

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

Civil Case 264 of 2006

RICHARD M. MUTISO.....PLAINTIFF

VERSUS

C.F.C. BANK LIMITEDDEFENDANT

RULING

The Plaintiff's application is the Chamber Summons dated 2nd March, 2006 brought under XXXIX Rule 1 of the Civil Procedure Rules. The Plaintiff seeks that the Defendant bank be restrained by itself, its servants or agents from repossessing the Plaintiff's motor vehicle Registration No. KAQ 866U Peugeot 406 saloon pending the hearing of this suit. The Plaintiff has sworn an affidavit in support of that application. He deponed that the Hire Purchase loan transaction between the Plaintiff and the defendant commenced on 3rd July, 2003 and was expected to be completed on 3rd June, 2007. That it was agreed the monthly installments payable by the Plaintiff for the hire purchase loan would be for Kshs.47,494/17. that the Plaintiff has duly paid the installments as they have fallen due until the Defendant arbitrarily varied the terms of the hire purchase agreement between them. That as consequence of that variation there were two installments which the Plaintiff called disputed installments which had not been paid. The plaintiff deponed that the Defendant had instructed an auctioneer to repossess the aforesaid motor vehicle. He further deponed that such repossession is wrongful and illegal since he had paid 2/3 of the hire purchase loan. The Defendant in response to the Plaintiff's application filed a replying affidavit where it accepted that there was a hire purchase agreement between the parties. That the Defendant agreed to finance the purchase of the aforesaid motor vehicle under the hire purchase agreement. That it was a condition that all hire purchase monthly rentals would be paid by the Plaintiff punctually. That it was also a term of that agreement that the bank was entitled to immediately repossess the said motor vehicle if the plaintiff was in breach of the hire purchase agreement. That the Plaintiff did breach the hire purchase agreement by failing to continue to meet the monthly rental installments as agreed and that by 3rd March, 2006 the Plaintiff was in arrears on installments of Kshs.143,814.98. That further the Plaintiff had issued the Defendant with cheques that had been dishonoured namely on 25th July, 2005 a cheque of Kshs.95,000/= and on the 3rd November, 2005 a cheque for Kshs.103,000/= and finally on 28th February, 2006 a cheque of Kshs.90,000/=. Further that by a letter dated 23rd November, 2005 written by the Plaintiff to the defendant the Plaintiff admitted his indebtedness. The Defendant deponed that in view of those three breaches the Defendant had issued repossession order to the aforesaid motor vehicle. The Defendant finally stated that the Plaintiff is still indebted to the Defendant for Kshs.796,736.79 as at 3rd March, 2006. The Plaintiff filed a further affidavit and again repeated that it had paid 2/3 of the hire purchase loan and that accordingly the Defendant was not entitled to repossess the motor vehicle. The Plaintiff did accept in this further affidavit that it had not paid some installments of the hire purchase agreement. In submissions counsel for the Plaintiff was of the view that the order for repossession of the motor vehicle was oppressive to the plaintiff and was only intended to self enrich the defendant. He said that he based his argument on Section 15(1) of The Hire Purchase Act since the Plaintiff had paid 2/3 of the purchase price. That in view of that section the Defendant could only enforce its rights through a suit. He submitted that Section 15(1) was enacted to protect the hirer who would have put so much of an investment by having made payments of 2/3 of the purchase price. The Defendant's counsel in response argued that The Hire Purchase Act does not apply to the transaction between the Plaintiff and the Defendant. Defendant's counsel referred to Section 3 which it is stated clearly limited the transaction that fall under the Act to those whose amount are within Ksh.300,000/=. The Defendant relied on the case of **Nurdin Bandali v Lombank Tanganyika Limited [1963] EA.** and particularly to the holding of that case as follows:-

“in view of cl. 9, it could not be said that because the respondent on a number of occasions forbore to exercise its right to repossess and accepted late payment it induced in the appellant a belief that the right to repossession would not be exercised”.

The Hire Purchase Act Section 15 is not applicable to this transaction as correctly submitted by the Defendant. The parties transaction falls outside the ambits of the Act by virtue of Section 3(1) thereof. That section provides that this Act would apply to Hire Purchase agreement where the hire purchase price does not exceed Kshs.300,000/=. This transaction does obviously go beyond Kshs.300,000/= and the Plaintiff therefore cannot place reliance on the provisions of the Act. The Plaintiff’s counsel stated that the defendants acts are unjust and oppressive. That argument does not find favour with the court since there is a contract that is binding between the Plaintiff and the Defendant. That contract provides that the hirer (the Plaintiff hereof) would be punctual in the payment of the hire rentals. The Plaintiff on his own admission had failed to make two payments. That being the case the defendant was entitled as provided by Clause 5 of the Hire Purchase agreement to carry out repossession of the motor vehicle. The Plaintiff was heard to argue that the reason why the payments of the two installments was not made was because the defendant had varied the terms of the agreement. The Plaintiff stated that the Defendant varied those terms by increasing the rate of interest applicable to his account. What the Plaintiff failed to appreciate is that under Clause 2(b) the Defendant had reserved the right to vary, reduce or increase the hire rental without necessarily informing the plaintiff. Since that is a term of the contract the defendant’s variation cannot be said to be wrongful or illegal. Since also that there is an admission of non payment the Defendant was entitled under the Hire Purchase agreement to repossess the motor vehicle. I find that the Plaintiff has failed to make out a prima facie case with a probability of success to entitle him to an injunction as sought by the present application. The court will therefore, decline to grant the orders as sought. The order of this court therefore, is that the Plaintiff’s application dated 2nd March, 2006 is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 27th of October, 2006.

MARY KASANGO

JUDGE