



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 639 OF 2003**

**FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF**

**VERSUS**

**PARSEEN OLE SHUNET.....DEFENDANT**

**JUDGMENT**

**Background information**

[1] The Plaintiff and the Defendant entered into a Hire Purchase agreement on 14<sup>th</sup> July 1997. The Defendant was to purchase a motor vehicle from a third party, Twiga Motors Ltd, for Kshs 1,100,000/-. The Defendant was to pay an initial deposit of Kshs 500,000/- to the dealer, after which the Plaintiff was to facilitate the balance of Kshs 600,000/-. The facility was to be repaid in eleven (11) monthly installments of Kshs 59,500/- with effect from 14<sup>th</sup> August, 1997 and one (1) instalment of Kshs 61,500/- including Kshs 2,000/- as an option to purchase. It has been alleged that the Defendant failed to make the repayments as agreed, necessitating the repossession and sale of the motor vehicle by the Plaintiff.

[2] After the disposal and selling of the motor vehicle for Kshs 500,000/- to offset the claimed balance of the hire purchase price, there was still an outstanding balance of Kshs 534,093.75 owed to the Plaintiff as at 30<sup>th</sup> December 1999, at an interest rate of 48% per annum from 31<sup>st</sup> December 1999. Now the Plaintiff seeks judgment to be entered in its favour for Kshs 534,093.75 with interest at 48% per annum from 3<sup>rd</sup> November 1999 until payment in full and any other further reliefs.

**The Plaintiff's Case**

[3] The Plaintiff filed Amended Plaint dated 21<sup>st</sup> May 2003 on 28<sup>th</sup> May 2003. The Plaintiff averred that the Defendant failed to meet his obligations under the hire purchase agreement, and as a consequence thereof, the Plaintiff terminated the agreement on or about 24<sup>th</sup> July 1998 and repossessed the motor vehicle. At the time of the termination the outstanding balance was Kshs 356,500/- after the Defendant paid Kshs 359,500/-.

[4] In support of its claim, the Plaintiff called two (2) witnesses; PW1 Carolynne Wambui Nganga, and PW2Juda Rapheal Deli, the Legal Officer and Credit Manager of the Plaintiff, respectively. PW1 testified before Ibrahim, J (as he then was) on 6<sup>th</sup> May 2004. She testified that

the Defendant had agreed to enter into a hire purchase agreement on 14<sup>th</sup> July 1997 with the Plaintiff for the purchase of a motor vehicle registration number KAC 535E. The motor vehicle was being sold by Twiga Motors Ltd for Kshs 1,100,000/- as per the invoice dated 14<sup>th</sup> July 1997. According to the agreement, the Plaintiff was to facilitate the balance of Kshs 600,000/- together with hire charges of Kshs 114,000/- making a total sum of Kshs 714,000/-. She testified further, that, under Clause 2 of the agreement the Plaintiff had sole discretion to vary the rate of interest. And, under Clauses 4 and 6 the Plaintiff had the right to terminate the agreement and repossess the motor vehicle if the hirer defaulted. She said that the sale of the motor vehicle did not take place until November 1999 although it had been surrendered to Yusuf Enterprises Ltd on 24<sup>th</sup> June 1998.

[5] PW1 stated that the Defendant had been duly notified of the sale of the motor vehicle to a Mr David Murage for Kshs 500,000/-. A deposit slip of Kshs 500,000/- credited against the Defendant's account on 2<sup>nd</sup> November 1999 was tendered in evidence. PW1 further testified that the Defendant had issued various cheques to offset the claimed amount but the cheques bounced on presentation for payment. The Plaintiff then issued to the Defendant demand letter dated 28<sup>th</sup> September 1999.

[6] During cross examination PW1 stated that the rate of interest as provided under Clause 2(c) had not been filled in at the time the Defendant signed the hire purchase agreement, and that further she could not produce any of the other advertisements that had been issued for the sale of the motor vehicle. She insisted, however, that there were payment vouchers on the advertisement. She further testified that the Plaintiff was the co-owner of the motor vehicle for the purpose of the hire purchase agreement and had the capacity to enter into the agreement with the Defendant.

[7] PW2 stated that the Defendant had approached the Plaintiff to be assisted in the purchase of a motor vehicle. The Plaintiff was to facilitate the payment of Kshs 600,000/- by a hire purchase agreement. He stated that the Defendant defaulted in making the repayments and subsequently the vehicle was repossessed. He further testified that the rate of interest of 40% and 48% was never in dispute, and that they had advised the Defendant on the same, to which he was agreeable. PW2 stated that the motor vehicle had not been sold at an under value price as claimed, and that after two attempts to dispose of the motor vehicle, the highest bidder was able to purchase the said motor vehicle at Kshs 500,000/-.

### **Defendant's Case.**

[8] The Defendant filed its Amended Defence dated 26<sup>th</sup> May 2003. The Defendant averred that the Plaintiff acted fraudulently and dishonestly in dealings with him under the hire purchase agreement. The Defendant reiterated that there was no provision in the agreement that provided for an interest rate of 48% per annum and that the Plaintiff had no discretion to unilaterally determine the rate of interest. Further, it was contended that the Plaintiff had demanded the sum of Kshs 534,093.75 which comprised of unauthorized charges and expenses at unlawful and un-agreed interest rates. The Defendant made further averments; that the agreement between the Plaintiff and the Defendant was a simple hire agreement, to which the Defendant had not exercised his option to purchase the said motor vehicle, and that subsequently the Plaintiff could not claim the entire purchase price or any amount therefore, after the repossession of the motor vehicle.

[9] The Defendant did not call any witnesses to testify on his behalf. From the evidence presented before the court, there were several attempts that were made to serve the Defendant with hearing notices for various dates taken for hearing of the case. The Plaintiff was forced to and applied for substituted service by advertisement which was granted by Ogola, J on 4<sup>th</sup> November 2014. At the conclusion of the trial, the Plaintiff filed its submissions dated 10<sup>th</sup> December 2011 on 11<sup>th</sup> December 2011.

## THE DETERMINATION

### Issues

[10] The Defendant filed a List of Issues dated 23<sup>rd</sup> July 2003 on 24<sup>th</sup> July 2003. The following are issues for determination by the Court:-

- a. *Whether the agreement dated 14<sup>th</sup> July 1997 was hire purchase or for the purchase of the motor vehicle;*
- b. *Was the Plaintiff entitled to the entire purchase price of Kshs 714,000/-;*
- c. *Did the Plaintiff act fraudulently in charging the interest rate of 48%?*
- d. *Was the Defendant liable for charges, costs and expenses incurred in the repossession, advertisement and disposal of the motor vehicle?*

[11] The totality of the evidence on record is that the Plaintiff and the Defendant entered into a hire-purchase agreement on 14<sup>th</sup> July 1997 (P Ex. 1) for the purchase of motor vehicle KAC 535E from Twiga Motors Ltd. The agreement was for a total sum of Kshs 714,000/-. The sum therein was payable in eleven (11) monthly instalments of Kshs 59,500/- and one (1) instalment of Kshs 61,500 which was inclusive of Kshs 2,000/- for option to purchase. See Clauses 2(a) and 3(b) of the agreement. The initial deposit of Kshs 500,000/- had been made by the Defendant to Twiga Motors Ltd on 14<sup>th</sup> July 1997 (P Ex. 12) as agreed and the balance of Kshs 600,000/- was to be facilitated by the Plaintiff.

[12] The Defendant contended that the agreement he did not exercise his option to purchase, and, therefore, he was not obligated to pay the entire hire purchase price. He also insisted that, once the vehicle was surrendered for repossession as provided under Clause 3(a), the Defendant was under no further obligation to pay any costs and charges incurred by the Plaintiff. The Defendant also urged the termination of the agreement was done by the Plaintiff on 25<sup>th</sup> June 1998. These arguments by the Defendant throw me to want to establish what hire purchase agreement is in law. According to the **Blacks' Law Dictionary Ninth Edition at pg. 973**, a hire purchase agreement (therein referred to as a lease-purchase agreement) is defined as;

***“A rent-to-own purchase plan under which the buyer takes possession of the goods with the first payment and takes ownership with the final payment;”***

Further insight on hire purchase agreement is found in the Hire-Purchase Act, Cap 507 of the laws of Kenya, and Section 2 provides a definition *inter alia* as follows;

***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; and, where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of those agreements was made;***

[13] The Agreement between the Plaintiff and the Defendant was a hire purchase agreement and is governed by the relevant law, that is, the Hire-Purchase Act, Cap 507 of the laws of Kenya. Under the agreement, the Defendant had the option to buy the goods if he so chose by exercising the option to purchase as provided under Clause 2(a) of the agreement by paying Kshs 2,000/-. But, the Defendant did not provided evidence to show that he did not exercise the option under Clause 2(a) of the agreement. However, in a letter dated 9<sup>th</sup> June 1998, the Defendant reiterated in part thus;

***“ With a lot of regrets I wish to inform you that I was not able to meet my pledge to pay Kshs 200,000/- by May 30<sup>th</sup> 1998 and I now wish to surrender the car as shall be directed by you to***

**avoid embarrassment by your debt collector.”**

In the letter dated 7<sup>th</sup> July 1998, the Defendant also notified the Plaintiff that it had surrendered the vehicle to Yusuf Enterprises Ltd as per instructions given by the Plaintiff, and receipt of the motor vehicle was acknowledged vide letter dated 24<sup>th</sup> June 1998 (P Ex. 6). The Plaintiff is not claiming that the Defendant exercised the option to purchase or that he had paid such sum as would entitle him to claim title of the motor vehicle as required in law. And, therefore, unlike in the case of **Diamond Trust Bank Ltd vs. Meenakshi Kenya Ltd and 2 others [2012]**, the averments in the Defence on the option to purchase are sufficient for the court to make a finding that the Defendant did not exercise the option to purchase under Clauses 2(a) and 3(b) of the hire purchase agreement. The Plaintiff exercised its right to repossess the vehicle which was facilitated by the voluntary surrender of the vehicle by the Defendant to the Plaintiff. In any event, the law on right of repossession is still as was enunciated in the case of **Cramer v Gile (1883) Cab & E. 151** which cited with approval in **Benson Ngugi Muiruri v Kenya National Capital Corporation Ltd Civil Appeal No 190 of 2001**, that;

***“From the earliest days the rule laid down in Cramer vs Gile 1883 Cab & E, 151 that equity would not interfere to protect a hirer in default has been followed without any exception in so far as the owner’s right to repossess is concerned...”***

The property in the motor vehicle remained reposed in the Plaintiff. Therefore, the Plaintiff was entitled to only the arrears on the rental fee, interest thereon based on the agreed rate as at the date of sale, all charges and costs incurred on repossession and sale of the motor vehicle. The Plaintiff cannot in law be entitled to interest at the rate agreed in the Hire purchase agreement on the sum due as at the time of the sale until payment in full. The Defendant is, therefore, not liable to pay the entire rental fee for the entire period of the hire purchase. The reason is two-fold; the hire purchase agreement ended when the vehicle was repossessed and the rent on the motor vehicle ended too; and the property in the motor vehicle remained in the Plaintiff. In a manner of speaking, a dead agreement is not potent; it does not bring forth or sire anything. In such case, the Plaintiff would only be entitled to interest at court rates on the sum due as at the time of sale of the vehicle until payment in full.

[14] Now that I have set out the law, I will proceed to examine the claim made. The Plaintiff was entitled to sell the motor vehicle and recover the sum due including all costs and expenses that may have been incurred thereto. The apportioned rent for any broken period and all arrear in rent under Clause 6 of the agreement were recoverable. Under Clause 3(a), the Defendant was required to surrender the goods in good order, with any costs and expenses for repairs being incurred by him as provided under Clause 6(c). The Plaintiff produced exhibits P Ex. 17 (a) – (h) totaling to Kshs 23,195/-, for the storage charges at Yusuf Enterprises Ltd P Ex 7(a) and (b) for Kshs 37,100/-. Further under Clause 6(d) the Defendant was also liable to pay the difference of three quarters of the total hire purchase price and the total of the sums already paid and the monies due for rental at the time of the receipt of the goods by them. The motor vehicle was returned at the instructions of the Plaintiff to Yusuf Enterprises on 24<sup>th</sup> June 1998. As at that date, the monies due for rental under the agreement was Kshs 200,000/- as per the letter dated 8<sup>th</sup> May 1998 (P Ex. 5(f)). This figure was to be paid in two (2) instalments of Kshs 100,000/- ; at the receipt of the letter and on or before 30<sup>th</sup> May 1998. Under Clause 6(b) of the agreement, the Defendant was liable for all rent arrears and all interests and sums due and payable at the time of receipt of the goods by the owner. The Plaintiff reiterated that the total costs and expenses recoverable from the Defendant, under Clauses 3(a) and 6 of the agreement were Kshs 534,093.75. The Plaintiff sold the motor vehicle on 2<sup>nd</sup> November 1999 to Mr David Murage for Kshs 500,000/- (P Ex. 13(a), (b) and (c) and 14). This amount was not sufficient to cover the outstanding hire rental, costs and expenses incurred at the time of termination of the agreement on 25<sup>th</sup> June 1998. The claim for Kshs 534,093.75 being therefore uncontroverted, the sale of the motor vehicle was insufficient to cover the costs. This figure was arrived at as follows:-

a)	Arrears of instalments up to repossession.....Kshs.	356,500
b)	Interest on arrears (14.8.97-2.11.99).....Kshs.	542,013
	Sub-total.....Kshs.	898,513
c)	Less proceeds of sale of M/V.....Kshs.	500,000
d)	Add agreed damages and expenses.....Kshs.	135,580.75
	Total.....Kshs.	534,093.75

[15] The interest factored in the above tabulation was correctly so included for the following reasons. The rate of interest may seem excessive but it has a foundation in the hire purchase agreement which at clause 2(c) gave the Plaintiff had sole discretion to vary the interest without notice to the Hirer. The variation was only subject to the minimum and or maximum rates set by law. The Court was not been provided with any material that suggests the rate of interest applied was in violation of the law. The Hirer did not also adduce evidence to show how the rate of 48% p.a. was fraudulent and un-contractual. On these things, see the case of **Fidelity Commercial Bank Ltd v Surendra L. Goricha T/A Goricha Automobiles (2012) eKLR**, Musinga, J (as he then was) held inter alia;

***“As regards the rate of interest, it is clear that the plaintiff had the discretion to vary the same from the initial rate of 40% p.a. That is why sometimes in 1995 the interest rate was reduced to 36% p.a. but from 13<sup>th</sup> June, 1996 the rate went back to 40% p.a. and from 18<sup>th</sup> November, 1996 the same was increased to 48% p.a. Whereas that rate of interest appears to be rather high, it must be noted that this was an express term of the hire purchase agreement which was freely agreed upon by the parties and the court has no power to vary the same.”***

[16] Accordingly, the Court finds and holds:-

- 1. That the agreement dated 14<sup>th</sup> July 1997 was a hire purchase agreement.***
- 2. That the Defendant, having not exercised his option to purchase, the property in the motor vehicle remained in the Plaintiff who had the legal right to reposes the said motor vehicle.***
- 3. That the Defendant was under an obligation to surrender the motor vehicle in question in good order, repair and condition under clause 2(d) of the hire purchase agreement.***
- 4. That consequently, the Defendant was not liable under the contract, and the law to repay the entire hire purchase amount less the amount charged as an option to purchase. However, the Defendant is liable to pay all arrears of rent as at the time of repossession, costs and expenses incidental to repossession and sale of the motor vehicle.***
- 5. The Plaintiff duly sold the motor vehicle and the proceeds of sale thereof were not sufficient to pay off the sum due.***
- 6. Accordingly, the Plaintiff is entitled to and I enter judgment for the Plaintiff in the sum of Kshs. 534,093.75 with interest at court rate (i.e. 12%) from the date of filing the suit until payment in full. The Plaintiff, for reasons stated above, is not entitled to interest on the principal sum herein at 48% p.a.***
- 7. I award the Plaintiff costs of the suit.***

[17] Any or all other reliefs prayed for in the Amended Plaintiff but which have not been specifically granted in this judgment has been declined. It is so ordered.

**Dated, signed and delivered in court at NAIROBI this 18<sup>th</sup> day of March 2015**

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**F. GIKONYO**

**JUDGE**