REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 726 OF 1999

FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF

- VERSUS -

NACITI ENGINEERS LIMITED.....1ST DEFENDANT

WAMBUGU KARIUKI.....2ND DEFENDANT

MINJU KARIUKI.....3RD DEFENDANT

JUDGEMENT

1. The plaintiff, **FIDELITY COMMERCIAL BANK LIMITED,** provided funding to the 1st Defendant, **NACITI ENGINEERS LIMITED,** to enable the said defendant purchase 2 vehicles.

2. The facilities accorded to the 1st Defendant were secured through Guarantees which were executed by the 2nd and 3rd Defendants, namely **WAMBUGU KARIUKI** and **MINJU KARIUKI.**

3. The 2 vehicles which Naciti were purchasing were registration numbers **KAH 248 D** and **KAH 960 E.**

4. Whereas the cost of each vehicle was Kshs. 727,654/-, Naciti paid a deposit of Kshs. 181, 913.50 for each of the said vehicles. In effect, the bank financed Kshs. 545,740.50 for each vehicle.

5. In respect to each facility, the bank added the sum of Kshs. 207,403.50 on account of ***"Hire Charges".*** Therefore, the 1st Defendant was expected to pay back to the bank the Hire Purchase Charges amounting to Kshs. 753,144/-, in respect to each of the 2 vehicles.

6. It is common ground that Naciti was to pay Kshs. 31,351/- every month, for 23 months, and the sum of Kshs. 33,381/- for 1 month. In addition, Naciti was to pay the sum of Kshs. 2,000/- on account of the option to purchase.

7. These payments were in respect to each of the vehicles.

8. It is the plaintiff's case that the 1st defendant failed to meet the terms for the repayment of the loan facility. As a consequence of the default, the plaintiff has asked the court to grant judgement in its favour for the sum of Kshs. 799,834/- plus interest at 38% per annum from 30th April 1999. The plaintiff has also asked the court to award it the costs of the suit.

9. In their Defence, the defendants admit that the bank had accorded financial facilities to Naciti, and that the 2nd and 3rd defendants had executed personal guarantees, to secure the facilities.

10. However, the defendants asserted that the facilities had been repaid in full. Therefore, the defendants' position was that they did not owe the money being claimed by the bank.

11. It is the defendants' case that the sums being claimed arose from the bank's wrongful calculations of the amounts in issue.

12. The defendants' further contention was that the claim in issue was based on agreements which were null and void and/or illegal.

13. Over and above the Defence, the defendants put forward a Counter-claim against the plaintiff.

14. The counter-claim was based on the fact that the plaintiff had repossessed the 2 lorries, and had refused to release them to the 1st defendant.

15. The fact that the bank had retained the vehicles meant that Naciti was deprived of the opportunity to use them.

16. Therefore, Naciti claimed damages for loss of use of the vehicles.

17. Naciti also pointed out that the bank had severally caused the vehicles to be repossessed. As the said acts were said to be illegal and unlawful, and because they inconvenienced Naciti, the 1st Defendant claimed damages.

18. Naciti asked the court to order the bank to reimburse it for the sum of Kshs. 52,036/- which Naciti was compelled to pay under duress, in order to secure the release of the vehicles, when they had been repossessed.

19. Naciti further claimed damages arising from the harassment and arrest of its employees, during the time when the vehicles were being repossessed. The damages were claimed in relation to the loss of business whenever the bank undertook the alleged unlawful repossession of the 2 lorries.

20. At the trial **PW1, CAROLINE WAMBUI NG'ANG'A,** testified that she was the legal advisor of the plaintiff. She said that she was conversant with the case.

21. PW1 produced the 2 Hire Purchase Agreements which had been executed by the plaintiff and the 1st defendant.

22. She pointed out that pursuant to clause 2 (c) of both agreements, the loan facility would attract interest at the rate of 40% per annum, in the event of any default.

23. PW1 also pointed out that pursuant to clause 4 of the agreements, the bank was entitled to repossess each of the vehicles, in the event that Naciti was either in default or if Naciti breached any other terms of the agreements.

24. From the bank statements produced by the bank, it is clear that Naciti did not faithfully remit monthly payments as and when each fell due. In other words, Naciti fell into arrears several times.

25. Pursuant to clause 4 of each of the 2 Hire Purchase Agreements, the bank became entitled to the immediate repossession of the vehicles whenever Naciti was in arrears. Therefore, when the bank repossessed either of the vehicles, when Naciti was in arrears, such repossession was not illegal or unlawful as suggested by the defendants.

26. PW1 testified that the rate of 40% was inserted onto the Agreements after Naciti had signed them, when he was at the dealers, from whom he was getting the vehicles.

27. Therefore PW1 conceded that she had no idea whether or not Naciti was aware of the interest on arrears.

28. In my considered view, that which the plaintiff inserted into the agreements, after the borrower had signed the said documents, cannot be construed as constituting a part of the agreements unless the lender proves that he brought the said inserts to the attention of the borrower, and that the borrower accepted them.

29. In this case, the 2nd defendant testified as **DW1.** He confirmed that the interest rates were added onto the agreements after he had signed the said agreements.

30. Of course, it can be said that it was not wise of **DW1** to sign an agreement which had gaps in it.

31. But it is similarly unwise of the lender to insert terms into the agreement which had already been signed by the borrower. There was definitely going to arise the question concerning how the parties to the agreement had a meeting of minds.

32. In this case, the lender has failed to demonstrate that there was a meeting of minds on the issue of the rate of interest that was to be charged.

33. And because it was not clear what the original rate of interest was, that meant that the borrower and the guarantors did not know the point from which the rate would either increase or decrease.

34. DW1 testified that Naciti did not owe the plaintiff any money. He had procured a Financial Consultant, who analysed the record of payments which the borrower made to the lender.

35. The said Financial Consultant conducted his analysis based on documents which the defendants provided to him.

36. At that stage in the trial, Mr. Kipkorir, the learned advocate for the plaintiff, raised an objection to **DW1** producing the report of the consultant.

37. Mr. Wanjama, the learned advocate for the defendants, sought an adjournment, with a view to later calling the maker of the document.

38. The defendants' advocate also informed the court that he would need to call an expert from the Automobile Association (AA), who would testify about the value of the 2 vehicles.

39. When the trial resumed, **DW2, JOSHUA MWANGI KABACHO,** testified. He worked as a consultant at Kabacho & Associates, where he consults on Banking Investments; Viability Studies and advising customers on Banking Matters. **DW2** was also a part-time lecturer at **USIU.**

40. It was his evidence that the borrower had paid Kshs. 656, 213/50 on one Account; and Kshs. 647,953/00 on the other Account.

41. According to **DW2,** the following balances were outstanding:

a) HD 86/618 …. shs. 96,930.50

b) HD 96/627 … shs. 105,191.00

TOTAL shs. 202,121.50 .

42. It is common ground that after this suit had been filed, the 2 vehicles were sold by the lender for the following sums:

1. KAH 248 D …… shs. 150,000/-

2. KAH 960 E ….. shs. 100,000/-

TOTAL shs. 250,000/-

43. By his calculations, **DW2** testified that the lender owed to Naciti, the sum of Kshs. 47,878.50.

44. **DW2** explained that in arriving at that balance, he had removed all penalties which had been reflected in the statement of account. His reason for removing the said penalties was that the agreements between the plaintiff and the 1st defendant did not have any provision for penalties.

45. When called upon to calculate the value of the penalties which he had removed, **DW2** said that the same added up to Kshs. 597,712/80.

46. During cross-examination **DW2** said that he was not an Accountant, by qualification. He said that he was a banker.

47. DW2 said that he did not know the International Accounting Standards. He added, that he had neither held himself out as an accountant nor had he analysed accounts. He said that he had only analysed the bank statements

48. **DW2** conceded that if the borrower failed to remit any particular installment when it was due, the borrower may be called upon to pay interest thereon.

49. His attention was drawn to an item in the statement, citing ***"interest".*** **DW2** said that the said item, which was dated 29th March 2007, was in respect to interest charged on arrears.

50. He said that it was possible to determine the rate of interest, from the said entry; however, he had not determined the rate.

51. **DW2** also conceded that the Agreements provided for Legal Costs and Other Expenses.

52. Notwithstanding the said provision in the Agreements, **DW2** removed from his calculations all legal costs and other expenses.

53. **DW2** also testified that he never asked the bank to explain to him about any of the legal costs or other expenses. **DW2** simply relied on the word of his client, who had told him that those charges were unfair.

54. As I have already held herein, the borrower failed to remit a number of installments on time. Therefore, the lender was entitled to charge interest.

55. I also find that when the lender repossessed the vehicles, it was entitled to do so, because the borrower was in arrears. The costs incurred during the task of repossession were legitimate, and the lender was entitled to debit the costs to the accounts.

56. The outstanding issue is in relation to the rates of interest.

57. As I have already held, there was no meeting of minds between the lender and the borrower on the rate of interest to be charged.

58. In the circumstances, I find that it was not a term of the Agreements that interest was payable at the rate of 40%.

59. The court now has the option of either reading into the Agreements, a reasonable rate of interest, or, alternatively, requiring the lender and the borrower to address the court further. In my considered opinion, justice demands that I do not simply impose a rate which I consider reasonable. Therefore, I direct that the parties will address the court further, on the issue of such interest as each of them deems reasonable in the circumstances of the case.

60. In the meantime, I find that, in principle, the plaintiff's case is successful.

61. Secondly, I find that the Counter-claim was not proved; the same is therefore dismissed.

62. The court will give the final orders, especially on the quantum, after the parties address the court further.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 29th **day** of August 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Bibiu for Wanjama for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.