



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 378 OF 1997

JEMIMA MORAA SOBU.....PLAINTIFF

-VERSUS-

TRANS-NATIONAL BANK LTD.....DEFENDANT

JUDGMENT

[1] Vide the re-amended plaint dated 5th July 2010 and filed in court on 7th July 2010, the plaintiff, **Jemima Moraa Sobu**, sues the defendant, **Trans-National Bank Ltd**, basically for a declaration that the attachment of **m/v Reg No. KAA 541J**, was illegal and without justification in law. Consequently, return of the vehicle to the plaintiff is sought together with special and general damages including interest and costs of the suit.

[2] The plaintiff pleaded that by diverse acts and other matters entered in writing on or about **5th March 1993**, she obtained financial accommodation from the defendant in that she was offered a sum of Ksh. 1,400,000/= (Ksh. 1.4 million) for the purchase of a motor vehicle make Isuzu NKR 575 under lease hire upon terms set out in the material letter of offer dated the same 5th March 1993. The letter contained conditions precedent to the validity of the facility to wit, valid sales invoices from the dealer after the signing of a lease hire agreement between the plaintiff and the defendant, satisfactory registration of the securities relative to the leasehire, valid registration of the vehicle in the joint names of the plaintiff and the defendant and comprehensive insurance policy documents over the vehicle with the defendant's interest duly noted on the policy as beneficiary in the event of any loss and the relative insurance premiums to be paid by the plaintiff.

[3] The plaintiff also pleaded that the letter of offer further contained "inter-alia" terms and conditions obligating her to open a saving account with the defendant during the duration of the loan. To this intent, she opened such account being A/C No. 081-0100868-001 and in the premises, on or about the month of April 1993, the defendant released **m/v Reg No. KAC 029Z** to the plaintiff in terms of the letter of offer. Shortly thereafter, she commenced the repayment of the loan by monthly instalments of Ksh. 56,800/=.

[4] The plaintiff pleaded that the defendant reportedly carried out the compliance of the terms and conditions of the letter of offer by registration of the motor vehicle Isuzu NKR 575 as m/v KAC 029Z Mini-bus and comprehensively insuring the vehicle in the sum of Ksh. 301,408/=. That, on or about the month of July 1993, the vehicle was damaged after being involved in an accident but despite claims for compensation the defendant refused and/or neglected to make good the claim. Later, in mid 1995, the plaintiff learnt that the defendant did not take out a comprehensive insurance cover but fraudulently proceeded to burden the plaintiff's account by the sum of Ksh. 301,408/=.

[5] Further, that the defendant continued to increase the interest charged on the facility from 23% per annum to 40% per annum in addition to a monthly large sum of between 4000/= and Ksh. 5000/= or thereabout as ledger fees levied on the chattel's loan account. In the premises, the plaintiff approached a third party namely National Industrial Credit Ltd (N.I.C) to take over her liabilities on the said chattel's loan and in or about January 1995, the defendant fraudulently misled the N.I.C Ltd as to her indebtedness which was paid over to her by the N.I.C thereby occasioning a transfer of the loan to herself and the N.I.C.

[6] In particular, the plaintiff pleaded that the defendant fraudulently represented to the N.I.C Ltd that the balance of the lease hire facility account as at 17th November 1994 was the sum of Ksh. 1,400,000/= and confirmed that the outstanding balance in respect of the motor vehicle Reg No. KAC 029Z as at 26th January 1995, was the sum of Ksh. 850,000/=.

That, the defendant committed the acts of fraud complained hereinabove and also fraudulently purportedly made a letter of amendment dated 26th January 1995 purporting to amend the original letter of offer dated 5th March 1993 by inserting cryptic terms and conditions in transferring motor vehicle Reg No. KAC 029Z to the N.I.C Ltd and imposing unnegotiated terms and conditions and purporting to obtain chattels mortgage of the plaintiff's suit vehicle Reg No. KAA 541J.

[7] The plaintiff pleaded and contended that she was misled by the defendant that her total indebtedness had been discharged and that the

loan facility had been rescheduled yet the defendant knew or ought to have known that the facility had been paid in full.

That, her true statement of account was never supplied by the defendant and that the defendant purported to validate an item of the ledger fees retrospectively and prospectively charged on the loan account without agreement.

[8] The plaintiff's claim thus arises from the fact that on 18th August 1997, a firm of auctioneers known as **Nyanya Auctioneers**, wrongfully and unlawfully trespassed upon and attached the plaintiff's motor vehicle Reg No. KAA 541J Toyota Hilux on allegation that the plaintiff owed the defendant a sum of Ksh. 960,163/30 cts. It is on the basis of this ground that the plaintiff seeks a declaratory order and damages against the defendant.

[9] The defendant denies all allegations made against itself by the plaintiff and counterclaims against her the sum of Ksh 1,151,257/05 plus interest at the rate of 34% per annum together with penalties and other sundries from the date of default until payment in full.

The defendant is also claiming the costs of the suit. The denial and the counterclaim are based on the defendant's pleadings contained in the amended defences and counterclaim dated 26th July 2010, in which the defendant contends that in 1995 the plaintiff without any lawful excuse and justification breached the loan contract by failing to pay the loan instalments as per the letter of amendment dated 26th January 1995 and failing to regularly provide the defendant with such information relating to finances and operations as well as failing to maintain a saving account with a minimum balance of Ksh. 50,000/= thereby occasioning loss and damage to the defendant.

[10] Both the plaintiff and the defendant filed their submissions in support of their respective cases. These and the authorities cited therein have been given due consideration by this court which therefore identifies the basic issue for determination as being whether the attachment of the plaintiff's motor vehicle Reg No. KAA 541J by the defendant through its agents was lawful and if not, whether the plaintiff is entitled to damages and to what extent.

[11] The lawfulness or unlawfulness of the attachment would be dependent on the terms and conditions contained in the letter of offer or agreement dated 5th March 1993.

It was herein undisputed that the plaintiff's claim and invariably the defendant's counterclaim are anchored on the said agreement revolving around the purchase of motor vehicle Isuzu NKR 575 which is not the actual subject matter of this suit but the plaintiff's m/v RegNo. KAA 541J.

[12] In evidence, the plaintiff tendered a copy of the agreement as P.Ex 1 which was also the defendant's D.Ex 1. It is dated 5th March 1993 and was addressed to the plaintiff by the defendant's predecessor, **Trans-National Finance Company Ltd.** It was in response to an application by the plaintiff dated 3rd March 1993, in which she applied for a financial facility in the sum of Ksh. 1.4 million to purchase the motor vehicle Isuzu NKR 575 which was later registered as m/v Reg No. KAC 029Z.

[13] Clearly, the financial facility was presented as a leasehire agreement with a repayment period of thirty six (36) months from the date of initial drawdown. The collateral or security for repayment was to be a chattel mortgage over the vehicle being financed and another chattel mortgage over the plaintiff's subject m/v Reg No. KAA 541J which was then valued at Ksh. 550,000/= by a government agency (i.e Ministry of Public Works).

The valuation date is given as 3rd March 1993.

[14] The repayment of the facility was to include or attract interest at the prevailing rate of 23% per annum on a daily calculation and be debited monthly by way of compound interest.

The taking effect of the facility was governed by conditions precedent which included the receipt of a comprehensive insurance policy document over the material vehicle with the defendant's interest being noted on the policy as beneficiary in the event of any loss. Insurance premiums were payable by the plaintiff.

[15] The offer together with its terms and conditions was accepted by the plaintiff who duly signed it on 22nd March 1993.

A chattels mortgage respecting m/v Reg No. KAC 029Z make Isuzu Matatu was duly executed on 30th April 1993 effectively binding the parties to the same as well as the material letter of offer dated 5th March 1993.

[16] It is evident that the implementation of the written agreement commenced on a sound note with the understanding that the security for the repayment of the loan was the chattel mortgage over the vehicle being purchased by the plaintiff. However, the end of the agreement was on a sour note with this suit where each party is accusing the other of renegading on the terms and conditions of the agreement in one way or the other. It is very sad that it has taken about twenty one (21) years for this matter to be finally put to rest at this stage.

[17] Be that as it may, the plaintiff's obligation was to prove her claim against the defendant on a balance of probability by presenting sufficient and credible evidence capable of demonstrating or showing the defendant's alleged breach of the terms and conditions of the agreement reached between themselves and how the breach occasioned her loss and damage.

Similarly, on the counterclaim, the obligation lay with the defendant to prove its claim against the plaintiff.

[18] Proof is a matter of solid evidence and not wishful thinking and/or conjecture.

The question arising here is really not about the taking of accounts as between the plaintiff and the defendant nor fluctuation or otherwise of interest rates but all about the lawful or unlawful attachment of the plaintiff's subject m/v Reg No. KAA 541J by the defendant on account of the impugned agreement or agreements. Herein, two versions of the agreement have been pleaded i.e the original version dated 5th March 1993 and the amended version dated 26th February 1995.

[19] The plaintiff (**PW 1**) testified that the defendant agreed to finance the purchase of a vehicle by herself at a cost of Ksh. 1.4 million. However, the defendant later demanded a sum of Ksh. 250,000/= in addition to the agreed purchase price. A further Ksh. 301,408/= was payable by the defendant for the vehicle's insurance cover but at a later stage when the vehicle was involved in a road accident, the defendant on being requested to make the necessary compensation indicated that the vehicle's insurance cover was not comprehensive and therefore she (plaintiff) was required to meet expenses for the vehicle's repair.

[20] The plaintiff stated that the defendant did not pay for comprehensive insurance cover as agreed but she nonetheless continued to repay the loan by monthly instalments of Ksh. 56,800/= made at the defendant's Kisii branch office. However, statements obtained periodically from the defendant were not accurate as some of the payments made by herself were not reflected therein.

[21] The plaintiff went on to state that on taking accounts she realized that she had actually overpaid the loan but to her disappointment the repayments never ceased. Consequently, she transferred the loan and the transaction pertaining to it to a different financier i.e the National Industrial Credit Ltd (N.I.C) which agreed to take over the matter and a letter to that effect (P.Ex 11) was written. Nevertheless, the defendant still went ahead to instruct a firm of auctioneers to attach her m/v Reg No. KAA 541J for reasons that she had an outstanding debt balance. This action triggered the present suit.

[22] The plaintiff produced bank statements (P.Ex 5 a-c) of all payments made by herself as from August 1993 upto March 1995 and contended that she paid a sum of Ksh. 850,000/= together with an extra amount of Ksh. 50,000/=. She indicated that the letter dated 1st March 1995 (P.Ex 11) to N.I.C showed that the total amount due to her was Ksh. 850,000/=. She maintained that she fully repaid the loan although some payments made by her were not reflected in the bank statements.

[23] In cross-examination, the plaintiff indicated that she took possession of the financed vehicle after the defendant paid the purchase price of Ksh. 1.4 million.

Thereafter, she repaid the loan by monthly instalments of Ksh. 56,800/= but realized later that she actually repaid more than was required. She is therefore claiming a refund of the extra payments and contends that at the time of filing this suit the loan had been repaid to the tune of over Ksh. 2 million.

[24] The plaintiff alluded to the repossession of the material vehicle by the defendant and its release by an order of the court at a time when its conditions had deteriorated due to weather conditions such that she was forced to sell it as scrap metal.

She vehemently denied being indebted to the defendant in the sum of Ksh. 1,151,257/05cts as at 27th August 1997 and contended that her claim was actually for a refund of the extra payments made by herself inclusive of extra insurance cover payment.

[25] In denying the plaintiff's entire claim the defendant through its legal officer, **Irene Kipkorir (DW 1)**, testified that the plaintiff took a loan of Ksh. 1.3 million in 1993. This was prompted by the letter of offer dated 5th March 1993 (D.Ex 1) but in 1995, the agreement was restructured by the defendant for reasons that the plaintiff was having problems with the loan repayments. She (plaintiff) instigated the restructure in her letter dated 5th January 1995 (D.Ex 3) and accepted the same by signing the letter dated 26th January 1995 (D.Ex 2).

[26] The defendant further testified that the loan was secured by chattels mortgage for two motor vehicles i.e Reg No. KAA 541J and Reg No. KAC 029Z. This mortgage was dated 30th April 1993 (D.Ex 4). However, the security for m/v Reg No. KAC 029Z was taken over by the N.I.C Ltd in the year 1995 and a sum of Ksh. 800,000/= was paid to the defendant. Consequently, the outstanding loan balance due from the plaintiff reduced to Kshs. 600,000/= which was to be settled within a period of eighteen (18) months by monthly instalments of Kshs. 45,000/=.

[27] The defendant contended that the plaintiff defaulted in the repayment of the entire amount which continued to attract interest such that in the year 1997, the loan increased to over Ksh. 1.1 million. This prompted the issuance of necessary notices followed by the re-possession of the subject m/v Reg No. KAA 541J and its disposal by public auction. Later, the present suit was instituted by the plaintiff and since she owed the defendant more money, the defendant counter claimed for the sum of Ksh. 1,151,207/05cts with interest at the rate of 34% per annum with effect from 27th August 2012 to date.

It is the defendant's contention that it did not illegally or unlawfully re-possess and/or attach the plaintiff's motor vehicle.

[28] From all the evidence and as noted hereinabove, the bone of contention in this matter is simply the attachment of the plaintiff's motor vehicle Reg No. KAA 541J (suit vehicle) clearly on account of an agreement for the purchase by the plaintiff of a m/v Reg No. KAC 029Z (NKR 575) with money borrowed from the defendant repayable within a period of thirty six (36) months by monthly instalments of Ksh. 56,800/=.

[29] The agreement was the letter of offer dated 5th March 1993 from the defendant to the plaintiff. The letter essentially doubled up as the written agreement between the plaintiff and the defendant responsible for governing their newfound relationship. It was "inter-alia" provide therein that the loan was for Ksh. 1.4 million and not Ksh. 1.3 million as stated by the defendant's witness (DW 1). The amount was for the purchase of the m/v Isuzu NKR 575 later registered as Reg No. KAC 029Z.

[30] It was also provided that the loan was to be secured by chattels mortgage over the vehicle being purchased and the plaintiff's m/v Reg No. KAA 541J.

To that effect, a Chattels Mortgage dated 30th April 1993 was executed and signed by both parties. It is annexed to the material letter of offer (P.Ex 1) and clearly relates to the vehicle being purchased and not m/v Reg No. KAA 541J (suit vehicle).

Although the agreement provided for a Chattels Mortgage on each of the two motor vehicles it was only the vehicle being purchased that was secured. Indeed, the defendant conceded that it did not have a chattels mortgage for the suit vehicle (Reg No. KAA 541J).

[31] It is factual that where a person borrows money from a financial company for the purchase of a motor vehicle, the loan is normally secured with a mortgage over the vehicle being purchased or in addition any other belonging to the borrower. This is what is referred to as Chattels Mortgage. It transfers the legal title to the chattel to the secured party (i.e the lender) and would include an express or implied provision that the legal title will be transferred to the debtor upon repayment of the loan (i.e equity of redemption).

If statutory requirements for a legal mortgage are not met the chattels mortgage would become an equitable mortgage or fixed or floating charge.

[32] So, the operating chattels mortgage in this matter was the one dated 30th April 1993 arising from the original agreement dated 5th March 1993 and relating to the purchased m/v Reg No. KAC 029Z.

Therefore, a default in the repayment of the loan amount meant that the lender (defendant) was lawfully entitled to re-possess and/or attach the mortgage vehicle and sell it to recover the amount or the balance thereof.

[33] It would appear from the pleadings and the evidence that the relationship between the plaintiff and the defendant started well and was expected to end well within the stipulated period of time. However, this was not to be so and the reason was the advent of a purported modified or amended version of the original letter of offer dated 26th January 1995 (P.Ex 10) (D.Ex 2).

[34] The said letter was treated by the defendant as a restructure of the original loan agreement or a variation therefore but was in essence a new and separate loan agreement which provided for a loan amount of Ksh. 600,000/= payable within a period of eighteen (18) months with effect from February 1995 by monthly instalment of Ksh. 45,000/=. It also provided for security in the form of a Chattels Mortgage over the suit vehicle Reg No. KAA 541J valued at Ksh. 620,000/= and a personal guarantee of Charles Gichana of P.O. Box 803, Kisii.

[35] It is paradoxical that a chattels mortgage for the suit vehicle was never executed yet it was contemplated in the later agreement and even the former agreement and was to be the basis for possible attachment and sale of the suit vehicle to recover the loan if there was any default in the repayment.

As it were, the defendant had no valid and legal basis to attach the suit vehicle even if there was default in the repayment of both loans. Its action in that respect was unlawful and smacked of gross impunity.

[36] In any event, the transfer of the original loan to the National Industrial Credit Ltd (N.I.C) had the effect of discharging it vis-a-vis the defendant. The defendant could not therefore be heard to claim from the plaintiff an unproved outstanding balance respecting that transferred loan.

The defendant could also not prove that the second loan was not discharged or that there existed an outstanding balance in respect thereof. It was strongly indicated in the defendant's evidence that its books of account respecting the two loans were not properly kept and this impacted negatively on the plaintiff's loan accounts.

[37] Ultimately, the defendant would be liable to the plaintiff for the consequences of its negligence and unlawful acts.

On the contrary, the plaintiff would not be liable to the defendant in any manner as the defendant's counterclaim was not established or substantially established against her.

[38] Consequently, the plaintiff would be entitled to a declaratory order that the attachment of her vehicle Reg No. KAA 541J by the defendant was unlawful and an order for special and general damages against the defendant.

The prayer for the return of the suit vehicle may have been overtaken by events and is misconceived as it is not known what happened to the vehicle. On one hand, it was stated by the plaintiff that the vehicle was released to her and sold as scrap metal and on the other hand, the defendant stated through its legal officer (DW 1) that it was attached and sold in a public auction.

[39] With regard to special damages, the plaintiff claims a sum of Ksh. 250,000/= being the extra amount added to the actual loan of Ksh. 1.4 million to make it Ksh. 1,650,000/=. The amount was not substantially disputed by the defendant who merely alleged that it was a contracted amount but documentation in respect thereof could not be provided due to lapse of time.

The plaintiff would thus be entitled to that amount.

[40] A claim for the sum of Ksh. 301,408/= being the amount paid for comprehensive insurance cover is also made by the plaintiff. However, the amount was not established as the plaintiff clearly stated that she did not obtain the insurance policy for the vehicle. She could not therefore have paid the amount in order to comprehensively insure the vehicle. If any amount was paid in respect of insurance then it

was the defendant who effected the payment on behalf of the plaintiff as confirmed by the defendant's witness (DW 1). The plaintiff is thus not entitled to any amount in respect of the vehicle's insurance cover.

[41] The other special damages claimed by the plaintiff include Ksh. 33,000/= for levied management fees and Ksh. 91,920/75 for wrongful and illegally imposed ledger fees. However, there was no proof that the said amounts were unlawfully charged by the defendant or that they were indeed paid by the plaintiff for whatever purpose. The plaintiff is absolutely not entitled to those amounts.

[42] With regard to general damages, the plaintiff claims a sum of Ksh. 5 million for reason that the attachment of her vehicle caused her business to collapse and her goodwill and reputation to be damaged. However, these factors were not established and were fanciful at most if not wishful thinking.

Nonetheless, the plaintiff would be entitled to general damages for breach of contract on the part of the defendant. In the circumstances, an amount of Ksh. 500,000/= would be reasonable and adequate compensation.

[43] In the upshot, judgment be and is hereby entered for the plaintiff against the defendant for the total sum of Ksh. 750,000/= being both special and general damages together with costs of the suit and interest from the date of the re-amended plaint.

The defendant's counterclaim is dismissed with costs to the plaintiff.

Ordered accordingly.

Delivered and signed this 16th day of May 2018

in the presence of

M/s Momanyi holding brief for Mr. G. Bosire for the Plaintiff

and M/s Ang'asa holding brief Mr. Omwenga for Defendant

J.R KARANJAH

JUDGE