



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 25 OF 2018

LUCY WAIRIMU MUTE.....PLAINTIFF

VERSUS

1. SLEEK TRADING LIMITED

2. MARY WANJIRU

WERU T/A TIGWOODS AUCTIONEERS.....DEFENDANTS

J U D G M E N T

Introduction

1. By a plaint dated 9/4/2018 and filed in court on the same day the plaintiff sought a judgment against for immediate return of the motor vehicle as well as exemplary and punitive damages under Section 84 of the Consumer Protection Act 2012.
2. Simultaneously filed with the plaint was a Notice of Motion which sought the preservation of the suit motor vehicle and its restoration to the plaintiff but the same was on the 13/7/2018 withdrawn by consent of the parties and costs made to be in the cause to enable parties fast track the determination of the suit by way of case stated. Pursuant to that agreement parties frame two issues for determination by the court and then filed submissions on the said issues.
3. The agreement to proceed by way of case stated was reached after the defendant had filed a statement of defence and a Replying Affidavit in opposition to the application for injunction.

Outline of Pleaded Facts

4. The plaintiff's case was pleaded to the effect that by an agreement dated 14/10/2016 between the two parties, she bought from the defendant motor vehicle Registration **No. KCJ 811 W Double Cabin, Pick-Up** at a price and consideration of Kshs.3,250,000/= of which she paid a deposit of Kshs.2,000,000/= leaving a balance of 1,250,000/= made payable within six(6) months in installments of Kshs.208,500/= each which he only managed to pay one instalment and then defaulted.
5. With the default, the 1st defendant on 7/3/2018 instructed the 2nd defendant to repossess and the 2nd defendant did repossess the motor vehicle from the plaintiff's custody. It was then pleaded that the plaintiff arraigned her finances and had the outstanding balance to pay and travelled to the defendants premises in Mombasa but could not be availed the vehicle for viewing as the 1st defendant became evasive.
6. The cause of action was then revealed to be in fact that having paid Kshs.2,200,000 being 67.69% of the purchase price, the defendant had by dint of Section 20, Consumer Protection Act, lost the remedy to reposes hence the actions by the defendants was illegal, null and void. It was then asserted that a demand letter was served on 20/3/2018 for the defendant to avail the motor vehicle for viewing and payment of the balance of purchase price a request which the defendant initially agreed to but subsequently reneged upon by failing to pick calls.

Defence filed

7. For the defendant a statement of defence dated 22/6/2019 in which the agreement and payment together with repossession were admitted but it was specifically denied that the payment made had reached 67.69% or that Section 20 of the Act applied with a contention that the agreement between the parties provided for payment of penalty of 30% for every default in any instalment. The allegation that the plaintiff visited the defendant's premises in Mombasa for the purpose of viewing the motor vehicle and effecting payment of the balance as well as service of demand letter were then denied and strict proof invited.

8. Both parties filed witness statement and documents to be relied upon. In those witness statements the only fact that is added by the defendant is the fact that the outstanding penalty had risen to Kshs.800,000/= together with auctioneers' fees of Kshs.45,000/=.

The Case Stated

9. By an agreement dated 3/9/2018 and filed in court on the 23/10/2018 parties agreed that the court determine for them only two issues as follows:-

1. Was the defendant justified to repossess motor vehicle Registration **No. KCJ 811W, Pick Up**, on 07/03/2018?
2. What remedies are available to the parties?

10. Both sides filed written submissions which agree that the determination of the isolated issues will revolve around the provisions of the Consumer Protection Act, 2012, particularly Sections 20, 80 and 84 of thereof.

Agreed facts

11. The pleadings filed and the documents exhibited concur on the fact that there was an agreement dated 14/10/2016 for the sale of the motor vehicle at Kshs.3,250/= and that a sum of Kshs.2,200,000/= had been paid by the February 2017. It thus follows that by that February 2017, the balance outstanding was 32.31% well below the 33.33%. In other-words the plaintiff had paid 67.69% which is more than 2/3 of the purchase price and accordingly the law forbade the defendant from retaking of the possession as it sought to do.

12. The provision of Section 20 is clear and unambiguous. It says:-

“Repossession after payment of two-thirds

(1) here a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.

(2) Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable”.

13. The statute reveals its purpose at the preamble to be the protection of consumers, prevention of unfair trade practices in consumer transactions and for related purposes. Thus when it provides that no repossession of retaking of possession is permissible once 2/3 of the purchase price is paid it leave no other interpretation than retaking is forbidden without the leave of the court first sought and obtained.

14. Put in the context of this case does it matter not that the agreement between the parties provided for repossession without regard to the level and extent of payment made.

15. This court proceeds from the public policy position of the law that parties cannot contract outside the law so as to defeat the clear purpose thereof and that any agreement made in contravention of the law is in void whether or not the parties knew or were ignorant of law. In *D. Njogu & Co. Advocates vs National Bank of Kenya Ltd [2016] eKLR*, the Court of Appeal reiterated this well-known position when it said:

“Likewise, we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore not enforceable”.

16. In this case bullet three of the agreement between the parties which the defendant apparently relied upon to retake the possession contravenes Section 20 of the Consumer Protective Act and is to that effect illegal and void ab initio and not capable of conferring upon the defendant a defence like that put forth in this matter. If being so illegal, null and void, it cannot be the basis or justification for the act of retaking possession.

17. Accordingly, therefore I do resolve the first issue for determination in the negative and hold that the defendant was never justified to retake the possession as it did.

What remedies are due between the parties?

18. On the 13/7/2018 when parties attended court to argue the application for injunction, the plaintiff counsel informed the court that the plaintiff no longer desired to pursue the recovery or possession of the motor vehicle but the refund of sums paid and other remedies under the law.

19. That request was readily accepted by the defendants counsel and by consent the application was marked withdrawn with costs being in the cause. Those proceedings to this court suffice as a notice of cancellation of the agreement under Section 76 of the Act. It thus follows that the agreement was terminated with the consequence that the supplier's obligations under Section 80 then accrued. That provision of the Act provides:-

Obligations on cancellation

(1) If a consumer cancels a consumer agreement, the supplier shall, unless the contrary is provided for in the agreement, in accordance with the prescribed requirements—

(a) refund to the consumer any payment made under the agreement or any related agreement; and

20. By the time of the cancellation aforesaid the chattel was already out of the possession of the plaintiff as a consumer hence there was no pending obligation upon her. To the contrary, the supplier, defendant, incurred the obligation to refund the sums paid by the plaintiff. That appears not to have been made to date and this suit must this be seen to be an action pursuant to Section 84 of the Act. The defendant's obligation first and foremost is the refund of all the sums paid under the cancelled agreement. It being admitted that Kshs.2,200,000/= had been paid on the date the repossession was conducted that sum is due and payable to the plaintiff by the defendant. I therefore find that under Section 80 and 84 of the Act, the plaintiff is entitled to the remedy of refund and, therefore, I do entire judgment for the plaintiff in the sum of Kshs.2,200,000/= together with interest at court rates from the date the defendant retook possession till the date the sum shall have been paid in full.

21. Under Section 84(3), the court is vested with the discretion to grant exemplary or punitive damages over and above the remedies under Section 80(2).

22. Now the question the court has to consider is under what circumstances are exemplary or punitive damages awarded. The object of a court awarding exemplary damages, or punitive damages as it is often called is to punish the defendant for exhibiting a calculation to make profit for himself, which may exceed compensation paid to the plaintiff and where that is a remedy provided by the statute^[1].

23. Those principles when put in the context of this matter the statute expressly mandate the court to consider awarding exemplary damages. That must be seen in the context of the object of the statute; to among other things, discourage unconscionable business practices or oppression by suppliers of goods on credit.

24. The purpose and object of the repossession as captured in the agreement between the parties is clear that once repossessed the defendant was entitled to resell to a third party without recourse to the plaintiff and without a word on the sums already paid to the defendant. In my view the agreement was crafted and drawn in a way to ensure the defendant gets unmitigated advantage over the plaintiff. When he so sells he gets a benefit and that must have been the propelling factor when the plaintiff pleads that after the letter before action was served, the defendant became evasive.

25. I however note that by its own nature the plaintiff also derived a benefit of using the motor vehicle for well over one year and is now being refunded all the sums she paid for the same motor vehicle.

26. In those circumstances the damages that recommend themselves to me to be just must be in the nature that reminds the defendant that the law regulates its trade but should not be to enrich the plaintiff beyond vindicating her from the pursuit of the observance of the law.

27. All considered and while balancing the interest of the parties, I do award to the plaintiff exemplary damages in the sum of Kshs.300,000/=.

28. In the end Judgment is entered for the plaintiff against the defendant as follows:-

i. Refund of Kshs. 2,200,000/= with interest thereon From 7.3.2018 till Payment in full.

ii. Exemplary damages in the sum of Kshs.300,000/= with interest at court rates from the date of this judgment till payment in full.

iii. Costs of the suit.

Dated and delivered at Mombasa this 30th day of May 2019.

P.J.O. OTIENO

JUDGE

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