



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 37 OF 1998

FIDELITY COMMERCIAL BANK LIMITED PLAINTIFF

VERSUS

SURENDRA L. GORICHAT/A GORICHA AUTOMOBILES DEFENDANT

JUDGMENT

This judgment relates to a hire purchase agreement between the plaintiff and the defendant. The plaintiff was the owner and the defendant was the hirer of motor vehicle registration number KAE 672X under a hire purchase agreement number HP-363. The plaintiff stated that pursuant to the said hire purchase agreement the said motor vehicle was delivered to the defendant but the defendant, in breach of the agreement, failed and/or neglected to pay the agreed instalments and as at 27th February, 1998 when this suit was filed the defendant was in arrears amounting to **Kshs.1,742,906.80**. Under the said agreement the sum was to accrue interest at the rate of 48% p.a. calculated on daily balances from 29th September, 1997 until payment in full.

In view of the said breach of the hire purchase agreement, the plaintiff contended that it was entitled to repossess the motor vehicle and recover all the outstanding arrears. The plaintiff therefore sought judgment against the defendant in the sum of Kshs.1,742,906.80 together with interest at 48% p.a. calculated on daily rates from 29th September, 1997 until payment in full as well as costs of the suit and interest at court rates.

The defendant filed a statement of defence and admitted that he had entered into the hire purchase agreement with the plaintiff. He however denied that he was in arrears of payments as stated by the plaintiff. The defendant further stated that the plaintiff repossessed the said motor vehicle on 7th January, 1997 and terminated the hiring of the same. At the time of seizure of the motor vehicle the hirer owed the plaintiff a sum of Kshs.371,672/= being seven whole installments and a fraction of the eighth instalment. Subsequently, the plaintiff received from the defendant a further sum of Kshs.145,000/=.

The defendant further stated that he is indebted to the plaintiff in the sum of Kshs.226,672/= only. The defendant added that there was no agreement between the parties to pay interest on late payments and the plaintiff's claim on account of interest on late payments of the monthly hire rentals is not recoverable. The defendant further contended that the rate of interest claimed by the plaintiff is arbitrary, excessive and unconsonable. The defendant urged the court to dismiss the plaintiff's suit with costs.

The plaintiff's case was heard before Mutungi, J. on 21st July, 2004. **Mr. Philip Muoka** the plaintiff's Legal Officer was the only witness who testified on behalf of the plaintiff. He produced the hire purchase agreement in respect of motor vehicle registration number KAE 672X. He stated that the plaintiff

financed the purchase of the motor vehicle upto Kshs.1 million. The hire purchase agreement was registered and a certificate issued to that effect. Under the agreement the total cost of the vehicle was Kshs.1,500,000/= and the defendant was to pay the hire charges by 29 monthly instalments of Kshs.46,667/= commencing 25th September, 1995. The total hire purchase price inclusive of hire charges and the option to purchase amounted to Kshs.1,902,010/=. The defendant was supposed to pay the monthly instalments by way of a banker's order. The defendant however failed to honour the terms of the hire purchase agreement and the plaintiff terminated the same on 20th January, 1997 when it repossessed the motor vehicle and resold it in August 1998 for Kshs.550,000/=. As at the date of repossession the outstanding amount was Kshs.1,195,311.80. On 7th July, 2003 the defendant paid a sum of Kshs.339,880/= which was credited to his account. The witness further testified that as on 23rd January, 2004 the outstanding balance was Kshs.2,425,735.82.

Under the hire purchase agreement the rate of interest was 40% but the plaintiff retained the sole discretion to vary the same. At some point the rate of interest was reduced to 36% but later on the same was increased to 48% p.a.

The defendant did not attend court during the hearing and neither was any evidence tendered on his behalf. His advocates filed an application to withdraw from acting for him due to lack of instructions and the application was granted by court. The plaintiff's evidence was therefore uncontested.

From the uncontroverted evidence on record there is no dispute that the parties entered into a hire purchase agreement on 25th August, 1995. The total hire purchase price of the motor vehicle was Kshs.1,902,010/=. Clause 2b of the hire purchase agreement stipulated that the defendant would punctually pay monthly hire charges amounting to Kshs.46,667/= and as per clause 2c the agreed rate of interest was 40% per annum or such other rate as the plaintiff in its sole discretion would determine from time to time. In the event of any default on the part of the defendant the plaintiff was entitled to repossess the motor vehicle and the defendant would be liable for all rent arrears including apportioned rent for any broken period and all interest thereon. The plaintiff adduced evidence that as at the date of repossession of the motor vehicle the outstanding balance was Kshs.1,195,311.80. That was on 20th January, 1997. But as at the date of filing suit the outstanding balance amounted to Kshs.1,742,906.80.

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 13th June, 1996 the rate went back to 40% p.a. and from 18th 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.

In the circumstances, I find that the plaintiff has proved its case on a balance of probabilities and there being no evidence to controvert the plaintiff's evidence, I enter judgment as prayed in the plaint.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex – Court Clerk

Mr. Khasianif or Mr. Wandabwa for Plaintiff

No appearance for Defendant

