



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1182 of 2001

NATIONAL INDUSTRIAL CREDIT BANK LIMITED..... PLAINTIFF

VERSUS

AUTO FAB LIMITED..... 1st DEFENDANT

MARY A. ONGONDO..... 2nd DEFENDANT

JOSEPH ONGONDO NGANI..... 3rd DEFENDANT

RULING

This is a Notice of Motion dated 3rd June, 2002 by the Plaintiff, a commercial bank seeking orders that summary judgment be entered for the Plaintiff against the Defendant in the sum of K.shs 2,965,674 together with interest thereon and costs as prayed in the plaint. It is made under Order XXXV, Rule 1 and 2 of the Civil Procedure Rules. The application is supported by 2 affidavits of one Mr. Reuben Nyangaga, a Manager in the Legal Department of the Debt Management Unit of the Plaintiff/Applicant company. The Plaintiff claims that the defence herein dated 24th September, 2001 is a mere denial, does not provide a traverse to the Plaintiff's claim, is not triable and is merely meant to delay the course of justice in this matter. That the Defendants are truly indebted to the Plaintiff as prayed in the plaint and it is in the interest of justice that this application be allowed to save the court's time.

At the outset, I am not persuaded that the affidavits of Mr. Nyangaga are incompetent for not disclosing on whose authority he swore the affidavits. Mr. Nyangaga disclosed his position in the Plaintiff bank and under oath said that he was authorised to make the affidavit. He is an officer of the bank and conversant with the matters raised in the application. By saying he is authorized to make the affidavit, there is no doubt that he means that he was authorised by the bank. The bank is a corporation and the deponent is employed as a Manager. He says he has authority. This is sufficient proof to this court. It is not necessary for the deponent to bring a resolution of the Board or authority under seal. What he said is enough for the purpose of the affidavit. The affidavits are admissible and admitted in evidence. The provisions of Order 3 Rule 2 (c) contemplate recognized agents and not deponents of affidavits.

What does the defence say? The Defendants claim:

That the Hire Purchase Agreement was frustrated by the Plaintiff making the whole transaction impossible.

That the motor vehicle was involved in an accident but remained unrepaired due to the Plaintiffs actions and conducts.

That in effect the Plaintiff is in breach of the Hire Purchase Agreement having imposed on the Defendants an Insurance Company to insure the vehicle instead of one of their choice.

That the Plaintiff knew that the new insurance company does not pay any claim less than 10% of the sum insured unlike their previous insurance company.

That at no time did the Plaintiff try to repossess the motor vehicle.

That the Plaintiff has not exhausted all avenues under the Hire Purchase Act and the suit is premature.

In the Defendant's replying affidavit sworn by the third Defendant, Joseph Ongondo Ngani on 21st June, 2002 the Defendants raise the issues/matters in the defence and introduce many others including discrepancy in the amount contracted, accounts, lack of registration of the hire-purchase agreement etc. The Defendants question disbursements of shs. 462,000, legal costs and other costs in the Plaintiff's accounts.

I have carefully gone through the application, supporting affidavits, replying affidavit, defence and submissions by both counsels. The findings of the court are that the Plaintiff and the 1st Defendant did enter into the Hire Purchase Agreement issued a joint guarantee and indemnity in favour of the Plaintiff in which they guaranteed the prompt and complete performance by the 1st Defendant of its obligations under the Hire Purchase Agreement.

In the Hire Purchase Agreement the Hirer, the 1st Defendant agreed to keep the motor vehicle insured. The relevant clause inter alia provided that the Hirer shall-

"2.10 Keep the goods insured to their full replacement value (in any case of mechanically propelled vehicles with full comprehensive cover) and in an office to be approved by the owner in writing against the loss or damage by fire and such other risks (including third party risks) as are usually covered by insurance in the type of business for which the goods are for the time being used and such further risks as to the owner reasonably requires and any insurance money shall be applied as follows at the option of the owner..... "

Under this provision it is clear that the Plaintiff as owner had the absolute discretion to choose which insurance company would insure the vehicles. Evidence was given that the 1st Defendant was given the option of having the vehicle insured by another insurer, other than the in-house scheme of insurance through Pan African Insurance. I have seen the forms issued by Stallion Insurance Co Ltd and United Insurance Co. Ltd. The 1st Defendant subsequently accepted the in-house insurer and signed the proposed form. This evidence was not rebutted or controverted. I therefore would have rejected the lines of defence regarding the insurance issue.

The Defendant denied that the Plaintiff did not attempt to repossess the vehicle. Letters from the 1st Defendant show that repossession was ordered and attempts made for repossession. The 1st Defendant made proposals and issued post-dated cheques. See letter dated 2.10.97 - Exh. 15 in the supporting affidavit.

I am also inclined to accept the Plaintiff's evidence that the vehicle was involved in an accident and it is immovable and of minimal economic value particularly with the allegations of cannibalisation by thieves. The allegations that the Defendants obstructed the lawful repossession of the vehicle also look credible.

The Defendant has asked this court not to accept or admit the Hire Purchase Agreement since it is dutiable under the Stamp Duty Act yet it has not been so stamped. That the document is not admissible in evidence on this ground.

Section 31 of the Stamp Duty Act requires that any Hire Purchase Agreement be stamped with duty as an agreement. It enjoys no exceptions as in certain other agreements. Section 19 of the Stamp duty Act says that no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever unless it is duty stamped.

The Plaintiff showed the court a stamp of shs. 2/-. I saw the stamp but the Defendant said nothing about this.

On a balance of probability I accept that the document was stamped. If not, then Section 19 (c) of the Act will apply and I hereby order that the counsel for the Plaintiff stamps the original document within the next 30 days from the date hereof.

The Defendant questioned some of the amounts appearing in the accounts and claims that they are not lawful or chargeable. The Defendant also said the provisions of Section 176 and 177 of the Evidence Act have not been complied with.

The sections read as follows:

"176. Subject to this chapter a copy of any entry in a bankers book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded".

177. (1) A copy of an entry in a bankers book shall not be received in evidence under Section 176 unless it be first proved that:-

- a) the book was at the time of making the entry, one of the ordinary books of the bank; and*
- b) the book is in the custody and control of the bank; and*
- c) the entry was made in the usual and ordinary course of business; and*
- d) the copy has been examined with the original entry and is correct.*

(2) Such proof may be given by an officer of the bank, or in the case of the proof required under subsection 1 (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits.

The Statement of Accounts on which the Plaintiff is replying on are annexed to the affidavit of Mrs. Kabiru at pp. 55, 56 and 57. The deponent did not prove the matters set out in Section 177 of the Evidence Act. The provisions are mandatory. The Defendant disputed the amount due and accounts. While I think that there is evidence which tends to show the liability of the Defendant, however, the said evidence and in particular the accounts are inadmissible at this stage. Since the accounts are disputed, I hold that it is a triable issue. It has been held that if a Defendant raises a single triable issue then he is entitled to unconditional leave to defend.

As a result, the application for summary judgment cannot succeed. I do dismiss it with costs to the Defendants.

DATED and DELIVERED at Nairobi this 4th day of March, 2004.

M.K. IBRAHIM

JUDGE