REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 696 OF 2003

SAMUEL NDUNDA VENGI.....APPELLANT

VERSUS

JOHN NORMAN WACHIRA T/A LION

MOTORS DEALERS & TECHNICAL INSTITUTE....1ST RESPONDENT

ZION CREDIT LIMITED.....2ND RESPONDENT

J U D G M E N T

The facts from which this appeal rises are as follows:-

The Appellant herein entered into a sale agreement with the 1st Respondent herein for the sale of a motor-vehicle registration number KAK 685Z on 18th January, 2003. The 1st Respondent was acting as a seller and also as an agent of the 2nd Respondent who was the owner of the vehicle. The purchase price of the motor vehicle was financed by the 2nd Respondent less the down payments. The funds financed were to be paid within a period of twelve months by monthly instalments of Ksh.12,027/-

Further perusal of documents confirms that the parties herein had entered into a purchase agreement whose title is **"NON-ACT HIRE PURCHASE AGREEMENT"** under which the terms between the "owner "and the "hirer" of the motor vehicle were spelt out.

The Agreement appears to finance the sale of the motor vehicle to the purchaser who therein is the hire until full payment of the moneys advanced to him.

Even further perusal of the Agreement shows that in case the hirer/ purchaser failed to pay one or more instalment payable monthly or failed to comply with certain default terms therein spelt out, the Owner/ financier, was empowered thereunder to repossess and sell the motor vehicle at the expense and/or cost of the hirer/purchaser. In the meantime the owner of the motor vehicle would continue holding and having a lien on the motor vehicle until fully paid for and the hirer/purchaser should pay the monthly instalments with interest arising, keep the motor vehicle comprehensively insured and in good condition, and allow the owner/financier to have access to the motor vehicle for the purpose of inspection.

The facts show that the hirer/purchaser failed to pay one or more of due monthly instalments. He was served with notices and demand notices as provided under the Agreement. The notices were provided as evidence and accepted by the court as properly served although vehemently denied by the appellant that

they were served as alleged. As expected, the Respondents who were the owner and financier, finally repossessed the motor vehicle upon the alleged default by the hirer/purchaser, mainly on the ground that there was default of one or more of the monthly instalments as provided under the Agreement. The Respondent alleged other defaults like failure to comprehensively insure the motor vehicle and keep its lien from any encumbrances beyond the rights of the owner.

Upon repossession and resale of the vehicle, the hirer/purchaser filed this suit at the lower court, claiming that:-

a. The resale of the motor vehicle was unlawful and the Agreement of the purchase of the motor vehicle was vague and did not provide the date of completion or did not provide the mode of payment by the Purchaser/Hirer.

b. The inclusion of the 2nd Respondent as the financier was unlawful as it also was done on unspecified terms.

c. The motor vehicle when sold was not merchantable and fit for the purpose it was purchased which was a matatu business.

d. That the Respondents had caused the Appellant to sign a vague unwitnessed and unexplained agreement of sale.

e. That the Respondents failed to supply the Appellant with a copy of the sale agreement.

f. That the agreement of sale gave the respondents no power or authority to repossess or sell the motor vehicle upon repossession.

g. That the Respondents conduct amounted to fraud which was actionable.

As a result the Appellant claimed a sum of Ksh.219,500/- being costs of repair of the vehicle by him before repossession, insurance premium over the motor vehicle during the same time, cost of servicing the vehicle and installing radio, tyres and battery etc. The appellant also alleged that he lost a net income of Ksh.3,000/- per day which he used to get when he used the motor vehicle in the matatu business.. He sought an order of unconditional release of the motor vehicle to the Appellant/Plaintiff and all the damages incurred by the Plaintiff/Appellant which he prayed should offset against the purchase price. He also sought for final accounts to be taken for settlement and/or rescission of the contract and payment of all monies paid and/or expended by him together with damages.

In her judgment which took into account evidence adduced before her by both sides, the lower trial court found the Hire Purchase Agreement signed by both sides to be quite clear. She found that it provided for a period of repayment of the advanced funds for the purchase of the motor vehicle to be 24 months from 18th February, 2003. She found also that the Agreement had clear terms of repayment and of default of repayment and that both sides had properly signed the same and signed the release document of the motor vehicle on the satisfaction that the motor vehicle was in a good condition. The trial court also found that the Plaintiff had signed every page of the said Agreement including the pages which declared that the terms thereof had been read and understood by the Plaintiff, a secondary school teacher. The trial court as well found that the Hire Purchase Agreement and copy of the Log Book were properly released to the Plaintiff who also signed the release letter.

Furthermore, the trial court found that the Hire Purchase Agreement was properly registered although outside the original 30 days, with the discretion of the registrar as provided by the law which gives him power to extend the original time for registration.

In addition the trial court found that based on the statement of Account adduced in evidence, the plaintiff had failed to pay certain instalments and was in arrears on two occasions when the defendants actually repossessed the motor vehicle but returned it to the hirer.

The trial court also found that the Hire Purchase Agreement was not valid under Section 3(1) of the Act because the value of the sum financed was beyond the Ksh.300,000/- authorized and could not therefore be enforced under the provision. But the Agreement was valid as a contract and its terms as between the parties were enforceable as they signed it intending to be liable and to comply with it.

The trial court as well found that the Plaintiff had been properly served with notices of default of repayment and the intention by the Defendants/owner and financier, to repossess. The court further found n basis for plaintiff's claims for costs of repairs as the Plaintiff would use and repair, insure and service the vehicle if it went into disrepair etc. Indeed the court found that the Plaintiff under the Agreement, had undertaken to fully maintain the vehicle while under the hire. Finally, the court found no evidence that the Plaintiff got Ksh.3000/- net per day from matatu business and found no basis upon which the respondents would pay him the sum of Ksh.3000/- or any, when it was him who caused the repossession by his defaults.

I have carefully perused the grounds of appeal in this appeal against the background and details of the evidence on the record from both sides. I am satisfied that the conclusions which the trial court reached as detailed herein above, are proper and correct.

I have read the Sale or Hire Purchase Agreement signed by the parties. I am satisfied they all understood or ought to have understood the same before signing it. There is no evidence on record forms the Appellant who is an educated man that signed before or without reading and understanding the agreement. There is evidence that he took the copy of the Agreement together with the logbook copy and release letter which he also signed.

Furthermore, the terms in the Agreement are not vague as calmed by the Appellant. He was clearly aware that in default of one or more of the monthly instalments, the motor vehicle would be repossessed. There is credible evidence that he was served with notices for repossession. After the first one the motor vehicle was repossessed and later returned to him after negotiations. The second time, the vehicle was not returned as he expected but sold.

As the Appellant argue, the Agreement of Sale or Hire, was for the value of more than Ksh.300,000/- authorized under the Hire Purchase Act. However, as found by the trial court, that did not invalidate the contract per se between the parties. Furthermore, the Respondents had clearly shown that the Hire Purchase Agreement was a "**Non-Act**". The court understands this to mean that the court was not supposed to affect it. Plaintiff agreed with this situation when he signed the Agreement.

The law applicable in cases such as this where much of the dispute is on facts was stated in **KENYA SHELL COMPANY LIMITED Vs CHARLES** in Court of Appeal Civil No. 7 of 2000, relying on **MBOGO VS SHAH [1968**] EA 93 page 95: -

> ***"… I think it is well settled that this court will not interfere in the exercise of the discretion of a judge with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it has failed to take into consideration matters which it should have taken into consideration and doing so arrived at a wrong conclusion."***

In this case the trial court properly considered all the evidence and pleadings before it and came to conclusions which were right and proper. The court would indeed have come to the same conclusions. The court accordingly, finds no reason to interfere with the judgment of the trial court which as I have stated above, is right in facts and law. In the circumstances, this appeal is found without merit. It is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 18th day of September, 2014.

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D A ONYANCHA

JUDGE