REPUBLIC OF KENYA

High Court Of Kenya At Nairobi
Milimani Commercial Court

Civil Case No. 655 Of 1999

DIAMOND TRUST BANK KENYA LTD

V

KIPKALYA KIPRONO KONES

Civil Case No. 655 Of 1999

October 25, 2000 T Mbaluto, Judge delivered the following judgment.

JUDGEMENT

This is an application for summary judgment against the defendant. The application has been brought under Order XXXV Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and is supported by an affidavit sworn on July 10, 2000 by Charles Kamande Ndegwa. The grounds upon which the application has been brought are that:-

(a) The Plaintiff's claim is a liquidated one founded on two hire purchase agreements and a chattels mortgage between the parties hereto.

(b) The Defendant defaulted in performance of his covenants under the hire purchase agreement and chattels mortgage and in particular the payment of the agreed hire rentals as and when they fell due and the sum claimed in the Plaint is therefore due and payable.

(c) The Defence filed by the Defendant is a sham incapable of resisting the Plaintiff's claim herein and the same is frivolous vexatious and is otherwise an abuse of the process of Court.

(d) To prevent further abuse of the process of Court summary judgement should be entered as prayed in the plaint.

The respondent has not filed any replying affidavit and consequently the facts contained in the affidavit of Mr Ndegwa stands uncontroverted. That affidavit reveals that on March 5, 1996 and September 30, 1996, the respondent applied for a hire purchase facility to enable him purchase three motor vehicles. Pursuant to the applications, two hire purchase agreements were entered into between the applicant as owner and the respondent as hirer under the terms of which the plaintiff let to the respondent one motor tractor a Massey Fergusson and two Toyota Pick-Ups on hire purchase terms. The particulars and terms of the two agreements are to be found in the agreements annexed to the application.

In consideration of the applicant having financed the purchase of the motor vehicles, the respondent charged all 3 of them in favour of the applicant by way of a Chattels Mortgage. The Chattels Mortgage

provided, inter alia , that:-

> "9 (1) If and so often and so long as more than one vehicle is the subject of this Instrument either alone or along with any other agreement between the Grantee and the Grantor for Lease Hire or Hire Purchase –
>
> (a) any payment whatsoever made from time to time by the Grantor to the Grantee shall notwithstanding any direction by the Grantor to the contrary be appropriated in or towards satisfaction of any such liability of the Grantor to the Grantee then outstanding in respect of any of such vehicles under this Instrument or any other agreement or Mortgage on any account as the Grantee may at its sole discretion elect; and

Upon completion of the documentation, the respondent took possession of the three motor vehicles and for a while thereafter, serviced his accounts with the applicant in accordance with the agreements but subsequently in breach of terms and conditions of the hire purchase agreement as well as the chattels mortgage, he defaulted in payment of the agreed hire rentals as and when they fell due. As a result, the hire purchase accounts fell into arrears. When that happened, the applicant exercised its right to repossess the subject vehicles. However only two namely KAJ 405J and KAH 406J both of which were badly damaged were traced. The third motor vehicle KAD 530P remains unrepossessed. In his affidavit, Mr Ndegwa indicates that he suspects the respondent to have either hidden the motor vehicle or disguised it. Due to the damaged condition, the two repossessed motor vehicles only fetched Kshs 70,000 and Kshs 90,000 respectively despite several attempts to sell them.

In the affidavit, Mr Ndegwa does not deal with one motor vehicle which had also been repossessed earlier, namely KAC 544Z. But as explained by Mr Wanjohi, learned counsel for the applicant, there is sufficient material in the pleadings and the affidavit to show that the said motor vehicle was also sold realising Kshs 250,000 which was credited to and is reflected in the accounts of the respondent kept by the applicant.

Upon the sale of the motor vehicles, the sum of Kshs 3,070,138.15 inclusive of interest as at April 15, 1999 remained unpaid. The applicant has filed this suit to recover that amount.

The defendant's defence is that he was never given a copy of the alleged hire purchase agreement and is a stranger to the covenants therein. He therefore pleads *non est factum and non assumpsit* . At the same time he denies owing the sum of money claimed or any part thereof and avers that, if the hire purchase agreements were in existence the same were terminated when the applicant repossessed the subject motor vehicles. On those premises he contends that he cannot be held liable for any shortfall.

When this application for summary judgment came up for hearing before me on September 28, 2000, learned counsel for both parties informed the court that only three issues required to be resolved for the purposes of determining the matter. Those issues were:-

> (a) Supply of the Hire Purchase agreements;
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> (b) Whether the tractor and the two motor vehicles were sold at under value; and
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> (c) Whether the plaintiff/applicant had sold 2 or 3 motor vehicles.

Having regard to what is stated above and more particularly the fact that no replying affidavit has been filed by the respondent, which as aforesaid means that what Mr Ndegwa of the applicant has deponed stands unchallenged, it is clear that the issues stated above have to be resolved in favour of the applicant.

With regard to the hire purchase agreements, the complaint by the respondent in his defence that he was never given a copy of the agreements obviously lacks merit. There is no evidence that he asked for a copy and was refused. It is in my view inconceivable that a person of the respondent's status (I take judicial notice of the fact that he is a former Cabinet Minister) signing such an important document and not

retaining a copy thereof for himself. The words of the House of Lords in the case of Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v. Anglia Building Society (formerly Northampton Town and County Building Society (1970) 3 All ER are apt.

> "The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.
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> The burden of establishing a plea of non est factum falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel."

The evidence available shows that the respondent not only applied for the facilities but also signed the hire purchase agreements. That being the case, the burden of establishing the plea of *non est factum* falls on him. In my view, he has wholly failed to discharge that burden. With regard to the averment in paragraph 9 of the defence that the hire purchase agreement was terminated when the motor vehicles were repossessed upon which event the respondent ceased to be liable for the shortfalls of the outstanding sums, I would observe that while the first part of the contention is correct, the second part is untenable in law.

As to whether the motor vehicles were sold at an under value the evidence available shows that the applicant made all reasonable attempts to advertise the motor vehicles for sale and in the end obtained the best prices he could for the motor vehicles. And with regard to the last issue, the evidence shows that 3 motor vehicles were sold and the moneys realised therefrom credited to the respondent's accounts with the applicant.

For the above reasons, my finding is that the respondent's defence is a sham which raises no triable issues. It does not answer the applicant's claim and is clearly an abuse of the process of this court. For those reasons, the application is allowed and judgment entered in favour of the applicant against the respondent as prayed in the plaint. The respondent will bear the applicant's costs of this application.

October 25, 2000

T Mbaluto,

Judge