



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1474 of 2001**

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

GAREX (K) LIMITED 1ST DEFENDANT
FIRESTONE E.A. (1969) LIMITED 2ND DEFENDANT
JAMES MWANGI GITAU T/A FOREFRONT AGENCIES 3RD DEFENDANT

JUDGMENT

1. The plaintiff's claim as pleaded and supported by the evidence of Elizabeth Hinga was that; by a Hire Purchase Agreement dated 31st July 1996, made between the plaintiffs as owner on the one hand and the 1st defendant as hirer on the other hand, the plaintiff let to the 1st defendant motor vehicle registration no. KAH 855B on hire purchase terms which were set out on the hire purchase agreement. The motor vehicle was registered in the joint names of the plaintiff and the 1st defendant who took possession and was supposed to pay the monthly rentals according to the agreement.
2. The 1st defendant defaulted in the repayment of the agreed rentals which constituted a breach of the hire purchase agreement. The plaintiff was thus entitled to terminate the agreement without notice to the 1st defendant and to repossess the motor vehicle. The 1st defendant fell in arrears and as at 25th August 1999, the arrears stood at Ksh.1.749,234.20/- which continues to accrue interest. The plaintiff's witness further testified that sometimes in August 1999, the 3rd defendant purported to execute a warrant of attachment obtained by the 2nd defendant in **HCCC NO.305 OF 1998 (Firestone East Africa 1969 Limited vs. Garex Kenya Limited)**.
3. According to the plaintiff, the motor vehicle was wrongly attached because it did not belong to the 1st defendant; it was jointly registered with the plaintiff. The 1st defendant had not paid the rentals under

the hire purchase agreement. Moreover, the 3rd defendant obtained the warrant of execution by indicating the wrong case number. This brought complications and delay when the plaintiff tried to file a notice of objection eventually when the order was granted; the 3rd defendant had purportedly sold the vehicle.

4. No valid warrants of attachment were issued in the suit No 305 of 1998. The 2nd defendant obtained warrants in HCCC NO.134 OF 1998 therefore execution was conducted on the basis of the wrong warrants. There was no proclamation as required under the auctioneer's rules. The attachment was done on the 11th August 1999, the motor vehicle was advertised for sale and the sale took place only the following day in order to defeat the plaintiff's interest. The motor vehicle was also advertised for sale in the Daily Nation newspaper of 25th August 1999 and proceeded to sell the vehicle the following day to persons unknown to the plaintiff.

5. The plaintiff has alleged fraud and illegality in the matter of sale in which the vehicle was seized contrary to the provisions of order XXI r42 of the Civil Procedure Rules. The 3rd defendant is faulted for acting contrary to the auctioneer's rules for misleading the plaintiff through an advertisement which was purportedly obtained in HCCC O. 134 OF 1999 in order to defeat the ends of justice. The plaintiff therefore claims for judgment against the defendant for the sum of ksh.1,749,234.20/- with interest. General damages for breach of contract and a declaration that the proceeds of the motor vehicle paid to the 2nd defendant is money due to the plaintiff. The plaintiff is also seeking for general damages for conversion with interest and costs.

6. The 1st defendant did not file any defence and default judgment was entered against it. The 2nd and 3rd defendants filed a defence in which liability is denied. They also relied on the evidence of James Mwangi Gitau who acted as the auctioneer. He testified that he received instructions to execute the warrant of attachment relating to Milimani HCCC NO. 134 OF 1999 against the 1st defendant. Mr. Mwangi was an auctioneer licensed under class B. He told the court that he proceeded to the premises of the 1st defendants and proclaimed the subject motor vehicle in order to recover the decretal sum due to the 2nd defendant. He proclaimed the goods and collected the motor vehicle and advertised the motor vehicle for sale on 18th and 25th August 1999 for sale on 26th August 1999.

7. Mr. Mwangi testified that the warrant of attachment for sale which he received from court read HCCC NO.134 OF 1999 and the parties were Firestone East Africa 1969 Limited versus Garex Kenya Limited. However he also received a letter from the court clarifying that the correct suit Number should have been HCCC NO. 305 OF 1998. According to Mr. Mwangi, the motor vehicle was sold for Ksh.400,000/- out of which he deducted his costs of Ksh.48,377.65/- and forwarded the balance to the 2nd defendants advocate.

8. Both parties filed written submissions and the issues that cut across both submissions are whether the execution levied by attachment of motor vehicle registration no. KAH 855B by the 2nd defendant was lawful. Secondly, whether the attachment and sale of the motor vehicle was lawful and whether the plaintiff is entitled to damages against the 2nd and 3rd defendants.

9. Firstly, the decree issued to the 2nd defendant in HCCC NO.134 OF 1998 was erroneous. The 2nd and 3rd defendants contended that the correct suit should have been HCCC NO. 305 OF 1998. What is the effect of executing a wrong decree? The 3rd defendant an auctioneer to boot and an officer of this court had a duty to verify the correct case number by exercising due diligence. By issuing an advertisement citing **HCCC NO.134 OF 1999** instead of **HCCC NO.305 OF 1998** misled the plaintiff. When the plaintiff tried to file an objection against the sale of the motor vehicle which they had an interest, the process was delayed as they were misled by the case no under which the motor vehicle was attached.

10. In the case of **Atogo vs. Agriculture Finance & Another 1991 KLR page 521** the court of appeal while determining a case with similar facts as the present suit held that:-

- “1. The *respondents were not in law entitled To attach the appellant’s vehicle and they Were wrongfully instructed by the broker To do so.*
2. *The wrongful taking of another person’s goods constitutes the tort of conversion.*
3. *It is actionable trespass to wrongfully set in motion the law so that the wrong goods are seized or the wrong person is arrested.*
4. *It is actionable to set in motion a process of attachment without observing rules of ordinary prudence by ascertaining the true identity and ownership of the property to do seized with out the necessity for proof of express malice.”*

11. The 3rd defendant should have exercised due care by ascertaining the actual case number before proceeding to advertise the sale of the property. Had the 3rd defendant done so, he would have established the motor vehicle belonged to the plaintiff and the 1st defendant. Moreover the plaintiff would also not have been misled and delayed in obtaining an order of stay of execution following the objection proceedings. Thirdly, when the 3rd defendant was served with an order of stay of execution at 4 p.m. He had an opportunity of trying to cancel the sale after it was brought to his notice that he was executing the wrong warrant. Instead even after the order was served the 3rd defendant proceeded to pass the proceeds of the illegal sale to the 2nd defendant.

12. Going by the evidence on record, the plaintiff has been able to prove that the motor vehicle registration NO. KAH 855B was hired to the 2nd defendant. The 2nd defendant defaulted in the repayment and the motor vehicle belonged to the plaintiff under the hire purchase agreement. The 2nd and 3rd defendants wrongly fully executed a warrant issued in the wrong case number and attached the vehicle which belonged to the plaintiff. That attachment was wrongful null and void.

13. The plaintiff is therefore entitled to the said motor vehicle. According to the 3rd defendant the motor vehicle was sold for Ksh.400,000/-. The plaintiff contends this was an under value. However no evidence was presented in court to show the court the actual value for the motor vehicle. The plaintiff also claim that they have suffered damages to the extent that the loan account with the 1st defendant has not been settled and as at the time of filing the suit there was a sum of Ksh.1.749,234.20 which was due from the 1st defendant.

14. Judgment has already been entered against the 1st defendant, and since no evidence was adduced to show the actual market value of the motor vehicle, this court has no choice but to enter judgment against the 2nd and the 3rd defendants for the sum of ksh.400,000/- which was the proceeds of the sale and the money paid to the 2nd defendant. No evidence was also adduced regarding general and aggravated damages. Judgment is entered as above with costs from the date of sale that is 26th August, 1999 until payment in full at court rates.

The plaintiff will also have the costs of this suit.

JUDGMENT READ AND SIGNED ON 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE