



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 253 of 2007

DAVID MBURU KAMAU.....PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK...DEFENDANT

JUDGMENT

The plaintiff claims that in 1994 he borrowed a sum of Kshs.1,450,000/- from the defendant to purchase an Isuzu Lorry KAB 062V (the vehicle) under a Hire Purchase Agreement. He contributed the initial sum of Kshs.1,050,000/- which he deposited with the defendant and the defendant topped it up with the said sum of Kshs.1,450,000/- and paid the total purchase price of Kshs.2,500,000/- to the original owner of the vehicle. He claims that the defendant was supposed to register that Agreement under either the **Hire Purchase Act, Cap 507 of the Laws of Kenya** or the **Chattels Transfer Act Cap 28 of the Laws of Kenya** as a Chattels Transfer for it to take effect. On or about 31st October 1997, without registering the Agreement under either of these Acts or without a court order, the defendant unlawfully and fraudulently represented to the plaintiff that it was acting on a duly registered hire purchase instrument and/or chattels transfer and repossessed the vehicle. In 2006 the plaintiff filed a suit against the defendant on the same subject matter but the same was struck out as time barred under the **Limitation of Actions Act**. He says he is now re-agitating the claim upon his discovery of the statutory fraud of non-registration of the Agreement in October 2007 when the Registrar General confirmed to him that no Hire Purchase Agreement or Chattels Transfer with regard to their agreement was registered in the Registry of Documents. He says his claim is not statute barred as it is based on that discovery. He therefore prays for a declaration that the repossession and sale of the vehicle was illegal and fraudulent or an order for its return to him or in the alternative an award of damages in lieu thereof plus costs and interest.

In his evidence the plaintiff said that he himself did not try to register the Agreement. He conceded in cross-examination that nobody told him that the Agreement had not been registered. He claimed that he all along thought it had. He also conceded that had he written to the Registrar General in 1997 when the vehicle was repossessed he could have been given the information that the Agreement had not been registered that he got 10 years later.

In its defence the defendant averred that this suit is frivolous, vexatious and otherwise an abuse of the court process as the matter is *res judicata* and the plaintiff's claim is time barred under the **Limitation of Actions Act**. Without prejudice to that averment it denied that the

Agreement between the parties was a Hire Purchase Agreement though it was casually entitled "Hire-Purchase" there was actually no Hire Purchase Agreement and/or Chattels Transfer. It averred that it entered into an ordinary Commercial Agreement to enable the defendant finance the purchase by the plaintiff of the vehicle on the understanding that the plaintiff would have possession of it with the option of purchasing it upon full repayment of the amount advanced together with interest thereon. It further averred that that Commercial Agreement did not require registration under either the **Hire Purchase Act** or the **Chattels Transfer Act**. It denied making any false or fraudulent misrepresentation to the plaintiff and therefore denied being liable to the plaintiff in any way.

Other than the production by consent of the pleadings in Nakuru HC Misc. No. 724 of 2005 and Nakuru HCC No. 28 of 2006 as well as a copy of the letter dated 14th September 1998 written by M/S Kimatta & Co. Advocates on behalf of the plaintiff, the defendant did not deem it fit to call any further evidence in the matter. It relies on those documents and its counsel's submissions.

Counsel for the parties agree that the issues that arise for determination in this case are whether or not the matter is res judicata; whether or not the plaintiff's claim is statute barred under the **Limitation of Actions Act** and whether or not the Agreement between the parties was a Hire Purchase Agreement or a Chattels Transfer and if so whether or not it is null and void for lack of registration.

In their submissions counsel for the plaintiff argued that as the plaintiff's earlier suit was struck out on a technicality and not after full hearing, the matter was not res judicata. On limitation, citing the English cases of **Applegate Vs Moss [1971]2 WLR 567** and **Clark Vs Noor [1965]1 WLR 650** they submitted that concealment by the defendant of the non-registration of the Agreement amounted to fraud. As the plaintiff discovered that fact only in 2007, they contended that his claim was not statute barred.

On the merits of the case counsel for the plaintiff referred me to **Section 5 of the Hire Purchase Act** and submitted that the repossession of the vehicle by the defendant under an unregistered Hire Purchase Agreement and without disclosing that fact to the plaintiff was fraudulent. They therefore concluded that the plaintiff was entitled to a total sum of Kshs.3,712,504/- being the initial down payment, instalments, Insurance Premiums and other charges paid to the defendant under the Hire Purchase Agreement.

On their part counsel for the defendant submitted that the plaintiff's claim is not only incompetent for being statute barred and res judicata but it is also far fetched and totally unmeritorious. They contended that the plaintiff's previous suits being Nakuru HC Misc. Apl. No. 724 of 2005 and Nakuru HCCC No. 28 of 2006 having been dismissed the matter is res judicata. They also submitted that the plaintiff's claim is statute barred under the **Limitation of Actions Act**. They dismissed the plaintiff's claim of misrepresentation as non-existent and not proved at all. Citing **Chitty on Contracts 28th Edition Para 6-046 at page 361** they submitted that "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or not." In this case they submitted that the plaintiff has not adduced any evidence to prove when, by whom, where or by what means the defendant represented to the plaintiff that the Agreement was not registered. To the contrary they submitted that the plaintiff deliberately lied on the alleged misrepresentation or lack of knowledge. They submitted that if anything, it is the plaintiff who is guilty of misrepresentation in that under cross-examination he conceded that he knew of the non-registration of the Agreement before he filed Nakuru HCCC No. 28 of 2006 while in his plaint he averred that he discovered that fact on October 2007. They cited the case of **Ndungu Vs Republic, [1976-1980] 1 KLR 1442** and submitted that the evidence of a person who is shown to be a liar cannot be relied upon. They urged me to dismiss the plaintiff's reliance on **Section 26 of the Limitation of Actions Act** on the contention that he discovered the alleged fraud in October 2007. Even if he were to be believed on that, they said the plaintiff has not shown what prompted him to make the enquiry in the year 2007 and not earlier.

Counsel for the defendant further submitted that if the plaintiff's claim is not dismissed on being statute barred or res judicata, then it must fail on its merits. They said there is nothing to show that the Agreement between the parties was a Hire Purchase Agreement to warrant the invocation of the provisions of the **Hire Purchase Act** as the ceiling at the material time on the Hire Purchase Agreements was at Kshs.300,000/- far below the purchase price of Kshs. 2,500,000/= in this case.

Counsel further argued that courts base the interpretation of documents on the intention of the parties. In this case the Agreement itself having not been produced the court has nothing to enable it determine the intention of the parties but to go by their conduct. The conduct of the plaintiff coupled with the alleged discovery of the non-registration of the agreement after 10 years is proof that this was not a Hire

Purchase Agreement or a Chattels Transfer that required registration.

Even if the Agreement is found to have been a Hire Purchase Agreement or a Chattels Transfer counsel for the plaintiff cited the cases of **Walsh Vs Lonsdale [1882] 21 Ch D 9**, **Clarke Vs Sondhi, [1963] EA 107** and **Meralli Vs Parker, [1956] 29 KLR 26** and contended that non-registration of the Agreement did not affect its enforceability as a contract inter-partes. They therefore submitted that the defendant's act of repossession was lawful and the plaintiff's claim should be dismissed with costs.

I have considered these submissions and the evidence of the plaintiff as well as the documents produced by consent of the parties. There is no dispute that the earlier suit was between the same parties to this case and the same was decided by a court of competent jurisdiction. It is, however, settled law that a matter is res judicata when it has been heard and determined on merit - **Kibogy Vs Chemweno, [1981] KLR 35** and **Wanguhu Vs Kania, [1987] KLR 51**. The plaintiff's earlier case, that is Nakuru HCCC 28 of 2006, having been struck out on a technicality, I hold that this matter is not res judicata.

On limitation I agree with counsel for the defendant that the plaintiff's claim is hopelessly time barred under the **Limitation of Actions Act**. The vehicle was repossessed in 1997. The plaintiff's claim based on tort was time barred after a period of 3 years and on contract after a period of 6 years. **Section 4** of the **Limitation of Actions Act Cap 22** of the **Laws of Kenya** makes that quite clear.

The plaintiff's claim in this suit is founded on **Section 26** of the **Limitation of Actions Act** on the contention that the defendant's act of fraud and misrepresentation was allegedly discovered in October 2007 when the Registrar General wrote to the plaintiff's advocate that the Agreement between the parties in this matter was not registered under either the Hire Purchase Act or the Chattels Transfer Act. I must reject this contention for the reason that no fraud is disclosed or proved. Even if it was, the plaintiff admittedly knew or ought to have known of it much earlier than 2007. I will demonstrate.

The standard of proof in cases of fraud is more than a mere balance of probabilities. As was stated by the Court of Appeal in **R. G. Patel – Vs - Lalji Makanji [1957] EA 314 at page 317 par. F:-**

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

As I have stated, no fraud has been disclosed in this case. In his plaint the plaintiff claims that while repossessing and selling the vehicle the defendant fraudulently represented to him that “it was acting on a duly registered Hire Purchase Instrument and/or Chattels Transfer Instrument.” In his evidence he did not say when, where or who made that representation to him. As a matter of fact he said that nobody told him that but he all along thought the Agreement had been registered. How can such an assumption be fraud? As Evershed MR said in **Kitchen Vs Royal Air Forces Association [1958] 2 ALL ER 241** fraud “covers conduct which having regard to some special relationship between the two parties concerned, is unconscionable thing for the one party to do to the other.” In the circumstances I find the allegation of fraud against the defendant in this case totally unfounded.

Even if I am wrong in this I am clear in my mind that the plaintiff did not discover the alleged fraud in the year 2007. In his evidence he did not say what prompted him and/or his lawyers to make the enquiry on the registration of the Agreement in the year 2007 and not earlier. From his concession under cross examination that he knew of the non-registration of the Agreement before filing Nakuru HCCC No. 28 of 2006, I agree with counsel for the defendant that he must have been aware of that fact all along and on the authority of the Court of Appeal decision in **Ndungu Vs Republic, [1976-1980] 1 KLR 1442** his evidence cannot be relied upon. In the circumstances I reject the plaintiff's contention that he discovered the alleged fraud in the year 2007. That being my view I find that the plaintiff's claim is statute barred and I accordingly dismiss it with costs for being bad in law.

In event I am overruled on the above findings, I want to deal with the plaintiff's claim on its merits. I totally disagree with the contention by the defendant that the Agreement between the parties was not a Hire Purchase Agreement governed by the Hire Purchase Act. Although the Agreement itself was not produced the defendant concedes in its defence that it was entitled “Hire Purchase Agreement”. That

notwithstanding, I agree with counsel for the defendant that the provisions of the Hire Purchase Act do not apply to the agreement in this case as the purchase price was more than Kshs. 300,000/=. That limit was raised to Kshs. 4 million by Act No. 7 of 2007, long after the agreement in this case. In the circumstances, the issue of its registration under the Hire Purchase Act does not arise.

The defendant has not claimed to have acted under the Chattel Transfer Act. Registration under that Act does not also arise. Even if this Agreement were governed by either of these Acts, failure to register it would not affect its enforceability as a contract inter-partes- **Walsh Vs Lonsdale [1882] 21 Ch D 9, Clarke Vs Sondhi, [1963] EA 107 and Meralli Vs Parker, [1956] 29 KLR 26.**

General damages are not awarded in claims based on contract and in any case they are not claimed in this case. No court can go out of the parties' pleadings and base an award on counsel's submissions as I am being urged in this case.

In their submissions counsel for the plaintiff also prayed for judgment in favour of the plaintiff in the sum of Kshs. 3,712,504/=. This is a special damage claim. It is axiomatic that special damages should not only be specifically pleaded but also strictly proved – **Herbert Hahn Vs Amrik Singh, [1992-1988] 1 KAR 738, Corporate Insurance Co. Ltd Vs Loise Wanjiru Wachira, CA No. 151 of 1995 (CA)** and **Sande Vs Kenya Corporative Creameries Ltd, [1992] LLR 314 (CAK)**. As the claim is not pleaded and the plaintiff did not adduce evidence to prove it, it requires no further consideration and the same hereby dismissed. So even if the plaintiff's suit were competent I would have dismissed his claim.

In the upshot I dismiss this suit on the grounds that the plaintiff's claim is not only unmeritorious and statute barred, but also that the matter is rejudicata. The defendant shall have the costs of this suit and interest thereon from that date of taxation.

DATED and delivered this 26th day of January, 2010.

D. K. MARAGA
JUDGE.