REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 51 OF 2012

IMPERIAL BANK OF KENYA ……..……. PLAINTIFF

VERSUS

KARIUKI CONSTRUCTION COMPANY

LIMITED ……..…. 1ST DEFENDANT

JULIUS KARIUKI MWAURA ……...…….….. 2ND DEFENDANT

JOYCE WANJIRU KARIUKI ….……...…….…… 3RD DEFENDANT

J U D G E M E N T

1. The Plaintiff herein by its Plaint dated 19th September 2011 seeks Judgement as against the Defendants in the amount of Shs. 3,811,761/=. It detailed that pursuant to a written agreement dated 7th January 2008 made between the parties hereto, the Plaintiff advanced to the first Defendant the sum of Shs. 2,297,140/= for the purposes of financing the purchase of a motor vehicle being a Mitsubishi registration number KAZ 917L. The Plaint detailed that the loan amount was to be paid in 47 monthly instalments of Shs. 63,170/= per month commencing 2nd February 2008. The Plaintiff maintained that it was a term and condition of the said agreement that in the event of breach on the part of the first Defendant, the Plaintiff was to repossess the said motor vehicle which would remain in its custody until sale. The first Defendant defaulted in the repayment of the loan facility and as a result, the Plaintiff repossessed the said motor vehicle and sold it to a third party on the 23rd August 2010 for Shs. 1,100,000/=. The Plaint went on to detail that the second and third Defendants had signed a guarantee dated 19th September 2007, which was to form part of the hire purchase agreement between the parties, undertaking to indemnify the Plaintiff for all losses resulting from the breach of the first Defendant.
2. The Defendants filed a Statement Defence on 18th April 2012. The same contained a series of denials as regards the contents of various paragraphs of the Plaint. Paragraph 6 of the Defence was the most significant in that it maintained that the sale of the said motor vehicle at Shs. 1,100,000/= was a gross undervaluation of the same, as it could not have depreciated to that level after only 2 years of use. The Plaintiff's Reply to the Defence vehemently denied the allegations that the said motor vehicle had been sold at an undervaluation and placed the Defendants to strict proof thereof.
3. The case came for hearing before this Court on 11th March 2013. One Mary Wanjiru, the Plaintiff's Legal Officer gave evidence and relied upon her witness statement dated 19th September 2011 but only filed herein on 1st February 2012. She recounted the details of the first Defendant's 2 accounts held with the Plaintiff bank. She also recounted how the Hire Purchase

Agreement had been entered into between the Plaintiff and the first Defendant dated 7th January 2008 in which the first Defendant had been advanced the sum of Shs. 2,297,140/= for the purposes of financing the purchase of the said motor vehicle. The witness recounted the details of the agreement and then went on to say that the first Defendant did not make any payments covering the hire purchase instalments. In the end, the Plaintiff repossessed the said motor vehicle and sold it to Rex Motors Ltd on 23rd August 2010 for Shs. 1,100,000/=. She noted that the first Defendant's outstanding balance on its account plus interest stood at Shs. 2,417,993/- as at 28th February 2011. It was this amount that the second and third Defendants, being the directors of the first Defendant guaranteed to indemnify the Plaintiff in event of any breach of the said agreement which was why the Plaintiff had sought judgement against the Defendants jointly and severally for the amount of KShs. 2,417,993/=. The witness then went on to recount that the first Defendant had enjoyed a bank overdraft in relation to its current account initially in the amount of Shs. 500,000/= but later this was extended to Shs. 1 million for a period of a month. However, the first Defendant defaulted in repayment of its overdraft facility and, as a result, the amount outstanding plus interest as at 28th February 2011 was Shs. 1,393,768.03. Both the outstanding amounts as above attracted interest, the first at the rate of 40% per annum, the second at the rate of 18% per annum. PW1 produced her witness statement before court as well as its list and bundle of documents dated 19th September 2011.

4. Under cross examination, PW 1 admitted that she had signed the Verifying Affidavit to the Plaint being duly authorised to do so by the Plaintiff's Board of Directors. She noted that, as per the statement at page 20 of the Plaintiff's bundle of documents, the first Defendant had made six payments towards the written Agreement with the Plaintiff bank for the hire purchase of the said motor vehicle. PW 1 noted that the Deed of Guarantee executed by the second and third Defendant was dated 19th September 2007 while the Hire Purchase Agreement was dated 7th January 2008. Obviously she said, the Guarantee was signed before the loan was given. PW 1 was extensively cross examined as regards the repossession and sale of the said motor vehicle. It had been repossessed on 24th March 2010 whereas the demand letter had been dated the 30th July 2009. She admitted that the vehicle had been sold by private treaty. It had not been advertised for sale. She stated that the Plaintiff had its own agents who used to sell vehicles. Rex Motors was one of the people who made an offer for the vehicle which had been stored at the bank's premises. The Hire Purchase Agreement had detailed that the Plaintiff could sell the said motor vehicle either a public auction or by private treaty.
5. Thereafter the witness admitted that the Plaintiff was not able to get offers for the said vehicle nor did it advertise the same for sale. She was of the opinion that that the Plaintiff could not have got a better price for the said motor vehicle even if it had been advertised for sale. She did not agree with counsel for the Defence that the Plaintiff had sold off the said motor vehicle at a throw away price. Looking at the said Hire Purchase Agreement, the witness admitted that the default interest rate of 40% per annum had been entered in handwriting. It had not been countersigned by the first Defendant. She did not have available before Court the original Hire Purchase Agreement and she admitted that the copy produced to Court did not reflect that the original had been stamped. However, it was incorrect that Stamp Duty had not been paid. At this stage of the hearing, the Court requested PW 1 to produce the original documentation and thereupon stood over the hearing to the 18th September 2013. It turned out, on that date, that the original documentation was not exactly the same as the copy documents contained in the Plaintiff's list and bundle of documents dated 19th September 2011. Cross examination having been closed by counsel for the Defendant, PW1 responded in re-examination, to the effect that the Plaintiff had not sold the vehicle at an undervalue. The vehicle had been valued in March 2010 and it was sold in August 2010. PW 1 maintained that there would have been some depreciation in value between those dates.
6. In its submissions filed in Court on 18th October 2013, the Plaintiff set out its claim and details of the pleadings herein. It maintained that as the Defendants did not call any witnesses to testify before Court, PW 1's evidence was neither uncontroverted nor contested. The Plaintiff pointed to the documentation including the vehicle valuation report dated 25th March 2010 by Villacare Automobile Valuers & Assessors (K) Ltd which had detailed a value of the vehicle at that date of Shs. 1,502,000/= and a forced sale value of Shs. 1,149,000/=. The Plaintiff maintained that there was a valid Hire Purchase Agreement as between the Plaintiff and the Defendants. Such had been produced before this Court and as no evidence had been produced as against its validity, the Court

could only conclude that the same was valid. As a result, the denial in the Defence that the Hire Purchaser Agreement was invalid was just that, a denial and did not sufficiently traverse the allegations made by the Plaintiff. The Court was referred to the two cases of **Abdul Razak Khalfan & Anor v Pinnacle Tours & Travel Ltd & Anor (2005) eKLR** as well as **HCCC No. 3150 of 1997 Premier Savings & Finance Ltd v Nasir Peter Mohamed.** As regards the validity of the repossession of the vehicle, the Plaintiff pointed to the relevant clause of the Hire Purchase Agreement – clause 4. It maintained that the Defendants having perpetually defaulted in repayment of the monthly instalments under the said Hire Purchase Agreement, the Plaintiff was *prima facie* entitled to repossess the vehicle and sell it. A valuation report had been obtained before the same was sold and the forced sale value given as at 25th March 2010 of Shs. 1,149,000/= compared very reasonably with the selling price 5 months later of Shs. 1,100,000/=. The Plaintiff then pointed at **Rule 7 of the Third Schedule of the Chattels Transfer Act**. In its opinion, it had caused the said motor vehicle to be sold at the best available market price and to the highest bidder. It also maintained that the proceeds of sale had been credited to the first Defendant's account. As regards the adequacy of consideration of the sale, the Plaintiff pointed to **HCCC No. 655 of 1999 Diamond Trust Bank Kenya Ltd v Kones**. In conclusion, the Plaintiff noted that the Defendant did not call any witnesses to rebut the evidence of PW1 and, as a result, should not be heard to allege that the entire loan advance had been cleared, as no proof of the same had been produced before this Court.

7. The Defendants' submissions opened with the suggestion that the suit was improperly filed and consequently incompetent. It pointed to the fact that PW 1 did not have the authority of the Plaintiff's Board of Directors to swear the Verifying Affidavit in support of the Plaint nor indeed, to file this suit. No evidence had been produced before Court to show a Directors' resolution giving such authority to PW 1. The Defendant pointed to the provisions of **Order 4 rule 1 (4)** of the *Civil Procedure Rules* which states as follows:

"Where the plaintiff is a Corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so."

The Defendants noted that the Plaintiff was described in the Plaint as a limited liability company duly incorporated in Kenya under the provisions of the Companies Act as well as being a duly registered banking institution under the Banking Act. It maintained that PW1 had indicated in evidence that she did not have the resolution of the Plaintiff's Board of Directors showing that she was duly authorised to swear the Verifying Affidavit on behalf of the Plaintiff. There was no authority under the Company Seal brought to Court or attached to the Plaintiff's documents. As a result, the Suit should be struck out and the Plaintiff referred this Court to **HCCC No 524 of 2004 Affordable Homes Africa Ltd v Henderson and 2 Ors** as authority in this regard.

8. The Defendants also queried the validity of the Hire Purchase Agreement and the Directors' Guarantee. They referred the Court to **section 5 (1)** of the Hire Purchase Act as well as **sections 6 and 19** of the *Stamp Duty Act*. They also pointed to the case of **Computer Source Point Ltd v Lantech Ltd & 3 Ors HCCC No. 3 and 75 of 2002 (Mombasa)**. That case held that a guarantee is one of the documents required to be stamped under the Stamp Duty Act. The Court had found that the copies of the document exhibited by the supporting affidavit were inadmissible. The Defendants submitted that the two documents produced by the Plaintiff before Court in evidence, being the said Hire Purchase Agreement and the Guarantee, were not stamped as required by the Stamp Duty Act nor registered under the Hire Purchase Act and were consequently inadmissible.
9. In response, the Plaintiff filed further submissions on 6th November 2013. As regards the point raised by the Defendants that PW 1 did not have authority to swear the Verifying Affidavit on behalf of the Plaintiff, it was submitted that such was not an issue for determination as it was not pleaded in the Defence nor indeed in the Defendants' Statement of Issues. The Defendants could only limit themselves to matters pleaded. The issue had been brought in bad faith, very late in the proceedings and, as a result, the Plaintiff attached to its submissions an extract from the minutes of a special meeting of its Board of Directors held on 24th March 2011. In my view, the Plaintiff in so attaching, has breached the rules of evidence as such document should have been produced either as part of its list and bundle of documents or at any time before the hearing, not

surreptitiously introduced as part of its submissions. In any event, the first minute reads that the Chairman had reported that the Plaintiff:

"has commenced civil proceedings against Kariuki Construction Ltd…."

To my mind, such resolution is obviously a pre-dated afterthought and, in any event, is not under Company Seal.

10. The second point relied upon by the Plaintiff in this connection was the relevant Article in the Constitution that justice shall be administered without undue regard to procedural technicalities. Such referred to *Article 159 (2) (d)* of the *Constitution* and the Plaintiff also relied on **Order 19 rule 7** of the *Civil Procedure Rules, 2010* as regards the Court receiving any affidavit…:

"notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality".

Finally, the Plaintiff submitted as follows:

"The original documents that are the Hire Purchase Agreement and Guarantee Agreement were provided to counsel for the Defendant who confirmed to the court that the documents were in order and registered. He did not raise the fact that they were not registered because he verified that they were indeed registered and that their erroneous position was explained by the fact that the Stamp did not appear on the photocopy documents which were faint."

11. With regard to the Plaintiff's final submission, counsel who appeared before this Court on behalf of the Defendant I have recorded as saying:

"The original of the transaction documents have been produced by the Plaintiff. I have looked at the documents and they are the same as the copies produced to Court save for the Guarantee document which has a number of alterations not on the copies. We don't know whether or when they were added. The Box No. has been included and the motor vehicle registration No. as well as the name of Kariuki Construction Company Ltd which details did not appear on the copies supplied to Court. Also the names Julius Mwaura and Joyce Wanyoike are also included in the original not on the copy. However these additions make no difference to our clients' Defence."

Quite clearly counsel did not dwell upon the fact that the said documents were registered or otherwise. He also did not comment upon whether the original documentation had been stamped. This Court has now had the opportunity of inspecting that original documentation. The Hire Purchase Agreement dated 7th January 2008 bears a revenue stamp of Shs. 100/= at the place where the document has been executed by the hirer – the first Defendant under its Company Seal. However and more importantly, there is no evidence on the face of the document that it has been registered as required by the provisions of **section 5 (1) and (2)** of the *Hire Purchase Act*. Further, I have perused the said Guarantee Document which is dated 19th September 2007. Again, the execution of the signatures of the second and third Defendants has been affixed with 2 x Shs. 100/= revenue stamps. Most certainly I would agree with counsel for the Defendants that the names of the guarantors to the Guarantee Document being the second and third Defendants had been added thereto. The Hire Purchase Agreement Number has not been completed and apart from the registration number of the motor vehicle being KAZ 917L detailed thereon (and again which has been added to the original), there is nothing to indicate what the guarantors were guaranteeing. Accordingly, to my way of thinking, the Guarantee cannot be enforced as against the second and third Defendants herein. Indeed I am distressed that the Plaintiff in submitting the original documentation as required by Court has put before it a Guarantee Document which has obviously been doctored. The copy of this document placed before the Court in the Plaintiff's list and bundle of documents, which have been allowed into evidence, do not contain the details that I have described as above. In no way can it be held to be related to the Hire Purchase Agreement dated 7th January 2008. As a result, I dismiss the Plaintiff's suit as against the second and third Defendants with costs.

12. The next point for this Court to consider and as raised by the Defendants was whether there existed a valid Hire Purchase Agreement. I noted above that there was no evidence on the face of the original of the document dated 7th January 2008 that the same had been registered in the Hire Purchase Registry. In that regard, **section 5 (4)** of that Act reads as follows:

"(4) Unless a hire-purchase agreement has been registered under subsection (2) –

a. **no person shall be entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer; and**

b. **no security given by the hirer in respect of money payable under the agreement, or given by a guarantor in respect of money payable under a contract of guarantee relating to the agreement, shall be enforceable against the hirer or the guarantor by any holder thereof."**

In my view, the said Agreement having not been so registered as required by the Hire Purchase Act, the same cannot be enforced as against the first Defendant. Furthermore, as per **section 5 (4) (a)** supra, the Plaintiff had no right to repossess the said motor vehicle registration No. KAZ 917L and sell the same. However, I am unable to agree with the learned counsel for the Defendants that either the Hire Purchase Agreement or the Guarantee Document was unenforceable as against the Defendants owing to a failure to pay Stamp Duty thereon. In both cases, the documents were stamped with Shs. 100/= revenue stamps which would suffice for the purposes of the Schedule to the Stamp Duty Act. Accordingly I am satisfied that the said two documents were not invalid as per the Stamp Duty Act.

13. I now come to the point concerning the validity of the Verifying Affidavit annexed to the Plaint dated 19th September 2011 and the necessity or otherwise of a Resolution under Seal from the Board of Directors of the Plaintiff company. As above, *Article 159(2)(d)* of the Constitution provides that the Court may determine matters without undue regard to procedural technicalities. This Court has also taken cognizance of the provisions of **Order 51 rule 10 (2)** which read:

"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

However, as reiterated by Musinga, J in **Willis Evans Otieno v Law Society of Kenya & 2 Others (2011) eKLR**, this constitutional provision cannot be used as a panacea for an incompetent pleading or inadequate documentation upon which to base a claim. Moreover, the Court is not considering an application to which **Order 51 rule 10 (2)** would apply. The suit has moved well beyond the application stage to the actual hearing of the same. As a result, I find little assistance from the authorities quoted by the Plaintiff which all related to applications brought before Court not to the hearing itself. The Defendants have submitted that the contents of the Supporting Affidavit sworn by PW 1 on 19th September 2011 are not supported by a Resolution of the Board of Directors of the Plaintiff company/ bank. Although PW 1 deponed to the fact that she was authorised by the Board, such was not supported by an authorisation under the seal of the Plaintiff. To this end, I would refer to the finding of my learned brother **Odunga J.** in the case of **Mavuno Industries Ltd & 2 Ors v Keroche Industries Ltd (2012) eKLR** wherein he detailed:

"The other issue raised is with respect to failure to file a resolution with the verifying affidavit. As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13

<u>others Misc. Application No. 67 of 2005 [2005] eKLR</u> and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime <u>before the suit is fixed for hearing</u> as there is no requirement that the same be filed at the same time as the suit." (Underlining mine).

As I have reflected above, the attempt by the Plaintiff to introduce a Resolution of its Board of Directors through the back door as it were, by attaching a copy to its submissions in response to those of the Defendants is underhand. The Plaintiff had the opportunity of perusing the Defendants' submissions in relation to this case and, presumably, surmised that the lack of the Board Resolution would be fatal to the same. Incidentally, I hold no store by the Plaintiff's submission that the Defendants were bound by their pleadings and thus estopped, in their submissions to Court, from alleging that the suit Documents were invalid or that the evidence brought in the suit was unsupported by a Resolution of the Plaintiff's Board of Directors under seal.

14. I have closely perused the Plaint herein. The Plaintiff's claim was divided into two parts. The first part seeks an amount of Shs. 2,417,993/= directly related to the Hire Purchase Agreement. As I have found above, the lack of registration of that Agreement under the provisions of the Hire Purchase Act nullified the Plaintiff's right to pursue the first Defendant for monies owed under the same. Indeed, I have already found that the Plaintiff, in view of the invalidity of the Hire Purchase Agreement, had no right of repossession and sale of the motor vehicle financed thereunder being Mitsubishi KAZ 917L. The fact that the Plaintiff did repossess and sale has not been challenged by the Defendants in their Statement of Defence nor has there been any counterclaim registered in that regard. In my view, and in view of the Plaintiff's behaviour as regards the whole issue, it can consider itself lucky to get away with the illegal transaction that it has undertaken.
15. However, and as detailed, the Plaint contained a second head of claim as against the first Defendant being the amount of Shs. 1,393,768.03. This amount was claimed in respect of the overdraft facility advanced by the Plaintiff to the first Defendant together with default interest thereon. The Defendants have put up no defence as regards such sum owed under this heading. From the list and bundle of the Plaintiff's documents as well as the evidence of PW 1, I am satisfied that the monies were so lent to the first Defendant which it has failed to repay. From the Statement of Account at page 19 of the Plaintiff's bundle of documents the amount of Shs. 1,390,768.03 was due and owing including interest added, as at 28th February 2011. At paragraph 11 of PW 1's witness statement put into evidence herein, it details that sum and that it continued to accrue default interest at the rate of 18% per annum. Such has not been disputed by the first Defendant other than a plain denial in the Statement of Defence. No evidence has been put before this Court by the first Defendant that the claim for default interest was unwarranted.
16. As a result of the foregoing, I would summarise my findings as follows:

a. The Plaintiff's suit as against the second and third Defendants in relation to the alleged Guarantee Document is dismissed with costs.
b. The Plaintiff's claim as against the first Defendant under the terms of the Hire Purchase Agreement is dismissed.
c. The Plaintiff's claim as against the first Defendant as regards its overdrawn account is allowed and Judgement is entered in the Plaintiff's favour in the amount of Shs. 1,393,768.03 together with interest thereon at the rate of 18% per annum from the 1st March 2011 until payment in full. The Plaintiff will also have its costs as against the first Defendant in that regard.

DATED and delivered at Nairobi this 13th day of February, 2014.

J. B. HAVELOCK

JUDGE