

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 97 OF 2014

TUMAINI TRANSPORT SERVICES CO. LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

1. For determination in this ruling is the plaintiff's application by notice of motion dated the 5/8/2014 seeking an order of injunction against the sale of the suit motor vehicles pending the determination of the suit and for an order for release of the same motor vehicles on terms as may be ordered by the court pending the hearing and determination of the suit.

2. The grounds upon which the application was made, as apparent in the face of the Application and the Affidavit of Support filed in support thereof, was among others, the facts that there was between the parties hire purchase agreement concerning the suit motor vehicles which the defendant had gone against by actions which sought to deny to the plaintiff its rights under the same hire agreement.

3. The actions complained about and said to have the effect of a clog on the plaintiffs rights were decision to repossess the chattels and schedule the same for auction on the 8/8/2014 without any prior notice and pursuant to an agreement which had become unenforceable on account of the fact that it was never registered as mandated by the statute, Hire Purchase Act.

4. The application was opposed by the defendant by a Replying Affidavit sworn by one CYRUS B. OMWANSA filed on 9/10/2014 and a Notice of Preliminary Objection dated and filed in court on the 14/10/2019. The Notice of Preliminary Objection asserts that the claim as pleaded and revealed in the plaint does not lie for being offensive to Section 3 of the Hire Purchase Act. On the other side the Replying Affidavit on its part asserts that by virtue of the pleaded fact of hire purchase arrangement, the property in the chattels had not passed to the plaintiff who was yet to effect full payment and that the entire suit is premised on the misconceived grounds that the dealings between the parties was subject to and governed by the provisions of the Hire Purchase Act when it was not. It then went on to assert that after the loan was advance, motor vehicles brought and registered in the joint names of the parties, there was default by the plaintiff which entitled the defendant to repossess which it did by serving a proclamation on 16/4/2014 and then made actual seizure on diverse dates between 24/4/2014 and 03/06/2014.

5. After the repossession the chattels were sold by public auction on the 8/8/2014 at 10/45am before the handwritten proceedings of the court were served upon the auctioneer at 11.15am and the court orders was served some 5 days later. Later, on the 15/8/2014, another order was served restraining the registration of the motor vehicles in favour of the purchasers. It was then contended that the application and order sought have been overtaken by events and the same is no more than an abuse of the court process.

6. As framed, the Notice of Preliminary Objection, can only be seen to assert that the plaintiff suit being founded on alleged wrongs against it under the Hire Purchase Act, does not lie. The court thus ought to determine if the suit lies as framed.

7. To answer the question posed one has to look at the plaint as drafted and filed and establish on what basis the claim is founded. At paragraph 8 of the plaintiff, the plaintiffs claim is revealed to be that the plaintiff's rights to complete the higher purchase agreement secured under Section 13 of the Act have been clogged and therefore general damages are sought for conversion.

8. Clearly the basis of the claim is wholly and entirely the provisions granting rights to a hirer under the Hire Purchase Act hence the question is whether or not the dealings between the parties was governed by the said Act.

9. The extent of the application of the Act is enacted at Section 3(1) to concern with all hire purchase agreement except those in which the hirer is a body corporate. The words of the statute present no ambiguity and has been interpreted by the Court of Appeal in *TAAWAN SUPERMARKET VS FINA BANK LTD [2010] eKLR* to mean that corporates hirers are not subject to the statute. The court said:-

“.....we find in the circumstances that the intention of parliament was to exclude purchases by co-operatives and registered companies from operation of the Act and not merely to remove the monetary thresholds for corporations”.

10. If the statute does not apply to regulate contracts in which a corporate is the hirer and the plaintiff here being a corporate then the suit as presented would be seeking protection from the provision of the Act that is clearly not available or intended for it.

11. For that reason, it is not difficult to see that as framed and filed, the plaintiff suit does not lie. If it does not lie then there is no basis to keep it in court and expect the defendant to continue defending a claim that does not lie and ought not to have been brought against it. I do struck out the suit and award the costs thereto to the defendant.

Dated and delivered at **Mombasa** this **25th** day of **October 2019**.

P.J.O. OTIENO

JUDGE