

REPUBLIC OF KENYA

John Njoroge Warui v Universal Bank Ltd

High Court of Kenya at Nairobi August 7, 2000

Milimani Commercial Courts

T Mbaluto, Judge

Civil Case No 583 of 2000

This is an application for an injunction under Order 39 rule 1, 2 and 3 and to restrain the defendant from repossessing or taking possession of motor vehicle registration number KAC 031J until the suit filed by the plaintiff/applicant against the defendant/respondent is heard and determined.

The application is supported by an affidavit sworn by applicant John Warui. The suit between the two parties arises from a Hire Purchase Agreement entered into by them on October 8, 1997.

The only complaints which are contained in the plaint and on which the application is based are that the defendant's computation of the sum due is wrong in that it is based on wrong figures and excessive interest charges and that no notice of default was served.

Clause 4 of the hire purchase agreement provides that the defendant/respondent can terminate the hiring and take possession of the motor vehicle the subject of the agreement if the applicant failed to pay any of the hire instalments or any part thereof. In the affidavit in reply to the application, it is deponed that as at April 27, 2000 the applicant was in arrears of Kshs 1,896,075. A statement of account is annexed to the affidavit in verification of what the deponent states. The applicant has not effectively challenged that evidence.

With regard to the complaint that excessive or wrongful interest was charged, I think it should be noted that the applicant does not claim to be a qualified accountant or auditor. Accordingly, what he claims to be outstanding in accordance with his calculations must be treated as the product of an assessment by a layman. Section 176 of the Evidence Act provides:-

“Subject to this Chapter a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters transaction and accounts therein recorded.”

To rebut the presumption created by the section, the applicant must tender evidence from a qualified accountant or auditor to show that the statements produced by the bank are incorrect. The applicant's bare assertions to that effect will not do.

For the reasons given above, I am not satisfied that the plaintiff has established a prima facie case with a probability of success and accordingly his application must fail. The application is dismissed with costs.