



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 626 OF 2013

KENYA CREDIT TRADERS LTD.....APPELLANT

VERSUS

S.P.K. WASILWA.....RESPONDENT

(Being an Appeal from the Judgment of the Ag. Chief Magistrate at Milimani Hon. C. Obulutsa dated 3rd December 2013 in CMCC No. 2559 of 2007)

JUDGMENT

The Respondent in this case was the Plaintiff in the lower court while the Appellant was the Defendant. The facts of the case at the lower court are that the Respondent on or about 16th September 2004 guaranteed a hire purchase agreements No. 238841 and No. 238840 between the Appellant and one James Gitau Mukuria (the Hirer). These agreements according to the P-Exh 1A and P-Exh 4A were in respect to a Sony 21” Flat screen television valued at Kshs. 47,850/- and a Sony Hifi VCD valued at Kshs. 82,050/- with the balance of the Hire Purchase price at Kshs. 48,200/- and Kshs. 82,400/- respectively inclusive of hire purchase charges.

The Respondent further signed guarantee of payment (through check off system) by his employer from his salary should the hirer fail to make the necessary payments in respect of both agreements.

The said Hirer defaulted on the terms of the agreement (servicing the instalments) and sometime in 2005, the appellant decided to exercise its right of check-off and promptly notified the guarantor’s employer to deduct amounts from the Respondent’s salary. The respondent sought to stop the deductions by a letter P Exh. 2 claiming that he had only guaranteed payment of the Sony VCD in agreement No. 238841 and thus the appellant had deducted amounts over and above what he had guaranteed. He thus filed suit seeking Kshs. 117,540/- being the amounts wrongfully deducted from his salary and general damages plus costs and interest.

The lower court in a Judgment delivered on 3rd December 2013 found that the Plaintiff had proved his case on a balance of probabilities, that he did not guarantee the purchase of the Sony VCD and ordered the appellant to pay Kshs. 74,860/-.

The Appellant being dissatisfied with the lower court’s decision, preferred this appeal set out in the memorandum of appeal filed on 6th December 2013. The following grounds have been set out –

- i. THAT the Learned Magistrate erred in law and in fact in finding that the Respondent did not

guarantee the purchase price from the Appellant of SONY HIFI VCD;

ii. THAT the Learned Magistrate erred in law and in fact in finding that the Appellant was not entitled to recover the hire purchase price of the SONY HIFI VDC from the Respondent upon default by the principal debtor

iii. THAT the Learned Magistrate erred in Law and in fact in awarding the Respondent.

iv. THAT the Learned Magistrate erred in proceeding on the wrong principles and erroneous consideration thereby arriving at a wrong judgment.

The appeal was argued by way of written submissions. Those on behalf of the Appellant were filed on 15th March 2016 while those on behalf of the Respondent were filed on 15th April 2016.

Upon perusal of the record of appeal, it is evident that the Hire Purchase agreements were guaranteed by the Respondent and the fact that some payment amounting to Kshs. 117,540/- was made from his salary for a period of fourteen months before he filed the suit, only goes to show that he had resigned to pay for what he had guaranteed.

As correctly pointed out by the Appellant, when the Respondent realized that his signature had been forged in agreement No. 238840 he ought to have reported the same to the authorities as forgery is a criminal offence. It would also have been expected that a document examiner would lead evidence in the lower court as to the nature of the forgery. He who alleges must prove.

The reasoning adopted by the lower court as to why the agreement No. 238840 is unsound cannot stand. However unfortunate the events leading to the suit and ultimately this appeal are, this court cannot allow a guarantor to run away from a contract he entered into willingly on behalf of the hirer whom he trusted to carry out his part of the bargain.

Parties are bound by their commercial agreements to which they have freely entered. They must be held up to their bargain. It is not in the realm of courts to rewrite contracts for parties. See **Habib Bank A.G. Zurich Vs Pop in Kenya Ltd and others Civil Appeal No 147 of 1989, Court of Appeal (unreported).**

I will in the circumstances allow the appeal in its entirety. The whole of the judgment of the lower court is set aside. The appellant is entitled to costs of this appeal and the lower court. It is so ordered.

Dated and delivered at Nairobi this 27^h day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE