



Diamond Trust Bank Kenya Limited v Galaxy Ventures (K) Limited (Civil Appeal 01 of 2019) [2023] KEHC 18814 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 01 OF 2019**

EC MWITA, J

JUNE 16, 2023

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

GALAXY VENTURES (K) LIMITED RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi (Hon D. W. Mburu (PM), dated 14th December 2018 in CMCC No. 3869 of 2017)

JUDGMENT

Background

1. On 6th July 2015, Galaxy Ventures (K) Limited (Galaxy) entered into a hire purchase agreement with Diamond Trust Bank Kenya Limited (Diamond Trust) for purchase of motor vehicle registration number KCE 906Q, Tata Tipper Lorry (the vehicle) for Kshs. 3,000,000. The amount was to be repaid in 24 monthly installments of Kshs. 146,250, inclusive of interest at the rate of 8.5% per annum.
2. Galaxy fell into arrears (of Kshs. 155,250) and on 3rd March 2017, Diamond Trust instructed auctioneers to repossess the vehicle. The vehicle was repossessed and kept at Kyevaluki Garage North Airport Road. Galaxy paid the arrears together with auctioneers' charges of Kshs. 45,000 on the same day and had the vehicle released.
3. Galaxy felt aggrieved with this action and filed CMCC No. 3269 of 2017 at the Chief Magistrates court Nairobi, seeking a declaration that the repossession was illegal, refund of Kshs. 45,000 auctioneer's fees, damages, punitive and exemplary damages, costs of the suit and interest.



4. Galaxy took the view that the arrears of Kshs. 155,250 were not substantial to warrant repossession and that Diamond Trust had not served notice of intention to repossess the vehicle which vitiated the repossession.
5. The trial court delivered judgment on 14th December 2018 holding that Galaxy having settled more than two thirds of the hire purchase price, the repossession of the vehicle was unlawful. Diamond Trust was also faulted for not seeking authorization from the court in accordance with section 15 of the [Hire Purchase Act](#). The trial court awarded Galaxy Kshs. 50,000 general damages for the loss incurred.
6. The trial court, however, held that the auctioneer was not required to issue notice before the repossession and that rule 12 of the [Auctioneer's Rules](#) was not applicable in cases of repossession. Even then, the trial court ordered Diamond Trust to refund auctioneers' charges of Kshs. 45,000 with interest from 3rd March 2017. Galaxy was also awarded costs of the suit and interest. Other claims were dismissed.

Appeal

10. Aggrieved, Diamond Trust filed an amended memorandum of appeal dated 14th August 2019, raising grounds which can be summarised as follows:
 - i. the trial court erred in holding that the hire purchased agreement was governed by the [Act](#), notwithstanding section 3 given that parties were corporate entities.
 - ii. the trial court erred by not finding that parties were bound by the terms of the agreement.
 - iii. the trial court erred in holding that repossession of the vehicle was illegal despite express terms of the agreement that ownership of the vehicle would vest in Diamond Trust until full payment and that in the event of default of any installment Diamond Trust would be at liberty to repossess the vehicle without notice.
 - iv. the trial court erred in ordering refund of auctioneers' charges of Kshs. 45,000 with interest from 3rd March 2013, yet the Hire Purchase Agreement was clear on who was to pay the charges in case of default.
 - v. the trial court erred in awarding special damages of Kshs. 50,000 for loss of business when the amount was neither specifically pleaded nor proved.
11. Diamond Trust urged that the appeal be allowed with costs and the judgment and decree of the trial court be set aside and refund of Kshs. 167,451.80 paid to Galaxy on 5th August 2019 with interest at court rates.

Cross-Appeal

12. Galaxy filed a cross-appeal against part of the trial court's judgment on the grounds summarized as follows:
 - i. the trial court erred in law in holding that rule 12 of the [Auctioneers Rules](#) 1997 does not in cases of repossession by hirers.
 - ii. the trial court erred in finding that the auctioneer did not repossess the vehicle for purposes of selling but delivery to Diamond Trust.
 - iii. the trial court erred finding that provisions of the [Auctioneers Act](#) and [Rules](#) do not apply in cases of repossession of assets by a Hirer.



- iv. the trial court erred in failing to find that the auctioneers never served the mandatory statutory notice of 7 days before attaching the vehicle
13. Galaxy urged that the cross appeal be allowed with costs.
14. The appeal and cross-appeal were disposed of through written submissions with oral highlights.

Submissions by Diamond Trust

15. Diamond Trust argued that the trial court was wrong in holding that repossession of the vehicle was illegal and did not comply with section 15 of the *Hire Purchase Act*. Diamond Trust asserted that the hire purchase agreement being between corporate bodies, was not governed by the *Act*. Diamond Trust relied on section 3(1) of the *Act*; *Diamond Trust Bank Kenya Limited (Formerly Diamond Trust of Kenya Limited) v Jaswinder Singh Enterprises* (Civil Appeal No. 285 of 1998); [1999] eKLR and *Imperial Bank of Kenya v Kariuki Construction Company Limited & 2 others* (Civil Suit No. 51 of 2012) [2015] eKLR.
16. In the view of Diamond Trust, the relationship between the parties was solely governed by the agreement. Clause 4 of the agreement entitled Diamond Trust to repossess the vehicle once Galaxy was in default. Diamond Trust relied on *National Bank of Kenya v Pipelastik Samkolit Kenya Limited & another* (Civil Appeal No. 95 of 1999) [2002] eKLR for the proposition that parties are bound by terms of their contracts.
17. Diamond Trust also submitted that Galaxy was not entitled to a refund of Kshs. 45,000 auctioneer's charges because the terms of the agreement were clear that Galaxy would pay costs incidental to repossession.
18. Diamond Trust agreed with the trial court's holding that rule 12 of the *Auctioneers rules* does not apply in cases of repossession as the *Act* applies to owners of goods and not hirers. According to Diamond Trust, at the time of repossession, Galaxy was merely a Bailee, having not completed repayment of the hire purchase price.
19. Diamond Trust relied on *Taawawa Supermarket Limited v Fina Bank Ltd* (Civil Appeal No. 118 of 2002) [2010] eKLR and *Middle East Bank Kenya Limited v Sundip Patel & 2 others* (Civil Suit No. 196 of 2015) [2019] eKLR to support its position.
20. Regarding the award of damages of Kshs. 50,000, Diamond Trust submitted that the trial court was in error because loss of earnings is a special damage claim which ought to be specifically pleaded and strictly proved. Galaxy neither pleaded nor proved the loss and the trial court should not have allowed it. Diamond Trust cited the decision in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (Civil Appeal No. 132 of 1987) [1992] KLR 177 to support this position.

Submissions by Galaxy

21. Galaxy conceded that the Hire Purchase Act is not applicable in this matter. This concession notwithstanding, Galaxy supported the trial court's holding that repossession of the vehicle was illegal. Galaxy also supported the award of damages.
22. Regarding the cross-appeal, Galaxy argued that the trial court erred in holding that rule 12 of the *Auctioneers Rules* did not apply to this case. It is Galaxy's case that once an auctioneer is engaged to repossess, he must act within the rules, including rule 12. The auctioneer repossessed the vehicle without issuing a 7 days' notice, rendering the repossession illegal.



23. Galaxy relied on *Real People Kenya Limited & another v John Nyandege t/a Akmal Enterprises & another* (Civil Appeal No. 33 of 2020) [2022] eKLR, for the holding that the repossession and sale of a motor vehicle without adhering to the provisions of the Auctioneers Act entitled the aggrieved party to damages.

Determination

24. I have considered the appeal, the cross appeal, submissions and the decisions relied on by parties. I have also read the record and the impugned judgment. The issues that arise for determination are; whether the repossession was unlawful; whether award of damages was proper; and whether rule 12 of the *Auctioneers' rules* applied to this case.
25. This being a first appeal. it is the duty of this court as the first appellate court to reconsider, reevaluate and reanalyze the evidence and make its on informed decision on that evidence. The court should however bear in mind that it did not see the witnesses testify and make due allowance for that. (See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
26. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal observed that a first appeal is by way of a retrial. The principles upon which the court acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it neither saw nor heard the witnesses and make due allowances in that respect. (See also *Peters v Sunday Post Ltd* [1958] EA 424).
27. The dispute before the trial court was triggered by repossession of the vehicle which was subject to a hire purchase agreement. Parties to that agreement were corporate entities. Galaxy fell into default prompting Diamond Trust to instruct the auctioneer to repossess the vehicle.
28. Galaxy moved to court claiming that the repossession was illegal and that it had suffered loss. Galaxy 's claims partially succeeded; was awarded damages and refund of the auctioneers' charges paid.
29. Diamond Trust argued that the trial court was wrong in finding that the repossession was unlawful and in awarding damages which were in the nature of special damages but which had neither been pleaded nor proved.
30. There was no dispute before the trial court that the suit arose from a Hire Purchase agreement between two corporate entities. There was uncontroverted evidence that Galaxy was in default which forced Diamond Trust to repossess the vehicle.
31. Section 3 of the *Act* excludes application of the Act where the hire-purchase agreement relates to a hirer who is a body corporate.
32. The hirer in the agreement, Galaxy Ventures (K) Limited, is a corporate entity. The law (s. 3) excludes application of the *Act* to the relationship between the parties that were before the trial court. That then left parties to resort to the terms of the agreement as the basis for resolving the dispute.
33. The trial court held that Diamond Trust did not comply with section 15 of the *Act*. That section states that where the hirer has paid more than three quarters of the hire purchase price, the owner of the goods cannot enforce any right to recover through possession of the goods from the hirer otherwise than by suit. The holding by the trial court that the only way repossession could be allowed was through authorization by the court (in a suit) was thus erroneous and against the law.



34. The Hire purchase agreement provided the terms of engagement and obligations. One of the terms was that in case of default, Diamond Trust would be entitled to repossess the vehicle without notice. This was an express term of the agreement that Galaxy, as the hirer, was well aware of and bound by.
35. From the record, there is no doubt that Galaxy defaulted and that was why the vehicle was repossessed. The trial court could not, therefore, order Diamond Trust to pay damages of Kshs 50,000 for loss of business when Galaxy was at fault.
36. More importantly, the damages awarded were in the nature of special damages for loss of business opportunities Galaxy is said to have suffered due to the repossession of the vehicle.
37. Special damages are intended to restore a party to the position he would have been save for the act complained of. In that respect, the law is firmly settled that special damages must not only be pleaded with particularity, but must be strictly proved. (see *Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa*-KSM Civil Appeal No 179 of 1995),
38. In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, (SCCA 109/2002); JM 2004 CA 40; [2004] 12 JJC 2015, Cooke, J.A. delivering the judgment of the Supreme Court of Jamaica, stated that special damages must be strictly proved; the court should be very wary to relax this principle; what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.
39. In *Union Bank of Nigeria PLC v Albaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the Supreme Court of Nigeria, stated:
- I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff....Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award
40. I have gone through the plaint filed before the trial court. There is no trace of any specific pleading on the amount of loss suffered. Galaxy pleaded at paragraph 9 of the plaint that it had suffered loss and damage in lost business opportunities. This was not sufficient for purposes of pleading loss of what would clearly be special damages. The lost opportunities should have been particularized in the plaint.
41. Similarly, the record shows no evidence of proof of the loss allegedly suffered was led. It is not enough for a party to allege that he suffered loss of business opportunities because of another party's actions. There must be proof of such loss with as much particularity as possible. The law requires the court to act strictly on the hard facts presented and accepted by it as establishing the amount claimed as justifying the award for the loss suffered.
42. The trial court could not act on mere conjecture or speculation when dealing with a claim for special damages. The trial court fell into error in awarding special damages of 50,000 that had neither been pleaded nor strictly proved.
43. It is also important to point out here, that there could not have been loss of business opportunities given that Galaxy pleaded at paragraph 8 of the plaint that the arrears were paid on the same day the



vehicle was repossessed and the vehicle was released immediately. This left no room for loss of business opportunities without hard facts justifying this assertion.

44. In the same vein, the trial court erred by directing Diamond Trust to refund auctioneer's charges. This was done notwithstanding the fact that Galaxy was indeed in default and paid the arrears without question. Diamond Trust having properly exercised the option available and repossessed the vehicle, could not be faulted and ordered to refund auctioneers charges that Galaxy was responsible to pay once there was repossession occasioned by its default.
45. Regarding rule 12 of the *Auctioneers Rules*, the trial court was right in holding that the rule does not apply in cases of repossession under the *Hire Purchase Act*. The vehicle (or goods) usually belongs to the owner and not the hirer until the hirer completes payments. That is why section 15 refers to the 'owner' and the 'hirer.' The hirer is a "Bailee" during the period of engagement until payment in full. When an auctioneer is instructed to repossess the vehicle (or goods), the subject of the hire purchase agreement, the vehicle is repossessed because it belongs to the owner and not the hirer. If the notice were to be served as Galaxy argued, then it would be served to the owner, in this case Diamond Trust which would be ridiculous. The trial court was, therefore, right in holding that the rule did not apply in the case.

Conclusion

46. Having considered the appeal, cross appeal and arguments by parries, and upon reanalyzing and reassessing the evidence and considering it myself, the conclusion I come to is that the appeal is meritorious.
47. Consequently, the appeal is allowed.
 - a. The judgment and decree of the trial court awarding general damages of Kshs. 50,000 to Galaxy is set aside.
 - b. The order for refund of auctioneers charges of Kshs. 45,000 to Galaxy is also set aside.
 - c. Any amount paid to Galaxy on the basis of the trial court's judgment and decree be refunded to Diamond Trust Bank Kenya Limited.
 - d. The Cross appeal is dismissed.
 - e. Costs of the appeal and before the trial court awarded to Diamond Trust Bank Kenya Limited.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023

E C MWITA

JUDGE

