

Defendant avers that the repossession and resale of the said vehicle was in contravention of the sale of Goods Act(Cap.31 Laws of Kenya) and therefore illegal. After this defence, the Plaintiff served a Notice to admit the following documents:

- 1. A declaration of lien-Deferred payment executed on 12.5.00 by the Defendant.**
- 2. Retail Vehicle Order Number 18529 executed on 12.5.000 by the Defendant.**
- 3. Vehicle sales invoice number 1798 dated 12.5.00 executed by Peter H. Huth Valuation Surveyor.**
- 4. A Certificate of Valuation dated 5.5.2003 executed by Peter H. Huth**
- 5. Sales Credit Note No.759 dated 10.7.2003, sent to Mr. Eliud Chogi Githua by the Plaintiff.**
- 6. Delivery/Acceptance Certificate dated 12.5.2000 executed by the Defendant.**
- 7. Letter dated 8.4.2003 sent to the Plaintiff by Rimuga Services,**
- 8. Letter dated 23.11.2003 sent to the Defendant by the Plaintiff.**

The Plaintiff's motion for Summary Judgment is supported by an affidavit of one Stephen Karanja Wainaina the Plaintiff's Credit Manager sworn on 23rd August, 2004. The affidavit recites the averments in the Plaint. To the said affidavit the said deponent has annexed the following documents.

- 1). Copies of vehicle sales invoice and retail vehicle order issued to the Defendant by the Plaintiff.**
- 2). A copy of the Declaration of lien-Deferred payment with other conditions of the transaction.**
- 3). A copy of the Delivery/Acceptance Certificate executed by the Defendant on delivery of vehicle.**
- 4). A copy of a report dated 8th April, 2003 prepared by repossession agents hired by the Plaintiff.**
- 5). A copy of the Certificate of Valuation dated 5th May 2003 prepared by Peter Huth a valuation surveyor.**
- 6). A copy of a letter dated 23rd May 2003 from the Plaintiff to the Defendant demanding immediate repayment of the outstanding sum of Kshs 3,796,866.45.**
- 7). Copies of vehicle sales invoice number 2128 in respect of sale of the vehicle to Githua & Credit Note number, 759 crediting the Defendants' account with the purchase price.**
- 8). Copies of debit notes/invoices for a total sum of Kshs 359,259.45.**
- 9) Receipts issued on payment of Kshs 134,130/= upon repossession of the vehicle.**
- 10) Copy of the demand letter for the said sum of Kshs 3,302,176.45.**

The Declaration of lien-Deferred payment shows that the Defendant owed the Plaintiff as at the date of the declaration i.e. 12.5.2000 Kshs 5,873,667/=. The document shows that this sum was to be paid within 24 months with effect from 30th June 2000. The document also provides for interest revisable by the Plaintiff without prior notice to the Defendant. There is also provision for a specific rate of interest of

36% per annum which is to be charged on arrears and is described as additional penalty interest charge. There is also provision for seizure and disposal of the said vehicle in the event of default in the payment of the said sum of Kshs 5,873,667/=.

The Retail Vehicle Order No.18529 dated 12th May 2000 shows how the purchase price of 6,473,6660.67 is arrived at.

The Delivery Acceptance Certificate provided that the property in the vehicle would not pass to the Defendant until the full purchase price had been paid. The Power to repossess in the event of default is also saved in this Delivery/Acceptance Certificate.

The Letter from Rimuga Services to the Plaintiff shows the state of the vehicle at the time of repossession and Peter Huth Certificate of valuation gave a valuation of Kshs 430,000/=, M/s Rimuga Services charged the Plaintiff a total 133,820/=.

The Defendant has filed a replying affidavit sworn on 7th October, 2004. He depones that he has a good defence to the suit. He further depones that a few months before the repossession he had fitted a new engine to the said motor vehicle worth Kshs 700,000/= and in his view the sale of the vehicle for Kshs 500,000/= was unconscionable.

The Defendant further depones that there are triable issues in respect of the legality of the repossession; whether or not the Plaintiff by selling the vehicle for Kshs 500,000/= was in breach of the duty of care to the Defendant; whether or not the vehicle was worth 4,347,826/= and whether or not the Plaintiff was entitled to charge a penalty interest rate of 36% per annum.

The Defendant filed a further affidavit in which he depones that at the time of the agreement between him and the Plaintiff the said vehicle was not registered in the name of Plaintiff but in that of a third party. Consequently the Plaintiff could not pass title to the Defendant. This prompted the Plaintiff to file a further affidavit in which it is deponed that the vehicle had originally been sold to another party who had also defaulted in the repayment of the purchase price and the vehicle had been repossessed. It is further deponed that the Defendant was aware of this fact and in fact the vehicle was subsequently transferred to the Defendant. The Plaintiff has annexed a copy of the logbook of the said vehicle to confirm this position. In addition the Plaintiff has annexed a valuation report of the vehicle after the first repossession giving the value of the vehicle as Kshs 5,400,000/=.

The application was canvassed before me on 12th November 2004. The advocates took me through the pleadings, the affidavits and the annexures which I have referred to above. I have considered counsels' submissions. I have also perused the pleadings, the application, the affidavits, the annexures and the authorities cited. Having done so, I take the following view of the matter.

It appears to me that according to the Defendant, the triable issues raised are:-

- (a) Whether or not the repossession of the motor vehicle was lawful.**
- (b) Whether or not the Plaintiff was in breach of a duty of care to the Defendant when it sold the vehicle for Kshs 500,000/=.**
- (c) Interest rate charged on arrears and penalties**
- (d) Whether or not the subject motor vehicle was worth Kshs 4,347,826/=.**

The Defendant believes that Section 43 1(b) of the Sale of Goods Act (Cap.31 Laws of Kenya) disentitled the Plaintiff from repossessing the subject motor vehicle. In my view this provision is not available to the Defendant as the Defendant himself gave the Plaintiff authority or right to repossess the vehicle under clause 5 of the Declaration of Lien-Deferred payment in the event of default in payment of the purchase price. Clause 1 of the said declaration also removed the Defendant from the protection of

Section 43 1 (b) of the Sale of Goods Act since the Defendant intended that the transaction between him and the Plaintiff operates as a pledge in terms of Section 59 (4) of the said Sale of Goods Act. I do not therefore consider this a triable issue.

Regarding the alleged breach of duty of care, the Plaintiff has exhibited documents showing the state in which the vehicle was at the time of repossession. These documents include items that were not in the vehicle and a valuation Certificate by Peter Huth giving a valuation of Kshs 430,000/=. The Defendant did not furnish any material to the contrary. He did not challenge the said Valuation Certificate and the letter dated 23rd May 2003 from the Plaintiff addressed to him demanding return of the parts that were missing when the vehicle was repossessed. When served with a notice to admit these documents the Defendant did not respond.

The Plaintiff used independent agents to sell the said vehicle. There is no evidence of collusion between the Plaintiff and the agent. Indeed none is alleged. Negligence is also not alleged. In the result the Defendant has nothing to challenge the sale of the vehicle. In my view the Defendant has not shown breach of duty of care by the Plaintiff. The vehicle was indeed sold at a price higher than the value given in the Certificate of Valuation of Peter Huth. I find that the allegation of breach of duty of care does not amount to a triable issue.

The Defendant wishes the Court to try the issue of the value of the vehicle. The Plaintiff has exhibited a Valuation Certificate for the said vehicle dated 6th March 2000. Peter Huth the valuation surveyor gave the said vehicle a valuation of Kshs 5,400,000/=. The Vehicle was sold to the Defendant on 12th May 2000 at Kshs 6,473,666.67. The Defendant does not allege that he was under any disability or that he was coerced into buying the vehicle. I find therefore that whether or not the vehicle was worth Kshs 4,347,826/= is not a bona fide triable issue.

As regards the issue of interest, it is plain from clauses 3 and 7 of the Declaration of Lieu-Deferred payment executed by the Defendant that the same provided for interest which could be varied by the Plaintiff without notice to the Defendant. It is also plain that an additional penalty interest charge of 36% per annum on arrears was provided for. The interest rate was therefore contractual. A challenge against interest rate applied in my view does not amount to a bona fide triable issue.

From the above it is clear that that Defendant has not shown a single bona fide issue that should go for trial.

In the result I accede to the Plaintiff's application dated 24th August, 2004. I strike out the defence and enter judgment for the Plaintiff as against the Defendant for the sum of Kshs 3,302,126.45 at the rate of 36% per annum from the date of filing suit until payment in full.

The Plaintiff shall also have the costs of this application and the suit.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-