



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

**Civil Appeal 238 of 2001**

**JOSEPH CHEGE GITAU.....APPELLANT**

**VERSUS**

**CFC BANK LIMITED.....RESPONDENT**

**J U D G M E N T**

1. Joseph Chege Gitau (hereinafter referred to as the appellant), is dissatisfied with the judgment of Senior Principal Magistrate delivered on 27<sup>th</sup> April, 2001, in which the Senior Principal Magistrate gave judgment in favour of CFC Bank Limited (hereinafter referred to as the respondent), against the appellant for Kshs.343,647/30 together with interest at 4% per month, and dismissed the appellant's counterclaim.
2. The suit in the lower court was initiated by the respondent following a hire purchase agreement, entered into between the appellant and the respondent pursuant to which the appellant obtained motor vehicle KAG 437K on hire purchase terms from the respondent. The appellant defaulted on the monthly payments causing the respondent to repossess the motor vehicle and file a suit for recovery of Kshs.343,647/30 being the amount due as at 30<sup>th</sup> November, 1997 together with interest thereon from 1<sup>st</sup> December, 1997.
3. The appellant filed an amended defence and counterclaim contending that the amount outstanding as at 28<sup>th</sup> July, 1997 was Kshs.322,721/= and that the respondent having repossessed the appellant's motor vehicle, the sale of the motor vehicle was sufficient to fetch more than the amount outstanding.
4. The respondent denied owing the appellant the sum of Kshs.343,647/30. He raised a counterclaim contending that the sale of the motor vehicle was lawful and that the motor vehicle was sold at a price which was manifestly low due to the appellant's negligence. The appellant therefore urged the court to dismiss the respondent's suit with costs and give judgment for the appellant for general damages together with costs of the suit.
5. During the hearing in the lower court, Nabboth Orieko, a Credit Officer of the respondent, and Stephen Karanja Mbutia, the managing director of Wanji Ltd, a debt collection and repossession company, testified. Their evidence was that the appellant entered into a hire purchase agreement with the respondent pursuant to which, the appellant was given motor vehicle KAG 437K. The appellant signed the hire purchase agreement on the 5<sup>th</sup> January, 1996 after taking delivery of the vehicle. The loan was to be paid by 23 hire purchase rentals with an option to purchase the vehicle. The appellant commenced

payment on 3<sup>rd</sup> February, 1996. Following persistent default by the appellant, the motor vehicle was repossessed but returned to the appellant on two occasions. It was finally repossessed on the 14<sup>th</sup> July, 1997 and the hire purchase agreement terminated on the 21<sup>st</sup> July, 1997. The motor vehicle was subsequently sold on 18<sup>th</sup> September, 1997 at a price of Kshs.350,000/=. Notwithstanding the sale of the motor vehicle there was a shortfall of Kshs.343,647/30 in respect of which the respondent filed suit for recovery.

6. The appellant and one Joseph Kahiyo Ndimori, testified on behalf of the appellant. The appellant's evidence was that the motor vehicle broke down in March, 1996 shortly after he had made the first installment on 3<sup>rd</sup> February, 1996. He returned the motor vehicle to Cooper Motors Corporation and informed the respondent he was unable to make payments. During the period that the motor vehicle was under repair. The motor vehicle was repossessed by the respondents on 2 occasions and that compounded the appellant's problem as he was unable to trade with the vehicle. The repossession charges enforced were also exorbitant and that increased the appellant's debt to the respondent. The appellant maintained that by the time the vehicle was finally repossessed the balance outstanding was Kshs.175,821/50. A sum of Kshs.350,000/= was realized from the sale of the motor vehicle but further charges like interests, repossession charges, and storage charges were added. The appellant maintains that he was not given adequate time to redeem his vehicle and that his guarantor even offered to pay the balance of the loan but was not given an opportunity to do so. The appellant maintained that the motor vehicle had only been used for 1½ years, and should have been sold for at least Kshs.800,000/= which would have enabled the respondent to recover all his money.

7. In his written submissions filed in the lower court, counsel for the respondent submitted that the appellant having signed the hire purchase agreement, he was bound by the terms of the agreement. He drew the court's attention to Clause 2g and 4 of the agreement, pursuant to which the respondent was entitled to repossess the motor vehicle and the appellant was bound to pay all costs, charges and expenses arising out of or in connection with the repossession of the motor vehicle. He maintained that the motor vehicle was lawfully repossessed and sold and that no negligence alleged by the appellant was established. Relying on ***Diamond Trust Bank (K) Ltd vs Jaswinder Singh Enterprises, Civil Appeal No.285 of 1998***, counsel submitted that the Hire Purchase Act only applies to agreements where the hire purchase price was not more than 300,000/= and therefore the transaction between the appellant and respondent was not governed by that Act.

8. Counsel for the appellant also filed written submissions in which he maintained that the respondent's general manager refused an offer made by the appellant's guarantor to pay off the amount outstanding on the appellant's account and instead proceeded to sell the repossessed motor vehicle at far less than what was outstanding. He pointed out that most of the amount claimed by the respondent was unexplained debit and unproved expenditure. Counsel further submitted that contrary to the Hire Purchase Act, the hire purchase agreement was not registered, and the respondent was therefore not entitled to enforce the agreement against the appellant and the repossession of the motor vehicle was therefore unlawful. The court was therefore urged to find that the repossession of the motor vehicle was contrary to Section 15(1) of the Hire Purchase Act. The court was further urged to find that the respondent was not diligent in selling the motor vehicle at the price it did. Counsel for the appellant therefore urged the court to dismiss the respondent's suit and enter judgment for the appellant on the counter-claim.

9. In his judgment, the trial magistrate found that there was a hire purchase agreement between the parties, and that the motor vehicle was repossessed because the appellant defaulted in the payment of rental installments for the motor vehicle. The trial magistrate further found that the appellant was given time to exercise the right to purchase the motor vehicle but he never did so. He therefore gave judgment for the respondent and dismissed the appellant's counter-claim.

10. In his appeal the appellant has raised 8 grounds as follows:

(1) The learned trial magistrate erred in law and in fact in holding that the respondents were entitled to the amount and interest claimed in the plaint.

- (2) The learned trial magistrate erred in law and in fact in totally disregarding the fact that the hire purchase agreement was not registered as required by law.
- (3) The learned trial magistrate erred in law and in fact in not holding that pursuant to (2) above the respondents had illegally repossessed the motor vehicle.
- (4) The learned trial magistrate erred in law and in fact in ignoring the fact that the appellants guarantor had offered to clear any outstanding amounts and the respondents would not be entitled to interest from that date.
- (5) The learned trial magistrate erred in law and in fact in holding that the respondents were entitled to the penal charges.
- (6) The learned trial magistrate erred in law and in fact in failing to take account of the respondent's conduct of selling the subject motor vehicle at a less amount than what it was valued and refusing to accept a high sum of payment by the guarantor.
- (7) The learned trial magistrate erred in law and in fact in failing to take into account the sums already paid by the appellant.
- (8) The learned trial magistrate erred in law and in fact in ignoring the appellant's counter claim entirely.

11. In support of the appeal, counsel for the appellant submitted that the trial magistrate did not take into consideration the issues which were raised by the appellant or the exhibits which were produced. He noted that the hire purchase agreement provided a right to the appellant to repossess the motor vehicle, but contended that the trial magistrate did not take into account the fact that the respondent initially issued a repossession order for the motor vehicle when it was within their knowledge that the motor vehicle had developed mechanical problems and the appellant could not use the motor vehicle to generate any income. It was maintained that the hire purchase agreement was frustrated by the respondent failing to consider why the appellant was not able to pay the installments. It was further submitted that the appellant was not given sufficient notice to redeem the motor vehicle. It was contended that the trial magistrate also failed to note that the appellant's guarantor attempted to redeem the vehicle but the respondent refused and this was clear from the correspondences which were produced in evidence.

12. Counsel for the appellant further maintained that the appellant's admission that the motor vehicle was not valued before the sale, and that only one tender was received for the sale of motor vehicle confirmed the appellant's allegation that the motor vehicle was irregularly sold and ought to have fetched more than 350,000/=. It was further contended that the respondent did not explain the balance of Kshs.353,000/= which it claimed was due after the sale of the motor vehicle. Nor were any receipts produced to confirm the payments reflected in the statements. Finally it was contended that there was no evidence in support of the award of interest of 4% per month.

13. Counsel for the respondent on his part submitted that Clause 2(d), (e) and (f) of the hire purchase agreement placed the burden of maintaining the motor vehicle on the appellant and therefore the non-working condition of the motor vehicle did not affect the right of the respondent. Counsel contended that there was an admission by the appellant both in his defence and under cross-examination that there was a sum of Kshs.322,121/= due and owing to the respondent. It was further submitted that the statement of account given by the appellant was not contested. It was maintained that the appellant was given ample opportunity to exercise his right as the motor vehicle was sold almost a year after it was repossessed. It was further contended that the respondent was not under any obligation to value the motor vehicle, and that in any case the appellant did not tender any evidence to justify his contention that the motor vehicle was sold at an undervalue.

14. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate including the exhibits and the submissions made by Counsels. I find that the agreement between the appellant and the respondent as evidenced by the hire purchase agreement signed by the

parties and produced as P.exh.5 involved motor vehicle KAG 437k whose hire purchase price was Kshs.1,232,160/=. Since Section 3(1) of the Hire Purchase Act limits the operation of that Act to transactions in which the hire purchase price does not exceed Kshs.300,000/=, the agreement between the appellant and the respondent was not governed by the Hire Purchase Act and the provisions of that Act do not therefore apply to the transaction.

15. From the pleadings and the evidence adduced before the trial court, it was not disputed that the appellant defaulted in the repayment of the hire installments for the motor vehicle. The appellant blames the respondent for repossessing the motor vehicle without taking into account that the appellant was unable to pay the rental installments because the motor vehicle had mechanical problems and the appellant could not therefore generate any income. However, the fact that the motor vehicle had mechanical problems did not absolve the appellant from his obligation to make the monthly payments, nor did it deny the respondent its right to repossess the motor vehicle. It is evident that the agreement provided the respondent the right to repossess the motor vehicle as long as there was default in payment of the monthly installments. Although the appellant claimed that he was not given an opportunity to redeem the motor vehicle this is not true. The motor vehicle was not actually sold until about 3 months after its repossession. There is no evidence that either the appellant or his guarantor tendered the required amount to avoid the sale of the motor vehicle. The fact that offers may have been made is not enough. Evidence of actually tender of payment was necessary.

16. With regard to the alleged sale of the motor vehicle at an under-value, there was no evidence adduced by the appellant to confirm that the value of the motor vehicle at the time of sale was much higher than that at which it was actually sold. Although the motor vehicle was less than 2 years old, there was evidence that it had developed mechanical problems just about two months after the appellant took possession of the motor vehicle and that the vehicle was further involved in an accident. In the absence of a proper valuation it cannot be said that the value was higher than that at which it was sold. The burden was upon the appellant who was alleging that the motor vehicle was sold at an under value to establish that fact. The appellant failed to discharge that burden. I therefore find that the motor vehicle was lawfully repossessed and lawfully sold, in accordance with the Hire Purchase Agreement.

17. As concerns the statement of account which was produced in evidence by the respondent, the shortfall of Kshs.343,647/30 claimed by the respondent from the appellant and the interest of 4% per month claimed, it is evident from the statement that payments made by the appellant were credited to the account and that charges were levied on the account in respect of repossession charges, storage, legal fees etc, all of which arose as a result of the repossession, and which the respondent was entitled to recover in accordance with clause 2g of the Hire Purchase Agreement. As regards the interest of 4% per month, this was in accordance with clause 2(c) of the Hire Purchase Agreement which provided for interest at the rate of 48% per annum. The rate may well be high, but that is what the parties freely agreed to and it is not for this court to question the fairness of what was agreed. I therefore find that the charges and interest were properly levied.

18. The upshot of the above is that the trial magistrate was right in giving judgment for the respondent and dismissing the appellant's counterclaim. Accordingly, I uphold the judgment of the lower court and dismiss the appeal with costs to the respondent.

Those shall be the orders of this court.

**Dated and delivered this 18<sup>th</sup> day of October, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Makungu H/B for Nganga for the appellant

Advocate for the respondent absent