



Arenen Holdings Ltd v Diamond Trust Bank Kenya Ltd; Diamond Trust Bank Kenya Ltd (Plaintiff to the Counterclaim); Arenen Holdings Ltd & 2 others (Defendant to the Counterclaim) (Civil Suit 439 of 2016) [2024] KEHC 5465 (KLR) (Commercial and Tax) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 439 OF 2016
FG MUGAMBI, J
MAY 17, 2024**

BETWEEN

ARENEN HOLDINGS LTD PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD DEFENDANT

AND

DIAMOND TRUST BANK KENYA LTD PLAINTIFF TO THE COUNTERCLAIM

AND

ARENEN HOLDINGS LTD DEFENDANT TO THE COUNTERCLAIM

ROHIT MEDIRATTA DEFENDANT TO THE COUNTERCLAIM

VINOD GUPTAN DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. The plaintiff instituted the present suit through a plaint dated 27th October 2016 seeking a declaration that the Letter of Offer to enter into a Hire Purchase Agreement dated the 19th of June 2015 (hereinafter the agreement), is void due to misrepresentation. The plaintiff also sought rescission of the agreement, a permanent injunction against any actions regarding alleged dues under the agreement, and general and special damages.



2. The agreement involved eight (8) Mercedes Axor Trucks and eight (8) Trailers, collectively referred to as "the vehicles," which were previously under another Hire Purchase Loan Agreement between the defendant (hereinafter the bank) and Cargo World Logistics Limited (CWLL). The plaintiff contends that CWLL had defaulted on its agreement with the bank. Consequently, the plaintiff proposed to acquire the vehicles and operate them profitably, thereby enabling the bank to recoup their funds.
3. Despite fulfilling all requirements of the agreement, the plaintiff asserts that the bank failed to transfer possession of the vehicles.

The counterclaim

4. The same was filed by the bank against the plaintiffs, through a further amended statement of defense and counterclaim dated 22nd April 2021.
5. The bank acknowledged that CWLL owed outstanding debts of Kshs 12.2 million and Kshs 44.2 million to the plaintiffs and to the bank, respectively. The bank further acknowledges that the plaintiffs offered to assume CWLL's debts and assets, including the vehicles. An agreement was subsequently executed between the plaintiffs and CWLL, where the plaintiff agreed to purchase the vehicles for Kshs 44,200,000/=.
6. Following this agreement, the bank terminated its agreement with CWLL without repossessing the vehicles. The plaintiffs then secured a Hire Purchase Loan for Kshs 41,200,000/= for the vehicles, to be repaid in 42 equal monthly installments, with provisions for defaults.
7. The bank denies responsibility for repossessing the vehicles on behalf of the plaintiff from CWLL. They claim to have reminded the plaintiffs multiple times to take possession of the vehicles, which the plaintiffs failed to do. The bank argues that any losses incurred by the plaintiffs arising out of the hire purchase arrangement were due to their own negligence.
8. The bank's counterclaim is based on the letter of offer and 16 individual hire purchase agreements that extended the said facility of Kshs 41,200,000/= to the 1st plaintiff for the purchase of the 16 vehicles. The 2nd and 3rd plaintiffs guaranteed these sums and agreed to indemnify the bank for any outstanding amounts.
9. Additionally, the bank also claims against the plaintiffs for an overdraft facility of Kshs 5,000,000/=, secured by a debenture over the vehicles and guaranteed by the 2nd and 3rd plaintiffs. The plaintiffs allegedly breached the hire purchase agreement, by failing to make payments and forcing the bank to repossess six (6) vehicles, which were sold to cover the outstanding debt.
10. During the hearing of the case the plaintiffs presented one witness, who is the 2nd plaintiff, Rohit Mediratta. The defendant bank called its Debt Recovery Officer, Joram Kiwanda. I will not regurgitate their testimonies which mirror the summary of the dispute as laid out. I will however refer to their testimonies as necessary.

Analysis

11. The Court has carefully examined the pleadings, submissions, authorities and evidence presented by the parties. The main issue that lends itself for determination is whether there was a valid hire purchase contract between the bank and the plaintiffs out of which rights and liabilities would arise and whether the same would be invalidated by lack of delivery of possession to the plaintiffs.
12. There is no contest over the existence of a hire purchase contract between the bank and CWLL, which the plaintiffs took over. The plaintiffs' main contention is the lack of delivery of possession of the



- vehicles by the bank, prompting their claim that the hire purchase agreement should be rescinded. Fortunately, the terms of the dealings between the parties was well spelt out in their various agreements.
13. The Court of Appeal held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited*, CoA CA No 95 of 1999 that:
- “...a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved”.
14. The agreement dated 24th April 2015 between CWLL and the plaintiffs includes a term that:
- “Ms. Arenen Holdings Limited be allowed to take over all assets currently charged to Diamond Trust Bank Limited as listed in annex 1 attached herewith in respect to outstanding loan arrears of Kshs 44,200,000/=. The assets will be handed over to M/s Arenen Holdings within seven (7) days hereof for inspection and taking over possession of the same.
- ... M/S Diamond Trust Bank Limited are free to transfer both the assets and the liabilities to the abovementioned Arenen Holdings Limited at their convenience.”
15. It is clear from this agreement that the parties intended to assign the rights and liabilities of CWLL under the hire purchase agreement. The intention is further evidenced by the plaintiffs' letter to the bank dated 12th June 2015, seeking the approval of the bank to take over the assets and the debt of CWLL. The letter reads in part as follows:
- “... please do let us have your acceptance of the same, at your soonest so that we can formalize and get the ball rolling.”
16. The bank's consent to the assignment is evidenced by the hire purchase agreements that were subsequently executed in respect of the motor vehicles as well as the joint registration of the vehicles in the 2 parties names, which was confirmed by the testimony of PW1 in cross examination. The motor vehicles were also charged in the joint names of the plaintiffs and the bank, a fact that was again admitted.
17. The submission by the plaintiffs that the hire purchase agreements are invalid for lack of registration is untenable. This court aligns with the bank's position, supported by section 3(1) of the *Hire Purchase Agreement Act*, which provides that:
- “This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of four million shillings or such other higher or lower sum as the Cabinet Secretary may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated: (emphasis mine).”
18. The bank's counsel have referred this court to the decision of the Court of Appeal in *Diamond Trust Bank Kenya Limited (Formerly Diamond Trust of Kenya Limited) v Jaswinder Singh Enterprises*, [1999] eKLR, in which it was held that:
- “The words “other than” should be read to mean ‘except’. The section therefore excludes all the agreements where the hirer is a body corporate from the protection of the Act.”



19. An examination of the hire purchase agreements clearly shows that the same were entered into by the 1st plaintiff as the hirer and the bank as financier, both parties of which are body corporates. It then follows that the hire purchase agreement does not lose its validity by being unregistered.
20. The plaintiffs have further argued for the invalidity of the agreement on the basis that the bank never parted with possession of the vehicles and did not deliver possession to the plaintiffs. This court reiterates its position on the import of section 3(1) of the Hire Purchase Act. Having found that the provisions of the Act do not apply to body corporate hirers, it follows that such transactions are governed by the terms agreed upon between the parties.
21. Against this background, reference is again made to the agreement of 24th April 2015 between CWLL and the plaintiffs. The parties expressly agreed that the motor vehicles would be handed over to the plaintiffs within 7 days of the agreement between the plaintiffs and CWLL for purposes of inspection and taking over possession of the same.
22. By a subsequent letter dated 12th June 2015 to the bank, the plaintiffs confirmed that they had ‘assessed the condition of the trucks’, which would only have been done if they had possession of the vehicles, a fact that was confirmed by the testimony by PW1. He further identified the delivery receipts which he confirmed having signed and which he also stated were in confirmation of delivery of the motor vehicles. The existence of this evidence contradicted the case by the plaintiffs that they were never given possession of the motor vehicles.
23. The plaintiffs have argued that the bank misrepresented important terms of its agreement with CWLL. The evidence on record shows that in fact that the plaintiffs were aware of the terms of the agreement between the bank and CWLL. The plaintiffs negotiated the assignment with CWLL directly. They had an opportunity to inspect the condition of the motor vehicles before entering into the agreement. They have not brought any evidence to substantiate their claim against the bank about the existence of third party claims on the motor vehicles. The allegations of misrepresentation by the plaintiffs fall short of the requirements under section 107(1) of the Evidence Act.

Whether the plaintiffs are entitled to the remedies sought:

24. This court finds that the plaintiffs have not proved their claim against the bank to the required standard and as such their whole claim fails. They are therefore not entitled to the prayers sought in the plaint dated 27th October 2016.

Whether the bank is entitled to the remedies sought:

25. The terms of the Hire Purchase Agreement between the bank and the 1st plaintiff are not controverted. Clause 4 thereof provided that in case of default by the hirer in remitting the hire purchase payments, the owner shall be entitled immediately to terminate this hiring without notice to the hirer and to retake possession of the vehicles/goods.
26. On the strength of this clause I find that the bank was entitled to repossess the motor vehicles. The evidence produced by the bank that it only managed to repossess some of the motor vehicles has not been controverted. The bank produced loan account statements to show the amounts due under the hire purchase loan and the overdraft facility.
27. During cross examination PW1 confirmed the existence of the debenture between the bank and the plaintiff as well as the guarantees that had been signed by the 2nd and 3rd plaintiffs to secure the overdraft facility. Besides denying the validity of the hire purchase agreement, this court finds that the plaintiffs



have not denied the amounts owing from the hire purchase loan or the overdraft facility. This court further finds that sufficient evidence has been tendered by the plaintiff to prove its claim.

Disposition

28. In conclusion, this court decrees as follows:

- a. That the plaintiffs claim against the bank is dismissed;
- b. That judgment is hereby entered as sought in the counterclaim, jointly and severally as against all the plaintiffs (the defendants to counterclaim) in the following terms:
 - i. The sum of Kshs 56,369,027.34 together with interest thereon at the rate of 13% per annum from 26th August 2020 until payment in full;
 - ii. The sum of Kshs 8,624,627.42 together with interest thereon at the rate of 13% per annum from 26th August 2020 until payment in full;
 - iii. Costs of the suit and the counterclaim together with interest thereon at court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

