

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 7 OF 2000**

AMJAD PARVES MALIK & 2 OTHERS PLAINTIFFS

Versus

NATIONAL INDUSTRIAL CREDIT BANK LTD. DEFENDANT

R U L I N G

By a Hire Purchase Agreement dated the 12th August 1997 (the Agreement) entered into between the plaintiffs (the Respondents) and the defendant (the Applicant) the Applicant hired to the Respondents two trucks Registration Numbers KAJ 931E and KAJ 932E at the total hire purchase price of Ksh. 12,236,952/= inclusive of interest and charges to be repaid by 35 monthly instalments as therein stated. Upon failure by the Respondents to repay the said sum as agreed the Applicant repossessed the said trucks and sold them. Aggrieved by that action the Respondents filed this suit alleging that the repossession was irregular and that the Applicant sold the trucks at throw away prices. They sought a declaration that the act of repossessing the trucks was illegal and an order that the Applicant refunds all the moneys they paid to it in respect of those vehicles.

The Applicant filed a defence and counterclaim in which it counterclaimed a sum of Sh. 2,926,473/= being the balance as at 31st July 2000 of the said purchase price interest and charges after selling the trucks and giving the Respondents credit. The Respondents filed a defence to the counterclaim but the Applicant found it to be no defence at all. Consequently by a Notice of Motion dated the 7th April 2003 brought under Order 35 Rule 1(1)(a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act the Applicant seeks summary judgment to be entered against the Respondents for the said sum of Sh. 2,926,473/= plus interest and costs as prayed in the counterclaim. In support of the application Reuben Nyangaga, a manager in the Debt Management Unit of the Applicant has sworn an affidavit to which he has annexed various documents including bank statements which he claims show that the Respondents are indeed indebted to the Applicant and have therefore no defence to the counterclaim.

The application is opposed by the Respondents. In his replying affidavit Amjad Parvez Malik, the first Respondent, deponed that apart from the repossession of the trucks being unlawful, unprocedural and consequently null and void the Applicant neither involved them when selling the trucks nor obtained a valuation before selling them. He further deponed that the Respondents having paid a total sum of Sh. 8,000,000/= it was unfair for the Applicant to repossess the vehicles, sell them and keep the proceeds of sale and go further to counterclaim. He said that the plaint and defence to counterclaim raise several triable issues which are “incapable of being determined summarily.”

Mr. Ndegwa, counsel for the Applicant’s submission was short and precise. He said that the annexures to the supporting affidavit show that the Respondents are indebted to the Applicant. There is therefore no triable issue to require a hearing. Summary judgment should be entered for the Applicant as prayed in the counterclaim. In response Mr. Sifuna, counsel for the Respondents, submitted that the Respondents having paid more than two thirds of the purchase price the repossession was illegal. Notwithstanding that the price of the vehicles is much more than the limit of Sh. 300,000/= stated in the Hire Purchase Act (the Act) he said the Agreement is drawn in accordance with the Act and it therefore applies to this transaction. He contended that the vehicles were not only sold at throw away prices but their sale was not advertised at all. He also submitted that the Agreement is not even stamped as required by the Stamp Duty Act.

The Respondents are also contesting the issue of penalty interest as it is not provided for in the Agreement. The plaint and defence to counterclaim raises several triable issues which can be best

disposed of in a full trial, he concluded. In response to those submissions Mr. Ndegwa pointed out that the Agreement was duly stamped. The Agreement provides for penalty interest contrary to Mr. Sifuna's contention. He further stated that the sale of the vehicles was advertised though no reserve price was given. I have considered these rival submissions and the application as a whole. Before I deal with the main issues in this application I would like to dispose of what I see as side issues in this matter. Mr. Sifuna submitted that his client having paid more than two thirds of the purchase price the repossession of the vehicles was illegal. He made this contention while fully aware of the provisions of section 3(1) of the Hire Purchase Act which limits the application of the Act to transactions where the purchase price is Sh. 300,000/= or less.

I found that surprising. The Act has no application to this matter in which the purchase price was over Sh. 12,000,000/=. The other side issue raised by Mr. Sifuna is that the Agreement is not stamped and will therefore be inadmissible at the trial. A perusal of the copy exhibited in this application shows that the same was stamped and that contention therefore has no substance. The main issue in this application is whether or not there are triable issues raised. It has been held time and again that:- "Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant." - Newbold, P in Zola & Another [1967] E.A. 691 at P. 694.

It must be plain and obvious that the defence does not raise any triable issue before summary judgment is ordered. In ICDC Vs Dabar Enterprises Ltd. [2000] E.A. 75 it was held that an application for summary judgment is suitable where the matter is not complicated and only a few documents are to be relied on. In this case can it be said that the Applicant's counterclaim is obvious and uncontestable? I do not think so. It is the Respondents' case that the vehicles were sold at throw away prices. I find this argument not to be without substance. Mr. Ndegwa admitted that the Applicant did not give any reserve price. As a result motor vehicle KAJ 931E valued at Sh. 2,720,000/= was sold for Sh. 1,800,000/= while KAJ 932E valued at Sh. 2,630,000/= was sold for Sh. 1,445,000/=. Whether or not those prices were fair I cannot say at this stage. That has to be left to the trial judge to decide after hearing evidence from both parties.

Further more there are numerous documents annexed to this affidavit in support of this application making it obviously not as simple as it is made to appear. For these reasons I find that the purchase prices at which the vehicles were disposed of in the light of their valuations raises a triable issue. Consequently I dismiss this application with costs.

DATED and delivered this 30th day of November 2004.

D.K. Maraga

Ag. JUDGE