



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 121 OF 2019

HENRY CHAMA CHAMA.....APPELLANT

VERSUS

SAMMY TRADERS LIMITED.....RESPONDENT

[Being an appeal from the Judgment of the Hon. L. Akoth Resident Magistrate at Kisumu

[Law Courts dated 7th October 2019 in the Kisumu CMCC NO. 409 OF 2015]

JUDGMENT

By an Amended Plaint dated 14th July 2016, the Plaintiff, **HENRY CHAMA CHAMA**, sued the Defendant, **SAMMY TRADERS LIMITED**, for the following reliefs;

“(a) Specific Performance or refund of deposited sum; Refund of Kshs 1,970,000/=.

(b) General and Exemplary Damages.

(c) The costs of the suit.

(d) Interest on (b) and (c) above.

(e) Any other remedy the Honourable court deem fit and just to grant.”

1. The claim arose from a Contract dated 7th October 2014.

2. Pursuant to the contract in issue, the Plaintiff purchased a **TOYOTA PRADO**, Registration Number **KBZ 603B**, from the Defendant.

3. The agreed Purchase Price was Kshs 3,600,000/=.

4. It is common ground that the Plaintiff paid a deposit of Kshs 1,200,000/=. The said deposit was made up of

Kshs 200,000/= cash, and Kshs 1,000,000/= being the value of the Plaintiff’s vehicle Registration Number **KAR 119W**, which the Plaintiff traded-in with the Defendant.

5. It is further common ground that the Plaintiff was supposed to pay the balance of the Purchase Price, through monthly payments of Kshs 200,000/=.

6. It was the Plaintiff’s case that in November 2014 he encountered difficulties, which made it difficult for him to remit the agreed monthly instalments. In those circumstances, the Plaintiff asserts that he negotiated with the Defendant, and that the said Defendant agreed to reduce the monthly instalments to Kshs 50,000/=.

7. However, the Defendant categorically denied the assertion concerning the alleged agreement to reduce the quantum of the

monthly instalments.

8. The Defendant repossessed the Prado and sold it. The Plaintiff asserted that the repossession was carried out without any Notice to him; and also that the sale of that vehicle was done without due regard to his rights.

9. In answer to the claim, the Defendant asserted that if there was any breach of the contract between the parties, the person who was in breach is the Plaintiff.

10. When the case came up for trial, each of the parties had one witness.

11. Being the first appellate court, I have a duty to evaluate all the evidence on record.

12. **PW1, HENRY CHAMA**, is the Plaintiff. He testified having purchased a Prado vehicle from the Defendant. The Sale Agreement is dated 7th October 2014.

13. Whilst the Purchase Price was Kshs 3,600,000/=, **PW1** testified that he paid the deposit of Kshs 1,200,000/=, which left a balance of Kshs 2,200,000/=.

14. **PW1** said that in the month of November 2014, he encountered difficulties, and was unable to remit the agreed monthly instalments of Kshs 200,000/=.

15. He testified that he re-negotiated with the Defendant, so that he could pay instalments of Kshs 50,000/= monthly.

16. By 2nd February 2015, **PW1** says that he had paid Kshs 165,000/=. However, the Defendant then demanded Kshs 635,000/=, which would bring the instalments to Kshs 800,000/=.

17. When **PW1** was unable to meet the Defendant's said demand, the Defendant had the Prado repossessed and sold-off.

18. After the Prado was sold-off, the Defendant handed over to the Plaintiff, the sum of Kshs 300,000/=.

19. The Plaintiff asked the trial court to compel the Defendant to refund him the sum of Kshs 1,670,000/=, excluding the sum of Kshs 300,000/= which he had already received.

20. During cross-examination, **PW1** said that he did not have any evidence to show that the Defendant had agreed to reduce the monthly instalments from Kshs 200,000/= to Kshs 50,000/=.

21. **DW1, ANDREW KIPKULEI**, was a Manager at **SAMMY TRADERS**.

22. He corroborated the testimony of **PW1** concerning the Purchase Price for the Prado, as well as the deposit of

Kshs 1,200,000/=.

23. **DW1** explained that the balance of Kshs 2,400,000/= was payable by the Defendant over a period of 12 Months, hence the monthly instalments of Kshs 200,000/=.

24. **DW1** said that it is only after the Plaintiff had defaulted that the Defendant instructed an auctioneer to repossess the Prado.

25. The Prado was then auctioned for Kshs 2,100,000/=, and the Agreement for that sale was produced as an exhibit in court.

26. According to **DW1**, the Plaintiff remitted payments amounting to Kshs 300,000/= after the Prado had been auctioned. It is that amount which the Defendant remitted back to the Plaintiff.

27. Both witnesses referred to the agreement between the parties herein as being a Hire Purchase Agreement.

28. However, the said Agreement was not registered pursuant to **Section 5** of the **Hire Purchase Act**.

29. The learned trial magistrate held as follows;

"20. Having analyzed the provisions of the Hire Purchase Act, against the conduct of the plaintiff, it would be

unjust that the plaintiff claims that the agreement is not enforceable on the basis that the terms therein are hire purchase in nature and therefore ought to have been registered."

30. The trial court noted that the Plaintiff had, by his conduct, attempted to meet his part of the bargain. Having made that observation, the trial court said;

“In the circumstances, it will be unjust and unequitable to raise an objection by the plaintiff, that the contract is enforceable based solely on the fact that it was not registered under Section 5 of the

Hire Purchase Act.”

31. Finally, the trial court held that the contract was enforceable between the parties, thus rendering legal and justified the action taken by the Defendant.

32. Pursuant to Section 3 (1) of the Hire Purchase Act;

“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 other than a hire purchase agreement in which the hirer is a body corporate wherever incorporated; but that monetary limitation does not apply so as to affect the definition of ‘hire-purchase business’ in Section

2 (1).”

33. As the Purchase Price in this instance was Kshs 3,600,000/=, the agreement ought to have been registered.

34. It is the Appellant’s submission that the consequence of non-registration of the agreement between the Appellant and the Respondent would be that it is illegal and therefore unenforceable.

35. The Appellant cited the decision in **IMPERIAL BANK OF KENYA V KARIUKI CONSTRUCTION COMPANY LIMIED & 2 OTHERS HCCC NO. 51 OF 2012**, in which Havelock J. held as follows;

“In my view, the said Agreement having not been so registered as required by the Hire Purchase Act, the same cannot be enforced against the first Defendant. Furthermore, as per Section 5 (4) (a) supra, the Plaintiff had no right to repossess the said motor vehicle registration No. KAZ 917L and sell the same.”

36. Section 5 (4) of the Hire Purchase Act provides as follows;

“Unless a hire-purchase agreement has been registered under subsection (2) –(a) no person shall be entitled to enforce the agreement against the hirer or to enforce the contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer; and

(b) no security given to the hirer in respect of money payable under the agreement, or given by a guarantor in respect of money payable under a contract of guarantee relating to the agreement, shall be enforceable against the hirer or the guarantor by any holder thereof.”

37. In the case of **IMPERIAL BANK OF KENYA Vs KARIUKI CONSTRUCTION COMPANY LIMITED** (above-cited), the court held that the hire-purchase agreement was not enforceable against the 1st Defendant, who was the hirer.

38. The court dismissed the Plaintiff’s claim against the 1st Defendant;

“under the terms of the Hire Purchase Agreement ……….”

39. However, the court went ahead to order as follows:

“c. The Plaintiff’s claim as against the first Defendant, as regards its overdrawn account is allowed and judgement is entered in the Plaintiff’s favour in the mount of Kshs 1,393,768.03 together with interest thereon at the rate of 18% per annum from 1st March 2011 until payment in full.”

40. In the light of the said findings, it is clear that the contract between the Hirer and the Owner was not illegal. The non-registration of the hire-purchase agreement did not render the agreement illegal: it only rendered it unenforceable in the specific terms as stipulated in **Section 5 (4) of the Hire Purchase Act.**

41. That would explain why, in that case, the Plaintiff's claim against the 2nd and 3rd Defendants was dismissed; and the reason is that those 2 Defendants were guarantors.

42. In the case of **TAAWAWA SUPERMARKET LIMITED Vs FINA BANK LIMITED, CIVIL APPEAL NO. 118 OF 2002** the Court of Appeal said the following, concerning a hire-purchase agreement that had not been registered;

“We may add that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement. It retained its validity as a contract inter se and was enforceable as such.”

43. The Court of Appeal went on to carefully examine the evidence on record and then made the following observation;

“There was provision in clause 7 of the agreement, for repossession of the vehicle in the event of breach, and the bank properly invoked that clause.”

44. In the case before me, I find that pursuant to **Clause 5 of the Agreement**, the Respondent had a right to repossess the vehicle, when the Plaintiff fell into arrears. Therefore, as the contract between the Appellant and the Respondent was valid and thus enforceable inter se, the Respondent's action of repossessing the vehicle was lawful.

45. I find that the trial court made the correct decision to dismiss the Plaintiff's case, in the circumstances.

46. Before concluding the judgment, I wish to adopt the following words of the Court of Appeal in **DAVID SIRONGA OLE TUKAI Vs FRANCIS ARAP MUGE & 2 OTHERS, CIVIL APPEAL NO. 76 OF 2014;**

“But perhaps the more compelling argument against the approach taken by the learned Judge lies in the provisions of our Judicature Act, Cap. 8 of Laws of Kenya, regarding the application of statutes and the doctrines of equity.

Section 3 (1) thereof embodies what has been called the hierarchy of norms, and provides for how the jurisdiction of the

courts in Kenya shall be exercised. The section creates a deliberate and hierarchical sequence of laws, starting with the Constitution, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897.

.....

section 3 (1) (c) makes it clear that the substance of common law and the doctrines of equity apply only in so far as the statute does not apply. In other words, the Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity.”

47. To the extent that the trial court appeared to base its judgment upon the consideration of what it deemed to be “*unjust and inequitable*”, the decision would have been unsustainable.

48. However, as already demonstrated above, the actions of the Respondent were lawful, and therefore enforceable inter se.

49. In the result, the appeal lacks merit, and is therefore dismissed. The costs of the appeal are awarded to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU

This 9th day of February 2021

FRED A. OCHIENG

JUDGE