



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 133 OF 2010

ASCAH MBOYA.....PLAINTIFF

VERSUS

KENYA WOMEN FINANCE TRUST.....DEFENDANT

J U D G M E N T

1). The plaintiff's claim against the defendant is for:

1. **Payment of Kshs. 5000/= per day as from 15-7-2009 till the date of release of motor vehicle Reg. No. KAE 605E to the plaintiff.**
2. **Interest and cost.**

2). The plaintiff testified that she took a loan facility of Kshs. 500,000/= from the defendant in December 2008 where she was to make repayments by way of monthly installments. From the evidence on record there was no security offered but it would appear that the agreement between the plaintiff and World Vision Kenya in which the plaintiff leased her car to the said organisation was one of the factors considered by the defendant. In the said agreement World Vision was to pay Kshs. 5000/= per day to the plaintiff. The contract ran between 11th May 2009 and 30th September 2007. The motor vehicle was registered as KAE 605E Toyota Double cabin owned by the plaintiff. Apparently, in the cause of time the plaintiff fell into arrears and the defendant wrote a demand to the plaintiff.

3). The defendant through its officers on 15-7-2009 attached the motor vehicle while in custody of the defendant at Lodwar and took it to their yard in Kitale. Efforts to have it released were fruitless as the defendant demanded full payment. This then prompted the plaintiff to file this suit.

4). In their defence, the defendant witness did not deny the fact that they attached the motor vehicle. Their argument however was that the attachment was in the process of recovery of the loan arrears.

5). I have perused the pleadings, the proceedings especially the testimonies of PW1 and DW1 as well as the rival submissions herein. The issues to determine are:

- a. **Whether the plaintiff was in loan arrears.**
- b. **Whether the subject motor vehicle formed part of the security for the loan.**
- c. **Whether the attachment of the motor vehicle was lawful or not.**
- d. **Whether the plaintiff should pay the sum of Kshs. 190,000/= as per the counter claim.**

6). In answering the first issue, there is no doubt that the plaintiff was in loan arrears. Through her own admission she said that todate she still owes the defendant the sum of Kshs. 190,000/=.

There is no document or exhibit showing that the motor vehicle formed part of the security for the said loan. DW1 said that the plaintiff brought some transfer forms and the copy of the logbook to them. However none was produced, and neither did the defendant produce any chattels mortgage. This court safely concludes that the motor vehicle was never charged to secure the loan or at all.

7). The attachment process was equally flawed. It was never disputed that the attachment was done by the defendants employees. No registered auctioneer was instructed to attach the vehicle. Infact the same was forcefully taken from the plaintiff from Lodwar and taken to the defendants yard at Kitale. There was no reason why the defendant could not get the services of a qualified auctioneers. Infact since the vehicle had not been charged I wonder how the defendant would have attached the same. To say the least, the attachment was crude and done in a despicable way by such a respectable organisation.

8). Is the plaintiff entitled to damages? The answer is to the affirmative. The agreement with World Vision was not disputed. The same run from 11-5-2009 to 30-9-2009. The attachment was on 15-7-2009 and the contract with World Vision run to 30-9-2009. The plaintiff has prayed for the sum of Kshs. 5000/= from the date of attachment to the date of release. However, what I find certain is the period which the World Vision contract subsided.

9). In computing the same it will be worth while to note that between 11-5-2009 to 15-7-2009 the plaintiff was in use of the motor vehicle. For about 65 days therefore the plaintiff must have been paid by the World Vision Kenya. However, from 15-7-2009 to 30-9-2009 when the vehicle was attached the plaintiff was not in control of the vehicle yet supposedly the contract was still running. This was about 75 days to the expiry of the contract. The plaintiff however did not let evidence to show that the World Vision contract was renewable although there was such a clause in the agreement. The plaintiff perhaps would have called a witness from the said organisation to shed light on this. Consequently, I do find that in terms of special damages the plaintiff shall be entitled to payment of Kshs. 5000/= per day for the 75 days period as explained above. This shall total to Kshs. 375,000/=.

10). Having found that the attachment of the motor vehicle was completely unlawful I do equally find that the plaintiff is entitled to general damages. As is the case this is solely discretional. There is no doubt that the plaintiff had defaulted in loan repayment but there was no reason for the defendant to illegally attach her vehicle and stay with it for over two years. The defendant could not even attempt to dispose the vehicle or at all. The defendant did not even formally demand the arrears from the plaintiff. The motor vehicle was actually a hot potato. The defendant could not do anything with the same. Upon release exhibit P5 shows that there were several things which were missing in the vehicle and although the plaintiff did not claim them in the plaint, the said exhibit was not disputed by the defendant.

11). Taking into totality the facts in this case as well as the fact that the plaintiff's vehicle wasted away for that period I do find that the sum of Kshs. 500,000/= as general damages shall be adequate compensation to the plaintiff.

There is finally the issue of counterclaim by the defendant. This as earlier analysed was never disputed by the plaintiff. Consequently, I shall enter judgment for the sum of Kshs. 190,000/= as prayed in the counter claim.

In the premise I make the following orders:

(I). The plaintiff shall be paid by the defendant as follows:

- a. **Kshs. 375,000/= being special damages and Kshs. 500,000/= general damages. Total Kshs. 875,000/=.**
- b. **Costs and interest from the date of filing suit.**

(II). Judgment is entered against the plaintiff and in favour of the defendant for the sum of Kshs. 190,000/= together with costs and interest from the date of filing suit.

(III). The defendant shall have the costs of the counterclaim.

Dated, signed and delivered at Kisumu this 24th day of June 2014.

**H.K.
JUDGE**

CHEMITEI