



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 998 OF 1999

KENYA TANZANIA UGANDA LEASING LIMITED.....PLAINTIFF

VERSUS

MUKENYA NDUNDA.....1ST DEFENDANT

CRATER AUTOMOBILES LIMITED.....2ND DEFENDANT

AND

COUNTERCLAIM

MUKENYA NDUNDA.....PLAINTIFF

VERSUS

KENYA TANZANIA UGANDA LEASING LTD.....1ST DEFENDANT

CRATER AUTOMOBILES LIMITED.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff’s suit was dismissed on 18th January, 2006. What therefore that proceeded for trial before me is the 1st Defendant’s counterclaim against the Plaintiff who is the 1st Defendant in the counterclaim (hereinafter “the 1st Defendant”) and 2nd Defendant, respectively.

2. The facts of this case are briefly that in or about August, 1995, the 1st Defendant (hereinafter “**the Plaintiff**”) agreed to purchase a Mitsubishi Fuso Lorry registration No. KAG 026 B (hereinafter “**the Motor Vehicle**”) at Kshs.7,231,500/-, she paid to the 2nd Defendant a deposit whereby the motor vehicle was released to her. That to complete the purchase price, the **1st Defendant** paid directly to the 2nd Defendant a sum of Kshs.5,431,000/- which became the Plaintiff’s debt. The Plaintiff executed certain documents in the offices of the 1st Defendant which later turned to be a Hire Purchase Agreement and other documents meant to perfect the 1st Defendant’s security over the motor vehicle. Thereafter, the 1st Defendant repossessed the said motor vehicle and sold the same.

3. In the counterclaim, the Plaintiff contended that the said motor vehicle was sold in or about April, 1999 at an undervalue of Kshs.1,750,000/-, that the purported hire purchase agreement with the 1st Defendant was unenforceable as against the Plaintiff as she was made to sign blank documents whose language she

did not know and whose contents was not explained to her and that the 2nd Defendant was in illegal possession of the Plaintiff's title documents for LR No. Machakos/Matuu/2002, 3541 and LR No. 254, Matuu Township. The Plaintiff prayed for various declarations.

4. At the trial, the Plaintiff testified that she purchased the said motor vehicle from the 2nd Defendant in or about August, 1995 for Kshs.7,231,500/- whereby she paid a deposit of Kshs.1,700,000/-, that she was requested by the 2nd Defendant to deposit with them three titles which she did and was then referred to a company known as Wheelbase Ltd, the predecessors of the 1st Defendant wherein she was made to sign certain documents whose contents was not explained to her, that she was informed at the said Wheelbase that the 2nd Defendant had directed that she signs those documents. She further testified that she commenced repayment of the balance of the purchase price for the said motor vehicle through her bankers Standard Chartered, Thika but the said motor vehicle was later repossessed and sold by the Plaintiff for Kshs.1,800,000/-, that at that time, the said motor vehicle was as good as new and it was valued for Kshs.6 million. That when she went to claim her titles from the 2nd Defendant she was chased away. That the repossession devastated her emotionally and financially as a result of which her children dropped out of school. She told the court that she does not know what the Defendants had discussed and agreed amongst themselves before she was sent by the 2nd Defendant to the 1st Defendant. The Plaintiff was emphatic that she surrendered the three titles to a Mr. Arthur of the 2nd Defendant to whom she had also paid the deposit money for the said motor vehicle at the 2nd Defendant's offices.

5. On cross examination, she was firm that all the transactions relating to the said motor vehicle was with the 2nd Defendant, that she went to Wheelbase Ltd at the instance of the 2nd Defendant and after the vehicle had been released to her and was being serviced. That apart from the deposit she never paid any other sums to the 2nd Defendant, that Mr. Arthur, the 2nd Defendant's employee took her to Wheelbase Ltd who gave her a document to take to her bankers who knew how and where the monies were payable. That although her dealings with the 2nd Defendant was in writing, when she surrendered the three titles to Arthur, she was not given any acknowledgement. She told the court that the 2nd Defendant told her that it would show her how the balance of the purchase price would be repaid and that that is when the Mr. Arthur took her to Wheelbase Ltd. She stated that she did not go to school and she did not know how to read and write.

6. In its defence field on 23rd March, 2012, the 2nd Defendant denied the Plaintiff's counterclaim, it denied the existence of any agreement with the Plaintiff in respect of the purchase of the said Motor Vehicle, it also denied that it had custody of any documents of security in respect of the agreement for sale of the said motor vehicle. Joel Ihugu Karanja, an Administration Manager of the 2nd Defendant testified on behalf of the 2nd Defendant. He admitted that the Plaintiff did purchase the said motor vehicle on or about 19th September, 1995 for Kshs.7,231,500/- of which she paid a deposit of Kshs.2, 071,575/- and that the balance was paid by the 1st Defendant who was the financier. That having been paid in full, the 2nd defendant did not demand any security and that it did not have any titles belonging to the Plaintiff. That the 2nd Defendant did not have any relationship with the 1st Defendant, that in their industry the 2nd Defendant does not require any security. He produced the searches for the suit properties which show that the 2nd Defendant has not interest in those properties. He admitted that the person who dealt with Plaintiff was one Arthur Lord, an employee of the 2nd Defendant. He told the court that the said motor vehicle could not be sold by any other company by way of Hire Purchase.

7. The parties framed separate issues which were contained in their respective submissions. To my mind, the four (4) issues that emerge both from the pleadings and evidence are, whether, the 1st Defendant having not tendered any evidence in defence of the Plaintiff's counterclaim, the Plaintiffs counterclaim against the 1st Defendant should succeed, secondly whether the Plaintiff did surrender her titles to the suit properties to the 2nd Defendant and if so, thirdly whether the 2nd Defendant should be compelled to release the same and finally whether the Plaintiff is entitled to the reliefs she has sought.

8. As regards the 1st Defendant, the evidence was clear the said motor vehicle belonged to the 2nd Defendant who sold the same to the Plaintiff, the 1st Defendant paid the balance of the purchase price on behalf of the Plaintiff. It was not very clear on what basis the 1st Defendant paid the said balance on behalf of the Plaintiff. It is also not clear whether the 1st Defendant was licenced to carry out hire purchase business. The documents produced by the Plaintiff as PExh1 were executed by the Plaintiff in blank, they cannot be taken to be documents exhibiting any complete contract as the time they were executed by the Plaintiff. I heard and saw the Plaintiff testify in court. I was satisfied that she was illiterate. She could not read a word of any of the documents put to her. What she was only able to identify was her signature. She testified that she was never advised what the contents of the documents she was signing were. I believed her testimony. I accept the unchallenged evidence of the plaintiff as against the 1st Defendant and I hold that she established her case against that Defendant to the standard required by law. It would seem that the 1st Defendant was engaging in business that it was not licenced to, it could not purport to charge and vary the rate of interest as if it were a bank which it was not. It could also not purport to charge by way of hire purchase a motor vehicle which it had no proprietary interest. I therefore enter judgment for the Plaintiff against the 1st Defendant accordingly.

9. As regards the issue of the title documents for the suit properties, the Plaintiff told the court how she dealt with the 2nd Defendant. The person whom she dealt with was one Arthur Lord, after she signed an agreement of sale, Arthur told her to deposit the three titles as security for the outstanding balance before the said motor vehicle could be released to her. The 2nd Defendant vehemently disputed this fact, it contended that it had been paid in full and there was no need to ask for security and that its policy is not to take any security for any transactions with its customers. After carefully listening to the testimonies of PW1 and D2W1 and analyzing the evidence tendered, my take is that there was no reason to disbelieve the Plaintiff. At the time she testified before me, the Plaintiff was 66 years of age. This is so considering that from the proposal at page 5 of PExh1, she was 49 years when she was purchasing the said motor vehicle in 1995. However, physically she looked order than that age. She impressed me as a honest person who by virtue of her illiteracy entered into the transaction with a view to advance herself.

10. I have seen documents No. 14 of PExh1. These are receipts for payments made by the Plaintiff. Some of these receipts were issued by the 2nd Defendant made up as follows:-

- (i) 8/01/95 - Kshs.100,000/-
- (ii) 26/07/95 - Kshs.150,000/-
- (iii) 02/08/95 - Kshs.70,000/-
- (iv) 03/08/95 - Kshs.200,000/-
- (v) 22/08/95 - Kshs.200,000/-
- (vi) 31/08/95 - Kshs.60,000/-
- (vii) 08/09/95 - Kshs.20,000/-
- (viii) 11/09/95 - Kshs.150,000/-

All these were for **“Deposit for New Vehicle.”** This confirms the Plaintiff’s testimony that she started making payments for the ultimate deposit of Kshs.1,700,000/- paid as at 19th September, 1995, nine months earlier. I have also seen the Agreement at page 2 of PEXh1. Although the Deposit required was Kshs.2,071,575/- the total deposit paid to the 2nd Defendant by the Plaintiff was Kshs.1,700,000/- as at that date. There was a balance of Kshs.371,575/- on the deposit required as at the date the motor vehicle was being released to the Plaintiff. Therefore, DW1 lied to the court when he stated that the 2nd Defendant had been paid in full and did not therefore require any security from the Plaintiff. If there was

a balance of Ksh. 371,575 as at the time the motor vehicle was being released to the Plaintiff, what was the security for that balance on deposit? The court was not told.

11. Document 14 of PEXh 1 were three (3) valuation reports by Horizon Associates in respect of LR No.258, Matuu Township, Machakos/Matuu/2022 and Machakos/Matuu/3541 all dated the 26th May, 1995, respectively. These properties are the ones in respect of which the titles are the subject of this case. The consolidated value of the properties is shown to be Kshs.5,500,000/-. The Reports seem to have been prepared during the currency or preparations to purchase the said motor vehicle, as at that time she had started making deposit payments to the 2nd Defendant. The total value of the said motor vehicle was Kshs.7,231,500/- and she only paid a deposit of Kshs.1,700,000/ therefore leaving real balance on the purchase price of Kshs.5,531,500/-. This was approximately the value of the three properties whose valuation reports were produced by consent. Might the value of the three (3) properties have had anything to do with the amount of deposit paid and the balance of the purchase price? The parties did not tell the court and the court is unable to speculate. What is clear is that the person who dealt with the Plaintiff on behalf of the the 2nd Defendant was one Arthur Lord, he is said to have asked for and received the three 3) titles before taking the Plaintiff to the 1st Defendant to **“show her how the balance of the purchase price was to be paid”** to use the Plaintiff’s words.

12. The counterclaim by the Plaintiff was filed and served upon the Defendants in October, 2005 raising the issue of the three titles. The 2nd Defendant only filed its Defence on 23rd March, 2012 denying the existence of any agreement with the Plaintiff and or being in possession of the three titles. D2W1 admitted that Arthur Lord was the one who dealt with the Plaintiff. The court was told that the said Arthur Lord is no longer in the employment of the 2nd Defendant, but the court was not told when he left that employment or whether there was any effort made to procure his attendance in court to deny or admit the allegations of the Plaintiff.

13. While I do not doubt the testimony of D2W1 that the 2nd Defendant’s policy is not to take any security, he conceded that he could not tell whether Arthur Lord may have taken the Plaintiff’s titles as security contrary to the 2nd Defendant’s policy. To my mind therefore, the testimony of the Plaintiff which was consistent as to the circumstances surrounding the execution of the Sale Agreement for the said motor vehicle, surrender of titles, her being taken to the 1st Defendant to execute further documents on repayment and her being chased away and locked out from the premises of the 2nd Defendant when she went for her titles remained unchallenged and uncontroverted. I believe her testimony. In the premises on a balance of probability I hold that the Plaintiff has proved her case that on the request of Arthur Lord, she surrendered to the 2nd Defendant her titles to the suit properties. I believe that the due to the deposit requested and the value of the properties as per the valuation reports produced by consent whose value is almost the same as that of the suit properties (a difference of only Kshs.31,500/-), it is more likely than not that the said titles must have been requested and provided as security.

14. I note that the 2nd Defendant produced evidence by way of official searches as DEXh1 to show that the suit properties did not reflect the interest of the 2nd Defendant in their encumbrance section. That may be so, but it was never contended by the Plaintiff that she executed any charge in favour of the 2nd Defendant. Her case was that she surrendered the titles to the 2nd Defendant. Arthur Lord having received the said titles, the same were and are deemed to been in the possession of the 2nd Defendant. I enter judgment for the Plaintiff against the 2nd Defendant accordingly.

15. In the end therefore, I enter judgment for the Plaintiff as follows:-

a) As against the 1st Defendant

(i) In terms of prayer Nos. (a), (b), (c), (d) (j) and (k) of the Amended Plaintiff.

(ii) I assess the damages in (j) and (k) at Kshs.3 million taking into consideration, the amount the

Plaintiff had already paid, the age and value of the said motor vehicle at the time of repossession and sale by the 1st Defendant.

(iii) I dismiss Prayer Nos. (f), (g) and (h) as there was no evidence to establish those claims.

b) As against the 2nd Defendant, in terms of Prayer Nos. (e) and (i) of the Amended Defence. If for any reason the 2nd Defendant is unable to release the said titles within 30 days of this judgment, the 2nd Defendant shall pay to the Plaintiff a sum of Kshs.300,000/- for purposes of the Plaintiff processing new titles for the subject properties in accordance with the relevant laws.

c) As against the 1st and 2nd Defendant, jointly and severally, the costs of this suit.

d) Interest on the amount decreed herein shall be 12% per annum from the date of this judgment until payment in full.

Decreed accordingly.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE