



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 67 OF 2019

GLADYS KARIMI MUSYIMI.....PLAINTIFF

VERSUS

1. FAHARI CARS LTD

2. JESSE WAINAINA

T/A EXPRESS AGENCY AUCTIONEERS.....DEFENDANTS

JUDGMENT

1. The Plaintiff, **Gladys Karimi Musyimi**, filed this suit seeking; *a full refund of the payment made for the **Motor Vehicle KCK 345S Mercedes Benz** in the sum of **Kshs.2,776,900/=**; exemplary and punitive damages under **Section 84** of the **Consumer Protection Act, 2012**, plus costs and interest.*
2. According to the **Plaint** dated **17th June, 2019**, that by an agreement dated **25th January 2017**, the Plaintiff and the Defendant entered into a sale agreement for the sale of a **Motor Vehicle Registration No.KCK 345S Mercedes Benz**. The agreed purchase price was **Kshs.3,553,000/=**.
3. The Plaintiff stated that she paid a deposit of **Kshs.2,000,000/=** in cash and the remaining balance of **Kshs.1, 553, 000/=** was to be paid in **10 equal monthly installments** starting from **25th March, 2017** and as at **June 2017**, the Plaintiff had paid an extra sum of **Kshs.776,900/=**.
4. It was pleaded by the Plaintiff that she stopped paying the installments as agreed, upon receiving a lot of harassment from the police on questions with regard to the validity of the documents pertaining to the said Motor Vehicle. Further, she stated that she had intended to buy a **2010 Mercedes Benz** but she realized that the 1st Defendant had sold her a **2009 model**. She stated that she tried to sort out the issue with the sellers, **Mr. Tricky Nzaka Chikuro** and **Mr. Imran** but to no avail.
5. As a result of the foregoing, on **6th December, 2017**, the 2nd Defendant under instructions from the 1st Defendant repossessed the **Motor Vehicle Registration No.KCK 345S Mercedes Benz** from the Plaintiff while she was in Kiambu and the vehicle is currently at an unknown destination.
6. It was stated that in **March, 2018**, the Plaintiff followed up with the 1st Defendant at their Mombasa office in to try and sought out the issue but the said Motor Vehicle was not available for possible viewing.
7. It is the Plaintiff's case that the transaction herein was specifically protected from repossession under **Section 20** of the **Consumer Protection Act, 2012** which prohibits any provision in an agreement or any security agreement incidental to the agreement to repossess goods and/or services upon default of payment by the Consumer not to be enforceable except by leave obtained from the High Court where the consumer has paid two thirds or more of his or her payment obligation.
8. In this case, the Plaintiff claims that she has paid **Kshs.2,776,900/=** out of **Kshs.3,553,000/=** which is way above two thirds and is translated to **78.16%** of her required obligation. It was emphasized that the option for repossession was not available in the case herein and therefore the actions of the Defendants were illegal, null and void.
9. On the part of the 1st Defendant, it was admitted that there was an agreement dated the **25th January 2017** for the sale of a **Motor Vehicle Registration No.KCK 345S Mercedes Benz** for the purchase price of **Kshs.3, 553,000/=** wherein the Plaintiff paid **Kshs.2,000,000/=** and that a balance of **Kshs.1,553,000/=** was owing, which was to be paid in ten (10) equal installments of **Kshs.155,300/=**.

10. It was stated that there was an express term of the agreement that should the Plaintiff default in paying any of the monthly instalments, the 1st Defendant was entitled to repossess the suit property without notice.

11. That as at **22nd November, 2017**, the 1st Defendant stated that the Plaintiff had an outstanding balance of **Kshs.776,100/=**, and owing to the fact that she had not made any attempts to clear the outstanding amount, the 1st Defendant instructed the 2nd Defendant via a letter dated **22nd November, 2017** to advertise for the sale of **Motor Vehicle Registration Number KCK 345S Mercedes Benz** through a public auction and the said advertisement was placed in the Star Newspaper.

12. It is the 1st Defendant's case that the Plaintiff was in breach of a contract and cannot allege illegal repossession of **Motor Vehicle Registration No. KCK 345S Mercedes Benz**.

The Plaintiff's Case

13. According to the Plaintiff, who testified as PW1, she stated that in **2017** she wanted to buy a car for her personal use. She had first opted for a **Toyota Crown Series** but could not get it. She then opted for **Toyota Prado** but the deal did not go through and instead she ended up taking a **Mercedes Benz Registration No.KCK 345S**.

14. It was PW1's testimony that by an agreement dated **25th January 2017** she bought a Mercedes Benz from **Fahari Cars Limited**, a Company based in Mombasa and paid **Kshs.2,000,000/=** deposit and a further instalment amounting to **Kshs.776,100/=** making the total amount paid to be **Kshs.2,776,900/=**.

15. The Plaintiff testified that she was constantly being stopped by the police with inquiries about the authenticity of the documents and number plate of the said Motor Vehicle that she became apprehensive that she had gotten a raw deal. That she later realized that she had been given a **2009 model instead of a 2010 model** which was agreed on paper.

16. She testified that around **June, 2017**, she stopped making further payments but sought and confronted the seller **Mr. Tricky Nzaka Chikuro** and **Mr. Imran** in efforts to try and find out what was going on with the said Motor Vehicle. She stated that she called **Mr. Imran** who was not helpful and since she was pregnant and nursing a young child, she came to Mombasa around **March, 2018** but the 1st Defendant was totally uncooperative.

17. In cross-examination by **Ms. Mulongo**, learned Counsel for the 1st Defendant, the Plaintiff said that she saw a clause in the agreement that in case of default, the car would be repossessed. She stated that she is aware that the 1st Defendant acted on the terms as per the agreement.

18. On repayment, the Plaintiff testified that she had not cleared the balance and that she was unable to do so because the Motor Vehicle was repossessed and sold. She also stated that she could not continue paying as she was given a wrong model of the car contrary to the agreement. Further, she stated she was given a **2009 model** instead of **2010 model** as indicated in the agreement.

19. In re-examination, the Plaintiff emphasized that the repossession of the Motor Vehicle was illegal under the law.

Defence Case

20. On the part of the defence, on behalf of the 1st Defendant, **Mr. Muhammad Imran** testified as DW1. The 2nd Defendant did not participate in the suit herein.

21. DW1 told court that he sold a **Mercedes Benz KCK 345 S** to **Gladys**, the Plaintiff herein for the purchase price of **Kshs.3,553,000/=** wherein the Plaintiff paid a deposit of **Kshs.2,000,000/=**. The balance of **Kshs.1,553,000/=** was to be in instalment of **Kshs.155,300/=**. He testified that the Plaintiff defaulted in payment as agreed and proceeded to repossess the same.

22. DW1 testified that the sale agreement as had been entered was not guided by the **Consumer Protection Act** and that there is a Clause to the effect that in case there is a default, the Motor Vehicle would be repossessed.

23. It was stated that after the Motor Vehicle was repossessed from the Plaintiff, the 1st Defendant proceeded to grant authority to the 2nd Defendant to resell the vehicle. He stated that all that was done was as provided in the agreement.

24. In cross-examination by **Mr. Muchiri** Counsel for the Plaintiff DW1 stated that the year of the manufacture of the Motor Vehicle was **2009** as at the date of the sale of agreement entered into in **2017**. It was stated that the agreement indicates the year of manufacture as **2010**.

25. He testified that he is aware of the **Consumer Protection Act**, but he was not aware that you cannot repossess a car once a customer has paid two thirds of the purchase price.

26. It was stated by DW1 that normally if a customer has paid **90%** of the purchase price, it is in the 1st Defendant's discretion to choose whether or not to repossess the Motor Vehicle.

27. DW1 testified that the agreement as signed is governed by the laws of Kenya and that he does not do business that violates the laws of this country. He added that the agreement did not include the **Consumer Protection Act** and that the same was not excluded deliberately. He

stated that he did not get any permission from the court before repossession.

28. Directions were then given on **14th December, 2020** that the suit be summed up by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Plaintiff/Applicant filed submissions on the **5th March, 2021** while the 1st Defendant/Respondent filed theirs on the **9th April, 2021**.

29. Parties highlighted their written submissions on **6th May, 2021** and relied on their respective contents entirely.

The Plaintiff's submissions

30. The Plaintiff has placed reliance on **Section 20** of the **Consumer Protection Act, 2012** that expressly prohibits any provision in an agreement or any security agreement incidental to the agreement under which a supplier may retake, repossess goods, services upon default of payment by a consumer not to be enforceable except with leave obtained from the High Court where the Consumer has paid two-thirds of his/her payment obligation.

31. It has been submitted that the Plaintiff had paid more than **two-thirds**, that is, **Kshs.2,776,900/=** out of **Kshs.3,553,000/=** which translates to **78.15%** and thus the option of retaking/repossession was not available without leave of the High Court. The actions of the Defendants were therefore null and void.

32. According to **Mr. Muchiri**, Counsel for the Plaintiff, the repossession of **Motor Vehicle Registration No.KCK 345S, Mercedes Benz** contrary to **Section 20** of the **Consumer Protection Act, 2012**, effectively cancelled the agreement dated **25th January, 2017** as between the Plaintiff and 1st Defendant.

33. That under **Section 80** as read with **Section 84** of the **Consumer Protection Act, 2012**, provides for remedies for an aggrieved party in the event there is breach. In this case the Plaintiff claims from the Defendant a refund of all payments made under the **Consumer Agreement (Section 80 (1)(a))** and exemplary or punitive damages under **Section 84 (3)**.

34. The Plaintiff's Counsel has further submitted that the actions of the Defendants amounted to an illegality and prayed that the Plaintiff be refunded all sums paid under the said contract, exemplary and punitive damages, costs and interest.

35. On exemplary and punitive damages, it has been stated that these remedies are provided for under **Section 84(3)** of the **Consumer Protection Act, 2012**, since the repossession was malicious and inhumane.

36. It has been submitted that the decision of the Defendants to keep both the car and money amounts to unjust enrichment as was held in the case of **Charles Wanjohi Wathuku –vs- Sam Kiplangat & Another [2014] eKLR**. Further the court has been urged to consider the case of **Lucy Wairimu Mute –vs- Sleek Trading Limited & Another [2019] eKLR**, where the court, faced with similar facts awarded the Plaintiff exemplary damages of Kshs.300,000/=. The Plaintiff urged the court to award her Kshs.500,000/=.

37. In conclusion, that the money paid under the contract of **Kshs.2,776,900/=** be refunded as shown under the **Consumer Protection Act, 2012** and she be paid exemplary and punitive damages of **Kshs.500,000/=**.

The 1st Defendant's submissions

38. The 1st Defendant does not dispute that they repossessed and sold the car.

It was maintained that the same was done under **Clause 11 and 12** of the **Agreement**.

39. It is the 1st Defendant's case that the Plaintiff breached the terms of the contract by failing to pay the monthly instalments as at and when the same fell due from the month of **March to December**, when the last instalment was to be made.

40. The 1st Defendant has submitted that parties herein are bound by the Contract Act which provides that parties are guided and bound by the terms of their contract. It has been stated that the Plaintiff admitted to being in default of the sale agreement as she had not attempted to make payments of any instalments in a bid to clear the balance of the purchase price. Further, that the Plaintiff did not deny that she was fully aware that in the event of default of payment, the 1st Defendant had the right to repossess and re-sell the Motor Vehicle.

41. In reliance on the case of **Danson Muriuki Kihara –vs- Johnson Kabungo [2017]eKLR**, the 1st Defendant explained that parties are bound by the terms of their contract and a court of law cannot re-write a contract on behalf of parties.

42. Further, the 1st Defendant has added that the Plaintiff cannot impose the **Consumer Protection Act**, whilst the said issues were not raised when the parties were executing the sale of agreement dated **25th January, 2017**. That the fact that the said agreement was not governed by the **Consumer Protection Act** was not denied by any party. It was stated that it goes against the basic law of contract to alter the terms of the written agreement and impose the provisions of the **Consumer Protection Act** upon parties as was held in the case of **Fidelity Commercial Bank Limited –vs- Kenya Grange Vehicle Industries Limited [2017] eKLR**.

43. It has been submitted that DW1 did not receive any complaint from the Plaintiff regarding the Motor Vehicle and that the Plaintiff has not rebutted this claim. That Plaintiff continued to use the suit Motor Vehicle without raising any issue with the 1st Defendant and without

payment of any single monthly instalment until when the said vehicle was repossessed pursuant to the sale agreement and thus issues as raised by the Plaintiff are an afterthought. Reliance was placed on the case of **Dickson Maina Kibra –vs- David Ngari Makunya [2015]eKLR**, where the Plaintiff remained in possession of the chattel despite its engine malfunction.

44. The 1st Defendant has asked the court to find the Plaintiff in breach of the sale agreement as she never made an effort to clear the balance as was required and has relied on the case of **Lucy Mwhaki Mureithi –vs- Sylvanus Ngaira Mukotsi [2018]eKLR**.

45. On whether leave of court to repossess the suit vehicle was required, the 1st Defendant has stated that the agreement as executed gave it the right to repossess the suit Motor Vehicle pursuant to Clause 11 of the aforesaid agreement and urged that the court does not impose the provision of **Section 20** of the **Consumer Protection Act** on the parties herein.

46. It has been submitted that the 1st Defendant did not require leave of court as the same under **Consumer Protection Act** is only a requirement for a future performance agreement. The agreement herein was not a future performance agreement according to the 1st Defendant.

47. The 1st Defendant has urged the Court not to award the Plaintiff as prayed as it has been instituted under the wrong provision of the law seeking to alter the terms of a contract which has been reduced to writing and seeks to impose new conditions on the parties.

Analysis and determination

48. I have carefully considered the pleadings, the evidence as adduced by both sides and submissions filed herein. I find that the issues for determination are as follows: -

i) Whether the Defendants were justified to repossess the Motor Vehicle Registration No.KCK 345S Mercedes Benz;

ii) What remedies are available to the parties.

i) Whether the Defendants were justified to repossess the Motor Vehicle Registration No.KCK 345 S Mercedes Benz

49. It is agreed by both parties that in the pleadings filed and the documents exhibited concur on the fact that there was an agreement dated **25th January, 2017** for the sale of a Motor Vehicle at **Kshs.3,553,000/=** and that a sum of **Kshs.2,776,900/=** had been paid by the June 2017. The outstanding amount is thus **Kshs.776,100/=**. It is further not disputed that the Motor Vehicle was repossessed and sold.

50. The Plaintiff's main contention is that she was sold a car that had issues of authenticity and the model was not reflective of the agreement. The model agreed on was **2010** but instead what was delivered was the **2009** model. She stated that, she stopped paying the monthly instalments as required and tried to sort out the said issues with the 1st Defendant but to no avail. The issue of having been sold the wrong model of car was admitted by DW1 but he stated that the Plaintiff never raised any issue about it but continued to pay her instalments until she defaulted sometime in **June 2017**.

51. From the evidence in this case, it is not in dispute that the Plaintiff had paid **78.15%** of the purchase price which is more than **two thirds** ($\frac{2}{3}$) of the purchase price. The Plaintiff has placed reliance on the provisions of **Section 20** of the **Consumer Protection Act** wherein the law forbids the repossession or resell of goods where one has paid **two thirds** ($\frac{2}{3}$) or more for goods or services. It provides as follows:-

1) where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.

2) Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable".

52. On the other hand, the 1st Defendant claims that they are only governed by the agreement which was signed by the parties and, which agreement does not include the provisions of the Consumer Protection Act. On the issue of applicability of the **Consumer Protection Act**, I agree with the finding of Justice P.J Otieno, in the case of **Lucy Wairimu Mute (supra)** where he stated: -

"...13. The statute reveals its purpose at the preamble to be the protection of consumers, prevention of unfair trade practices in consumer transactions and for related purposes. Thus when it provides that no repossession or retaking of possession is permissible once 2/3 of the purchase price is paid it leave no other interpretation than retaking is forbidden without the leave of the court first sought and obtained.

14. Put in the context of this case does it matter not that the agreement between the parties provided for repossession without regard to the level and extent of payment made..."

53. In line with the finding in the above case and a reading of **Section 20** of the **Consumer Protection Act** and **Clause No. 11** and **12** of the **agreement** dated **25th January, 2017**, I find that the repossession and resell of the said Motor Vehicle was illegal and void *ab initio*.

54. Further, the defence by the 1st Defendant that the parties are governed by the Law on Contracts, in this case the agreement dated **25th January, 2017** and not the **Consumer Protection Act**, cannot hold water, and as stated in the case of **Lucy Wairimu Mute (supra)** that Act was created to protect consumers from unscrupulous traders such as the 1st Defendant.

55. Having found **Clause No. 11 and 12** of the **agreement** dated **25th January, 2017** as being illegal and void, there is therefore no justification for the repossession and re-sell of the Motor Vehicle without leave of court, since two-thirds of the consideration was already settled.

*ii) **What remedies are available to the parties***

56. In the instant case, the subject Motor Vehicle cannot be recovered as the same was sold via public auction on the instructions of the 1st Defendant to the 2nd Defendant dated the **22nd November, 2017**. There is therefore nothing for the Plaintiff to recover if she were to be directed to pay the remaining owing amounts. In fact, the Plaintiff is not interested to recover or possess the suit Motor Vehicle but is interested in a refund of the sums paid and any other remedy she is entitled to under the law.

57. In this case, the Motor Vehicle is not in the possession of the Plaintiff since it has been sold to a third party in contravention of **Section 20** of the **Consumer Protection Act** after the Plaintiff had paid two-thirds of the agreed price.

58. The Plaintiff claims that the actions of the 1st Defendant amount to cancellation of an agreement and seeks a full refund under **Section 80 (1)(a)** of the **Consumer Protection Act** which provides: -

Obligations on cancellation

(1) If a consumer cancels a consumer agreement, the supplier shall, unless the contrary is provided for in the agreement, in accordance with the prescribed requirements—

(a) refund to the consumer any payment made under the agreement or any related agreement;

59. The above submission by the Plaintiff suffices as enough notice to the 1st Defendant of the intention of the Plaintiff to cancel the agreement as provided for under **Section 76** of the **Consumer Protection Act**. Further, the Plaintiff has clearly stated that she intended to cancel the agreement with the 1st Defendant as she was given the wrong model of the Motor Vehicle, a position which was confirmed by DW1.

60. It will be unfair to let the 1st Defendant benefit from the illegalities as discussed above and the fact that there is no car available for the Plaintiff to recover and or repossess, it is only just and equitable that the Plaintiff be refunded the sum of **Kshs.2,776,900/=**, which she had paid to 1st Defendant, which sum is not disputed.

61. The Plaintiff has also claimed that she is entitled to exemplary and punitive damages as provided under **Section 84(3)** of the **Consumer Protection Act** which provide: -

Action in Court

1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the appropriate Court.

2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover;

a) the full payment to which he or she is entitled under this Act; and

b) all goods delivered under a trade-in agreement or an amount equal to the trade-in allowance.

3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

ii)

62. Under the law, exemplary and punitive damages are normally awarded in order to deter the Defendant from committing a future breach of the same kind that would make him or her a profit that exceeds the compensation of the Plaintiff.

63. In the context of this case, it was unfair for the 1st Defendant to have sold the wrong model of car to the Plaintiff and then ignored her efforts of trying to resolve the matter. Instead, the 1st Defendant proceeded to repossess the suit Motor Vehicle at a stage where the Plaintiff had settled almost **80%** of money and went on to sell it. In essence, the Plaintiff has been left with nothing, no money and no car which only shows that the 1st Defendant must be discouraged from being an unconscionable business practitioner. In my view the agreement dated **25th January 2017** was crafted and drawn in a way to ensure that the Defendant gets unmitigated advantage over the Plaintiff.

64. It is also worth-noting that the Plaintiff also derived a benefit of using the Motor Vehicle for well over 11 months and is now seeking to be refunded all the sums she paid for the same Motor Vehicle. All considered, and in balancing the interest of justice of both the Plaintiff and 1st Defendant, I do award to the plaintiff exemplary damages in the sum of **Kshs.400,000/=**.

65. In view of the above, Judgment is entered in favour of the Plaintiff as against the 1st Defendant in the following terms:-

a) The 1st Defendant do refund to the Plaintiff the sum of Kshs.2,776,900/=.

b) Exemplary damages in the sum of Kshs.400,000/=.

c) Cost of this suit with interest from the date of this Judgment until payment in full.

DATED, AND SIGNED AT MOMBASA THIS14TH..... DAY OF ..JULY..., 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS ...14TH.... DAY OF ...JULY..., 2021.

A. ONG'INJO

JUDGE