



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 881 of 2000

MBURU GATHEE t/a GATHEE ENTERPRISES.....PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LTD.....DEFENDANT

J U D G M E N T

The plaintiff in this case hired motor vehicle registration Number KAG 664P from the defendant. The total hire purchase priced kshs 6, 362, 437. The defendant financed the plaintiff the sum of kshs 3, 005, 836. On or about July 1997 the plaintiff's account was rescheduled on the plaintiff's request. On 12th May 2000, the said vehicle was repossessed by the defendant and on a mandatory injunction being issued the vehicle as restored back to the plaintiff. A few days later, according to the plaintiff on 30th June 2000, the defendant once again repossessed the said vehicle and proceeded on 6th July 2000 to sell the said vehicle.

The plaintiff therefore brings this claim for loss and damage suffered as a consequence of said sale and repossession.

The plaintiff in evidence stated that prior to repossession of the vehicle he was in the business of carrying fertilizers, chemicals and maize. That he identified the motor vehicle he wanted to buy, namely registration No. KAG 664P, and was able to pay the dealer kshs 1, 630, 265/-. He obtained finance for the balance of the purchase price from the defendant of kshs 3, 805, 000, with interest at 23.88% per annum. He stated that he paid the amount due as instalments, to the defendant, as per agreement entered thereof. He stated that between 1st April 1996 and March 2000 he had paid in total kshs 7, 136, 000/-. That on the vehicle being repossessed after the court's injunction he only came to know about its sale by a letter sent by the defendant demanding the short fall of kshs 521, 221.9 and accrued interest of kshs 976, 569.

The plaintiff concluded his evidence in chief by stating that he was claiming for compensation of kshs 7, 136, 594/-. This figure, he said, was representing his claim for loss of business, for 90 days, where the vehicle was earning kshs 600, 000 gross; and it also represented loss of insurance premium being kshs 1, 300, 000. To prove loss of user, the plaintiff produced payment vouchers of a company called Boston Industries Limited which he said showed an earning of kshs 700, 000, less operation costs of kshs 200, 000/-. The plaintiff finally stated that his claim was for kshs 11, 871, 000/-.

On being cross examined by defence counsel the plaintiff accepted that he was not regularly in his remittance of his monthly instalments. He accepted that he sometimes delayed in remitting the instalments, whilst at other times he accepted he did not make any payment.

P W 2, **Alice Wangui Maina** described herself as an accountant with the firm of Mugo Waweru & Associates. P W 2 confirmed that they prepared accounts for the plaintiff, which she produced in court as evidence that the plaintiff, at the time of repossession of the motor vehicle, had overpaid the hire purchase charges, due to the defendant. The statement indicated that the plaintiff, as at 1st May 2000, had over paid the defendant kshs 1, 732, 393.

On being cross examined by defence counsel, P W 2 stated that she compiled the accounts from the information obtained from the Hire Agreement and from the defendant's bank statements.

She however conceded that she did not take into account the amount charged as hire purchase charges; she also did not pay regard to variation of rate of interest as provided by the hire agreement.

D.W. I **Kenneth Kinuthia Kariuki** stated that the plaintiff was consistent in the repayment of his schedule, for sometime, but became inconsistent thereafter. That as a consequence of that inconsistency the plaintiff sought and obtained rescheduling of his account. That after rescheduling the plaintiff again failed to be regular in his repayment of the instalments. as a consequence of failure to pay instalments on this due date the defendant issued notices of default the last one being dated 4th May 2000, defence Exhibit 12. D W 1 accepted that the defendant on being served with a court order did release the vehicle to the plaintiff and he accepted that after a few days later the defendant repossessed the vehicle. He stated that repossession was after the defendant had complied with the requirements placed by the court.

On being cross-examined D W 1 stated that, included in the past default interest, were such charges as; hire charges, normal banking charges, commissions for up country cheques and investigations charges, amongst others. These charges although not spelt out he stated were covered by the clause on hire purchase charges.

D W 2 produced letters that were sent to the plaintiff relating to his default.

As I begin to consider the judgment of the court it is important to deal with the issue raised by the plaintiff, and in his submissions that the defendant was in contempt of court, when it repossessed the motor vehicle, and proceeded to sell it. I note that the plaintiff filed an application for contempt of court and the same was dismissed by Justice Ransley. Since that dismissal has not been appealed against or set aside I find that I cannot seat in judgment on that issue of contempt of court. It is indeed res judicata.

Considering the evidence adduced before me there are two issues that arise. The first is whether the plaintiff has proved his claim for loss of user and for insurance premium.

The second issue is whether the defendant has proved its claim for counter claim of kshs 2, 696, 892.25.

In respect of the first issue I find that the plaintiff has fallen short of the burden of proof. The plaintiff in evidence stated that he had lost the use of the vehicle for 90 days. He proceeded to say that he earned kshs 700, 000 per month. In support of that he produced two-payment voucher of a company called Boston Industries Ltd. Those vouchers were for a period of March, April and February 2000. Those do not suffice to shift the burden. It was necessary for the plaintiff to produce statements of account to indeed prove that, that was the income on average that he attained every month; for all we know the vouchers produced could be the only months that the defendant obtained business. They certainly did not suffice. The plaintiff's claim for insurance is not understandable. He is not claiming the loss of the vehicle but he claims the refund of insurance he paid when he had the use of the vehicle. That claim is not sustainable. The plaintiff in submission stated that his claim for loss of a consignment on the day of repossession valued at kshs 1, 085, 670. 90, was not denied by the defendant in its defence, and accordingly the same should be granted. That position is not correct for indeed the defendant did not even have to tender evidence on the same but the plaintiff is on the other hand obligated to prove that claim. In other words the plaintiff had to prove that loss whether or not the same was denied by the defendant. That claim fails.

On the second issue the parties, accept that the plaintiff's accounts as rescheduled in 1997. The defendant claims that the plaintiff was indebted to it as at 28th February 2001 kshs 2, 696, 892. 25. The defendant however did not prove this claim. The statements produced by the plaintiff do not reflect the stated amount. The defence witnesses did refer to a statement of account, but that was not produced in evidence, it was only marked for identification. That being so the defendant's claim fails.

The end result is that both the plaintiff's and defence cases fail and are hereby dismissed. Each party shall bear their own costs.

Dated and delivered this 3rd October 2005.

MARY KASANGO

JUDGE