



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 50 OF 2017

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

VERSUS

AMUDEDE COMPANY LIMITED.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. SM Wahome,

Chief Magistrate, in Kakamega CMCCC No. 237 of 2015 of 22nd February 2017)

JUDGMENT

1. The appellant lodged herein a memorandum of appeal dated 25th April 2017, in which it is averred that the trial court erred in holding that the provisions of the Hire Purchase Act Cap 507 Laws of Kenya are applicable to hire purchase agreements entered into by body corporates, erred in holding that the hire purchase agreement the subject of the suit had to be registered under the Hire Purchase Act, erred in finding that the said hire purchase agreement was illegal null, void and unenforceable, erred in not finding that the appellant was a registered co-owner of the vehicle the subject of the hire purchase agreement, erred in not finding that the respondent was a mere bailee of the hire purchase vehicle, erred in not finding that the appellant was entitled to repossess the subject vehicle without notice, erred in not considering the appellants submissions and in failing to uphold the doctrine of precedent. It is prayed that the judgment and decree of 22nd February 2017 be set aside and substituted with an order dismissing the respondent's suit with costs.

2. I am alive to the fact that this is a first appeal, and that in determining the same I shall be guided by the principles stated in *Ephantus Mwangi and another vs. Duncan Mwangi* (1982-1988) 1 KAR 278, *Williamsons Diamonds Ltd vs. Brown* (1970) EA 1 and *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that fact.

3. The factual background to the matter is that the appellant and the respondent entered into an arrangement, by way of an agreement designed as a hire purchase, where the appellant advanced a sum of Kshs. 1, 600, 000.00 for hire of motor lorry KBH 426C. The terms of the arrangement were comprised in a letter of offer dated 18th April 2013 and a hire purchase agreement number 027HPLC13178001 dated 26th April 2013. In addition, the directors of the respondent executed a guarantee and an indemnity agreement undertaking to pay the sum of money due and owing from the respondent to the appellant. The hire purchase loan was to be repaid for thirty-six (36) at equal monthly instalments. The default clause allowed the appellant to terminate the agreement and immediately repossess and dispose of the lorry, without prejudice to its right to pursue the respondent for the balance due thereafter. In April 2015 the appellant instructed an auctioneer to repossess and dispose of the subject lorry by sale to recover loan arrears allegedly owed by the respondent. The suit at the lower court was intended to stop the intended sale.

4. The trial court heard two witnesses, one from the appellant and the other from the respondent. In the end it found that the hire purchase agreement between the parties had not been registered as required by the Hire Purchase Act and therefore the same was invalid, null and void. The court also held that the appellant was not qualified as a hiree as it was never the sole owner of the lorry the same having been bought from a third party. It was also held that the repossession of the lorry was irregular and illegal as it was founded on a null and void hire purchase agreement. The trial court granted the prayers sought and award of special damages.

5. Directions were given on 15th November 2017 for disposal of the appeal by way of written submissions. The parties have complied, and have each filed their respective written submissions. I have perused through them and noted the arguments advanced.

6. The appellant raises issue with several matters in the judgment. Firstly, it is argued that the hire purchase agreement was not subject to the Hire Purchase Act as the said legislation does not apply to body corporates, by dint of section 3(1) of the said Act. To support the submission the appellant cites the decisions in *Diamond Trust Kenya Limited (Formerly Diamond Trust of Kenya Limited) vs. Jaswinder Singh Enterprises* (1999) eKLR, *Taawawa Supermarket Limited vs. Fina Bank Ltd* (2010) eKLR and *Imperial Bank of Kenya vs. Kariuki*

Construction Company Limited & 2 others (2015) eKLR. Secondly, it is averred that the parties to the hire purchase agreement had a valid contract as between themselves, which was effective and enforceable. The appellant cited the decisions in *National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd and another* (2002) EA 503 and *Gatobu M'Ibuutu Karatho vs. Christopher Muriithi Kubai* (2014) eKLR. Thirdly, it is submitted that as the respondent was in default the appellant was entitled to repossess the vehicle without notice. The decision in *Makave Investment Company Limited vs. Diamond Trust Bank Kenya Limited* (2017) eKLR is cited to support that contention.

7. The respondent has urged me to uphold the judgment of the lower court, on the basis that the appellant had failed to register the hire purchase agreement as required by section 5 of the Hire Purchase Act. It is also argued that the payable stamp duty was paid way out of the time allowed by the relevant law, and without the benefit of extension by the registrar. It is further submitted that the respondent was a co-owner of the subject vehicle with the appellant, indeed the two were in partnership over the vehicle and therefore none had superior rights relating thereto over the other. It is argued that the appellant ought to have given notice of intention to dissolve the partnership before moving to repossess the vehicle. It is submitted that the transaction between the parties was more of a sale than a hire purchase arrangement. It is also argued that repossession was not available without a court order.

8. On whether the hire purchase agreement the subject of the proceedings was subject to the Hire Purchase Act, I believe the decision by the Court of Appeal in *Taawawa Supermarket Limited vs. Fina Bank Ltd* (supra) settled the matter, where the court interpreted section 3(1) of the Hire Purchase Act as not being applicable to transactions where the hirers were cooperative societies and registered companies. In that case, the court found that the High Court had fallen into error when it held that a hire purchase agreement between a body corporate and a hiree was registrable under the Hire Purchase Act. A similar point was made in *Diamond Trust Kenya Limited (Formerly Diamond Trust of Kenya Limited) vs. Jaswinder Singh Enterprises* (supra) and *Imperial Bank of Kenya vs. Kariuki Construction Company Limited & 2 others* (supra). Quite clearly, therefore, the hire purchase agreement between the parties hereto was not subject to the Hire Purchase Act, as the hirer, the respondent herein, was a registered company, and the requirement as to registration under the Hire Purchase Act did not apply to it.

9. The position stated in paragraph 8 hereabove should not be understood to mean that cooperative societies and body corporates cannot enter into valid hire purchase agreements. Such entities can enter into such arrangements, however, hire purchase arrangements where such entities are parties are not governed by the Hire Purchase Act. Such agreements would not be registrable under the Hire Purchase Act, and therefore they would not be enforceable under the terms of the Hire Purchase Act. It was said in *Taawawa Supermarket Limited vs. Fina Bank Ltd* (supra) that such hire purchase agreements would be valid and enforceable as contracts *inter se* as between the parties, in terms of the principles stated in *Walsh vs. Lonsdale* (1882) 21 Ch D 9, *Clarke vs. Sondhi* (1963) EA 107 and *Merali vs. Parker* (1956) 29 KLR 26. See also *Diamond Trust Kenya Limited (Formerly Diamond Trust of Kenya Limited) vs. Jaswinder Singh Enterprises* (supra), *National Industrial Credit Bank Limited vs. Joan Njeri Kivuva and another* Milimani Commercial High Court civil case number 1544 of 1999 and *David Mburu Kamau vs. National Industrial Credit Bank Ltd* Nakuru High Court civil suit number 253 of 2007. That would mean that there was a valid contract enforceable as between the appellant herein and the respondent. Arguments were raised as to the agreement documents not being dated. I have perused through the said documents, and there is no doubt at all that they bear the dates when they were executed. In any event both parties acted on the terms of the agreement, with the appellant advancing to the respondent the money for acquisition of the subject vehicle.

10. On the question of the appellant being registered as owner of the vehicle, I have seen a copy of the registration certificate in respect of the subject vehicle. As at June 2013 it was registered in the joint names of the appellant and the respondent. The respondent submits that that meant that the two were in a partnership over the same. That cannot possibly be correct given that there cannot exist a partnership of body corporates, for such an arrangement can only be of natural persons. Secondly, the interest of the hiree in the subject property cannot be gainsaid. In *National Industrial Credit Bank Limited vs. Equator Bottlers Limited* civil appeal number 173 of 1992 it was held that during the pendency of a hire purchase agreement the absolute property in the goods let on hire remains with the owner of the goods and as between the hirer and the owner the state of affairs continues until the hirer exercises the option to purchase. The fact that all the instalments are paid by the hirer does not mean that the vehicle became his, until the property passed by reason of exercise of the option, the vehicle would remain the property of the owner who can deal with the property as he pleases upon repossessing it in accordance with the law.

11. Was the appellant the owner of the vehicle while the respondent was the hirer? The respondent has argued that the appellant was not owner of the subject vehicle to the extent that it did not have a vehicle to sell, instead, it is argued, the vehicle belonged to a third party and appellant merely financed the sale. Secondly, it is argued the appellant was only funding a portion of the sale the rest having been paid by the respondent. Whatever the case, the money paid by the respondent to the third party was not sufficient to secure transfer of property to itself, hence the need to enter into the arrangement with appellant, which included transfer of the vehicle into their joint names. As this was a hire purchase arrangement, the property in the subject vehicle vested in the appellant as owner, with the respondent being a hirer or bailee. The respondent was alive to this hence the documents that its directors signed and the monthly installments it made. The argument that the appellant could not possibly be an owner of the subject vehicle does not therefore hold.

12. Was the appellant entitled to repossess the subject motor vehicle? I have stated above that there was a valid hire purchase agreement between the appellant and the respondent. I have also found that the same was not subject to the Hire Purchase Act, but was enforceable as a contract *inter se* as between the two parties. It bound both of them. I have read through the documents that comprise the contract. There is provision for repossession of the subject vehicle upon default of any one instalment by the respondent. It was conceded at the trial, by the officer of the respondent who testified, that there had been default. Clearly, the repossession clause had kicked in and the appellant was entitled to exercise the option to repossess. For avoidance of doubt, repossession is provided for in Clause 4 of the document titled 'Hire Purchase Agreement,' signed on 26th April 2013. There is nothing in that stipulation requiring the appellant to notify the respondent of intent to repossess. See *Taawawa Supermarket Limited vs. Fina Bank Ltd* (supra).

13. I have closely perused through the record of the lower court, especially the written submissions of the appellant, and noted that these arguments, and the relevant authorities to support them, had been placed before the trial court. It would appear that they were not sufficiently considered or taken into account. I have no doubt that if the trial court had weighed these matters in its mind it would have come to a different conclusion.

14. In view of what I have stated so far, there can be no doubt that I am of the persuasion that the trial court fell into error and came to the wrong conclusions. I shall therefore allow the appeal, set aside the decision of the trial court in the judgment delivered on 22nd February

2017, and substitute the same with a holding that the respondent's suit in Kakamega CMCCC No. 237 of 2015 is hereby dismissed with costs. The appellant shall have the costs of this appeal. Should any party be dissatisfied with the outcome of these proceedings, there is a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 27th DAY OF September, 2018

W. MUSYOKA

JUDGE