



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 854 OF 2009

CFC STANBIC BANK.....PLAINTIFF

-VERSUS-

JAMES KABATHA MAINA.....DEFENDANT

JUDGMENT

BACKGROUND

The Plaintiff (herein “**CFC Stanbic Bank Ltd**”) instituted a suit against the Defendant (herein “**James Kabatha Maina**”) by Plaint dated 16th November 2009 and filed on 19th November 2009. The Plaintiff’s claim is that upon the request from the Defendant, it advanced the Defendant Ksh 2,868,686/- under a Hire Purchase Agreement for the purchase of motor vehicle registration number **KAW 640V**, Nissan Diesel **MKB 210**.

The Plaintiff claimed that it was a term of the contract that the amount advanced shall be payable in 36 installments; 35 monthly installments of Ksh 96,658/- and a final installment of Ksh 99,658/-. There was “option to purchase” fee of Ksh 3,000/-, interest was to be charged at the rate of 8.56% flat per annum, equivalent to the Plaintiff’s Lending Rate plus 2% per annum on a reducing balance, plus default interest at the rate of 2.75% per month.

The Plaintiff avers that the Defendant had defaulted in the repayments under the above stated Hire Purchase agreements and as at 30th June 2009 the sum of Ksh 3,194,046/- was due and owing to the Plaintiff which sum continued to attract interest.

The Plaintiff now prays for judgment against the Defendant for reasons;

a) Kshs 3,194,046/- being the outstanding amount under the Hire Purchase Agreement, interest and costs of the suit.

STATEMENT OF DEFENCE

The Defendant states that the entire suit herein is incompetent and ought to be struck out and dismissed in *limine* for the following reasons;

- The Plaint was filed on 19th November 2009 which is almost three years ago.
- The summons were issued on 12th June 2012 contrary to Order 5 Rule 1 of the Civil Procedure Rules.
- That the validity of the summons is one year after from the date of filing the suit. In this matter no application was made to extend the summons herein.
- The Defendant shall move at the earliest opportunity to have the suit struck out and/or dismissed under **Order 5 of the Civil Procedure Rules**.

The Defendant stated that under **clause 3** of the agreement, if the Defendant returned the bus, the Plaintiff was to elect the remedies available to it. The remedies available were set out at paragraph 7 of the agreement and they include;

- Damages for breach
- Apportioned rent for the broken period

- Costs of repairs
- Agreed depreciation

The remedies were disjunctive and there was no provision for payment of the entire rent upon termination of the agreement.

He stated that in exercise of the rights under paragraph 3 of the agreement, the Defendant wrote to the Plaintiff on 14th April 2008 and terminated the contract and returned the bus to the Plaintiff. The bus was taken to Kawangware depot at the instance of and with the full knowledge of the Plaintiff. Having taken the bus and not raised an issue ever since, the Plaintiff cannot come to court four years later and demand payment of the entire hire purchase price.

HEARING

The Plaintiff adduced evidence on 19th September 2019 through PW1 Simon Mwangi Legal Counsel, Rehabilitation & Recoveries Department of Stanbic Kenya Ltd. He relied on his written Statement of 6th September 2019 and Plaintiff's list of Documents filed on 26th June 2019. He outlined in detail the particulars of Plaintiff's claim as evidenced by attached Hire Purchase Agreement dated 6th December 2006, the basis of claim against Defendant. Despite notice and demand to the Defendant the amount of Ksh.3,194,046 remains due and owing.

PLAINTIFF'S SUBMISSIONS

The Plaintiff in its submission relied on **Clause 3 (a) of the Hire Purchase Agreement** between the parties which provides;

“the hirer may at any time terminate the hiring by giving notice of termination in writing to the owners and by returning the vehicle(s) equipment in good order repair and condition at his own risk cost and expense to the owners at the address appointed or directed by them together with all necessary licences, registration books or certificates, insurance policy and other documents relating to the vehicle(s) equipment.”

It relied in the case of **National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (K) Ltd and Another (2002) EA 503**; the Court of Appeal of Kenya held that;

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

There was not the remotest suggestion of coercion, fraud or undue influence with regard to the terms of the Hire Purchase Agreement.

In **Motex Knitwear Mills Limited Milimani HCC 834/2002 Honourable Hon. Lessitt J citing Autar Singh Bahra & Another -vs- Raju Govindji HCC 548 of 1998** stated as follows;

“although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by 1st Plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are substantiated, in the circumstances the counterclaim must fail...” where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged...”

DETERMINATION

The issue for determination is whether the Plaintiff proved its claim on a balance of probabilities?

The hearing proceeded *exparte*, the Plaintiff's advocate served the Defendant with mention and hearing notices scheduled on 16th & 19th September 2019 respectively, through Sichangi Partners advocates for the Plaintiff on record on 12th September 2019. The process server served copies to the Defendants Advocates on record Githui & Co. Advocates. The served copies were received and stamped and copies filed with the Affidavit of Service on 16th September 2019. In the absence of any attendance, representation by Defendant or Counsel, any explanation, circumstances or reasons for absence advanced for the Court to consider, the Court proceeded *exparte*.

The Plaintiff's claim is based on Hire Purchase Finance Facility Agreement duly executed by both Plaintiff CFC Stanbic Bank and Defendant for Ksh 2,868,686/-.

There was no evidence of the Hire Purchase facility repayments by the Defendant. The interest continued to accrue culminating to the amount claimed.

The Plaintiff, through its advocate on record, wrote to the Defendant on 9th July 2009 and demanded Ksh 3,194,046. There was no response or any payment of part of or the outstanding amount.

The Defendant replied vide letter dated 21st July 2009 and he admitted the hire Purchase facility and intimated that he made monthly repayments from January – April 2007. Thereafter he experienced financial crisis due to the breakdown of the bus due to its mechanical

condition. He sought refinancing from the Plaintiff vide letter dated 14th April 2008 which was unsuccessful. He parked the bus at KBS garage in Kawangware. He sought the Bank to waive accrued interest and after sale of the bus recover and settle the debt. On 17th September 2009, the Defendant wrote to the Plaintiff that he surrendered the vehicle, left it to the Bank to sell the bus and recover its debt.

In Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others [2014] eKLR in part held;

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is requisite response to an already – discharged initial burden.

[The evidential burden is the obligation to show if called upon to do so, that there is sufficient evidence to raise an issue as to existence or non existence of a fact in issue.] [Cross & Tapper on Evidence (Oxford University Press 12th Ed 2010 Pg 124)”

The Plaintiff pleaded its claim and presented evidence through oral testimony of PW1 and the Plaintiff’s List of documents that constitute a valid hire purchase contract and subsequent correspondence between parties, notice and demand of the debt. The Defendant did not discharge his burden of proof or tender evidence to controvert the Plaintiff’s claim. The totality of the correspondence between the Plaintiff and Defendant, there is no dispute of the Hire Purchase facility to the Defendant by the Plaintiff. There is no contest as to validity of the Agreement. The amount remains due and owing save for the 4 months instalments repaid if proved. The fact of leaving the bus at KBS yard for the Bank to sell and recover the outstanding balance was not a term of the contract, and it was not agreed upon by parties. It does not waive the Defendant’s contractual obligation to repay the Hire Purchase Facility. Clause 3 (a) of the Hire Purchase was not complied with; the bus was not in good order repair and condition when it was parked at KBS Garage at Kawangware. On these grounds the Plaintiff has proved its claim on a balance of probabilities.

The Defendant raised the following issues in his Defence; the Plaint was filed on 19th November 2009 which is almost three years ago. The summons were issued on 12th June 2012 contrary to **Order 5 Rule 1 CPR** That the validity of the summons is one year from the date of filing the suit. In this matter no application was made to extend the summons herein.

The Court found from the court record that Hon Fred A. Ochieng J vide Ruling of 3rd December 2014 found the Summons served on the Defendant in June 2012 were valid following the Plaintiff’s application of 19th March 2012 before Hon Kimondo J. who granted extension of validity of Summons for 6 months.

DISPOSITION

1. Judgment is entered for the Plaintiff against the Defendant for Ksh 3,194,046/- interest and costs at court rates.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH JUNE 2020. (VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

SICHANGI PARTNERS ADVOCATES FOR THE PLAINTIFF

GITHUI & CO ADVOCATES FOR THE DEFENDANT