



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.355 OF 2000

DIAMOND TRUST BANK (K) LTD.....PLAINTIFF

=V E R S U S=

MARY NYAMVULA KINGA.....DEFENDANT

R U L I N G

The matter under consideration is the Notice of Motion dated 16.11.00 which was taken out by the Plaintiff under O.12 r.6 Civil Procedure Rules for orders:-

1. *That Judgment on admission be entered in favour of the Plaintiff against the Defendant as prayed in the Plaint.*
2. *That in the alternative judgment on admission be entered in favour of the Plaintiff against the Defendant for the sum of Kshs.252,310.00 being part of the sum prayed for in the plaint and the balance of the amount claimed to proceed to hearing.”*

To succeed in such prayers the Plaintiff must show that the admissions made by the Defendant are clear, unambiguous and unconditional. In the poetic words of Madan, J.A. (as he then was) in **Choitram –v- Nazari**, (1982 – 88) 1 KAR 467:

“For the purposes of O.XII r.6 admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends up on the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis”.

Let me state on the outset that the alternative prayer is conceded both in the defence filed at paragraph 6 and in submissions by learned counsel for the Defendant, Mr. Kenzi. I would therefore not belabour that point and would readily enter judgment for the admitted sum of Kshs.242,310/= if the main prayer fails. Has the Plaintiff discharged the onus of establishing the admission relating to the total sum claimed of “Kshs.591,639.50 together with interest thereon at 47% from 24.6.2000 until payment in full?”

A short recap of the facts is pertinent.

The Plaintiff company herein is described as “a Financial Institution and Bank”, (hereinafter “the Bank”) but the transaction the subject-matter of this suit did not arise out of the normal Bank/Customer relationship. What is pleaded is a Hire-Purchase agreement entered into on 10.6.1997 in which the Bank let to the Defendant (hereinafter “the hirer”) a Nissan Caravan Van (hereinafter the vehicle) valued at

Kshs.720,000/- on terms that the hirer would have the option to purchase the same after payment of monthly hire purchase instalments of Kshs.28,655.85. For some unexplained reason none of the parties saw it fit to exhibit the said agreement although both rely on its terms in support of their pleadings.

Be that as it may, for a period of about one year until 25.6.1998 the hirer made various irregular hirepurchase instalments but was still in arrears of Kshs.517,310/- together with interest thereon and other penalties. The Bank then invoked Clause 4 of the Agreement (which I am unable to verify) and repossessed the vehicle on that day. For some reason, which again is unexplained, the vehicle was not sold immediately but the Bank says it sold it 4 months later on 28.10.1998 and fetched Kshs.275,000/-. By that time they had incurred storage charges and further interest raising the debt due to kshs.591,997.20. Since then the Bank charged interest at a rate which it says was contractual but which I am unable to verify, for another period of about 20 months until 7.6.2000 when they formally demanded payment of Kshs.543,452.95. They stated:

hirer through Mr. Kenzi is weighty enough to deprive the Bank of summary judgment. It cannot be fully adumbrated in the absence of relevant material that the court has not had the benefit of analysing, having been omitted, whether by design or accident. There certainly seems to be some substance on authority, for the proposition that:

“Where under a hire purchase agreement the hire is determined by the owner because the hirer is in arrears with his payments of the hire instalments, the damages receivable by the owner are the instalments in arrears and unpaid and the interest on such arrears”.

That was stated in **Credit Finance Corporation Ltd –vs- Lanani [1964] E.A. 317.**

As to when that agreement was determined and for how long the interest on arrears should run, or the rate thereof, that has to await the trial.

I decline to grant prayer (1) in the application. There is nothing plain and obvious about it at this stage. I dismiss prayer (1) and grant the alternative prayer with interest thereon at court rates from the date of filing suit. The balance of the amount claimed shall go for trial.

The Applicant has only been partially successful. I grant half the costs of the application to the Plaintiff/Applicant.

Dated this 14th day of March, 2001.

P.N. WAKI

J U D G E