



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 588 OF 2000

MWALUKO MWANGILI.....PLAINTIFF

VERSUS

UNIVERSAL BANK LIMITED..... DEFENDANT

JUDGMENT

1. This is a Customer-Bank dispute pitting Mwaluko Mwangili (Mwaluko) and Universal Bank Limited (The Bank).
2. Mwaluko's case is that in 1997, being a customer of the Bank, he entered into an agreement in which the Bank financed purchase of motor vehicle KAJ 389K at a cost of Kshs.4,218,000.00. He avers that it was a term of the contract that the income generated from the vehicle would be applied to repay the facility in monthly instalments of Kshs.210,000.00
3. That having promptly paid the monthly instalments, his vehicle was involved in a traffic accident sometime in August 1998. Unable to generate income, he communicated this to the Bank. A similar fate befell him again in August 1999. The month of August!
4. He states that, notwithstanding the misfortunes, he strove to service the loan and with express permission of the Bank made irregular payments as he struggled to repair the vehicle. That ultimately he completed payment of the facility but that on 1st February 2000 the Bank repossessed the vehicle. On this count Mwaluko claims loss of income at the rate of Kshs.300,000.00 per month.
5. He has a further grievance. That in the month of February 2000, the Bank repossessed two other vehicles being motor vehicles KAB 384F and KXU 344 valued at Kshs.500,000.00 and Kshs.1,500,000.00 respectively.
6. In the Complaint amended on 13th March 2012, Mwaluko prays for judgment against the Bank for the following:-
 - a) A declaration that the possession of motor vehicle KAJ 389K was illegal and the Plaintiff is entitled to continue servicing the loan at the agreed terms.
 - b) A declaration that the possession of motor vehicle KAJ 389K by the Defendant was illegal.
 - c) An order for the return of the motor vehicle KAJ 389K to the Plaintiff's possession and/or its value of Kshs.7,030,000.00.
 - d) Damages for lost earnings at the rate of Kshs.300,000.00 per month with effect from 1st February 2000 upto the date of delivery of judgment.
 - e) An order that the Defendant are stopped from repossessing the truck having previously accepted irregular payment.
7. On its part the Bank denies the claim vide a Statement of Defence dated 14th November 2016 and filed on the same day. The Bank admits having entered into a Hire Purchase Agreement (HPA) with Mwaluko on 12th August 1997 in respect to motor vehicle KAJ 389K. It avers that the agreement was for the sum of Kshs.6,327,000.00 payable by monthly rentals of Kshs.210,920.00.
8. It is the defence of the Bank that the Mwaluko breached the terms of the agreement by failing to make regular instalments. That in the face of the default, the Bank terminated the agreement and repossessed the motor vehicle.
9. At the hearing, two witnesses testified. Mwaluko on his behalf and Timothy Kimani on behalf of the Bank.

10. While it is proposed to discuss the evidence as is relevant to assisting the Court determine the dispute herein, i feel it necessary to highlight some aspects of the evidence of Mwaluko.

11. Mwaluko rehashed what he pleaded. He however added that the payments he made to the Bank were in cash and he did not seek receipts. In addition that, the Bank never sent him statements or advice at all. Yet that the Bank discharged motor vehicle KAJ 389K and released the log Book to him. The original log Book was produced in Court as an exhibit.

12. That after the vehicle was repossessed, the Bank sold it to one Peter Mburu and a search from the Registrar of Motor Vehicles showed that the vehicle was registered in the joint names of Peter Mburu and Equity Bank Limited.

13. With that brief background the Court now turns to determine the dispute. The parties propose different set of issues for resolution. Mwaluko sees the following to be the issues:

a) Whether the Agreement between the Plaintiff and the Defendant dated 12th August 1997 was a Hire Purchase agreement and whether it could beget to the Defendant the privileges under the Hire Purchase Act.

b) Whether the Defendant was legally justified in repossessing and selling motor vehicles Registration Nos. KXU 344 and KAB 384F

c) Whether the Plaintiff is entitled to compensation and damages.

14. On the other hand the Bank proposed the following two issues;

a) Whether the Defendant is liable to the Plaintiff as per the claim.

b) Whether the repossession of motor vehicle KAJ 389K by the Defendant was illegal.

15. Issues to be determined by Court flow from the pleadings filed by parties or even if not pleaded it appears from the course followed at trial that the issue has been left to the Court for decision (Odd Jobs –vs- Mubia [1970] EA 476).

16. In the submissions filed at end of the Trial, there is an attempt by counsel for the Plaintiff to question the power of the Bank to repossess the vehicles without restore to the intervention of Court by way of Civil Suit. It is argued, for instance, that the Hire Purchase Agreement entered between the parties did not empower the Bank to repossess the vehicle. A not dissimilar argument is made in respect to the other two vehicles. It is contended that in the absence of a Hire Purchase Agreement or a chattels mortgage under the Chattels Mortgage Act, the Bank could only repossess and sale the vehicle on the strength a Court order.

17. This, however, is a departure from the thesis in the Amended Plaint in which the case by Mwaluko is that the repossession was unlawful not because of want of legal authority by the Bank to repossess but because there was no default. Even the following averment in paragraph 6 of the pleading does not challenge the power of the Bank generally to repossess and/or sale on default;

6. The Plaintiff avers that he completed paying the sum due and owing to the Defendant but nevertheless the Defendant unlawfully confiscated the Motor Vehicle on 1st February 2000 full particulars of which are well within the Defendant's knowledge.

18. Again, in testimony, both written and oral, Mwaluko does not raise a contention in respect to the general power of the Bank to repossess and/or sale.

19. To raise these issues now is to mutate the case presented and to traverse beyond the pleadings and scope of trial. To permit such an expansion is to prejudice the Defence which prepares its case on the basis of a case that is pleaded and not on a moving target or fluid claim. Parties must make out their cases within the pleadings that they drew for themselves.

20. Having made those observations, the matter is stripped to the following issues;

i. Did the Plaintiff default in making the monthly instalments?

ii. If the answer to the (i) above is in the affirmative, did the Bank grant the Plaintiff indulgence on default.

iii. Depending on the answer to (i) & (ii) above was the Bank entitled to repossess and sell the three vehicles.

iv. Is the Plaintiff entitled to the claim before Court?

21. It is common ground that Mwaluko applied for a hire purchase facility of Kshs.4,218,000.00 from the Bank through an application of 27th June 1997 (D. Exhibit P. 1). A letter of offer followed (D. Exhibit Pages 2-3). A highlight of the offer was that the hire purchase loan would be repaid in 30 monthly instalments of Kshs.210,900.00. In respect to security the following was to be taken:

i. Log book of the vehicle in joint names.

ii. Transfer forms signed in blank.

iii. Personal Guarantee of Mwaluko Mwangili.

iv. Guarantors – Mr Francis Paul Mutuno and 1 other Guarantor.

v. Additional Log Books to Motor Vehicles Reg. Nos KAB 384F and KXU 344 to be registered in the joint names of the Bank and Mwaluko.

vi. Comprehensive Insurance cover note duly endorsed in favour of the Bank.

22. Following the execution of that offer, a hire purchase agreement dated 12th August 1997 was entered between the parties. It is of course true as pointed out earlier that this agreement being for a hire purchase price of Kshs.6,327,000.00 (Kshs.4,218,000.00 plus Hire charges of Kshs.2,109,000.00) fell outside the provisions of the Hire Purchase Act as was then existing in 1997 and even now. Just a quick note is that the object of the statute is to regulate hire purchase relations with certain monetary limits (now standing at Kshs.4,000,000.00).The agreement that is the subject of this dispute falls outside the control of that statute and has to be construed on its own terms and conditions.

23. It is conceded by Mwaluko that he fell into difficulty in payment of the monthly rentals because his vehicle was involved in two accidents both in the month of August in 1998 and 1999. The following was his evidence in this regard;

“7. Despite the two accidents and ensuing difficulty, I strived(sic) to service the loan and within the express permission of the Defendant, I made irregular payments as I struggled to repair the truck and keep it on the road”.

24. On the part of the Bank, it produced Bank statements showing that as at 12th January 2000, Mwaluko was in arrears of Kshs.4,964,117.00. See Bank statements (D. Exhibit Page 22-26). The veracity of the contents of the Bank statements was not debunked in cross-examination. The Court has to find that there was indeed default on the part of Mwaluko.

25. As to whether the Bank granted indulgence to Mwaluko notwithstanding breach, the Bank in paragraph 6 of its defence denied this. The onus was therefore on Mwaluko to prove that the Bank had granted such forbearance. On this, I am afraid, no evidence was forthcoming. Instead he testified;

“We did not agree with the Bank to make less payment. The Bank never complained of underpayment of instalments”.

This Court does not think that this is sufficient proof that the Bank accommodated the irregular payments or waived its rights to insist on the terms of the hire purchase agreement.

26. There is additional evidence that supports the Bank’s contention that there was default by Mwaluko. The Bank produced a letter of 27th September 2001 (D. Exhibit Page 41) said to be authored by the Mwaluko in which he states;

27th September 2001

The Manager

Paramount Universal Bank Limited

Nairobi.

Dear Sir,

Re: Mwaluko Mwangili – HP 157

I wish to confirm that Mr. Danson Nzivo Kavivya (ID No. 2901465) and Mr. Haron Muthama Kavivya (ID No. 1698939) have agreed to pay the agreed settlement figure of Kshs.660,000.00 towards redemption of my liabilities in the above account and as such I hereby consent to and authorize you to transfer my securities to their names as follows:-

1. M/V Reg. KXU 344 (Isuzu Lorry) to Mr. Danson Nzivo Kavivya and

2. M/V Reg. KAB 384F (Isuzu Pick-up) to Mr. Haron Muthama Kavivya.

As agreed, you will, upon receipt of the sum of Kshs.660,000.00 fully discharge my liabilities towards you and release my above stated securities as directed above.

Yours faithfully

27. Counsel for Mwaluko makes heavy weather of the letter. It is true that at hearing Mwaluko denied writing the letter. Counsel states that Mwaluko is an illiterate old man who could not write in English less still use vocabulary such as “settlement figure”, “redemption”, “liabilities”, “authorize”, “consent”, “transfer”, “securities”, “discharge” found in that letter.

28. Yet this Court is unable to hold this as a serious argument. If the argument is that Mwaluko is not the author of the letter then it is an assertion that the letter is a forgery. That letter has been on the Court record since 30th July 2018 when the Bank filed its list and bundle of documents. When the hearing commenced, on 2nd October 2018, there was no complaint by the Plaintiff that the Bank's documents had not been served upon his advocates. As will become apparent shortly, the contents of the letter incriminate Mwaluko on important aspects of this case and I would be surprised that, if indeed it was a forgery, the Plaintiff would not take it up in the manner required in civil matters. Plead it and then prove it to the standard required (higher than on a balance of probability but not as high as beyond reasonable doubt).

29. In addition, when Counsel argues that the Mwaluko is illiterate and could not author such a letter, he does question the signature that signed off the letter. Mwaluko's signature appears in the application for the facility, the letter of offer, the hire purchase agreement and numerous affidavits filed in his name in these proceedings. Even if it is assumed that the letter was written by someone else on his behalf, his signature signifies that he accepts the contents.

30. I find the letter to be that of Mwaluko. What the letter does is to demonstrate that as at 27th September 2001 he was still indebted to the Bank. This date is important because motor vehicle KAJ 389K had been repossessed and sold some time in the year 2000, a date before the admission of 27th September 2001. This is inconsistent with Mwaluko's position that the log Book to the vehicle was released to him because he no longer owed money to the Bank. I have to find that the Plaintiff took possession of the log Book in circumstances other than that the debt to Bank had been paid in full.

31. As Mwaluko's entire theory in challenging the repossession and sale of motor vehicle KAJ 389K was that he was **not** in default, the overwhelming evidence that he was indeed in default defeats that argument.

32. The outcome would not change even if I was to consider the unpleaded argument that the Bank would not have power under the hire purchase agreement to repossess upon default without intervention of Court. Let me make some brief observations in this regard. It bears repeating that the Hire Purchase Act only regulates hire purchase agreements falling within the application of the statute (See Section 3). Many others do not and there are no doubt that the agreement between the parties in this matter is not regulated by the Act because the purchase price exceeds the monetary cap. Contracts nevertheless would be valid hire purchase agreements as long as they bear the hallmarks of such agreements. In this regard the Court of Appeal in Taawawa Supermarket Limited v Fina Bank Ltd [2010] eKLR stated:-

We have anxiously considered that issue of law and we think it would stand or fall on the determination of the related issues as to whether the agreement executed by the parties was a “Hire Purchase Agreement”; if so, whether **section 3(1)** of the Act applies to it; and in any case whether it was registrable under **section 5(1)** of the Act.

The Act came into operation on 2nd November, 1970 and its preamble, as relevant states:

“An Act of Parliament to make provision for the regulation of certain hire purchase agreements.....”

The logic in that preamble is that the Act does not cover all hire purchase agreements or put another way, some hire purchase agreements are outside the Act even when the definition of “hire purchase agreement” in the Act is the same. As defined in the Act, hire-purchase agreement means:

“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.....”

That is also the definition in common law and the general characteristics are therefore that:

- 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 instalments, and the owner agrees to transfer the property in the goods to the hirer on completion of the payment.

(See “**The Law relating to Hire Purchase**” by Robert Dustan, 4th Edn.)

“... 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 – see Walsh v Lonsdale [1982] 21 Ch. C.9, Clarke v Sondhi [1963] EA 107 and Meralli v Parker [1956] 29 KLR 26”.

33. The agreement between the parties here bears the three core characteristics of a hire purchase agreement and is indeed a valid one. Being unregulated by the Act, the rights and obligations of the parties are governed by the contractual rights and obligations set out in the agreement.

34. In that contract the parties agreed that the Bank would be the owner of motor vehicle KAJ 389K and Mwaluko the hirer. In that arrangement, ownership would only pass to the Hirer upon him paying the hire instalments and all sums due to the owner and on payment of the sum of Ksh 20.00 (See clause 6(b)). Indeed, clause 8 is unequivocal that prior to this happening the vehicle remains the absolute property of the Bank. Clause 8 reads;

8. Unless and until all sums due by the Hirer to the owner hereunder shall have been duly paid to the owner and the option contained in Clause 6(b) hereof shall have been exercised the vehicle/goods shall remain the absolute property of the owner and the Hirer shall have no right or interest to or in the same other than as a mere Bailee thereof.

35. It may well be that the Mwaluko was registered as owner of the property yet that would not defeat the provisions of Clause 8. Mwaluko would not be shielded by the provisions of Section 8 of the Traffic Act which reads;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”.

The hire purchase agreement and in particular clause 8 (coupled with default of the rentals) prove that, contrary to the registration of Mwaluko as the owner of the vehicle, the true owner was the Bank. And as the owner of the vehicle, the Bank was entitled to retake possess the vehicle and to sell it upon default of payment of the monthly hire rentals (Clause 4 of the Agreement) without the aid of a court order.

36. The controversy around the repossession and sale of the other two vehicles is even easier to resolve. Mwaluko admits that as part of security for the facility he pledged motor vehicle registration KAB 384F and KXU 344 to Bank. That would be in consonance with the terms of the letter of offer. So as to effect that security, the two vehicles were jointly registered in the names of Mwaluko and the Bank.

37. These two vehicles were sold and transferred with the express consent and authority of Mwaluko given in his letter of 27th September 2001. The letter is reproduced in paragraph [26] of this decision. His claim of wrongful repossession and sale is clearly without merit.

38. The Court turns to another limb of the suit. Does Mwaluko deserve an order for an account of the money received by the Bank? A simple answer is that the Bank statements of Mwaluko's account has been produced by the Bank. The statement found on D Exhibit Page 38 shows that the sale proceeds for KAJ 389K were credited to his account. This has not been disproved. As to the proceeds of the sale of the other two vehicles, it was requested by Mwaluko(see letter of 27th September 2001) that upon receipt thereof the same be applied towards full discharge of his liabilities. This was confirmed as done by the Bank in its letter of 27th September 2001 (D exhibit page 43). An account is needless as both parties are fully aware of the arrangement.

39. In the end the claim is without merit. If however I had found the Bank liable, I would have made an award of Ksh 3,300,000.00 for m.v KAJ 389k being the price for which Mburu purchased it as the was no professional opinion of value led by the Plaintiff. This is also true for the other 2 vehicles and I would have awarded the sum of Ksh. 660,000.00 expressly agreed to by the Plaintiff in his letter of 27th September 2001. As to damages for lost earnings, the Plaintiff should have done more to prove his claim. Producing what he called a schedule of earnings was not enough. He should have complimented this evidence with such other proof like bankings, income tax returns or evidence from the driver to the vehicle. This could defeat an argument that the figures were simply a desktop exercise tailored for these proceedings.

40. In the end, I dismiss the Suit with costs.

Dated, Signed and Delivered in Court at Nairobi this 29th Day of November 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mugi holding brief Mumia for Defendant

Mukuha holding brief Bwire for Plaintiff

Court Assistant: Nixon