



CIVIL PRACTICE AND PROCEDURE

- Application for summary judgement and/or for striking out a defence under Order 35 rule 1 and Order 6 rule 13(1).

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS NAIROBI

CIVIL CASE NO.2062 OF 1998

BARCO HIRING & LEASING LTD.....PLAINTIFF

VERSUS

ZAHRA SPARES LTD..... 1ST DEFENDANT

AZIZ MOZAMIL SHEIKH.....2ND DEFENDANT

ANGELINA NJERI MACHARIA.....3RD DEFENDANT

CHANDRAKANT S. PATEL.....4TH DEFENDANT

AMRAN N. MOHAMMED.....5TH DEFENDANT

ALFRED NAZARETH6TH DEFENDANT

YASSIN CHIWE.....7TH DEFENDANT

RULING

This is an application by the plaintiff for orders that (i) judgement be entered in the plaintiffs favour against the 1st, 2nd, 3rd, 4th and 6th defendants as prayed in the plaint alternatively and (ii) that the defences filed be struck out as disclosing no or no reasonable defence and/or as being a sham and/or an attempt to delay the fair trial of the suit and/or as being otherwise an abuse of the process of the court. The application is expressed to be brought under Order 35 rule 1 and Order 6 rule 13(1) (a) and or (b) and or (c) of the Civil Procedure Rules. The application is supported by the grounds stated on its face and by an affidavit sworn by the Director of the plaintiff company on 13th July, 1999.

The application and the suit itself are predicated on alleged two hire purchase agreements entered into between the plaintiff on the one part and the first defendant on the other part and written guarantees and

indemnities whereby the other defendants allegedly undertook and or guaranteed to be responsible for the debts of the first defendant to the plaintiff.

There are defences filed by all the defendants. There are also grounds of opposition or objection filed by the 1st, 2nd, 3rd, and 4th defendants. In addition there is an affidavit sworn by the 3rd defendant on her own behalf and on behalf of the 1st and 2nd defendants. The 4th defendant has also filed a replying affidavit. The application was canvassed before me at length on the 23rd July and the 17th October, 2001.

I have considered the pleadings, the grounds of opposition, the affidavits filed and the submissions of counsel. I have come to the conclusion that this is not a matter for summary adjudication under either order 6 rule 13 or Order 35 rule 1 or both for the following reasons. First, the plaintiff's claim against the first defendant is based on the hire purchase agreements and a written acknowledgement of indebtedness dated 11th August, 1997 whereby the first defendant acknowledged being indebted to the plaintiff in the sum of Kshs.2,805,000.00 and agreed to pay finance charges of 5% per month with effect from September, 1997 in the event of any default in the payment of the agreed upon instalments. In its defence the 1st defendant in paragraph 5 has averred that the said acknowledgement is invalid and unmaintainable as the same was a result of duress and coercion exacted upon its director by the plaintiff through some police officers at Central Police Station Nairobi. Although Mr. Rach, counsel for the plaintiff, dismissed the alleged duress on the basis that even if the allegation were true, they did not amount to duress as no threat to life or limb was disclosed, I am of the opinion that this is a matter that requires full ventilation at a full trial for the court to determine the truth or otherwise of the allegations and their effect on the consent agreement. And with the validity of that consent being in question, the amount of the plaintiff's claim against the defendants jointly and severally must remain in doubt. Secondly, the 2nd, 3rd and 4th defendants have denied executing the agreements of guarantee and indemnity relied on. Execution of the documents concerned is a necessary part of the plaintiff's claim. Now although there is Considerable force in Mr. Rach's arguments that these defendants did sign the guarantees as all of them purport to be witnessed by an advocate who has drawn the defences on record on behalf of the 1st, 2nd and 3rd defendants, I think I cannot make a definitive finding on the issue without the risk of being seen as having tried the case on affidavits. I am of the opinion that where execution of a document is denied, the truth or otherwise of the matter can only be determined at a full hearing after cross examination of the executants. That must be especially so where a party denies, as the fourth defendant has done in his replying affidavit, even knowing or meeting the other executants of the document or the attesting advocate. Thirdly, the fourth defendant has in his replying affidavit raised substantial issues of law on whether or not the consent between the 1st defendant and the plaintiff could bind the guarantors and the effect of such consent on the validity and enforceability of the guarantees allegedly entered into prior to such consent. He also raises the issue of misrepresentation. According to him, it was misrepresented to him that the guarantee was for purchase of a motor vehicle worth Kshs.400, 000 only. Fourthly, the 6th defendant has raised the issue of whether any notice was served on him under the guarantee and whether in the absence of such notice, he could be liable to the plaintiff.

All in all, it is apparent that the defendants have raised bona fide triable issues and it would not be right in those circumstances to enter summary judgement against them or to strike out their defences on the grounds that they do not disclose any reasonable defences or that they are plainly unsustainable or they may delay the fair trial of the action or are otherwise an abuse of the process of the court.

In the result the plaintiff's motion is dismissed with costs to the respondents.

DATED at Nairobi this 29th day of November 2001.

A.G. RINGERA

JUDGE