



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO.205 “A” OF 1996

PREMIER SAVINGS & FINANCE LTD.....PLAINTIFF

V E R S U S

HAMENDRA MANSUKHLAL SHAH.....DEFENDANT

R U L I N G

This application seeking summary judgment is brought by the Plaintiff under Order 35 rule 1 and 8 of the Civil Procedure Rules. It seeks such judgment for Kshs.2,632,376.55 plus costs and interest as prayed in the plaint. It is supported by an affidavit sworn by one Shafiq Pirbhai sworn on 3.2.99.

The facts of the case are that the Plaintiff by a hire purchase agreement dated 7.6.95, hired to the Defendant a motor vehicle – one Land Rover registration number KAE 375H (hereinafter referred to as the vehicle) subject to the terms and conditions of the said agreement, marked as Exhibit “A”. The Defendant is alleged to have taken delivery of the vehicle by signing a delivery receipt marked Exhibit “B” acknowledging such delivery. It is alleged the Defendant before taking delivery of the vehicle, had paid deposit of Kshs.1,089,000/- to the Plaintiff. The financier of this transaction is shown as Premier Savings & Finance Limited who also is the Applicant/Plaintiff in this application. The Respondent is said to have paid two monthly equal installments of Kshs.137,331/- totaling to Kshs.274,662 and then defaulted henceforth until this claim was filed in this court. The financial bank statement related to this transaction is annexed and marked as Exhibit “C”. The said affidavit in support of this application as sworn by the said Shafiq Pirbhai, the Manager of the Plaintiff bank, states in paragraph 8 that he annexes the affidavit and marks it as Exhibit “C” a true copy of the statement of account showing the balance due by the Defendant/Respondent to the Plaintiff/Applicant under the said hire purchase agreement as at 2.11.98. The Applicant therefore argues that the Defendant has no defence to the claim. He signed a hire purchase agreement after reading and understanding the terms and conditions. He paid a deposit of Kshs.1,098,000/-. His defence filed against the plaint herein amounts too mere general denials and is therefore a sham. He had taken delivery of the vehicle, otherwise how could he sign a delivery receipt acknowledging that much, quipped the Plaintiff.

Not so by the Defendant who strongly argues that he indeed signed the delivery receipt acknowledging delivery, but that he did so on a misrepresentation by the Plaintiff who had told him that unless he signed so, the financier would not release the finances and that the vehicle which belonged to a third party would not be released. And so in good faith and trusting upon the good intentions of the Plaintiff that the Plaintiff would release the vehicle, the Defendant argued, he signed. I have examined the application and the annexed affidavit in support as well as the exhibits.

I have also examined the plaint and the defence as well as the Defendant’s counterclaim.

The Hire Purchase Agreement Exhibit "A" is not as self explanatory as represented by the Plaintiff. It shows that the balance of hire after the deposit of Kshs.1,089,000/- has been paid, is Kshs.3,295,944/- which was to be settled by monthly equal instalments of Kshs.137,331/-. The total price of the vehicle reduced to Kshs.2,500,000/- when the said deposit of Kshs.1,089,000/- is paid.

This is increased by sum of Kshs.793,944/- and Kshs.2000/- to make it Kshs.3,295,944/- . Kshs.2000/- is explained as Hire charges. What is Kshs.793,944/- and why is it squeezed into the agreement and yet it is supposed to be borne by the Respondent. As baffling as the said figure aforementioned is the Hire Purchase Agreement which provides that the total cash price plus hire charges is Kshs.4,384,944/-. This latter figure does not agree with the earlier figure also shown on the agreement as balance of hire, which is shown as Kshs.3,295,944/-. Furthermore, the Applicant depones that Exhibit "C" is the true financial statement showing the amount borrowed and the amount outstanding at relevant times of this case. The amount claimed in the plaint is Kshs.2,632,376.55. But the sum advanced by the Plaintiff/Applicant to the Defendant is shown in Exhibit "C" as Kshs.2,502,000/-. The figure claimed of Kshs.2,632,376/55 does not appear anywhere on the said financial statement at any relevant time. Where did it come from and does it not require an investigation before it would form the basis of any awarded judgment? The figures on the plaint which calculate the final sum claimed therein are also strange! The balance of the sum due as per calculation on the plaint as on 8.8.95 is Kshs.3,021,394/85. Exhibit "C" does not carry the date 8.8.95 on it. It shows the situation on 7.8.95, the day before, as Kshs.2,616,917.80 inclusive of the applied interest of Kshs.56,537.80. How does it jump to Kshs.3,021,394.85 the next day? And further in relation to Exhibit "C", the final available calculated figure before the plaint was drawn was that of 7.2.96 which was indicated as Kshs.2,914,980/- and yet the amount claimed during the same month is Kshs.2,632,376/55. Finally, in relation to Exhibit "C", the Plaintiff in "f" on page 2 of the plaint gives credit to the Defendant of Kshs.686,655/- as the unpaid installments and in "j" it debits the Defendant with the same figure. Why and what sense does it make?

There are other issues which need an explanation. The Plaintiff claims that the Defendant made a first deposit of Kshs.1,089,000/-. No date is indicated when this was done. If it was done on the same day the Hire Purchase Agreement was signed and the Delivery Note, Exhibit "B" signed, where is the receipt acknowledging such a large sum from the Defendant, if indeed it was paid by the Defendant? The Defendant of course has sworn that he never at anytime paid the said sum. He paid Kshs.274,662/- as two months installments and he does not deny it. Indeed he claims it back in the counterclaim. Why would he deny having made such a big amount of payment which would definitely be against his own interest but easily admit having paid a lesser amount? Would he be saying the truth? If so why would the Plaintiff wish to claim having received such a big sum of money? And again, it was received, why has the Plaintiff, who is a bank and is expected to record every transaction carefully and clearly, failed to show such an entry on the financial statement, exhibit "C"? Could the Plaintiff be making these generous provisions for higher or greater expectations or returns in this case?

In his defence, the Defendant claimed that he was by the misrepresentation of the Plaintiff led to sign the exhibited delivery receipt. He clearly stated that he was never on 7.6.1995 nor afterwards given delivery of the vehicle by the Plaintiff. That he stopped further repayments of his installments because the Plaintiff refused/failed to deliver the vehicle. That what really pushed him to sign the delivery receipt although the vehicle was not available to him then, was the threat by the Plaintiff that the financier would not release the funds of the advances unless he signed the delivery receipt at the same time as the Hire Purchase Agreement. This having been frankly and strongly pleaded in the defence, would the Plaintiff have not respondent against it in a reply to defence? Why did it not do so? To this day, the Plaintiff has really never faced the Defendant's assertion squarely. Would it be court's waste of time to investigate this question and by so doing establish whether or not the Plaintiff ever delivered the vehicle to the Defendant or not? Upon getting an answer to that issue, the whole solution of this case might depend on it. And finally, who is Alnoor Kara? Was he or not an agent of the Plaintiff? Was the part he played crucial to this matter or not?

I note that this application was brought by the Plaintiff after the parties had prepared for the full hearing of the case in respect of which this court had given directions and parties agreed on issues of the case. It is brought under Order 35. This Order is intended to enable a Plaintiff with a liquidated claim to

which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. A Defendant who wishes to resist the entry of a summary judgment needs to place before the court evidence showing some reasonable ground of defence. The preferable way of doing this is by swearing an affidavit. But the court will consider other methods including viva voce evidence or otherwise, although the court would prefer an affidavit properly sworn. I am aware that I have a wide discretion in deciding this issue but the same has to be exercised judicially. I have considered the pleadings, the affidavits, the exhibits and the submissions made by both counsel. I find and hold that there are many questions and therefore issues which need to be investigated in a full trial before a judgment may be entered for the Plaintiff. The questions if answered might on the other hand give the Defendant full or partial defence. I feel constrained not to give him a chance to properly and fairly establish his possible defence. His filed defence, to my mind is not a sham, nor is it intended to delay the justice of this case. He has canvassed sufficient material to enable me to reach that conclusion.

Having come to the above conclusion, I have now to dismiss the Plaintiff's application for a summary judgment and thus allow the Defendant to defend this matter unconditionally.

Costs will follow the final event after a fully hearing.

I so order.

Dated and delivered on the 7th Day of February, 2002.

D.A. ONYANCHA

J U D G E

Delivered in the presence of:-

Mr. Okongo - for Plaintiff

Mr. Khatib – for Shah - for Defendant