



## REPUBLIC OF KENYA

### IN THE HIGHCOURT OF KENYA AT NYAHURURURU

#### CIVIL CASE NO 7 OF 2019

SUPA SAVING CREDIT COOPERATIVE SOCIETY

LTD.....CHARGE/PLAINTIFF

-VS-

ALEX MAINA KIBOI.....BORROWER/1<sup>ST</sup> DEFENDANT

HAMBU FREIGHT SERVICES LTD.....CHARGOR/ 2<sup>ND</sup> DEFENDANT

#### RULING

##### INTRODUCTION

1. By way of Originating Summons dated 20<sup>th</sup> May 2019 the applicant herein sought for the following orders;
2. Spent.

***I. That the property known as motor vehicle registration number KAX 322R, charged to the Plaintiff by the Defendants under an informal charge dated 31/1/2017 be sold to recover part of Ksh. 1,323,250/- together with further interests currently due and owing from the Defendant to the Plaintiff as at 1/05/2019.***

***II. That the 2<sup>nd</sup> Defendant be compelled to transfer the said motor vehicle in the name of the Plaintiff to enable it sell the same.***

***III. That the salary of the 1st Defendant be attached to repay the balance loan arrears after part-payment of proceeds of the sale of the said motor vehicle.***

***IV. That the auctioneer appointed by the charge be granted and vested with full power and authority to sell by public auction property known as motor vehicle registration number KAX 322R with a view to repaying, fully in part, the same Ksh. 1,323,250/- currently due and owing by the Defendants to the Plaintiff as at 1/5/2019.***

***V. That the auctioneer's costs be paid by the Defendants in any event.***

***VI. That the costs of this suit be awarded to the Plaintiff.***

3. The application is premised on grounds found on the face of the application and the affidavit of Isaac Missoy Kiptoo, the Chief Executive Officer (CEO) of the Plaintiff.

4. The crux of the Plaintiff's application is that on or about 23/2/2017 the 1<sup>st</sup> Defendant applied for a FOSA loan facility of Ksh. 1,500,000/- which was secured by informal charge over all that property known as Motor Vehicle Toyota Fortuner Registration Number KAX 322R registered in the name of the 2<sup>nd</sup> Defendant. The loan request was approved on 31/1/2017 at an interest of 14% per annum.

5. The 1<sup>st</sup> Defendant offered registration book for the said motor vehicle. The Plaintiff asserted that by so doing an informal charge was created between the Plaintiff and the Defendants and the said motor vehicle was charged to secure repayment of monies owed, interest and all other monies aforesaid on the legal date of redemption. The Plaintiff averred that despite making several demands, the Defendant failed to service the said loan and as a consequence whereof the amount outstanding as at 1/5/2019 stood at Ksh. 1,323,250/-.

6. In rejoinder, the 2<sup>nd</sup> Defendant through his replying affidavit dated 5/7/2019 opposed the Plaintiff's prayers a claimed it ought not to have

been enjoined in the suit as it denied being the 1<sup>st</sup> Defendant's guarantor or being the owner of motor vehicle registration number KAX322R or having interest thereof.

7. Furthermore, in rebuttal, the 1<sup>st</sup> Defendant through his replying affidavit dated 3/10/2019 asserted that the Plaintiff has no known cause of action against him and that the forum by which the Plaintiff brought the instant suit was erroneous. He maintained that there was no subsisting informal charge between him and the Plaintiff and that the money borrowed was meant to buy motor vehicle registration number KAX 322R and that the money was paid to the 2<sup>nd</sup> Defendant.

8. He was opposed to the attachment of his salary to recover the debt owed and meeting the auctioneer's charges. The Plaintiff claimed that on experiencing challenges in repaying the loan, he delivered the said motor vehicle to the Plaintiff on 29/3/2018 and that he had no objection to transfer and that it was the 2<sup>nd</sup> Defendant who was to initiate transfer but they failed to do so. Further, he maintained that the Plaintiff ought to have filed a suit against the 2<sup>nd</sup> Defendant as he is not in a position to transfer the vehicle even if ordered to do so.

## ANALYSIS

9. First and foremost, on the forum used by the applicant to pursue its claim:-

10. I find that the applicant did not err by instituting the suit by way of originating summons in any case Article 159(1) (d) of the Constitution urges the courts not to over dwell on procedural technicalities, while exercising their judicial authority. Section 1A (1) and (2) and Section 3A of the Civil Procedure Act give guidance on what the objective of the Civil Procedure Act and Civil Procedure Rules is. The ends of justice in this matter would demand that this court recognizes the intention of the respondents as being their desire to be represented by counsel and to be heard.

11. In Cecilia Njoki Njenga & 3 others V James Mburu Ndua & Another HCC NO. 335 of 2009 (Nakuru) (2010) eKLR, Hon. Ouko J (as he then was) when deciding on a similar preliminary point regarding competence of a suit involving a trust commenced by way of plaint instead of an originating summons as provided for under Order 36 Rule 1 Civil Procedure Rules expressed himself as follows:-

***“The trend of looking at the substance and considering if there would be prejudice to any party has culminated in the enactment of Sections 1A and 1B of the Civil Procedure Act introducing the concept of overriding objective of the Civil Procedure Act. The courts, by those provisions are conferred with considerable latitude in the interpretation of the law and giving effect to the rules at the same time. In concluding this point, the argument raised on the procedure adopted in this matter is not fatal as it has not been shown to be prejudicial to the 1<sup>st</sup> respondent ...”***

12. It would be unjust to throw the applicant's case out just because their advocates approached the court by way of originating summons instead of plaint. The fundamental consideration for the court in such an objection should be whether failure to comply with the prescribed procedure for the commencement of a suit has occasioned prejudice to the Defendant such that if the suit was to proceed to hearing in the manner in which it was filed, there would be a failure or a miscarriage of justice.

13. In any case, the Plaintiff fully asserted its claims against the Defendant and the relief sought thus the Defendant is not likely to suffer any prejudice as the claim against him has been fully disclosed and applying the spirit of Article 159 (2) of the Constitution and the overriding objective of the Civil Procedure Act and the Civil Procedure Rules.

14. On whether there exists a legal or equitable informal charge between the Plaintiff and the Defendants; -

15. Section 2 of Movable Property Security Act, 2017 interprets the following terms as:-

a. debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;

b. "grantor" means— (a) a person that creates a security right to secure either its own obligation or that of another person; (b) a buyer or other transferee, lessee, or licensee of the collateral that acquires its rights subject to a security right; and (c) a transferor in an outright transfer of a receivable;

c. collateral" means— (a) a movable asset that is subject to a security right; or (b) a receivable that is the subject of an outright transfer;

d. "security right" means—

(a) a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; and

(b) the right of the transferee in an outright transfer of a receivable;

16. Section 6 of the Movable Property Security Act, 2017 states that:-

## 17. 6. Creation by execution of a security agreement

**(1) A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.**

**(2) A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.**

18. In the foregoing, there is no dispute that a loan was advanced to the 1<sup>st</sup> Defendant by the Plaintiff. The respondent offered Motor Vehicle Registration Number KAX 322R as security as evidenced by the FOSA Loan Application Form; Part XI (*annexed and marked as IMK/2*) registered in the name of Hambu Freight Services Limited (*annexed and marked IMK/3 is a copy of the registration book for motor vehicle*).

19. I however fail to understand the lender's lack of due diligence in ensuring that the borrower had ownership or beneficial interest in the property offered as security for the loan as envisioned in section 6 of the Movable Property Security Act, 2017 therefore no informal charge exists over Motor Vehicle Registration Number KAX 322R between the Plaintiff and 1<sup>st</sup> Defendant as the subject motor vehicle did not belong to the 1<sup>st</sup> Defendant at the time of the purported creation of the informal charge.

20. Furthermore, the funds amounting to Kshs. 1,500,000/- were directly transferred to the borrower/the 1<sup>st</sup> Defendant account number 1173044639- Alsoniah Events & Adventures at KCB Maralal Branch on 1/02/2017 via Cheque Number 3295 (*attached and marked IMK/9A an IMK/9B is the cash transfer application by Alex Maina Kiboi and Supa Sacco Fosa Activity Account dated 10/4/2019*) and not directly to the 2<sup>nd</sup> Defendant as the claimed by the 1<sup>st</sup> Defendant.

21. There is no proof of relationship between the Plaintiff and the 2<sup>nd</sup> Defendant and more so no evidence to proof that the 2<sup>nd</sup> Defendant acted as the 1<sup>st</sup> Defendant's guarantor. The same is not indicated in the loan application form between the Plaintiff and the 1<sup>st</sup> Defendant and the Plaintiff did not adduce any evidence to this effect. Under Section 3(1) of the Law of Contract Act CAP 23 Laws of Kenya the guarantee must be in writing or there must be a memorandum of it in writing signed by the guarantor. The limitations on the enforcement of a lender and guarantor relationship is more often contractual as provided for in the loan agreement. The 2<sup>nd</sup> Defendant cannot be held liable for the loan secured through a document that it did not in law execute.

22. However, it is clear that The 1<sup>st</sup> Defendant defaulted on the loan and despite the Plaintiff's notices for payment of arrears the Defendant did not take any step to settle the same. Through a demand letter (*annexed and marked IMK/7*) dated 2/0/2018 the Defendant was given 3 months to settle the outstanding loan arrears failure to which the Plaintiff would exercise its statutory power of sale in realization of the security offered.

23. Consequently, the Plaintiff wrote to the Defendants on 30<sup>th</sup> and 20<sup>th</sup> July 2019 respectively requesting for online transfer of the motor vehicle which the Defendants didn't act on. (*Attached and marked IMK/10A and IMK/10B are copies of the said letters respectively*). I am of the view that there is no reason to deny the Applicant the opportunity to realize security for the loan which is not disputed as being in arrears. The Plaintiff has recourse under Part VII of the FOSA Loan Application Form (*annexed and marked as IMK/2*) that is to attach 1<sup>st</sup> defendant salary as a means to recover all the loan, interest and cost thereof in case of total failure to repay the loan and cover the cost of advertisement, valuation and the auctioneer's charges.

## **CONCLUSION**

24. In the premises, and having found that there was no valid charge (formal/informal) created in respect of the subject motor vehicle on account of it not being owned by the 1<sup>st</sup> Defendant, I thus make the orders;

**i. That the salary of the 1st Defendant be attached to repay the balance loan arrears Ksh. 1,323,250/- currently due and owing by the Defendants to the Plaintiff as at 1/5/2019 plus costs and interests to date of payment.**

**ii. That the Plaintiff's application lacks merit on other prayers save above (i) and are therefore rejected.**

**iii. No orders as to costs.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13<sup>TH</sup> DAY OF MAY, 2021.**

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**CHARLES KARIUKI**

**JUDGE**