



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 2680 of 1996

EXPRESS FINANCE LIMITED..... PLAINTIFF

VERSUS

JOSEPH MUISYO NZIOKA..... DEFENDANT

JUDGMENT

This suit was heard ex parte on 29th June 2005, the Defendant having failed to appear to defend the same either in person or by Counsel, his former advocate Dr. Willy Mutunga having, with notice to the Defendant ceased acting for him and the Court having noted that the Defendant had been given notice to either appear in person or instruct other Counsel to defend the suit. The Defendant having failed to do so, this Court allowed the Plaintiff to thus proceed ex parte.

The Plaintiff claims from the Defendant the sum of Kshs.2,481,918 being the principal and interest as at 30th September 1996 of a loan advanced to the Defendant sometime in July 1994. The Plaintiff further claims interest at 36% of the said amount from 1st October 1996 until payment in full. It is the Plaintiff's case that the said loan was secured by a Chattels Mortgage dated 29th March 1995 registered against the Defendant's motor vehicle bearing a Foreign Registration Number P205. The Plaintiff produced the said Chattels Mortgage as an exhibit herein and had the same marked "Ex P.2." The Plaintiff called one witness, Horatius Da Gama Rose who testified on its behalf and produced various other documents in support of the Plaintiff's claim. He testified that the subject loan was advanced initially to one Fordy Kromah but assigned to the Defendant after the latter purchased the motor vehicle registration No. P-206 from Mr. Kromah for a sum of Kshs.2,250,000/= of which the Defendant paid a sum of Kshs.725,000/= to the said vendor and simultaneously agreed to pay the loan outstanding of 1,479,975 then due from Mr. Kromah to the Plaintiff. The said arrangement is evidenced by copies of correspondence adduced herein and marked "Ex P.3" "Ex. P4" "Ex P.5" and "Ex P.6". Of particular importance is "ex. P.4" which is a letter from the Defendant to the Plaintiff dated 28th March 1995 addressed to the Managing Director, PW.1, and which stated as follows:

"We refer to our personal meeting yesterday when Mr. Emanuel Shaw II was also present.

As discussed we have entered into an agreement of sale to buy the Range Rover Registration Plate No. P-206 Liberia, at a cost of Kshs 2.25 million from Mr. Foday Kromah who is enjoying a loan facility with your company against Chattels Mortgage of said vehicle and the outstanding in loan account is about Kshs.1.5 million by 31st March '95 (sic).

I have arranged to pay the difference i.e. Kshs.750,000/= to Mr. Foday through Mr. Shaw.

I now request you to kindly consider me a loan facility with effect from 1st April 1995 by transferring the outstanding of Mr. Foday to my name against Chattels Mortgage of the vehicle.

I agree to pay interest @ 36% and the loan to be settled within 90 days i.e. by 30.6.95.

I also agree to carry out the following: -

a) Taking comprehensive insurance cover with interest of your company noted in the policy immediately on possession (sic) of the vehicle.

b) Registering the vehicle through the registrar of motor vehicle in Kenya (sic)

c) Taking road license immediately as it expires on 1st April 1995 as I understand.

I once again thank you and request you to consider my loan favourably at an early date

Yours faithfully

JOE MUISYO NZIOKA.”

Upon the receipt of the said letter the Plaintiff proceeded to make an offer of loan to the Defendant (“Ex. P.5”) outlining the terms as contained in the Defendant’s letter which the Defendant duly accepted. The Chattels Mortgage “Ex P.2” was thereafter executed and registered on 5th April 1995. Prior thereto, a comprehensive Insurance Cover was obtained in the names of the Defendant and the Plaintiff as is evident from the duplicate cover certificate produced herein as “Ex P.8”. On or about 22nd May 1995 the Plaintiffs released the motor vehicles’ log book to the Defendant for him to cause the registration of the same locally. It would appear that was the last time the Plaintiffs heard of the motor vehicle. According to the Plaintiff’s witness, the loan was not repaid come the 30th of June 1995 and arrears thereon started to accumulate. Several demand letters were sent to the Defendant but he ignored all of them. A legal demand was then sent to the Defendant by M/S Shapley Barret & Company Advocates on 6th February 1996 which was also ignored.

PW.1 also testified that, in the hope of exercising their rights under the Chattels Mortgage, the Plaintiffs engaged auctioneers to attach the motor vehicle but their efforts to trace the same, even through private investigators came to naught, hence their filing this suit. On 3rd June 2002 the Plaintiff filed its statement of issues which the Defendant had refused to approve after service. The same are as follows:

- 1. Did the Plaintiff enter into a contract with the Defendant in 1995 to advance the defendant the sum of Kshs.1,497,975/=?**
- 2. If so, did the said contract provide for payment of interest on the loan by the Defendant?**
- 3. If the answer to Issue No.2 above is in the affirmative what was the rate of interest agreed upon?**
- 4. Did the Defendant breach the terms of the said contract by failing to repay the loan and interest?**
- 5. If so, what is the amount due and owing from the Defendant to the Plaintiff under the contract?**
- 6. Is the said contract lawful?**
- 7. Which party is liable to pay the costs of this suit.**

The Plaintiff has adduced overwhelming evidence to persuade this Court to find and I hereby do find that Issue No’s 1, 2, 4 cannot be answered otherwise than in the affirmative. It is abundantly clear from the evidence adduced before me that the parties did agree that an interest rate of 36% would govern the loan facility. There being no reasonable rebuttle or challenge to the figures provided under “Ex P.3”,

which shows the loan calculations from inception to the period just prior to the hearing of this suit, I have no hesitation in finding that the Defendant, being liable to the Plaintiff for breach of the loan contract, is duly indebted to the Plaintiff in the sum of Kshs.1,497,975 at the rate of 36% as per the letter of offer of 28th March 1995 which was duly accepted by the Defendant as previously noted.

I have studied the Defendant's Defence and find the same a sham in view of the evidence adduced against him. If anything was to be considered unlawful it clearly is the Defendant's conduct which has all the elements of fraud. Issue No. 6 is therefore answered in the negative.

On the basis of the evidence adduced herein both orally and documented I find that on the balance of probabilities the Plaintiff has proven its case against the Defendant and its suit against him succeeds. I have looked at the prayers set out in the Plaint and I am of the view that an order for the recovery of the loan at the agreed interest is adequate without going to the issue of the whereabouts of the mortgaged motor vehicle.

Accordingly I enter judgment for the Plaintiff against the Defendant in the sum of Kshs.1,497,975 at the rate of 36% but from the 29th March 1996 to the date of filing suit, that is, 30th October 1996 and at Court rates from the said date until payment in full. The capitalized interest of 3% being interest on interest shall not be allowed.

Costs and interest at Court rates are also awarded to the Plaintiff.

Dated and Delivered at Nairobi this 11th day of November 2005.

M.G. Mugo

Judge

In the presence of:

Mr. Vadgma for the Plaintiff

N/A for the Defendants