



**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL SUIT NO.3 OF 2013**

**JOSEPHAT MAINA KIRAGU .....PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD .....DEFENDANT/RESPONDENT**

**RULING**

1. Before this Court is the Plaintiff's Notice of Motion dated 30<sup>th</sup> July 2013 brought under the provisions of Order 8 Rule 3 of the Civil Procedure Rules seeking the following prayers:-

**“1. Leave be granted to the Applicant to amend his plaint.**

**2. Upon grant of No.1 above the draft amended plaint be deemed as duly filed and served.**

**3. Costs be in the cause.”**

2. In support of that Application, the Plaintiff swore an affidavit on 30<sup>th</sup> July 2013 in which he states that the reason sought for Amendment is to include a claim of kshs.1,748,000/= (Kenya shillings one million seven hundred and forty eight). That amount is said to comprise Kshs.1,388,000/= (one million three hundred and eighty eight) being the value of six hundred and ninety nine cartons of Jik that were damaged as a result of the repossession of his vehicle KBL 1964 towing trailer ZD 3846 by the Defendant. While kshs.360,000/=(Kenya shillings) is for penalties he has had to incur for delayed deliveries.

3. The Defendant opposes the Application and in its behalf Roy Akubu swore an Affidavit on 10<sup>th</sup> December 2013. Essentially, the Deponent attempts to demonstrate that not only is the amendment undeserved but that the entire claim by the Plaintiff is weak and frivolous. It is contended that, in the first instance, the Defendant was entitled to repossess the chattels on account of default by the Plaintiff in servicing a credit facility granted to him by the Defendant on 16<sup>th</sup> of March 2010. In respect to the amendment it was the contention of the Defendant that the Plaintiff was solely to blame for any damage to the goods and the Defendant is not liable for any such loss or damage.

4. I was asked by Mr. Ipapu Counsel for the Plaintiff, to allow the Application as Courts should freely allow amendments to pleadings. It was his contention that the attachment levied for and on behalf of the Defendant was wrongful and unlawful. That in doing so the Defendant breached the contract entered between it and the Plaintiff. It was also the Plaintiff's Counsel's argument that an issue in contention is whether the attachment was levied in breach of the provisions of the Hire Purchase Act (Chapter 507 Laws of Kenya). Lastly, that the issues raised by the Defendant in response to his application were questions of evidence which should be left for trial and should not

- be used to bar the Plaintiff from amending his pleadings.
5. Miss Karanja appearing for the Defendant argued that the provisions of the Hire Purchase Act are totally irrelevant in view of Section 3 of thereof. This Court would straight away agree with that argument because by virtue of the provisions of the Act it applies to Hire Purchase Agreements whose price does not exceed the sum of Kenya shillings four million. In this instance the Master Instalment Sale Agreement (which is the Hire Purchase Agreement) entered between the parties is in respect to a facility of Kenya shillings five million three hundred and ninety thousand(Ksh.5,390,000/=).
  6. Counsel also argued that in accordance with clause 21.4 of that agreement the Defendant is not liable for any consequential loss. The Defendant pressed that as there is no basis for the amendment it should not be allowed at all. That the real intention of the amendment is to muddle up what is due and outstanding from the Plaintiff to the Defendant and that would certainly prejudice the Defendant's position.
  7. This application is brought before the suit has been set for main hearing. Generally amendments sought before hearing should be freely given, if that will not prejudice or cause an injustice to the other side (see **Eastern Bakery –vs- Castettino** [1958] E.A 461.
  8. As I understand it the Plaintiff's cause of action is that the Defendant repossessed motor vehicle KBL 196K and Trailer Reg.No.ZB3846 in a manner that breached Master Instalment agreement entered between the two parties. In the plaint as it stands it was averred that the Plaintiff has not fallen into arrears whatsoever in servicing the Defendants "financial contribution." The claim by the Plaintiff against the Defendant is for **"the Defendant to refund (sic) to the Plaintiff the chattels described in three (3) above in their good and serviceable condition as was during the repossession or their current market monetary value together with the transit Cargo on board, and general damages for breach of contract and loss of user."** Up to now, the Defendants have not sought the striking out of that pleading.
  9. The amendment sought by the Plaintiff is to specify the value of goods and a further sum of Ksh.360,000/=. It being explained that the repossession of the chattels caused damage to some goods being 694 cartons of Jik damaged. That the owner of the damaged goods has claimed that amount from the Plaintiff. That in addition, the owner has charged the Plaintiff a demurrage of kshs.360,000/=.
  10. I take the view that the loss sought to be introduced in the plaint is one which if proved would be connected to the repossession. Whether the repossession was wrongful and/or unlawful will have to wait the decision of the Trial Court. As for the terms of clause 21.4 of the agreement, it provides:-

**"The Seller shall not be liable (in contract, tort or otherwise) for any claim, damage, liability, loss (including consequential loss) or expense of any kind arising directly or indirectly in connection with the Goods nor from any delay in delivery of, or failure to deliver the Goods, any defect or deficiency in, or inadequacy or unsuitability of, the Goods or their installation, use, performance, servicing or repair or from any action or omission(negligent or otherwise) of the Seller, its servants or agents, provided that nothing contained herein shall exclude any liability of the Seller for:**

**21.4.1 Death or personal injury caused by the Seller's negligence to the extent that such exclusion is prohibited by the statute; or**

**21.4.2 a breach by the Seller of any express obligation of the Seller under this Agreement."**

The Defendant reads an absolute exclusion of consequential loss. As I see it, given the terms of proviso 21.4.2, an issue that may arise for determination is whether that exclusion is wide enough to extend to loss incurred by a buyer where the repossession is in breach of the agreement. But that, again, must be left to the Trial Court. For now, I cannot see how setting up the claim can prejudice or embarrass the Defence.

11. The upshot is that I allow the Application of 30<sup>th</sup> July 2013. Costs in the cause. Keen that the

Plaintiffs should pay Court fees in full, I direct the prayer portion of the plaint must specify the sum claimed.

**F. TUIYOTT**

**J U D G E**

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 15<sup>TH</sup> DAY OF MAY 2014.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**.....FOR PLAINTIFF**

**.....FOR DEFENDANT**