



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.374 OF 1998**

**FIDELITY COMMERCIAL BANK LTD :::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**TAJDIN HUSSEIN NAZARAL RATANI**

**JAYENDRA R. SAMPAT ::::::::::::::::::::::::::::::: DEFENDANT**

**JUDGMENT**

The Plaintiff by Plaintiff dated 27th June 1998 sued the Defendant for Kshs 2,902,412/= together with interest at 48% p.a. calculated at daily rates from 17th June 1998 until payment in full. The claim was based on a Hire Purchase Agreement dated 29th August 1995 made between the Plaintiff and the Defendant in respect of the purchase by the Defendant of Motor Vehicle Registration No.KAE 217 Y. The Defendant defaulted in the payment of instalments in terms of the said Hire Purchase Agreement and the Plaintiff repossessed the said motor vehicle and sold it for Kshs 1750,000/= leaving the sum claimed in the Plaintiff as the balance of the amount due from the Defendant to the Plaintiff.

On 8th September, 1998 the Defendant delivered a defence denying the plaintiff's claim. On 30th October 1998, the Plaintiff applied for summary judgment against the Defendant. Ransley J. granted the application on 30th November,1999 but awarded interest at the rate of 24% p.a. from the 17th June 1998 until payment in full.

On 26th September, 1999, the Defendant applied for leave to issue a third party Notice on Jayandra R. Sampat claiming indemnity against the Plaintiff's claim. Leave was granted the same date and the said Jayandra R. Sampat was subsequently served with the pleadings and the third Party Notice. He entered appearance on 14th October and on 2nd November, 1999 delivered his defence in which he denied the Plaintiff's and the Defendant's claim.

On 1st October, 2001, the Court ordered on directions that the Third Party proceedings be tried separately on viva voce evidence I believe because judgment had already been entered for the plaintiff against the Defendant on 30th November, 1999. It is the hearing of the dispute between the Defendant and the Third Party that came before me for hearing on 15th June 2004.

The Defendant gave evidence that he bought the lorry described in the plaintiff using money borrowed from the Plaintiff in 1995. He produced a Hire Purchase Agreement dated 29th August, 1995. The money he was given by the Plaintiff was Kshs 3960,000/=. This sum was secured by another lorry. He was to pay Kshs 165,000/= per month for 24 months. He made 12 payments and defaulted when his shop was looted. A Bank official one Kariuki informed him that he had identified a buyer for the lorry. It turned out to be the Third Party in these proceedings. He entered into an agreement with the Third Party which was produced by the Defendant as Exhibit 2. The Agreement is dated 17th April, 1997. Under this agreement the Third Party was to take over the payment of the balance due to the Plaintiff which amount at the time of the agreement was Kshs 2732518/=. The Defendant further testified that the Third Party was to continue to pay the Plaintiff at the rate of Kshs 136,000/= per month. The agreement was executed on the said date i.e. 17th April, 1997 and the Third Party took possession of the said lorry. The Defendant told the Court that the third Party made only one payment of Kshs 136000/= on 23rd June 1997. He had the lorry all this time. The lorry was repossessed from the Third Party and sold for Kshs 1,750,000/= on 16th April, 1998. The Lorry is registered as KAE 317 Y. The outstanding sum at the bank (Plaintiff) was Kshs

4,160,626/35. The Defendant produced a statement of account as Exhibit 3. The Defendant testified that in terms of the agreement between him and the Third Party, the Third Party was to repay the entire loan balance. He therefore prayed that the third party be ordered to pay the entire amount due to the bank. The Third Party unfortunately did not attend at the hearing. Neither did his Counsel despite knowledge of the hearing date.

The Defendant's claim against the Third Party is based on the sale Agreement dated 17th April 1997 between him and the Third Party. I have carefully read the said Sale Agreement. It is clear that the Third Party was notified of the Defendant's indebtedness to the Plaintiff and that it was the Defendant's inability to settle this liability that made him agree to sell the said vehicle Registration No. KAE 317 Y to the Third Party. The sum then due by the Defendant to the Plaintiff was at Kshs 2,732,518/=. Clause 1 of the said Agreement provided as follows:-

***1. "The seller agrees to sell and the buyer agrees to buy (in the manner specified in the above recitals) the said HINNO LORRY REGISTRATION NUMBER KAE 317 Y for the amount of shillings two million seven hundred thirty two thousand five hundred eighteen (shs 2,732,518/=) together with any interest that shall accrue (if any) after the date of this Agreement."***

By Clause 7 of the said Agreement the Defendant reserved the right to sue the Third Party in the event of default of discharging his obligations under the said Agreement. There is no doubt that the Third Party defaulted in the discharge of his obligations under the said Agreement. He only paid Kshs 136,000/=. I hold that the Defendant was entitled to file these Third Party proceedings and is entitled to be indemnified by the Third Party. The Third Party has offered no evidence in rebuttal. The Defendants evidence has therefore not been challenged. In the circumstances I enter judgment for the Defendant as prayed against the Third Party. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY FO JULY 2004.**

**F. AZANGALALA**

**AG. JUDGE**

**Read in the presence of:-**