

Republic of Kenya

High Court of Kenya

at Nairobi

George Masaki Masereti

v

Victoria Commercial Bank Limited

Civil Case 734 of 2000

September 1, 2000

T Mbaluto, Judge delivered the following ruling.

The applicant George Masaki Masereti has brought this application for an order to restrain the defendant from selling, alienating, interfering or in any manner dealing with motor vehicle registration number KAE 458M. By the same application, the applicant seeks to compel the defendant/respondent Victoria Commercial Bank Limited to release the said motor vehicle to him together with the registration book of the motor vehicle and transfer forms duly signed in his favour.

The grounds upon which the application is based are stated in the body of the application to be that the applicant has paid for the motor vehicle in full and that the respondent has deliberately and without justification purported to repossess the motor vehicle without serving a notice upon the applicant. The application is also supported by an affidavit sworn by the applicant which, amongst other things, shows that the sum outstanding as at March 31, 2000 on a hire purchase agreement between the applicant (the hirer) and the respondent (the owner) was Kshs 203,949.90. The affidavit also reveals that on March 29, 2000, the respondent demanded payment of Kshs 5,096,106.55 being the combined total outstanding on two hire purchase agreements including agreement No 00084 under which the motor vehicle the subject matter of this suit was acquired. The affidavit also reveals that the respondent threatened to sell the motor vehicle (KAE 458M) if the money was not paid upon expiry of the demand notice.

In response to the application, the respondent claims that it was entitled to repossess the motor vehicle because the applicant was in breach of clauses 4 and 5 of the hire purchase agreement which said breach entitled the respondent to terminate the agreement. The breach is said to have occurred when the applicant suffered the motor vehicle to be attached in execution of a decree in Nakuru High Court civil case No 466 of 1999, a case in which the applicant and his wife had been sued by one Vimul Shah. Regarding the attachment, there is sufficient evidence that it occurred (the applicant does not deny it anyway) and that the motor vehicle was not released until after the intervention by the respondent through objection proceedings under Order XXI rule 53 of the Civil Procedure Rules.

Clause 5 (vi) of the agreement which is said to have been breached provides:-

“Without in any way derogating from their rights under Clause 4 hereof, and without discharging or prejudicing any pre-existing liability of the Hirer to the Owners (including the liability of the Hirer under Clauses 6 thereof), this Agreement and the hiring hereby constituted shall, forthwith and for all purposes, be determined absolutely and come to an end and neither party shall thereafter have any rights hereunder, and the right of the Hirer to the possession of the Vehicle and shall cease without any previous notice or demand being given by the Owners, who shall be entitled to immediate possession of the said Vehicle and to retake and resume possession of the said Vehicle upon the happening of any of the following events:- (vi) if any step is taken by any Judgement Creditor of the Hirer to levy execution upon the goods of or in the possession of the Hirer.”

From the facts of this case, it is more than clear that by suffering the motor vehicle to be attached in execution of a decree, the applicant was in breach of clause 5 (VI) of the agreement which said breach

clearly entitled the respondent to terminate the agreement and repossess the motor vehicle. It is to be observed that the applicant's claim is that all the moneys due under the hire purchase agreement have been repaid. Obviously, if that is the case then the applicant would stand discharged from his obligations under the agreement and consequently all talk about breach of the agreement would be rendered irrelevant. Further, because of that and also because of the fact that the amount shown to be outstanding in the respondent's books is relatively very small, the possibility that the applicant's contention could be correct cannot, in the absence of a thorough audit of the account, be completely ruled out. However, as matters stand now, the respondent is, owing to the breach of the agreement by the applicant and the evidence of default in payment of instalments, prima facie entitled to termination of the agreement as well as repossession of the motor vehicle. By the same token however, the respondent is not entitled to sell the motor vehicle at this stage, because in my view the issue of whether anything is outstanding on the account and if so how much is not settled.

During the course of hearing this application, reference was made to a recent decision of this court (in HCCC No. 25/2000) in which the court found invalid the respondent's attempt to combine two hire purchase agreements together with their securities. However the decision on that case turned on the peculiar facts of the case and the issue arising thereunder which was whether the respondent could in law continue to hold as security for another outstanding loan and without a formal agreement, a motor vehicle in respect of which a hire purchase agreement had been discharged. I therefore agree with Mr Wasuna's submission, that the facts of the cited case are different and inapplicable to the circumstances of the instant case. In my judgment, the position in the instant case is that there appears to be a sum of money, albeit small, still outstanding on account of the loan the subject matter of this suit. Further, as aforesaid, the applicant was in breach of clause 5 (vi) of the hire purchase agreement. Given those circumstances, the agreement entitles the respondent to repossess the motor vehicle without notice.

Before concluding this matter, I would make one observation. In his application for an ex parte injunction, the applicant did not disclose to the court that the motor vehicle in question had earlier been attached in Nakuru HCCC No 466 of 1999 which fact meant that the applicant was in breach of the hire purchase agreement. The attachment of the motor vehicle was in my view a material fact and consequently by failing to disclose that fact the applicant was guilty of non-disclosure of material facts. That above would disentitle the applicant from obtaining an injunction because he is required to disclose all material facts at the ex parte stage of the application, which clearly he did not.

In view of what is stated above, I find that the applicant has not established a case for the grant of an interlocutory injunction and consequently, I would dismiss this application with costs. There will be orders accordingly.