



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1798 OF 2000

NATIONAL INDUSTRIAL CREDIT BANK LTD. PLAINTIFF

VERSUS

DIGO CHEMISTS LIMITED 1ST DEFENDANT

WALLAGE KAMAU KIGOTHO 2ND DEFENDANT

JOSEPHINE WANGUI KAMAU 3RD DEFENDANT

RULING

The applicant who is the plaintiff in this matter has brought this application under O. XXXV Rule 1(a) and O. VI Rule 13(1) (a) of the Civil Procedure Rules for orders:-

(a) That the defendant's defence be struck out;

(b) That judgment be entered for the plaintiff against the defendants jointly and severally as prayed in the plaint.

The application is supported by an affidavit sworn on 30.1.2001 by Reuben Nyangaga, an Assistant Manager in the plaintiff's Debt Management Unit and is based on the ground that the defence comprises mere denials and raises no triable issues. It is also asserted in the body of the Notice of Motion that the claim is for a liquidated sum.

The affidavit in support of the application reveals that the parties hereto entered into a hire purchase agreement whereby the plaintiff facilitated the purchase by the defendant of a Nissan Diesel CDA – 12 SHRX Truck Registration Number KAG 011S. The purchase price for the truck was Shs.4,995,000/= out of which the plaintiff contributed Shs.3,496,500/=. In addition, the plaintiff was entitled under the agreement to recover hire purchase charges and interest on the facility making the total sum payable by the 1st defendant to the plaintiff under the agreement Shs.5,283,211/=. That sum was to be repaid by 35 monthly installments of Shs.160,650/= each, commencing 16.5.1996 and one final installment of Shs.161,961/= due on 16.4.1999.

By personal guarantee dated 16.4.1996 the 2nd and 3rd defendants bound themselves to pay the sum referred to above together with interest accrued therein and to indemnify the plaintiff against all claims, damages, losses and expenses arising from the failure by the 1st defendant to pay the debt.

The plaintiff claims that the defendants have failed to repay the debt interest and other lawful expenses arising from the hire purchase agreement and as a result the sum of Shs.1,253,600.75 was due and owing on the agreement as at 30.11.2000.

As regards the motor vehicle, the purchase of which was financed under the hire purchase agreement, Mr. Nyangaga states that the plaintiff is unable to repossess it because the defendants have moved it out of the jurisdiction of this court. Annexed to Mr. Nyangaga's affidavit is a letter Exh. 'RN8' which establishes that the motor vehicle was taken to Uganda in July 1999.

A perusal of the joint defence filed by the defendants reveals that what the plaintiff says about it is true; it is nothing but a catalogue of mere denials and does not raise any triable issue. As to the replying affidavit which was purportedly sworn by the 2nd defendant on 18.2.2001 and filed in court on 12.2.2001 (which obviously cannot be correct) the only matters of any substance deponed to therein are:-

(a) an allegation that interest was charged at a rate of 36.25% which is higher than that allowed under the agreement;

(b) an oblique suggestion that the plaintiff should first have repossessed the truck before commencing legal action to recover the balance outstanding.

The answer to these complaints is to be found in the Hire Purchase Agreement. Clause 2.3.1 of the agreement gives power to the plaintiff to charge interest at any rate which in its absolute discretion may determine provided that such rate shall not exceed the maximum rate which financial institutions are from time to time permitted to charge by the Central Bank of Kenya. The defendants have not substantiated their allegations about excessive interest rates and accordingly, in view of the provisions of Section 176 of the Evidence Act which require courts in all legal proceedings to receive as prima facie evidence, matters, transactions and accounts in bankers books, I must reject their unsubstantiated allegations and accept as prima facie proof the entries in the statements of the accounts of the 1st defendant tendered in evidence through the affidavit of Nyangaga. Those statements show that as at 31.7.2000, the balance due from the 1st defendant to the plaintiff was Shs.2,291,229.30.

As for the suggestion that the plaintiff should first have repossessed the subject motor vehicle, Clause 8.1 of the agreement shows that the plaintiff is on termination entitled to take action to recover the sums due under the agreement. This implies that it was not necessary for the plaintiff to repossess the motor vehicle before commencing legal proceedings to recover the outstanding debt.

In my view therefore, neither the defence filed herein nor the replying affidavit sworn by the 2nd defendant answers the plaintiff's claim and clearly there would be no point in allowing the defendant to proceed any further with the matter. For those reasons, the application is allowed, the defence struck out and judgment entered in favour of the plaintiff against the defendants jointly and severally as prayed in the plaint. The defendants will bear the plaintiff's costs of this application.

Dated at Nairobi this 9th day of March, 2001.

T. MBALUTO

JUDGE