



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 3512 of 1990

PRUDENTIAL FINANCE LIMITED..... PLAINTIFF

VERSUS

JOHNSON NGANGA MBUGUA.....DEFENDANT

JUDGEMENT

The cause of action in this suit arises out of financial advances made to the defendant for the purchase of a motor vehicle a Mercedes Benz imported into the country and locally registered as KZN 660. The plaintiff is seeking judgment against the defendant for Shs. 316, 581/ 75 together with interest thereon at 19 % p.a. from 1st March, 1990 till full repayment. The plaintiff is also asking for costs of the suit together with interest.

The defendant does not only dispute the plaintiff's claim but has put in a counter-claim. The plaintiff's case is based on the evidence of Mr. Hosea Kiprono Bunei (PWI) and Mutisya Mutua (PW2) together with the documents produced as exhibits.

Mr. Bunei (PWI) testified how the plaintiff company (Prudential Finance Limited) granted loan facilities to the defendant (Johnson Nganga Mbugua) to assist him (defendant) purchase a Mercedes Benz 200 from abroad. The letters of offer and acceptance were produced as Exhibits 1 and 2 respectively. First disbursement was effected on 11th November, 1987 and this was for Shs. 461,467/- which was paid to Barclays Bank. This security for this loan of Shs. 600,000/- was the vehicle which was being imported. Further disbursements were made as follows: On 15th March, 1988 Shs. 25,000/-, on 26th May, 1988 Shs. 20,000/- and on 18th October 1988 Shs. 189,600/-. These figures are reflected in the credit card produced as Exhibit 4.

The vehicle eventually arrived in Kenya and the defendant was again assisted by the plaintiff company in paying clearing charges. This was in December, 1988. The defendant was supposed to start repayment but this was not forthcoming. On 1st March, 1989 the plaintiff wrote to the defendant asking him to make good the account but the defendant did not respond.

On 16th March, 1989 the defendant company sent a repossessing agent to make a humble request to obtain payment or the surrender of the vehicle. On 22nd March, 1989 the defendant issued repossession orders so that the vehicle could be traced. The following day (23rd March 1989) the defendant called on the plaintiff company and reported his inability to sell the vehicle due to restrictions imposed on the log book. The defendant offered to sell his Lavington property and instructed a firm of lawyers (Ndungu Njoroge & Kwach Advocates) to act for him. The lawyers were to remit the proceeds of the sale to the plaintiff

company in settlement of the loan. Tyson Ltd., was requested to look for a suitable buyer but the property could not be sold immediately as there were attachments involving City Commission rates. This forced the plaintiff company to go back to the vehicle as security. On 8th August, 1989 the plaintiff company wrote to the defendant giving him seven days in which to execute the sale of his Lavinton property or they repossess the vehicle. This letter was produced as Exhibit S. Since the defendant did not respond the plaintiff company instructed the reposessor on 6th October, 1989 to proceed and repossess the vehicle. The vehicle was repossessed and valued by the Automobile Association of Kenya (AA) on 25th October, 1989, for Shs.935,000/- as per Exhibit 9. The defendant then approached the plaintiff company and said that he had identified a buyer willing to pay Shs.1.3 million for the vehicle. The plaintiff company was willing to release the vehicle provided they 'received an irrevocable instructions but on 17th October, 1989 the defendant's advocates wrote a letter (Exhibit 11) to the effect that Diplomatic Vehicles were unable to sell the vehicle

In view of the above the plaintiff company proceeded to advertise the vehicle by tender. The advertisement appeared in the "Daily Nation" of 7th and 10th November, 1989 and the "Standard" of 8th and 13th November 1989 as per Exhibit 12. The advertisement attracted three buyers - M. Raffiq & Co Ltd., - 900,000/- (Exhibit 13) Snack Products Ltd., 701,5000/- (Exhibit 14) and Karim Karachiwalla - 850,000/- (Exhibit 15). There was a further offer of Shs 1. 1 million from one David Kamau Kariuki (Exhibit 16). The tender was awarded to David Kamau Kariuki and a letter was written to Mr. Kariuki (Exhibit 17) but Mr. Kariuki failed to show up. The plaintiff company re-examined the offers available and on receipt of an offer of 950,000/- they decided to accept it. The defendant was immediately contacted and advised of this sale by letter dated 24th January, 1990 (Exhibit 18). The vehicle was bought by Messrs. Nicholas Kiwi Kenya Limited for Shs. 950,000/=. As at 24th January, 1990 the defendant's outstanding balance was shs.1,236,577/80. The proceeds from the sale of the vehicle having been credited to the defendant's account there was an outstanding balance of shs. 286,577/80. The plaintiff company advised its lawyers to recover the shortfall from the defendant. By 14th February, 1990 the plaintiff's lawyers had not received any response from the defendant. On 1st March, 1990 the defendant's advocates wrote to the plaintiff company questioning the sale of the vehicle at shs. 950,000/= while the value was shs. 1.3 million. According to the plaintiff the vehicle was valued at shs. 935,080/= hence they sold it for the best price. Mr. Bunei concluded his evidence in Chief by confirming that the balance as at the end of January, 1993 was 542,058/35 which the plaintiff company was demanding from the defendant. This figure was supported by Mutisya Mutua (PW2) the Chief Manager of the plaintiff company. Mr. Mutua produced the statement (Exhibit 21).

The foregoing is the summary of the plaintiff's case. We must now consider the defendant's case.

The defendant, Johnson Nganga Mbugua (DW1) testified that he requested for a loan of shs. 600,000/= from the plaintiff company in order to purchase a vehicle. He said that he did not commence repayment because other matters occurred in his life which changed his ability to repay. He pointed out that when he applied for this loan he was the town Clerk of Nairobi City Commission and was under contract with Kenya Government to hold that position for three years from 1st February, 1987 and the contract was renewable. He held the office up to 31st December, 1987. Mr. Mbugua narrated how, in the course of his duties, he discovered the methodology used by people inside and outside City Hall to siphon money out of the City Hall and so he took necessary measures by interdicting three officers. These necessary measures, according to Mr. Mbugua had the backing of the Head of State. However those interdicted officers used influence of their godfathers to twist the story and so it was Mr. Mbugua who was sent on a compulsory leave under the provisions of Local Authority Act. He was sent on compulsory leave on 31st December, 1987. He continued receiving his dues until October, 1988 when the City Commission stopped his salary without following proper procedure. Mr. Mbugua took the matter to court and on 18th May, 1989 Hon. Justice Dugdale issued a court injunction. The defendant explained that Mr. Wilson Kipkoti the Managing Director of the plaintiff company was a Commissioner of Nairobi City Commission and also the Chairman of Finance Committee of the Nairobi City Commission, and he continued in that position up to 1990s. Hence Mr. Kipkoti was aware of the defendant's predicament.

Coming back to the vehicle the defendant testified that he was given special permission to import the vehicle in question. The vehicle finally arrived in the country in 1988. To get money to clear the vehicle

the defendant mortgaged one of his shambas to get a loan from National Bank of Kenya. According to the defendant the plaintiff company gave him part of the money while he contributed a part of it. The defendant had decided to sell the vehicle even before it could be registered. He intended to settle his liabilities with the plaintiff company by using proceeds from the sale of this vehicle but the defendant found it difficult to sell the vehicle due to conditions imposed in the log book to the effect that he should not transfer the vehicle until after four years. The defendant then decided to sell his matrimonial home in Lavinton. He instructed his lawyer Ndungu Njoroge & Kwach (Exhibit B). He then handed over the vehicle to Diplomatic Motors Ltd to sell it on his behalf. Then the defendant was informed that the vehicle had been seized on 9th October, 1989 by auctioneers acting on instructions of Prudential Finance Company Ltd (the plaintiff company). The defendant spoke to Mr. Bunei (PW1) about this matter and Mr. Bunei (PW1) said that the vehicle would not be released unless the amount was paid. The defendant then informed his lawyers who took up the matter with the plaintiff company. On 12th October, 1989 the defendant's lawyers wrote to the plaintiff company (Exhibit E).

The defendant pointed out that when he received the logbook for the vehicle he took the log book to the plaintiff company and signed a blank transfer form. The defendant testified that the buyer who had been identified by Diplomatic Motors had found another vehicle although Diplomatic Motors thought that they could get another buyer quite easily. The next thing that the defendant saw was a letter of demand from Munene Co. Advocates. The defendant then came to know that his vehicle had been sold vide a letter dated 24th January, 1990 (Exhibit G). The defendant was told that the vehicle had been sold for shs. 950,000/= but they were demanding about shs. 286,377/80 on top of shs. 950,000/=. The defendant denied owing the plaintiff this money. The defendant went to D.T. Dobie where he paid shs. 2000/= and D.T. Dobie gave a valuation of a similar vehicle similar description and same date of manufacture at shs. 1,762,610/=. This was the valuation given this year (1993) and the defendant produced the valuation report (Exhibit H). The defendant said that he had insured this vehicle for shs. 1.5 million with Lion of Kenya Insurance Company (Exhibit I). The defendant produced a bundle of advertisements showing prices of similar vehicles.

It was the defendant's evidence that the seizure of this vehicle by Triple One Auctioneers was wrongful and that the sale at shs. 950,000/= was undervalued.

The defendant conceded that he owed certain monies but complained that the plaintiff company did not send statements showing the amount owing. The defendant testified that as far as he was concerned he owed Prudential Finance Company Ltd shs. 1.0 million.

The defendant's counter-claim is the difference between the amount he could have realized from the sale of the vehicle and the amount due to Prudential Finance Co. Ltd. at the date of repossession. The defendant is asking for interest on this sum together with costs of the counter-claim.

Looking at the evidence on record we find that the area of dispute is rather narrow. It is not in dispute that in 1987 the defendant approached the plaintiff company for financial loan to purchase an imported Mercedes Benz. It was quite clear that the defendant intended to service the loan from the proceeds of his salary and other sources. It is important to note here that when the defendant ordered for the vehicle and made arrangement for this loan he was the Town Clerk of Nairobi City Commission. One Mr. Wilson Kipkoti was the Managing Director of the plaintiff company and at the same time holding an important position of Chairman of Finance Committee within Nairobi City Commission. It is not unreasonable to conclude that Mr. Kipkoti and the defendant were friends and hence the financial facilities were being arranged in a most friendly atmosphere. The defendant was appointed Town Clerk in 1987. He was on a contract of three years with effect from 1st February, 1987. Unfortunately things took a turn that was most unexpected. The defendant did not even complete a year before he was abruptly sent on a compulsory leave in December of 1987. Hence when the vehicle finally arrived in 1988 the defendant's position had changed. He was no longer the Town Clerk. It would appear that this change of events was the root of the defendant's problems as far as repayment of this loan was concerned. The defendant had to turn to his matrimonial home in Lavinton but as usual selling a property of that nature takes a long time. The Plaintiff company was seeking repayment of the loan and quite rightly so. The defendant on the other hand was making efforts to raise funds but to no avail. Although evidence on record

shows that the defendant at times adopted "ostrich policy" of burying his head it should be appreciated that this is a person who had been suddenly dropped from his high office of a Town Clerk and so had many war fronts to deal with. In this case he has admitted receiving the loan but his problem was sudden predicament of being unable to repay due to abrupt changes in his life. The defendant has even gone further and admitted that he owes the plaintiff company shs.1.0. million. It is the defendant's contention that the vehicle should have been sold for shs. 1.3 million which would have meant that the loan would have been repaid in full with a balance to his credit in the sum of shs. 3000,000/=. But the plaintiff company would not hear of this. The plaintiff company contends that even after selling the vehicle at shs.950,000/= the defendant still owes it shs. 316,581/75 at the time the suit was filed but as at January, 1993 this amount has shot up to shs. 542,058/35. This is the bone of contention. We must then go back to the sale of the vehicle.

Miss Chege for the plaintiff company states in her written submission that the defendant had assumed a very evasive attitude as far as repayment of the loan was concerned. As already stated I do not think the defendant was evasive. He was equally concerned but found it difficult to honour his earlier commitments in view of his changed status.

He had to sell his Lavington property in a bid to clear the loan. But one does not sell a house in Lavington as easily as one would sell a bag of maize. The defendant then made arrangements with Diplomatic Motors so that they could get a better price for his vehicle. But as experience has shown one who sets out in desperation to sell his property always ends up more desperate and frustrated. This is what happened with the defendant. This then meant that the plaintiff company had to fall back to the vehicle as security for this loan. This vehicle had then to be sold. It is the selling of this vehicle that has been challenged by the defendant. It is the defendant's contention that this vehicle ought to have been sold for about Shs.1.3 million and not shs.950,000/-. In the written submission by the defendant's advocate it is stated that the conduct of the plaintiff company revealed malice. (Note that during the hearing of this case the defendant was represented by Mr. Ngugi but the written submissions presented to court shows that the same was the efforts of one Nganga R.W. - whether male or female it was not stated).

The law on this point is as stated in the case of Cuckmere Brick Co V Mutual Finance Ltd. (1971) 2 All E R 633 at p.646 where Salmon LJ said:-

"I accordingly conclude both on principle and authority that a mortgagee in exercising his power of sale does owe duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line"

The above authority received support in our local case of Kenya Commercial Bank Ltd.,- v James Osebe (1982 -88) I KAR 48 in which it was held that while a bank had no duty to wait for a rising market it was unrealistic for a bank to see its only duty as covering its own outstanding debt:

In our present case the plaintiff company advertised the sale of the vehicle. There were four prospective buyers - M.Raffiq & Co. Ltd. - 900,000/- Snack Products Ltd - 701,500/-, Karim Karachiwalla - 850,000/- and David Kamau Kariuki - Shs.1.1 million. The plaintiff company quite properly accepted Mr. Kariuki's offer since this was the highest. But Kariuki appears to have developed cold feet since he never showed up when contacted.

The other buyers were rejected and so the matter had to be reconsidered. The vehicle was eventually bought for Shs.950,000/-. It is important to note that according to a valuation report (Exhibit 9) by the Automobile Association of Kenya the vehicle was valued at Shs.935,000/- Hence the price of Shs.950,000/- could not be described as undervalue.

Evidence on record shows that the plaintiff company tried its best in identifying a buyer. Indeed even the defendant was allowed to look for a buyer through Diplomatic Motors but he did not succeed. There is no evidence to show that the plaintiff ignored a buyer who was offering more than Shs.950,000/-. Evidence

clearly shows that the best price offered was Shs.950,000/-.

The defendant admitted that he owed the plaintiff about one million shillings and so it was on this understanding that he put in a counter-claim. He was of the view that the vehicle ought to have been sold for more than one million shillings. His efforts to establish this fact took him to D.T. Dobie who gave a valuation of Shs.1, 762,610/- for a similar vehicle. (See Exhibit H). But that is unrealistic approach since D.T. Dobie were giving the current market value of a similar vehicle and not the vehicle KZN 660. We must go by the valuation of AA who inspected the vehicle KZN 660. Whichever way we look at it we find that the plaintiff company was entitled to sell that vehicle for Shs.950,000/- as that was the best price offered at the material time. We are talking about 1989 and not 1993. Since the plaintiff was perfectly entitled to sell that vehicle in December, 1989 at Shs.950,000/- I am satisfied that the sale was proper. Even accepting for a moment that the defendant owes the plaintiff company Shs. one million then the defendant is not entitled to a counter-claim. He still owes the plaintiff company some money as the proceeds from the sale of the vehicle could not clear the outstanding loan. But evidence of Mr. Bunei (PWI) and Mr. Mutua (PW 2) clearly shows that when this suit was filed the defendant's outstanding balance was Shs.316,581/75 and this suit was for recovery of this money. Clearly the defendant has nothing to claim from the plaintiff company. Therefore, the defendant's counter-claim is dismissed with costs. It is of course disappointing in that the defendant obtained a loan of Shs.6000,000/- to purchase the Mercedes Benz 200 registration number KZN 660. He used the vehicle for a very short time when problems started. He has now lost the vehicle and still having the burden of paying more money to the financial institution that was so kind to him initially as to make the loan facilities available to him. But that is how financial world operates.

Now that the defendant's counterclaim has been dismissed with costs we must conclude the plaintiff's case. We have found that the sale of the vehicle for Shs.950,000/- was proper and that even after the sale the loan was not cleared. The plaintiff filed the suit claiming Shs.316,581.75 together with "interest. It has been shown that this figure has gone up but I am reluctant to give judgement for a higher figure than the amount sought in the plaint. Clearly the sum of Shs.316,581.75 has been proved. I therefore enter judgment for the plaintiff in the sum of Shs.316,581.75 together with interest at 19% p.a. from 1st

March, 1990 till payment in full. The plaintiff will have the costs of this suit. Order accordingly. Delivered at Nairobi this 21st day of September, 1993.

E. OKUBASU

JUDGE