



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 65 of 2009

NIC BANK LIMITED.....APPELLANT

VERSUS

SAMUEL MAINA NGUGI.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Nairobi - Ms Mokaya Ag Principal Magistrate, Milimani Commercial Courts dated 6th February, 2009 in CMCC No.313 of 2009)

J U D G M E N T

1. This appeal arises from a ruling which was delivered by an Ag. Principal Magistrate, in which a mandatory order of interlocutory injunction was issued directing the appellant, NIC Bank Ltd, to release motor vehicle registration No.KAV 279B (Isuzu Matatu) (hereinafter referred to as the subject vehicle), to the respondent Samuel Maina Ngugi, during the pendency of the suit.

2. The appellant has raised 6 grounds of appeal as follows:

- (i) That the magistrate erred in law and in fact in holding that the respondent had satisfied the grant of the orders of a mandatory temporary injunction.
- (ii) That the magistrate erred in law and in fact in failing to appreciate that the subject motor vehicle in this case was co-owned by the appellant and the hirer.
- (iii) That the magistrate erred in law and in fact by treating the hire purchase and sale agreement between the appellant and the hirer.
- (iv) That the magistrate erred in law and in fact by failing to find that the respondent could not have acquired good title to the motor vehicle the subject of this suit without the consent of the appellant who was a co-owner.
- (v) That the magistrate erred in law and in fact in failing to find that there was fraud in the purported transfer of the subject motor vehicle without the consent of the appellant.
- (vi) That the magistrate erred in law and fact in finding for the respondent.

3. The background to the dispute in this matter, is that the respondent purchased the subject vehicle at a public auction on 1st August, 2008 at a consideration of Kshs.350,000/=. The public auction was done pursuant to

warrants of attachment and sale issued in execution of decrees against John Kahugu Munge in several suits filed at the Magistrate's Court in Makueni. The respondent was given possession of the subject vehicle together with all the transfer documents, and a certificate from the auctioneer confirming that the subject vehicle was bought by the respondent at the public auction.

4. On 19th January, 2009, the appellant's agents took possession of the subject vehicle from the respondent. The appellant impounded the subject vehicle purporting to have repossessed it pursuant to a Hire Purchase Agreement entered into between the appellant and one John Kahugu Munge. The respondent filed a suit in the subordinate court against the appellant for mandatory injunction and general damages, claiming that the appellant's actions were unlawful, and that the respondent was an innocent purchaser for value without notice. The respondent also filed an interlocutory application for an interlocutory injunction for release of the subject vehicle to him, pending the hearing of the suit.

5. In his ruling, the trial magistrate found that the respondent's claim that he had bought the subject vehicle at a public auction, which was duly advertised, was not challenged. The trial magistrate further found that the appellant had not demonstrated that the Hire Purchase Agreement, upon which the appellant relied was registered, and that Section 5(4) of the Hire Purchase Act bars a person from relying on an unregistered agreement.

6. The trial magistrate noted that the alleged Hire Purchase Agreement exceeded the sum of Kshs.300,000/= provided under Section 3(1) of the Hire Purchase Act, and therefore did not qualify as a Hire Purchase Agreement under Cap 507. The trial magistrate concluded that the respondent had established that the repossession of the subject vehicle by the appellant was unlawful, and that the respondent was entitled to the protection of the court. Accordingly, the trial magistrate granted the orders sought.

7. In support of the appeal, counsel for the appellant submitted that the trial magistrate was wrong in holding that the Hire Purchase Act applies only to hire not exceeding a sum of Kshs.300,000/=. Counsel argued that the correct position was that only agreements that fall under the pecuniary ceiling of the Act, (which the trial magistrate took to be Kshs.300,000/=) ought to be registered. Counsel submitted that agreements that fall outside the pecuniary ceiling of the Act only required to be stamped for the stamp duty and need not be registered. Counsel for the appellant further noted that in this case the stamp duty on the Hire Purchase Agreement was paid.

8. It was further argued for the appellant that under Clause 4 of the Hire Purchase Agreement title of the good remained with the appellant until payment of the Hire Purchase debt and the exercise of an option to purchase. It was submitted that there was a balance of Kshs.682,582/= which was still due under the Hire Purchase Agreement. Therefore, the purported attachment of the subject vehicle by a 3rd party and subsequent sale were illegal and fraudulent and could not pass a good title to the respondent nor could the hired goods be ceased by a 3rd party for auction for an execution in the decree. It was further noted that the subject vehicle was jointly registered in the names of the appellant and the hirer to protect the appellant's interest.

9. In support of his submissions, counsel for the appellant relied on the following:

- ***Halsbury's Laws of England 4th Edition Vol.22 Para 267***
- ***L.M. Goode Hire Purchase Law and Practice***
- ***National Industrial Credit Ltd & James Mugo vs George Kinyanjui Embu High Court Civil Appeal No.47 of 2004.***

Finally it was submitted that the respondent did not meet the conditions for grant of a mandatory injunction and the trial magistrate erred in finding for the respondent.

10. For the respondent it was submitted that the auctioneer attached the subject vehicle pursuant to decrees and warrant of attachment from a court of competent jurisdiction. It was maintained that at the time of the

attachment the subject vehicle belonged to the judgment debtor who was Munge John Kahugu. It was contended that the appellant did not place any objection to the attachment of the subject vehicle, and therefore the auctioneer legally sold the subject vehicle to the respondent, who was an innocent purchaser for value without notice of the appellant's rights in the subject vehicle.

11. As regards the Hire Purchase Agreement, Counsel for the respondent noted that Section 3(1) of the Hire Purchase Act Cap 507 provides that the Act applies to all Hire Purchase Agreements where the Hire Purchase price does not exceed the sum of Kshs.4 million or such other higher or lower sum as the Minister may from time to time prescribe. Counsel for the respondent also noted that Section 5 of the Hire Purchase Act requires all Hire Purchase Agreements to be registered within 30 days from the date of execution, and that a Hire Purchase Agreement which was not registered could not be enforced against the hirer, nor could the owner enforce any rights to recover the goods from the hirer. It was pointed out that the trial magistrate made a finding that the appellant did not demonstrate that the Hire Purchase Agreement was registered so as to confer an automatic right of repossession of the subject vehicle upon it.

12. Counsel for the respondent referred to **HCCC No.30 of 2008 The Wellness Health and Fitness Centre Ltd vs Shamsher Kenya Ltd**, in which it was held that although the agreement was stamped and registered under the Registration of Documents Act Cap 285, it was not a chattels mortgage registered under the Chattel Transfer Act Cap 28 which could entitle the defendant to repossess the gym equipment. **HCCC No.1667 of 2000 Fidelity Commercial Bank Ltd vs Aggritools Ltd and 4 others**, was also cited for the proposition that an agreement which is not registered is not enforceable against the hirer. It was submitted that only a chattels mortgage could serve as a notice to the public on the rights of the mortgagee's interest in the chattel. It was noted that in this case, neither a Hire Purchase Agreement nor a chattels mortgage was registered and therefore the respondent acquired a clean title to the subject vehicle.

13. It was further pointed out that the appellant did not exhibit any log book to confirm his assertion that it had any proprietary interest in the subject vehicle. It was argued that the trial magistrate properly directed herself by referring to **Showind Industries vs Guardian Bank Ltd & another HCCC No.273 of 2003**, and **Kenya Breweries vs Okeyo Civil Appeal 332 of 2000** and that the trial magistrate did not misdirect herself or misapply the principles. The court was therefore urged to uphold the ruling of the lower court and dismiss the appeal.

14. I have carefully perused the proceedings of the lower court. I have also given due consideration to the submissions made before the trial court and before me. It is evident that in the application subject of the ruling under appeal, the substantive order sought was an interlocutory mandatory injunction. The trial magistrate referred to appropriate authorities and properly directed herself, that the interlocutory mandatory injunction should only be granted sparingly, and only in exceptional circumstances such as where the applicant's case was very strong and straightforward. The question therefore is whether the respondent demonstrated that he had a strong and a straightforward case against the appellant and further, whether there were special circumstances justifying the granting of the interlocutory order of mandatory injunction.

15. It is evident from the annexures to the affidavits which were filed in support and in reply to the application for the interlocutory mandatory injunction, that the appellant's claim to the subject vehicle was anchored on a Hire Purchase Agreement, which the appellant purported to have entered into with John Kahugu Munge. A copy of that agreement was duly exhibited, and it is apparent on the face of the agreement that the agreement was not registered. Section 5(4) of the Hire Purchase Act is clear that unless a Hire Purchase Agreement is registered, no person shall be entitled to enforce the agreement against the hirer, and the owner shall not be entitled to enforce any right to recover the goods from the hirer. The replying affidavit sworn by the appellant's Manager Legal Debt Management Unit, Henry Maina, did not offer any explanation as to why the Hire Purchase Agreement between the appellant and John Kahugu Munge was not registered. Therefore, *prima facie*, the appellant had no right to recover the subject vehicle relying on the Hire Purchase Agreement.

16. I note that in her ruling, the trial magistrate held that the Hire Purchase price referred to in Section 3(1) of the Hire Purchase Act was Kshs.300,000/=. The trial magistrate delivered her ruling on 6th February, 2009. This was after Section 3(1) of the Hire Purchase Act had been amended by Act No.7 of 2007 increasing the Hire Purchase Price to not exceeding Kshs.4 million. The trial magistrate did not make reference to this amendment, and appears to have been guided by the previous figure of Kshs.300,000/=.

17. Nonetheless, the Hire Purchase Agreement between the appellant and the respondent having been signed on 31st January, 2006, the figure which was effective as the Hire Purchase Price for the purposes of Section 3(1) of the Hire Purchase Act, at the time of signing the agreement, is the one which applies. As at that date, by virtue of an amendment brought in by Act 11 of 1992, the Hire Purchase price limit for the purposes of Section 3(1) of the Hire Purchase Act was Kshs.300,000/=. The subsequent amendment enhancing the figure to the sum of Kshs.4 million, brought in by Act 7 of 2007, could not act retrospectively to apply to an agreement which had already been executed. That is to say that the Hire Purchase price indicated in the agreement between the appellant, and John Kahugu Munge being a sum of Kshs.2,767,800/= that agreement was excluded from the application of the Hire Purchase Act by Section 3(1) of that Act. Therefore, the agreement between the appellant and the respondent was not enforceable under the Hire Purchase Act.

18. Further, the appellant did not exhibit any logbook to demonstrate its contention that it was co-owner of the subject vehicle. The appellant only produced a copy of records from the Registrar of Motor Vehicles dated 23rd July, 2008 which showed that the motor vehicle was co-owned jointly by John Kahugu Munge and the appellant. However, that document was contradicted by a copy of records dated 25th June, 2008 from the Registrar of Motor Vehicles, and another copy of records dated 1st December, 2008 both of which were exhibited by the respondent, and which showed that the subject vehicle was owned by Kima Chweya and Munge John Kahugu.

19. In the light of the above, I find that the respondent demonstrated before the trial magistrate that he had a strong and a straightforward case against the appellant. The subject vehicle was an article subject to depreciation and deterioration. Secondly, the subject vehicle was a matatu, whose continued detention would have exposed the respondent to substantial loss. I am satisfied that there were compelling reasons for the granting of the mandatory interlocutory injunction. However, the trial magistrate failed to address the need for the respondent to provide appropriate security or undertaking in respect of damages that may arise as a result of the mandatory injunction.

20. In this regard, I would confirm the interlocutory mandatory injunction subject to the respondent providing a guarantee for a maximum sum of Kshs.1million from a reputable financial institution undertaking to pay damages that may arise from the interlocutory mandatory injunction. The appeal is otherwise dismissed with costs.

Dated and delivered this 14th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Kipkorir for the appellant

Ambani for the respondent

Eric - Court clerk