, for instance, it is perfectly in order for the court to order that judgment be entered against the defendant without having recourse to O.XXXV. The respondent's contention on that point fails as well.

The fourth point relates to the proper defendant. The hire-purchase agreement which is in issue was made on the 28th day of February, 1995, between Diamond Trust of Kenya Limited, the plaintiff, and Mohammed Noor Ahmed the defendant. On 4th June, 1996, the defendant incorporated MANURA HAULIERS LIMITED. In paragraph 3 of his affidavit in opposition to the application, the defendant states-

“...Initially I operated under a business name – Manura Hauliers, which was later incorporated into a company on 4/6/96 and thereafter I changed all my accounts and dealings with the plaintiff from my personal name as a sole proprietor of Manura Hauliers to the Company's name.”

It is a fact that Manura Hauliers Limited was incorporated as stated by the defendant. A copy of the certificate of incorporation is annexed to his affidavit in evidence. However, his assertion that he changed all his accounts and dealings with the plaintiff from his personal name as a sole proprietor of Manura Hauliers to the company's name is not borne by the evidence on record. In support of this view, it is noted that the plaintiff has attached copies of cheques issued to the plaintiff by the defendant between 25th December, 1995 and March, 1997. This period covers a span of time from preincorporation to post incorporation of the company. These cheques share two distinct qualities. Not only were all of them dishonoured on presentation, but they were also all in the name of MOHAMED NOOR. This is not compatible with the defendant having changed all his accounts and dealings from his personal name to that of the company. If he ever did, then the change is not reflected in this particular account. In the circumstances, the person before the court is the proper defendant.

Finally, Mr. Kopere submitted that according to a copy of the accounts attached to the supporting affidavit of ELIZABETH WANJIKU HINGA, the defendant had overpaid the hire agreement price. I have two observations to make. A copy of the dealers' invoice attached to the application shows the following tabulation-

Cash Price of Vehicle/Goods	2,100,000.00
Accessories	20,000.00
Total	2,120,000.00
Deduct Deposit	848,000.00
Balance	1,270,000.00
Add Hire charges	434,223.20
Balance of Hire	1,704,223.20

In my calculation, this figure should read 1,272,000.00. But no matter.

According to the account produced as exhibit "EWH 7", Mr. Kopere stated that the sum payable is Ksh.1,704,223.20 and the sum paid was Ksh.2,297,745.80. In his view, the sum paid exceeded the sum payable. Unfortunately, what counsel overlooked was that in addition to the balance of hire of Ksh.1,704,223.20, the defendant was also bound to pay an additional sum of Ksh.1,114,342.05 by way of interest on arrears, commission on upcountry cheques, reversal of unpaid cheques and interest, interest differential and repossession charges. The total sum payable was not Ksh.1,704,223.20, but Ksh.2,818,565.25. After deducting the sum of Ksh.2,297,745.80 which was the total payment received, this left unpaid an amount of Ksh.520,819.45 which amount was transferred to non accrual basis on 11.11.97. It was the interest on that sum which precipitated the amount of the claim over the years.

Looking at the totality of the above observations and the defence filed herein, I find that the defence does not disclose a reasonable defence. I accordingly strike it out and enter judgment for the plaintiff as prayed in the plaint, save and except that interest rate claimed under prayer (a) is exorbitant and unconscionable it will be accordingly paid at court rates under both prayers (a) and (b).

It is so ordered.

Dated and delivered at Nairobi this 21st day of April 2005

L. NJAGI

JUDGE