SMP Capital Limited v Gekonde (Civil Appeal 95 of 2019)
[2023] KEHC 24690 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 95 OF 2019

PN GICHOHI, J

OCTOBER 30, 2023

BETWEEN

SMP CAPITAL LIMITED ..... APPELLANT

AND

JASPHER JULIUS MOGAKA GEKONDE ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. E.A. Obina Principal Magistrate (PM) delivered on the 17th July 2019 in Kisii CMCC No. 224 of 2017; Julius Mogaka Gekonde vs SMP Capital)

JUDGMENT

1. The brief background of this appeal is that Julius Mogaka Gekonde (herein referred to at the Respondent) instituted a suit against SMP Capital Limited (herein referred to as the Appellant) vide a Plaint dated 25th May 2017 where he claimed to have purchased motor vehicle KCA 538Y (suit motor vehicle) from the Appellant vide a hire purchase agreement HP00548 . He pleaded that he paid a total of Kshs 5,757,000/= through bank deposit slips leaving a balance of Kshs 1, 500,000/=. He further pleaded that if the attachment is done, he would suffer and lose Kshs 5,757,000/= as the Appellant did not give him notice. He therefore sought the following orders: -

    a. That the Defendant/its agents, servants to be restrained from attaching the motor vehicle KCA 538Y.

    b. Costs and interest.

2. The Appellant entered appearance and filed a statement of Defence and Counter- Claim dated 30th April, 2018. The Appellant admitted entering into a hire purchase agreement HP00548. It however pleaded that the Respondent was non-compliant with the terms of the loan agreement and that the payments made towards the suit motor vehicle were irregular and inconsistent. It denied that the Respondent paid a sum of Kshs 5,757,000/= and exercised the option to purchase the motor vehicle.

3. In its Counter- claim, the Appellant pleaded that the purchase price of the suit motor vehicle was Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000); that the Respondent paid a deposit of Kshs 2,732,000/= and paid the balance of Kshs 2,768,000/= together with hire charges of Kshs 1,264,000; that the total balance of Kshs 4,032,000/= was to be paid in thirty-six (36) equal monthly instalments of Kshs 112,000/= per month.

4. The Appellant further pleaded that under the hire purchase agreement, the payments were to be paid punctually and without fail and in cash or cheques at market rates. Furthermore, the Respondent was expected to pay interest on any overdue rental.

5. Further, the Appellant pleaded that under Clause 4 of the Hire Purchase Agreement, the Respondent agreed that in event of default in punctual payment of the hire rentals, the Appellant was entitled to repossess the motor vehicle without any further notice or demand to the Respondent.

6. The Appellant contended that the Respondent breached the terms of the Hire Purchase Agreement by defaulting in making the payments and the hefty interest which the hire rentals have accumulated on the Respondent's account which the Respondent has not made good. That the outstanding amount stood at Kshs 4,220,624/= as at 12th March 2018 which remains unpaid to date and it continues to accumulate interest and further penalties.

7. The Appellant therefore prayed that the Respondent's suit be dismissed with costs and that the Respondent do pay Kshs 4,220,624/= being the arrears due to the Appellant under the Hire Purchase Agreement. The Appellant also prayed for costs of the Counter- claim and interest.

8. After hearing both parties, the trial court delivered its judgement on 17th July 2019 dismissing the Appellant's counterclaim but with no costs. The Respondent was ordered to pay the sum of Kshs 964,134/- to the Appellant with interest from the date of filing the suit and at court rates until payment in full. The Court found the repossession premature and unlawful and therefore awarded the Respondent costs.

9. Being dissatisfied with the judgement and decree, the Appellant preferred the instant appeal on listing four grounds as per the Memorandum of Appeal in the record of appeal dated 17th February 2020 at page 83 – 84 and as follows:-

    1. That the learned Magistrate erred in both law and fact by finding that the Appellant's Counter-claim for Kshs 4,220,624/= had not been proved and thereby dismissing it;

    2. That the trial court erred in law and in fact by making a finding that the repossession of motor vehicle registration number KCA 538Y by the Appellant was premature and unlawful;

    3. That the trial court erred in law and in fact by failing to follow and uphold decisions of the superior court cited in support of the Appellant's case and as a result arrived at an erroneous decision;

    4. That the trial court erred in law and in fact by failing to consider the evidence on record and the submissions of the Appellant which failure led to a miscarriage of justice.

Appelant's Submissions

10. The Appellant's submissions dated 19th September 2022 where it was submitted that the trial court erred in placing reliance on the *Hire Purchase Act*. It was further submitted that the price of the motor vehicle as agreed was Kshs 6,764,000/= made up of Kshs 5,500,000/= being the purchase price and Kshs 1,264,000/= being the hiring charges and therefore, the *Hire Purchase Act* is not applicable to

this transaction by dint of the provisions of Section 3 of the *Hire Purchase Act*. The Appellant further relied on the interpretation of the said provisions as it was held in the case of *John Mwangi Muchira v Hyper Cars Limited & 2 others* (2013) eKLR and *NIC Bank Limited v Balume Laurent Mbotaz* (2020) eKLR.

11. The Appellant further submitted that in failing to consider the inapplicability of the *Hire Purchase Act*, the trial court fell into error in finding that the repossession was premature. The appellant further submitted that the trial court erred by relying on Section 15 of the *Hire Purchase Act* which prohibits repossession where the hirer has repaid two thirds of the debt.

12. It was therefore submitted that the agreement between the Appellant and the Respondent remained to be enforced between the parties as per the agreed terms of the agreement. That restraining the Appellant from exercising its rights upon default as provided for under clause 4 amounted to infringement of the Appellant's rights.

13. Arguing that the Law of Contract does not require that money lending agreements be in writing, it was submitted that the trial court erred in not considering the account statement submitted by the appellant as evidence of the disbursement and Respondent's admission that they entered into an oral agreement with regards to the loan.

14. Lastly, it was submitted that in dismissing the Appellant's Counterclaim, the trial court erred in failing to consider the evidence rendered by the appellant including furnishing the court with a detailed statement of account showing the inconsistent payments by the Respondent thus proving its claim against the Respondent on a balance of probability as per Section 107 of the *Evidence Act*. The Appellant therefore urged the Court to allow the appeal and set aside the trial courts judgment with costs to the Appellant.

Respondent's Submissions

15. In his submission, the Respondent recounted the history giving rise to the present dispute. It was submitted that the court was right in dismissing the Counterclaim as DW1 on cross- examination admitted that the balance as of 10th May 2017 was Kshs 964, 134/=. It was further submitted that DW1 did not have in court any cheque issued by the Respondent which was returned unpaid or dishonoured.

16. Further, it was submitted that DW1 admitted in court that he did not have a receipt for Kshs 82,500 or for Kshs 400,000/= though the undated Dexh1. 1 (a) reflected a nil balance. The Respondent further submitted that DW1 admitted that the Respondent had paid Kshs 5,817,866 /= out of the total amount for Kshs 6,782,000/- but was unable to tell the court how the Appellant arrived at the sum of Kshs 4,220,624. Further, the Respondent submitted that he was to pay Kshs 112,000/= monthly and therefore the remaining balance was Kshs 68,134/= as of 11/1/2018; that the amount of Kshs 4,220,624 stands unproven and the trial court rightfully dismissed the Counterclaim.

17. The Respondent submitted that notwithstanding this appeal, on 30/9/2019 the Appellant's lawyer demanded payment of Kshs 1,171,082.76 but this calculation ignored the paid Kshs 300,000/=, assessed costs of Kshs 150,000/= but instead it put the Respondent's costs at Kshs 72, 650/= while exaggerating the interest at Kshs 279, 598.76 but through his counsel's letter, the Respondent clarified why he was ready to pay Kshs 660,013/=.

18. The Respondent further stated that there is no evidence which was produced to show that besides the Hire Purchase Agreement, there was another agreement under the Contract Act. On the amount of Kshs 964,134/= , it was submitted that parties agreed on an out of court settlement since this

amount was uncontested. The Respondent therefore urged this Court to not disturb the trial court's judgement and dismiss the appeal with costs.

Determination

19. This being a first appeal, this Court's role is to reconsider the entire evidence, evaluate it a fresh and draw its own independent conclusion but bearing in mind that this Court never saw nor heard the witnesses and should make due allowance in this respect (see *Selle and another v Associated Motor Boat Co. Ltd & others* (1968) E.A 123.

20. Further, it is settled law that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of evidence, or the magistrate is shown demonstrably to have acted on wrong principles in reaching the finding he did.

21. From the proceedings at the trial court, the judgment thereof, the Memorandum of Appeal, the record and supplementary records of appeal, and the respective parties' submissions, the broad issue for determination is whether the trial magistrate demonstrably acted on wrong principles in arriving at his findings.

22. There is no dispute that the parties herein entered into a Hire Purchase Agreement No HP00548 dated 11th December 2014. There was no dispute that clause 4 of the agreement provided that:-

> " If the Hirer:-
>
> a. Defaults in the payment or punctually paying any of the hire rentals or any other sum or sums payable to the Owners under this agreement; or
>
> b. Is in breach of this agreement or any part thereof or suffers any such breach to be committed ;or
>
> c. Does or allows to be done any act or omission which may prejudice or jeopardise on any way or to whichever extent the Owners property or any other right or rights in the said vehicle/s; or
>
> d. Permits any judgment against him/her/it in relation to the vehicle/s or which may in any way affect the vehicle/s to remain unsatisfied, then on the happening of any such events the Owners may , without prejudice to their clam for arrears of the monthly rentals or payment of any interests or any other sum or sums due or for damages for breach of this agreement, immediately terminate the hiring and shall thereupon without notice or demand and outstanding that they may have waived some previous defaults on the part of the Hirer, become immediately entitled to the immediate possession of the said vehicle/s and to retake and assume possession of the same and the hirer shall therefore cease to be entitled to the possession of the vehicle without express consent in writing of the Owners..."

23. A look at the said agreement shows that the price of the vehicle was Kshs 5,500,000/=. Out of that sum, the Respondent deposited Kshs 2, 732,000/= leaving a balance of Kshs 2,768,000/= plus hire purchase charges of Kshs 1,264,000 /= making a total of Kshs 4,032,000 /= as the balance. This outstanding balance was payable in 36 monthly instalments of Kshs 112,000/= commencing 11/1/2015 and the final instalment was payable on 11/12/2017.

24. What appears to have been the issue leading to the primary suit was the amount outstanding arrears to warrant the Appellant's purport to attach the subject motor vehicle. This leads to the sub-issue as to whether the *Hire Purchase Act* was applicable to the Hire Purchase Agreement between the two parties. What led to this issue is the trial magistrate's finding in his judgment that:-"The Plaintiff may have defaulted to pay one , two or three instalments but having paid more than two thirds of the purchase price the Defendant could not repossesses the motor vehicle without first coming to court to obtain an order."

25. This may have been a reflection of Section 15 (1) of the *Hire Purchase Act* which provides:-

> "Where goods have been let under hire- purchase agreement and two thirds of the hire purchase price has been paid, whether in pursuance of the agreement or of a judgment or otherwise, or has been tendered by or on behalf of the hirer or a guarantor , the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by a suit."

26. Then what follows is the issue of the applicability of the *Hire Purchase Act* in the Hire Purchase Agreement between the Appellant and the Respondent. Section 3 of the Act provides:-

> "This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire- purchase price does not exceed the sum of four million shillings other than a hire purchase agreement in which the hirer is a body corporate wherever incorporated; but that monetary limitation does not apply so as to affect the definition of 'hire-purchase business' in Section 2 (1)."

27. The interpretation and applicability of the above provision was the subject in *Taawawa Supermarket Limited v Fina Bank Ltd* [2010] eKLR where the Court of Appeal held:-

> "That section is not, with respect, happily worded. In our view it is capable of two constructions, namely: that the Act does not apply at all where the hirer is a corporation, which is the construction adopted by Mr. Mbigi; or that the monetary threshold applies only to individual hirers but not corporate hirers who will be covered by the Act regardless of the monetary consideration in the transaction, which is the construction adopted by Mr. Ombwayo. None of the advocates cited any authority for their respective propositions and we have not been able to find any. We must therefore decide the matter on first principles.
>
> There is no doubt that the Act would be inapplicable on the basis of the monetary threshold since the subject matter was here beyond the upper limit of Kshs 300,000/= at the time of the transaction. A pertinent hypothetical question may be asked: why would an individual hirer take advantage of the Act to a limited extent when a body corporate would not be limited by any monetary threshold? No compelling reason presents itself to us and we find in the circumstances that the intention of Parliament was to exclude purchases made by co-operative societies and registered companies from the operation of the Act, and not merely to remove the monetary threshold for corporations."

28. In this case, the hire purchase price of the suit motor vehicle at the time of entering into the agreement was Kshs 5,500,000/=. Further, the Respondent is described in the Hire Purchase Agreement as the

"Hirer" while the Appellant herein is described as the "Owner". Section 2 of the Act described the two parties thus:

> " hirer" means the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirerer's rights or liabilities under the agreement has passed by assignment or by operation of the law.
>
> "owner" means the person who lets or has let goods to a hirer under a hire-purchase agreement , and includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by assignment or by operation of the law."

29. The Appellant herein is further described in the Hire Purchase Agreement as a "Limited Liability Company". No doubt, the *Hire Purchase Act* does not apply in this case considering that the hire purchase price was far above the amount stipulated under the Act and further, the Respondent who is the hirer is an individual and not a body corporate. The question now is whether the agreement is void and incapable of enforcement in the circumstances.

30. The parties consciously and deliberately entered into the Hire Purchase Agreement. As held by the Court of Appeal in Taawawa Supermarket Limited (supra), such a contract retained its validity inter se and enforceable and therefore both parties were bound by the terms of the said contract.

31. So then, the issue is how each of the parties supported their respective claims before the trial court.

32. In his testimony on 16th October 2018, the Respondent (PW1) told the trial court that as at the time he testified, he had paid Kshs 5,788,000/= leaving a balance of Kshs 976,000/= only. He produced a bundle of 53 receipts (Exh. 2) in support. He told the Court that even if interest was to be worked out , it could not reach the amount the Appellant was seeking for in the Counterclaim.

33. In cross- examination by Mr. Thiong'o Advocate for the Appellant, he told the court that he continued paying as per the agreement and only stopped paying when on phone, the Appellant demanded over Kshs 3,000,000/= from him. He told the court that by May 2017, he only had a balance of Kshs 976,000/=. He then clarified that he could have cleared this balance had it not been for this demand of the Kshs 3,000,000/=. That is an admission that the Respondent was in some arrears.

34. On his part, the Appellant's witness (DW1) who identified himself as the recovery manager of the Appellant adopted his recorded and filed witness statement dated 12th October , 2018. In that statement, he stated that the Respondent breached the terms of the Hire Purchase Agreement by defaulting in payment causing hefty accumulation of interest. He testified that the initial sum of Kshs 732,000/= was to be deposited in cash but the Respondent deposited only Kshs 2,000,000/=. The balance of Kshs 732,000/= was lent as a loan payable in one month to clear the deposit.

35. He stated that the Respondent did not clear it and therefore, the said sum of Kshs 732,000/= attracted interest of 15% in that one month .That as at the time of initial attempt to repossess the vehicle, the Respondent had defaulted for three months and the whole loan was attracting interest at 15 %.

36. Further, he testified that total Hire Purchase price was Kshs 6,782,000/-, less amount received being Kshs 5,817,866/= leaving a balance of Kshs 964,134/=. That the interest earned on the arrears was Kshs 2,790,521/= being interest for 36 months together with other charges , less interest refunded to the client for prepayment of Kshs 21,531/= , add two bounced cheque charges Kshs 5, 000/= ; debt collection fee Kshs 82,500/-, less legal fees Kshs 400,000/=. That this amounted to total arears of Kshs 4,220,000/= which they were claiming for from the Respondent.

37. However, when cross- examined by Mr. Momanyi Advocate for the Respondent, he told the court that the outstanding balance as at 10th May 2017 was Kshs 964,000/=. That from that date, to the date he testified on 16th October 2018, total interest was Kshs 2,790,521/= which they were calculating at 10% arrears. That the sum of Kshs 732,000/= was agreed as a loan and that the payment was to commence on 11th January 2015. However, he admitted that this agreement was not in the Hire Purchase Agreement.

38. In its pleadings at paragraph 10 of the counterclaim, the Appellant pleaded:-"It was a term in the agreement that the Plaintiff would put in a deposit of Kshs 2,732,000 (which he did) ..."

39. If the Respondent did pay the aforesaid amount in full, it is not clear how then the Appellant turned to argue that the said amount was a loan. It is also not clear how the Appellant , being a Limited Liability Company, as per its description in the hire purchase agreement, opted to deviate from a written agreement and allegedly enter into an oral agreement which the Respondent disputes. His argument that the Law of Contract does not require that money lending agreements be in writing is therefore lop-sided in the circumstances of this case.

40. Further , DW1 claimed during cross- examination that the Respondent had at one time overpaid but could ascertain by how much. Again , he claimed that two cheques had bounced but he did not have the cheques of the copies of the same. He did not have the receipt for debt collection of Kshs 82,500/= or the receipts of Ksh. 400,000/= allegedly paid to the lawyer.

41. Further, Dexh. 1 (b) conflicts with the statement of account produced by the Respondent (Pexh. 3 (a)) which shows that the alleged outstanding amount stood at Kshs 992,752/= as of 18/5/2017. The account produced by the Appellant (Dexh. 1(b) shows that the alleged outstanding amount stood at Kshs 4,220,624/=. There seems to be two columns in this statement which is the "amortization schedule" and the "arrears account."

42. Both columns of the amortization schedule and the arrears account do not have the date 18/5/2017. On the amortization schedule, the balance as at 8/5/2017 stood at Kshs 832,105/= while at the arrears account, the balance stood at Kshs 703, 847/= as of 8/5/2017.

43. The importance of clear statements and/or accounts in money lending agreements was emphasized in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR where the Court of Appeal had this to say on the issue of statement of accounts:-

> "... Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance."

44. It is not clear how three conflicting statements of accounts emerged in the course of the same transaction. It was the Appellant's duty to maintain proper statement of account so as pursue meaningful and accurate execution for non-compliance by the Respondent to make payments as they fell due. If the balance was Kshs 964,134/= as admitted by the Appellant's witness, it is not clear how

the outstanding balance came to be Kshs 4,200,624/=, even if the interest was to be charged was 10% of the arrears as they claim.

45. With the confusion and to that extent, the repossession of the subject motor vehicle based on incomprehensible statements of accounts was unlawful. From the foregoing, this Court finds no error in principle in the trial court's analysis leading to the finding that the Appellant failed to prove its Counter-claim.

46. Regarding the sum of Kshs 964,134/= , the trial magistrate concluded:-

> " The Plaintiff has offered to pay the amount owed to the Defendant Kshs 964,134/=. Let it the Plaintiff pay to the Defendant the said amount of Kshs 964,134/= which shall attract interest from the date of filing the suit at court rates until payment in full."

47. This Court finds no error in this finding . In conclusion this Appeal is devoid of merit and therefore dismissed. The Judgement and Decree of Hon. E. Obina dated and delivered on 17th July, 2019 is hereby upheld. Due to the nature of the matter, each party is ordered to bear its own costs of this Appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUAL) THIS 30TH DAY OF OCTOBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of;

Kibuba for the Appellants.

N/A for the Respondent.