

REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI

CIVIL CASE 1064 OF 1999

NATIONAL INDUSTRIAL CREDIT BANK LTD V BANKSONS EXPRESS & 2 OTHERS

T Mbaluto, Judge

August 7, 2000 T Mbaluto, Judge delivered the following judgment.

This is an application to strike out with costs the defendant's defence and for summary judgment to be entered against the defendant as prayed in the plaint. The grounds upon which the defence is sought to be struck out is that it discloses no reasonable defence; that it is a sham and that the defendants have no defence to the claim. The defendants who oppose this application have filed in this matter two principal documents in response to the application, namely, grounds of opposition as well as a replying affidavit.

The documents reveal that the 1st defendant entered into two Hire Purchase Agreements Nos. 47/0071190/3 and 47/007191 with the plaintiff under which the 1st defendant obtained loan facilities from the plaintiff. The 2nd and 3rd defendants were guarantors of the Hire Purchase Agreement. Pursuant to the agreements, the 1st defendant purchased motor vehicles KAD 911D and KAD 922D both of which were Nissan Diesel Buses. The loans were to be repaid by 35 monthly installments of Kshs 196,120 per motor vehicle with effect from September 3, 1993 with a final installment of Kshs 195,800 payable on August 3, 1996 on each motor vehicle.

In breach of the agreements the plaintiff defaulted on payment of the installments on both motor vehicle and as at February 28, 1999, the hire purchase installments due on both motor vehicles inclusive of interest stood at Kshs 9,225,382. The documents also reveal that both the 2nd and 3rd defendants in breach of the deeds of indemnity under the guarantee have refused and or failed to indemnify the plaintiff. The Hire Purchase Agreements expressly stipulated under clause 33 thereof that interest would be payable along with the hire purchase charges and that in cases of default the interest would be variable at the option of the owner, the plaintiff.

Because of the 1st defendant's default, the two motor vehicles were repossessed and sold for Kshs.150,000 which said sum was credited to the 1st defendant's account. The 1st defendant claims that no notice was served before repossession but the plaintiff asserts that notice was duly served. It is worth observing that the claim regarding lack of notice is neither raised in the defence nor in the grounds of opposition or the replying affidavit and is clearly an afterthought. Further, although the defendants do not dispute the facts as stated above, in their grounds of opposition, they complain that the plaintiff has not disclosed all the material facts regarding the repossession of the motor vehicles. One of the material facts allegedly not disclosed was the balance and interest due. This complaint is obviously spurious because particulars of the claim inclusive of interest are given in the plaint. As far as I can see, the only serious complaint that the defendants raise in their defence is that the interest charged is punitive, excessive, unreasonable and without any basis. They have however wholly failed to tender any evidence to substantiate those claims. Because of that failure, what the defendants state in their grounds of opposition and replying affidavit as well as in their defence amounts to no more than empty and bare assertions without substance.

The other complaint by the defendants is that the plaintiff has failed to mitigate its losses. Given the circumstances of this case, I do not see what the plaintiff could have done to mitigate any losses. On their part, the defendants did not offer any ideas on how the alleged loss could be mitigated and in my judgment, the complaint also lacks substance.

The defence filed by the defendants raises only two issues, namely alleged failure to account for the proceeds of sale of the two motor vehicles, the subject matter of the suit and interest which is said to be

arbitrary, excessive and unreasonable. I have already dealt with the issue of interest. As to the proceeds of sale of the motor vehicles, I think the plaintiff has satisfactorily accounted for it. In the case of Continental Butchery Limited Vs. Nthiwa (Court of Appeal, Civil Appeal No. 35 of 1977) the Court of Appeal cited with approval the statement of Jessl M.R. In Anglo – Italian Bank V. Wells where the learned judge said:-

“When the judge is satisfied that not only is there no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.”

On the facts of this case, the defendants have no defence to the plaintiff’s claim and no life can possibly be breathed in the defence by amendment. For those reasons, I allow the application, strike out the defence and enter judgment in favour of the plaintiff against the defendants as prayed in the plaint. The defendants will jointly and severally bear the plaintiff’s costs of this application.