



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO 1628 OF 2000**

**NATIONAL INDUSTRIAL**

**CREDIT BANK LIMITED.....APPLICANT**

**VERSUS**

**GATHUKU.....RESPONDENT**

**RULING**

By an application by way of a Notice of Motion dated 5th March, 2001, the applicant seeks two (2) orders:-

1. Summary judgment against the defendant for the sum of Kshs 1,276,064/ = together with interest thereon at the rate of 38.75% per annum from 1st August, 2000.

2. Costs.

The application is based on the grounds:

- (a) The defendant is truly and justly indebted to the plaintiff in the amounts claimed.
- (b) The defence filed by the defendant does not raise any triable issue whatsoever.
- (c) The defence filed by the defendant is in fact an admission of the plaintiff's claim.
- (d) The defendant does not have any defence to the plaintiffs claim.
- (e) The defendant has admitted his indebtedness.

The application is predicated upon the annexed affidavit of one Reuben Nyanganga sworn on 5th March, 2001.

It was submitted, on behalf of the applicant, that by a hire-purchase agreement entered into on 4th December, 1995 the applicant let to the respondent on hire purchase a motor vehicle registration number KAG 978H – DFN Aeolus Standard Chassis at a consideration of Kshs 1,454,600/= *inter-alia*. The hire purchase agreement is marked, in the application, as exhibit “RNI”.

It was further submitted, on behalf of the applicant, that delivery of the motor vehicle was effected on 1st

December, 1995. The delivery receipt is marked, in the application, as exhibit “RN 2”.

It was also submitted, on behalf of the applicant, that the hire purchase price aforesaid was to be paid in twenty four (24) equal monthly equal instalments of Kshs 60,610/= commencing from 5th January, 1996 together with the agreed interest at 38.75% per annum or such other rates as may be determined by the plaintiff from time to time and on security of the said motor-vehicle.

Apart from the foregoing, the contract entailed bank charges, repossession expenses, administration costs and interest at the agreed rate of 38.75% pa.

It was the applicant’s ultimate argument that in breach of the said contract, the respondent failed to pay the installments on due dates. Instead the respondent paid on various dates between 5th January, 1996 to 20th January, 1997 to the tune of Kshs 785,670/= as at 20th January, 1997 . The balance outstanding continued to attract interest at 38.75% pa apart from bank charges, and other incidental expenses under the agreement.

Flowing from the breach the applicant, in exercise of its rights under the Hire-Purchase agreement, attempted to repossess the subject motor-vehicle but the defendant frustrated such efforts by holding the subject motorvehicle. Later on the motor-vehicle was found abandoned in a state of utter disrepair thus frustrating the repossession exercise.

As at 31st July, 2000, as a consequence of the aforesaid breach, the respondent fell in arrears to the tune of Kshs 733,825/=. The respondent’s account further accrued interest at the rate of 38.75% pa which interest alone stood at Kshs 542,239/= as at 31st Jul, 2001. In the foregoing circumstances the applicants ultimate position is that the applicant’s total claim against the respondent as at 31st July, 2000 stood at Kshs 1,276,064/ =. The said amount continues to attract interest at the rate of 38.75% from 1st August, 2000 until payment in full. In the light of the foregoing the applicant took the view that the defence, is as much a sham as it is an admission of liability and as such, does not disclose triable issues.

The respondent filed grounds of opposition dated 13th March, 2001 and replying affidavit sworn on 13th March, 2001 and purported to rely on the same at the hearing. That cannot be.

Order L rule 16(1) states:

“16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.

(2) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the Court, file a supplementary affidavit.

(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard *ex parte*.”

In my view the said order entitles the respondent to elect whether to file a replying affidavit or statement of grounds of opposition but not both. By filing grounds of opposition and replying affidavit the respondent has breached the mandatory provisions of order L rule 16(1) which in my view is fatal. On that ground alone I would allow the application. However, before I conclude this ruling, I consider it pertinent to consider the issues which the respondent raised in opposition to the application.

According to the respondent a sum of Kshs 785,670/= out of a principal sum of Kshs 1 million, has been so far paid. This leaves a balance of Kshs 213,330/= which he is willing to pay together with interest thereon. This, in my view, amounts to an admission of liability. This is embodied in paragraph 5 of the amended defence dated 6th February, 2001 as read together with paragraph 6 and 7 of the replying affidavit of the respondent sworn on 13th March, 2002.

What the respondent disputes is the interest rate. The respondent signed the agreement exhibit "RN1" which, *inter-alia*, provides for a principal sum of Kshs 1,454,600/= which attracts interest at the rate of 38.75% per annum or such other market rate determined by the plaintiff from time to time. At paragraph 6 and 7 of the replying affidavit the respondent admits that he is prepared to pay the balance outstanding, with reasonable interest thereon or interest at the agreed rate. According to the respondent the issue of interest charged is a triable issue. In my view what the respondent is asking the Court to do is to re-write the contract. That goes against the grain.

I have anxiously weighed the two rivaling arguments vis-à-vis the pleadings and evidence on record. Having done so, I have come to the irresistible conclusion that the defence is a sham. It is an admission of liability. The defence, in my view, raises no triable issues.

The upshot is that the application dated 5th March, 2001 thereby succeeds. Accordingly, therefore, there shall be summary judgment for the plaintiff against the defendant in the sum of Kshs 1,276,064/= together with interest thereon at the rate of 38.75% per annum from 1st August, 2000 together with costs and interest. It is so ordered.

**Dated and delivered at Nairobi this 25th day of April, 2002**

**R.N.O OMBIJA**

**JUDGE**