



**REPUBLIC OF KENYA**

**HIGH COURT AT KISII**

**CIVIL SUIT 269 OF 2002**

**CHARLES GICHANA ANGWENYI ..... PLAINTIFF**

**VERSUS**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED)**

**SHAMSUDIN ABDI ) ..... DEFENDANTS**

**JUDGMENT**

The plaintiff entered into an hire purchase contract with the first defendant in or about December, 1995 in respect of a new motor vehicle registration number KAG 690 M, a Nissan lorry. The total hire purchase price was Kshs. 4,506,266/= and the plaintiff paid a sum of Kshs. 936,505/= as a deposit and took possession of the said motor vehicle. The plaintiff defaulted in payments, having paid a total of Kshs. 2,436,505/=.

On or about 17<sup>th</sup> October, 1997 the second defendant, an Auctioneer, trading as Samaar Auctioneers, acting on instructions received from the first defendant, repossessed the said motor vehicle.

On or about 23<sup>rd</sup> October, 1997 the plaintiff approached the first defendant regarding release of the lorry but the first defendant denied any knowledge of the repossession.

The plaintiff did not know where the lorry had been taken to but sometimes before 1<sup>st</sup> November, 1999, he came to learn that it had been dismantled and major parts like the engine, gear box, diff and other essential parts removed, leaving behind just a shell of the original lorry whose salvage value was said to be Kshs.80,000/=.

The plaintiff claimed that the defendants acted fraudulently, dishonestly and in breach of the hire purchase agreement. Particulars of fraud and breach of the hire purchase agreement were set out in the plaint. The plaintiff further averred that as a result of the defendants' act as aforesaid he had suffered loss and damage as follows:

**(a) Value of the motor vehicle less salvage**

**Value ..... Kshs. 4,426,266.00**

**(b) Costs of repair ..... Kshs. 2,770,000.00**

The plaintiff prayed for judgment in the sum as stated in (a) above and damages for breach of contract and conversion. In the alternative, the plaintiff sought a declaration that the defendants do properly repair

the said motor vehicle and he be released from all liability under the hire purchase agreement.

The first defendant filed a statement of defence and stated that the plaintiff entered into a hire purchase agreement with her for the purchase of the said motor vehicle in the sum of Kshs. 3,568,761/= payable by instalments of Kshs. 99,140/= effective from 10/3/96 until 01/02/1999 when the last instalment of Kshs.99,861/= was to be paid. The first defendant was a joint registered owner of the motor vehicle for the purposes of securing the financial interest in the said motor vehicle.

The first defendant admitted having instructed the second defendant to repossess the said motor vehicle as per the hire purchase agreement because the plaintiff was neither diligent nor regular in the repayment of the loan. It further stated that the repossession was not wrongful as it was intended to keep in safe custody the subject of the hire purchase agreement as the plaintiff was to make suitable arrangements to settle the arrears. As regards vandalism of the lorry, the first defendant stated that the plaintiff had custody of the lorry until the police recovered it in a vandalized condition. It was the plaintiff who dismantled the lorry after taking it by force from the second defendant at Keroka service station, the first defendant alleged. The first defendant denied having acted fraudulently and in breach of the hire purchase agreement and stated that it was the plaintiff who acted fraudulently, dishonestly and in breach of the hire purchase agreement by, *inter alia*, intentionally refusing or neglecting to pay the regular instalments of hire purchase, hiring thugs who assaulted the second defendant and his officers before overpowering them and taking by force the said motor vehicle. The first defendant urged the court to dismiss the plaintiff's suit, saying that he was not entitled to any of his prayers.

The second defendant was served with summons to enter appearance and plead but filed neither a memorandum of appearance nor a statement of defence. The first defendant's advocates were served with a hearing notice for 5<sup>th</sup> February, 2009 but they did not attend court on the said day.

During the hearing, the plaintiff produced the hire purchase agreement, **P. Exhibit 1**. The total hire purchase price inclusive of hiring charges was Kshs. 4,506,266. He said that on 26<sup>th</sup> April, 1996 the lorry was involved in an accident and that caused him to fall in arrears. He notified the first defendant about the accident but that notwithstanding, on 17<sup>th</sup> October, 1997 the first defendant, without any notice to the plaintiff, instructed the second defendant to repossess the lorry. When he went to pursue the matter, the first defendant told him that they did not know where the vehicle was.

On 1<sup>st</sup> April, 1998 the first defendant wrote to the plaintiff demanding a sum of Kshs 1,346,802/=.

On 16<sup>th</sup> April 1998 the plaintiff responded to the aforesaid letter stating that on 17<sup>th</sup> October, 1997 the vehicle had been repossessed from him by the second defendant. At the time it was in good condition, he said.

It seems that after the repossession of the motor vehicle by the second defendant it went missing.

On 10<sup>th</sup> February, 1999 the first defendant wrote to the plaintiff and stated, *inter alia*:

**“We advise that the vehicle subject to the  
above referenced agreement is not in our  
possession. We are getting in touch with  
Mr. Abdi and will revert to you soon.”**

However, on 14<sup>th</sup> March, 1999 the first defendant wrote to the plaintiff and stated:

**“We refer to our letter dated 10<sup>th</sup> February, 1999**

**in response to yours dated 4<sup>th</sup> February, 1999.**

**We have now received a report from our Agent  
Mr. Shamsudin S. Abdi of Samaar Auctioneers  
and are now in a position to inform you that the  
vehicle subject to the agreement is neither in  
our custody nor in the hands of the agent.”**

Sometimes thereafter the plaintiff was informed by the police that the said motor vehicle was lying at Keroka police station and was asked to go and remove it from there failing which it was going to be sold by public auction. When he went there, he found the lorry completely vandalised. He instructed the Automobile Association of Kenya to assess the motor vehicle before he removed it from the police station. The assessment report (**P. Exhibit 4**) revealed that the cost of repairs was Kshs. 2,770,000/= and the salvage value was Kshs. 80,000/=. Thereafter the plaintiff removed the salvage from the police station but he was unable to repair it. He blamed the first defendant for unlawfully causing the second defendant to repossess the motor vehicle. He lamented that he had not been given any notice as required and further, that the defendants failed to take care of the motor vehicle after its repossession and was thus vandalized.

The plaintiff admitted that he was in arrears of payment of the hire charges for more than 14 days. In that case, according to clause 7.1 as read with 7.2 of the Hire Purchase Agreement, the first defendant had the right, by notice in writing, to terminate the contract. Clause 8 of the contract stipulates that upon such determination, the plaintiff would be liable to pay to the first defendant (in addition to all other sums in respect of which he may have been indebted to pay:

- (a) any arrears of rentals accrued upto the  
date of termination,**
  
- (b) the cost of all repairs required to be done  
to the motor vehicle to put it in a  
condition consistent with the performance  
of the plaintiff's obligation, and**
  
- (c) compensation for the first defendant's loss  
of the hire purchase price of the lorry less  
the aggregate of:**
  - (i) the rental already paid under the agreement,**

(ii) any arrears accrued up to the date of termination.

(iii) The proceeds of sale of the motor vehicle if repossessed and sold if not at its value.

(iv) The option payment.

Was the plaintiff given notice of termination of the hire contract? He said that none was given to him. It was not possible to verify that in the absence of evidence from the defendants. The law as well as the Hire Purchase Agreement required the first defendant to give notice to the plaintiff and if the same was not given, the first defendant also acted in breach of the agreement.

But the issue that is rather intriguing is what became of the motor vehicle after it was repossessed. Where was it taken? Why was it not sold shortly thereafter? Who vandalised it?

The plaintiff testified that the second defendant found the vehicle at a place known as Nyabururu after it had a puncture. He had the puncture fixed and then his people drove it away. That was on 17<sup>th</sup> October, 1997. The vehicle was not seen again. The plaintiff made effort to look for it but in vain. He enquired from the first defendant if they knew about its whereabouts. On 14<sup>th</sup> March, 1999, a Mr. J.M. Kithuka, the first defendant's Assistant Manager, wrote to the plaintiff and said that it was neither in their possession nor that of their agent, the second defendant. It appears that the vehicle was taken to Keroka police station and it is not clear at what point it got vandalized.

The defendants should have proceeded to dispose of the motor vehicle immediately after they repossessed it from the plaintiff and thereby mitigate their losses. No explanation was given as to why that was not done. Both the plaintiff and the first defendant suffered loss as a result of the said vandalism because the salvage was worth a paltry Kshs.80,000/=.

The first defendant alleged in its defence that it was the plaintiff who vandalized the vehicle after taking it by force from the second defendant at Keroka service station but no evidence was adduced to that effect.

Is the plaintiff entitled to judgment in the sum of Kshs. 4,426,266/= or cost of repair of the motor vehicle as claimed? The plaintiff was in breach of the Hire Purchase Agreement and that is what caused the first plaintiff to instruct the second defendant to repossess the vehicle. Equity cannot permit a person who has breached a fundamental term of a contract to benefit out of his own breach. I dismiss that claim.

As for the first defendant, it was the lawful owner of the motor vehicle since the plaintiff had not paid all the hire instalments and exercised the option to purchase. It had the right to repossess and sell the same and mitigate its losses, see **NATIONAL INDUSTRIAL CREDIT LIMITED –VS- EQUATOR BOTTLEERS LIMITED**, Civil Appeal No. 173 of 1992 (unreported). Thereafter it had the right to recover from the plaintiff such sums of money as stipulated under clause 8.1 of the Hire Purchase Agreement. However, because the first defendant, having repossessed the vehicle, did not act diligently to ensure that the vehicle is kept in a secure place where it could not be vandalized before it is sold, it is estopped from enforcing its rights under clause 8.1 of the Agreement. The plaintiff is therefore discharged from any further obligations and/or liabilities under the Hire Purchase Agreement. Each party shall bear its own costs of the suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF SEPTEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**14/9/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Bosire for the Plaintiff.

N/A for the Defendants

**Court:** Judgment delivered in open court on 14<sup>th</sup> September, 2009.

**D. MUSINGA**

**JUDGE.**