



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO. 3041 OF 1997.

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

GRAHAMS SILCOCK & 3 OTHERS.....DEFENDANTS.

**J U D G M E N T**

By its Plaint dated the 2.12.97 the Plaintiff seeks for an order that the Defendants hand over to them the vehicles details of which are set out in paragraph 7 of the Plaint (the vehicles). The plaintiff also asks for judgment against the 4th Defendant for shs.5,000,000/- plus interest thereon at court rates. The 4th Defendant did not appear to defend the suit against it and I give judgment against the 4th Defendant for Shs.5million interest and costs thereon as prayed.

The Plaintiffs also seeks general damages which I shall deal with later.

The main dispute is over which party has the right to the vehicles.

The Plaintiff claims a right to the vehicles by virtue of a loan agreement and letter of offer both dated the 1.8.96 and both executed by the 4th Defendant whereby the 4th Defendant was granted a loan of Shs.15million plus interest thereon. As security for the loan the 4th Defendant pledged the logbooks for the vehicles together with blank transfer forms endorsed in favour of the Plaintiff. The other security given is not relevant to these proceedings. From the logbooks P.W. 1 gave evidence that the 4th Defendant received possession of the vehicles from their owners and applied for a loan in each case to pay the owner.

The vehicles were then held by the 4th Defendant for resale and in obtaining a purchaser the amount borrowed by the 4th Defendant from the Plaintiff in respect of the vehicle sold would be repaid. In respect of the vehicles the owner had been paid but at the time that the Receivers took possession of the vehicles no purchaser had at that time been found. One of the vehicles namely KAE 625P had been transferred into the name of the 4th Defendant as appears from the logbook. In all other cases, the vehicles are in the name of the owner who had given the vehicle to the 4th Defendant for sale.

The Debenture under which the 3rd Defendant claims a charge over the vehicles is issued by the 4th Defendant and is dated the 25.6.95 being registered in the Company's Registry on the 16.2.96.

Clause 3 of the Debenture created a floating charge over the property set out therein including the 4th Defendant's stock in trade referred to in the fifth sub paragraph to the clause. This would include any

vehicles owned by the 4th Defendant. However as the charge was a floating charge it would only be effective as a specific charge against any particular vehicle as and when the charge crystallised which was on the appointment of the 1st and 2nd Defendants as Receivers on 8.5.97 as deposed to by D.W. 1 the Manager of the Plaintiff Bank.

Mr. Silcock the 1st Defendant gave evidence that the vehicles were found in the 4th Defendant possession at the date of his and the 2nd Defendant's appointment.

The Defendants submitted that as the loan documents executed by the 4th Defendant in favour of the Plaintiff were not registered in the Company's Registry under Section 96 of the Companies Act, the same were void to create a charge in favour of the Plaintiff.

It seems to me however that the nature of this transaction was not that the vehicles were charged to the Plaintiff but that they had a lien over the logbook of an equitable nature which gave them the right to complete the blank registration form to transfer ownership of the vehicles to the purchaser found by the 4th Defendant upon which event the purchase price would be paid to the Plaintiff.

The Defendants also relied on Clause 4 of the Debenture which stated that the charge created thereby would rank as a first charge on all the property and assets thereby charged and in respect of the property jointly described as a floating charge and stated the company would not without the 3rd Defendant's consent create a charge over the property to or *pari passu* with that of the 3rd Defendant.

The Charge created however is over the property and assets of the 4th Defendant. The question therefore arises were the vehicles the property and assets of the 4th Defendant or did they belong to some other person. To make it clear that the ownership of the property or asset must be determined one can take the simple example of a customer of the 4th Defendant leaving a briefcase belonging to the customer in the 4th Defendant's workshop by mistake.

No one could claim that this was property of the 4th Defendant which the Receivers took later to pay the 4th Defendant debt.

Who is the owner of the vehicles in question. The answer must be the one in whose name the vehicles are registered.

Mr. Chacha submitted for the Plaintiff that Sec.43 of the Traffic Act states that *prima facie* the owner of the vehicle is the one in whose name the vehicle is registered.

Section 116 of the Evidence Act lays the burden of proving that whether any person is the owner of anything of which he is shown to be in possession lies on the person who asserts this fact.

I also refer to the passage in Kerr on Receivers 17th Edition at page 330 where under the heading "property to which appointment extends" states as follows:-

"Clearly the receiver can have no title to the property which does not belong to the person over whose property the appointment extends, or which is not comprised in the documents from which his title derives" and further down

"Thus no appointment can properly extend to property to which the chargor has no legal or equitable title, nor can it extend to property which is held upon trust by the chargor for third persons.

In this case it is clear the Plaintiff has shown by producing the logbooks for the vehicles that in all cases save for vehicle KAE 625P the 4th Defendant is not the owner and as such the property was not that of the 4th Defendant and was not subject to the charge created by the Debenture. In the case of vehicle KAB 625P the onus of showing that this vehicle did not belong to the 4th Defendant fell on the Plaintiff which has not in my view discharged that onus.

In the result, I find that the vehicles other than KAE 625P are not the property of the 4th Defendant but that the same are held in trust for the Plaintiff which has a right to sell the same to recover the money due to it from the 4th Defendant.

With regard to vehicle KAE 625P as the Plaintiff has not discharged the onus on it in respect of the vehicle the same is deemed to be the property of the 4th Defendant and is attachable under the charge in the Debenture. The Plaintiff have succeeded in respect of five out of six of the vehicles. I award 5/6 of the costs to the Plaintiff and one sixth of the costs to the Defendants.

The Plaintiff has not proved any general damages and I do not award anything in this respect to the Plaintiff.

Dated and delivered at Nairobi this 11th day of October, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.