



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC NO. 856 OF 2009**

**CFC STANBIC BANK LIMITED.....PLAINTIFF**

**VERSUS**

**AMOS KIPCHUMBA TENAI.....DEFENDANT**

**J U D G E M E N T**

1. **CFC STANBIC BANK** the Plaintiff herein has sued **Amos Kipchumba Tenai**, the Defendant herein for the following reliefs namely;

- i. Kshs.3,434,874/-
- ii. Interest on the above at 14.5% until payment in full.
- iii. Costs of the suit.

2. The facts relied on by the Plaintiff for the above prayers are that sometime in 2007, the Plaintiff at the Defendant's own request advanced the Defendant a hire purchase finance facility of **Kshs.3,458,000/-** for purchase of a motor vehicle namely a Lorry Tipper Registration No.KAX 435 from Trans Africa Motors Ltd. The Defendant under the terms of the agreement was to pay monthly instalments of **Kshs. 95,355** for 48 months. The Plaintiff avers that it released the money to the said dealer and the lorry was given to the Defendant.

3. Simon Mwangi (PW1) a legal counsel in the Recoveries Department of the Plaintiff testified on behalf of the Plaintiff and told this court during trial that after the advancement of the loan facility, the Defendant paid but defaulted in payment from August 2009 and that at the time the amount owing was **Kshs.3,458,000/-** which amount continues to attract interests at 14.5% p.a.

4. He further told this court that the motor vehicle the subject of the hire purchase agreement was repossessed but because it had been vandalized, it was not able to attract buyers. He added that the motor vehicle has not been valued and that before it is sold it will be valued as a matter of procedure. He added that he had no records showing how much the Defendant had paid.

5. In its written submissions filed on 16<sup>th</sup> September 2019 the Plaintiff reiterates the issue of its pleadings and the evidence. It submits that its list of documents contains the hire purchase agreement dated 17<sup>th</sup> April 2007 which it claims is admitted by the Defendant. It submits that though the hire purchase agreement is not registered, there was no obligation for registration it for it to be adduced in evidence. It further submits that the Defendant fell into arrears in monthly instalments after he defaulted payments. It contends that the defendant has not tabled evidence to show that it has paid the debt.

6. The Plaintiff avers that it is a financial institution that relies on lending and advancing monies and that the Defendant's action has prejudiced its interests. It contends that the defence consists of admissions and does not raise any triable issue in its view.

7. The Defendant in this case filed a defence and though he chose not to testify or call any witness he has denied breaching the terms of the hire purchase agreement in his pleadings. He has pleaded in his defence that he paid more than 2 million in the first 20 months between May 2007 and May 2009 when the business was good. He accuses the Plaintiff of hastily repossessing the lorry and secretly disposing it claiming that the value of the seized lorry was sufficient to cover the arrears and the balance. He has also faulted the Plaintiff for not registering the Hire Purchase agreement and failing to supply him with details for how much the lorry realized upon sale. He further states that the Plaintiff has not supplied him with statements of the loan account.

8. In his written submissions done through KulobaWasike& Co. Advocates, the Defendant avers that the Plaintiff's witness conceded that

the bank had not produced bank statement showing how the Defendant was in default. He further contends that the subject matter of the Hire Purchase agreement was repossessed in 2009. He avers that the repossessed vehicle was not used to offset the outstanding loan. He has faulted the Plaintiff for not availing to court the valuation of the repossessed lorry for checking if its value could have set off any outstanding loan. He further contends that the documents relied on by the Plaintiff save for demand letter were drawn before the loan was advanced. He avers that the Plaintiff had not tendered evidence to show when the default of payment began and how much is outstanding if at all. The Defendant has pointed out that the Plaintiff admitted having repossessed the vehicle from the Defendant but did not account for the proceeds of sale of the said motor vehicle.

9. The Defendant submits **Section 5 of Hire Purchase Act** invalidates any Hire Purchase agreement that is not registered and states that the same cannot be enforced. He avers that the Plaintiff has conceded that the Hire Purchase agreement was not registered.

10. He further submits the Plaintiff has not discharged its burden of proof and has cited **Sections 107 and 108 of the Evidence Act** to back up his assertion. He has further cited the decision in **Mbuthia Macharia –vs- Annah Mutua Ndwiga & Another [2017] eKLR** where the Court of Appeal citing Halsbury's Laws of England observed the following:

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case.....”**

11. This court has considered the evidence tendered and submissions of both parties. It is a fact that the Defendant in this case tendered no evidence in defence but that failure or omission in my view does not shift the evidential burden placed on the Plaintiff under **Section 107 and 108 of the Evidence Act**. The Defendant has raised weighty issues in his pleadings and submissions which necessitates determination of this case on its merits. There are two main issues in this matter which are as follows:-

- i. Whether the Hire Purchase agreement between the Plaintiff and the defendant is void and unenforceable for want of registration.**
- ii. Whether the Plaintiff has proved its case against the defendant to the required standard.**

**Whether the Hire Purchase agreement is valid and enforceable.**

12. The Defendant’s main thrust of his defence is that the hire purchase agreement between him and Plaintiff and relied upon by the Plaintiff in this case was not registered as required by law and therefore unenforceable. **Section 2 of Hire Purchase Act** (Cap 507 Laws of Kenya) defines Hire Purchase agreement as;

**“ an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee.....”**

In **Taawawa Supermarket Ltd –vs- Fina Bank Ltd [2010] eKLR**, the Court of Appeal defined the general characteristics of H.P agreement as follows:

- " (a) There is delivery of goods to the hirer who obtains possession thereof;**
- (b) The property in the goods remains in the owner**
- (c) The hirer agrees to pay the purchase price thereof by instalment and the owner agrees to transfer the property in the goods to the hirer on completion of the payments (all agreed instalments)"**

The contractual relationship between the Plaintiff and Defendant fits the description given under Section 3 of the Act which provides as follows:-

**“ 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 or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a higher purchase agreement in which the hirer is a body whenever incorporated; provided that monetary limitation does not apply so as to affect the definition of “hire purchase business in Section 2(1).”**

13. A further perusal of Section 5 of the Act indicates that Hire Purchase agreements within the monetary range of the subject agreement between the Defendant and the Plaintiff herein require registration. **Section 5(4)** states as follows:-

- “Unless a hire purchase has been registered under subsection 2 of this section;**
- 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;”**

14. In the face of the above provision, the question posed is whether a party who benefits from a Hire Purchase agreement/arrangements can be allowed to get away from such agreed arrangements if he defaults in his contractual arrangements simply because of omission to register the Hire Purchase agreement. It is my considered view that a party should never benefit from his own wrong if it's proved that he is in the wrong side of the contractual agreement. In Taawawa Supermarket Ltd (Supra) the Court of Appeal rendered this;

**“ We may add that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement. It retained its validity as a contract inter se and was enforceable as such.”**

In our present case, as I have observed above, the Hire Purchase Act applies because the agreement dated 17<sup>th</sup> April 2007 tendered by the Plaintiff was for a sum of less than 4 million as stated under the Act and the hirer (the defendant herein) is an individual. Additionally, the features or characteristics of the agreement are undeniably hire purchase in nature a fact not denied by the Plaintiff. Going by the above Court of Appeal decision lack of registration of the said agreement does not render it void. It still entitles the Plaintiff to a refund of monies paid out because the Defendant concedes receipt of the lorry which was duly paid for by the Plaintiff. In that regard this court finds that the said Hire Purchase agreement between the Plaintiff and the Defendant is enforceable as between the Plaintiff and Defendant notwithstanding the fact that it may not have been formally registered.

(ii) **Whether the Plaintiff proved its case against the Defendant to the required standard in law**

16. It is trite law that whoever alleges existence of some fact has the onus of proving the same. The Plaintiff in this case had the onus to prove that it not only extended a loan facility to the Defendant but it was required to prove that the Defendant failed to repay and by how much. Going by the plaint dated 16<sup>th</sup> November, 2009, the Plaintiff claims under paragraph 8 therein that its claim was Kshs.3,661,599/- plus interest. However in its final prayers, the Plaintiff claims for principle amount of **Kshs.3,434,874** plus interests at 14.5%. The evidence tendered by Simon Mwangi (PW1) indicates that the defendant was required to pay Kshs.3,458,000 plus interest. The disparities in the claims were not clearly explained by the Plaintiff's witness during trial but it is apparent from the High Purchase agreement that the amount advanced by the Plaintiff was Kshs.3,458,000/- with the Defendant financing the other amount of Kshs.1,482,000/- required to pay for the lorry.

17. Apart from the unexplained disparities in the actual amount claimed, there is the other conceded claim that the Defendant had paid some amounts until August 2009. When PW1 was asked under cross-examination by the Defendant's counsel to show proof that the defendant was in arrears he responded;

**“We have not attached a statement showing that defendant is in arrears.”**

This court has perused through the statement in pages 27 and 28 in the Plaintiff's list and the statement shows that the principal amount had been repaid in full as at April 2011 when the Defendant was credited with repayment of Kshs.95,364.56/-.

18. This court finds that the Defendant's claim that he was not provided with statements clearly showing how much he owed whether in principal sum or interest is well grounded. The practice by financial institutions to lay claim of outstanding amounts without supplying statements to its customers detailing the amounts demanded in my view is both unfair and unjustified. The Defendant as a customer to the Plaintiff is required to be updated periodically on the performances of bank accounts to enable him make arrangements and/or adjustments where necessary to meet his obligations. Besides this, I find that the Defendant's lorry Registration No.KAX 435 N was repossessed as conceded by the Plaintiff but the Plaintiff is silent on its valuation and though it claims that it had been vandalized, it should have at the very least given a valuation so that the Defendant is not subjected to double jeopardy of being ordered to repay the loan and losing or surrendering his lorry to the Plaintiff for free. The Plaintiff was also not very clear on whether the lorry was sold and for how much or whether it is in their yard unsold.

19. This court is persuaded by the defence contention that there was no evidential burden placed on the Defendant so as to require him to testify in his defence. The legal burden laid with the Plaintiff and this court finds that the same was not discharged to the required standard which is on a balance of probabilities. This finding is based on the following aforesaid reasons;

i. The Plaintiff has failed to clarify the disparities in its claim whether it is Kshs.3,434,874 as per the prayer in plaint or Kshs.3,661,599 as per its demand letter dated 9<sup>th</sup> July 2009 at page 30 of its list of documents and paragraph 8 of its plaint.

ii. The Plaintiff failed to tender a loan statement showing or detailing the amount it claims whether Kshs.3,434,000/- or Kshs.3,661,599/-. The Plaintiff has not justified the claim of the amount outstanding and or explained whether the amount is interests and how the amount has been arrived at.

iii. The Plaintiff has besides the above failed to table the value of the vehicle repossessed and has failed to clarify whether the same was sold as claimed by the Defendant and the amount it realized upon sale if at all. The Plaintiff clearly withheld vital information to the Defendant and this court.

In **Pius Kimaiyo Langat –vs- Cooperative Bank of Kenya Ltd**, the Court of Appeal dealt with a situation where interests charged by a

bank was found to be unconscionable to necessitate court's interference and held that information is crucial in such a relationship. It stated as follows at paragraph 43.

**“ In the case before us, there were no terms in relation to the interest charged and no information was rendered to the appellant. That situation would be worse than earlier case. Information is crucial in such matters. Apart from enabling the borrower to make an informed decision on the manner of liquidation of the debt or to re-assess the relationship with the bank, it gives an objective appraisal on the circumstances necessitating the interest rate increase; whether it was as a result of the Appellant's default; an economic change that averred the bank's base lending rate; loss of value of money or other genuine reasons. It was an act of bad faith, we so find, for the bank to withhold information including properly kept bank statements from the appellant.....”**

It is apparent in this instant case that the Plaintiff has failed to justify its claim against the defendant based on the evidence tendered in this court. It has failed to explain why it did not supply periodic statement or at all to the Defendant indicating how the loan facility had been serviced and/or show whether it was in default and by how much.

In the end, this court finds that the Plaintiff's suit against the Defendant has not been proved to the required standard in law. The same is dismissed with costs.

Dated, signed by;

**HON. JUSTICE R. K. LIMO.**

**SIGN..... DATE.....**

**Dated, signed and delivered in the open court on 31<sup>st</sup> day of January, 2020.**

**By:**

**HON. JUSTICE .....**