



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.159 OF 2019**

**PATRICK OTIENO NYAPANDA.....APPELLANT**

**VERSUS**

**AUTOZONE MOTORS (K) LIMITED.....RESPONDENT**

*(Being an Appeal against the Judgment, Decree and Order made*

*by Hon. Lesootia Albert Saitabau (PM) on the 11<sup>th</sup> July, 2019*

*in Civil Suit No. 2310 of 2018)*

**JUDGMENT**

1. The dispute leading to this Appeal was in respect of two agreements entered into by the parties herein in respect of the sale of two **Motor Vehicles Registration Nos.KCH 133M** make **Toyota Voxy-Van** and **KCH 953L** make **Voxy-Van**.
2. The Appellant was sued by the Respondents vide a **Plaint** dated **13<sup>th</sup> November, 2018** for an outstanding sum of **Kshs.2,290,000/=** and storage fees in respect of the sale of **Motor Vehicles Registration No. KCH 133M** make **Toyota Voxy-Van** and **KCH 953L** make **Voxy-Van**.
3. The Respondent's case was that on **5<sup>th</sup> January, 2017** they entered into an agreement with the Appellant for the sale of **Motor Vehicle Registration No.KCH 133M** make **Toyota Voxy-van** for the sum of **Kshs.1,600,000/=**. That the Appellant traded in **Motor Vehicle Registration No.KCK 025D** make **Toyota Vitz** which was valued at **Kshs.500,000/=** thus offset part of the purchase price leaving a balance of **Kshs.1,100,000/=**. A further **Kshs.30,000/=** was paid by the Appellant which then took the balance to **Kshs.1,070,000/=**.
4. The terms of the agreement for sale of **Motor Vehicle Registration No. KCH 133M** make **Toyota Voxy-van** was that the balance of **Kshs.1,070,000/=** was to be paid in weekly instalments of **Kshs.30,000/=** for a period of about nine (9) months from the date of agreement; the said motor vehicle was sold on an '**AS IT IS**' basis and; in the event of default of any of the instalments, the Respondent had the right to repossess the motor vehicle without any notice to the Appellant.
5. It was the Respondent's case that as at **14<sup>th</sup> November, 2017**, the Appellant had a balance of **Kshs.680,000/=** with respect to the purchase of **Motor Vehicle Registration No.KCH 133M** make **Toyota Voxy-van**, having paid a total of **Kshs.320,000/=**.
6. That further, on **8<sup>th</sup> February, 2017**, the Respondents entered into an agreement with the Appellant for the sale of **Motor Vehicle Registration No.KCH 953L** make **Voxy-Van** for **Kshs.1,700,000/=** and the terms of sale were that no deposit was to be paid but equal monthly instalment of **Kshs.130,000** were to be paid on or before the **8<sup>th</sup>** day of every succeeding month with effect from **8<sup>th</sup> March, 2017**; possession of the motor vehicle was granted on **8<sup>th</sup> February, 2017** at 3:30pm; and that the Respondent had the right to repossess the motor vehicle without any notice to the Appellant in the event of default of any instalments.
7. It was the Respondent's case that as at **10<sup>th</sup> January, 2018**, the Appellant had a balance of **Kshs.1,610,000/=** with respect to the purchase of **Motor Vehicle Registration No. KCH 953L** make **Toyota Voxy-van**.
8. The Respondent's contention was that the Appellant owed them a total sum of **Kshs.2,290,000/=** in respect of both motor vehicles, which particulars were well within the Appellant's knowledge and he had neglected to pay the said outstanding balance despite several demands by the Respondent.

9. It was the Respondent's case that the motor vehicles were repossessed and parked at a yard from **5<sup>th</sup> April, 2018** to the date of filing the case, thus incurring storage charges of **Kshs.1,000/=** per day for each motor vehicle. The said amount continues to accrue until such a time that the Appellant will pay the outstanding amount of **Kshs.2,290,000/=**.
10. The Respondent's prayers before the trial court were that Judgment be entered against the Appellant and they be paid **Kshs.2,290,000/=**, as the outstanding balance, storage charges of **Kshs.1,000/=** per day for every vehicle accrued from **5<sup>th</sup> April, 2018** with respect to **Motor Vehicles Registration No. KCH 133M** make **Toyota Voxy-Van** and **KCH 953L** make **Voxy-Van** together with interest and costs.
11. The Appellant filed his Statement of Defence on the **7<sup>th</sup> December, 2018** and denied owing the Respondent any money. He claimed that the cars were taken away through dubious methods. He thus prayed that the suit against him be dismissed.
12. The case had only two witnesses, that is, the Respondent's Director who testified as PW1 and the Appellant's Director who testified as DW1.
13. PW1, was **Muhammad Tahir Khandwalla**, the Respondent's Director. He testified that the Appellant purchased two (2) **Motor Vehicles** being **Registration No.KCH 133M** make **Toyota Voxy-Van** and **KCH 953L** make **Voxy-Van**. He stated that for **Motor Vehicle Registration No.KCH 133M** make **Toyota Voxy-Van**, the agreed purchase price was **Kshs.1,600,000/=** vide an agreement which was entered on **5<sup>th</sup> January, 2017**.
14. It was PW1's testimony that the Appellant traded in his motor vehicle valued at **Kshs.500,000/=** and paid a further **Kshs.30,000/=** in cash. The remaining balance was to be paid in instalments of **Kshs.30,000/=** every week until payment in full. He stated that the Appellant complied for ten (10) weeks and he defaulted having paid a sum of **Kshs.420,000/=** in cash, leaving a balance of **Kshs.680,000/=** as outstanding. The car was repossessed.
15. He testified that for the second (2<sup>nd</sup>) **Motor Vehicle Registration No.KCH 953L** make **Voxy-Van**, an agreement was signed on **8<sup>th</sup> February, 2017** for the purchase price of **Kshs.1,700,000/=** and a further agreement was that of an installment of **Kshs.13,000/=** be paid every month until payment in full. He stated that he was only paid **Kshs.90,000/=**.
16. PW1 testified that for both cars he was owed a total of **Kshs.2,290,000/=** by the Appellant.
17. **DW1**, was **Patrick Otieno Nyapanda**, the Appellant herein. He stated that he knew **Autozone Motors (K) Ltd**, the Respondent herein and that on **5<sup>th</sup> January, 2017** he went to them with an intention of buying a motor vehicle.
18. He testified that he inquired about **Motor Vehicle Registration No. KCH 133M** make **Toyota Voxy-Van** and was told by the Respondent's Director that its price was **Kshs.1,200,000/=** in cash. He stated that the then Director told him that he could trade in his **Motor Vehicle Registration KCK 025D** and buy the said motor vehicle. He added that **Motor Vehicle Registration KCK 025D** was valued at **Kshs.500,000/=** and he paid an additional **Kshs.30,000/=**, the agreement was that he would pay **Kshs.30,000/=** every week for nine (9) months.
19. It was the Appellant's testimony that he agreed with the Respondent that in Default of any payment, he would forfeit the deposit paid and that the car would be repossessed. He stated that he paid the instalments without defaulting for three (3) months. He stated that on **8<sup>th</sup> February, 2017** he took another **Motor Vehicle KCH 953L** make **Voxy-Van** from the Respondent valued at **Kshs.1,700,000/=** and he was to pay **Kshs.30,000/=** until payment in full. The Appellant paid **Kshs.30,000/=** as the first instalment on the **8<sup>th</sup> February, 2017** and he took the motor vehicle.
20. He testified that he paid instalments for both vehicles on **13<sup>th</sup> March, 2017** and that on **20<sup>th</sup> February, 2017**, the **Motor Vehicle KCH 953L** make **Voxy-Van** was swept away by flood waters at Kinango. He informed the Respondent of the same but he was told to continue paying for the said motor vehicle. He stated that he had repaired the motor vehicle but the same was not fully restored.
21. It was PW1's testimony that on **1<sup>st</sup> September, 2017**, **Motor Vehicle Registration No.KCH 133M** make **Toyota Voxy-Van** was involved in an accident at Voi and in **April, 2018**, the Respondent came for his motor vehicle and thereafter filed the suit before the trial court.
22. Upon evaluating the evidence that was presented before him, the trial Magistrate found that the dispute had arisen out of a mutual agreement between the Appellant and the Respondent and the fact that the motor vehicles were involved in accidents did not absolve the Appellant from his monthly obligations of paying the agreed instalments. The trial court allowed the Respondent's prayers and awarded **Kshs.2,290,000/=** being the outstanding balance and storage charges of **Kshs.1,000/=** per day for each motor vehicle respectively effective from **5<sup>th</sup> April, 2018** until payment in full, together with costs and interest.
23. Dissatisfied with the lower court's decision delivered on **11<sup>th</sup> July, 2019**, the Appellant filed a **Memorandum of Appeal** on the same date which set out **seven grounds** as follows: -

*1. The Trial Magistrate erred in law and in fact in failing to find that the property in the subject motor vehicles did not pass from the Respondent to the Appellant since the Appellant did not pay the entire price.*

*2. The Trial Magistrate erred in law and in fact in failing to find that the Appellant had no property interest after repossession.*

*3. The Trial Magistrate erred in law and in fact in failing to find that upon the exercise of the right to repossess both the registered and beneficial ownership remains on the Respondent. Thus is so despite evidence by way of logbooks and admissions by the Respondent that it repossessed both vehicles.*

*4. The Trial Magistrate erred in law and in fact in failing to find that the agreement between the Appellant and the Respondent did not have a provision for storage or provision daily charges storage after repossession.*

*5. The Trial Magistrate erred in law and in fact by failing to find that the Appellant was not privy to the alleged storage agreement and did not acquire any rights or obligations under agreement.*

*6. The Trial Magistrate erred in law and in fact in failing to find that the legal relationship between the Appellant and the Respondent terminated when the Respondent exercised its right to repossess.*

*7. The Trial Magistrate erred in law and in fact by failing to find that the Respondent could not exercise the right of repossessing, sue for the price at the same time and keep the deposit.*

24. The Appellant prayed that the Appeal be allowed and the court do set aside the Judgment, decree and order made by the trial court on **11<sup>th</sup> July, 2019**, to be replaced with an order dismissing the Plaintiff's/Respondent's suit with costs. That further, an order do issue discharging the Appellant from the agreements dated **5<sup>th</sup> January, 2017** and **8<sup>th</sup> February, 2017**. The Appellant also prayed that costs be provided for.

25. Directions were then given on **11<sup>th</sup> October, 2019** that the Appeal be canvassed by way of written submissions. The parties duly complied and the Appellant filed his on the **7<sup>th</sup> November, 2019** while the Respondent filed theirs on **19<sup>th</sup> February, 2020**.

26. The parties opted to rely on their written submissions in their entirety and the same were orally highlighted before me on the **16<sup>th</sup> March, 2021**.

#### **The Appellant's Submissions**

27. The Appellant has submitted that the two agreements entered into by the Appellant and the Respondent were Hire Purchase agreements and as such the Motor vehicles were the Respondent's until payment in full. That the buyer only gets possession and not ownership while the seller has the right to repossess.

28. The Appellant has submitted that once he breached the agreements, the Respondent repossessed all vehicles on **5<sup>th</sup> April, 2018** thereby terminating the agreement and thus there was no legal connection between the Appellant and Respondent. It has further been added that there was no legal relationship between the Appellant and Respondent after **5<sup>th</sup> April, 2018** when the repossession occurred because the possession of the said motor vehicles reverted back to the legal owner.

29. According to the Appellant, the agreement between him and the Respondent did not have a provision for storage or daily storage charges after repossession and that no legal binding relationship subsisted after repossession.

30. The Appellant has also stated that the alleged claim of **Kshs.1,095,000/=** awarded as storage fees has no basis in the law of contract and being specific damages, they ought to have been proved.

31. On the seventh ground, the Appellant has submitted that once he breached the agreement, the Respondent became entitled to keep the deposit he had already paid and obtain the possession of the motor vehicles as the registered owner.

32. The Appellant urged the Court to grant his Appeal as prayed since the motor vehicles were in the possession of the Respondent, the actual owners of the vehicles.

#### **The Respondent's Submissions**

33. It has been submitted by the Respondent that both agreements dated the **5<sup>th</sup> January 2017** and **8<sup>th</sup> February, 2017** had a clause that the motor vehicles would be repossessed without any notice once there was breach of any of the instalments as agreed by parties.

34. The Respondent has also submitted that they understand the Appellant's main contention to be whether he owes the Respondent **Kshs.2,290,000/=** yet the Respondent had already exercised his right of repossession.

35. The Respondent further submits that the Appellant testified that **Motor Vehicle Registration No.KCH 953L** was swept away by floods

in Kinango and rendered useless while **Motor Vehicle Registration No. KCH 133M** was involved in an accident at Voi on the **1<sup>st</sup> September, 2017**. Due to the extensive damages, the Respondent stated that they were unable to resell the said motor vehicles, thus the trial court was right to direct that the Appellant honors the sale agreement by paying the balance of the purchase price.

36. According to the Respondent, the two sale agreements had a provision for storage charges and the clause stated “*all expenses and charges during repossession of the vehicle will be the responsibility of the buyer.*” It has been submitted that storage charges qualify as an expense incurred during repossession and that the trial court was right to direct the Appellant to pay storage charges of Kshs.1,000/=.

37. This court has been urged by the Respondent to uphold the decision of the trial court that was delivered on **11<sup>th</sup> July, 2019** and dismiss the Appeal herein with costs.

### **Analysis and Determination**

38. This being the first Appeal, this Court has a duty to re-evaluate and analyze the evidence in detail, and then come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. (See the case of **Peters –vs- Sunday Post Ltd [1958] EA 424**).

39. I have proceeded to read through and re-evaluate the proceedings of the lower court record in line with the Grounds of Appeal raised by the Appellant, and find the fact that the Appellant bought **Motor Vehicles Registration No.KCH 133M** and **KCH 953L** from the Respondents for the price of Kshs.1,600,000/= and Kshs.1,700,000/= on **5<sup>th</sup> January, 2017** and **8<sup>th</sup> February, 2017** respectively, is not in contention.

40. To offset the purchase price of **Motor Vehicle Registration No.KCH 133M**, the Appellant traded in **Motor Vehicle registration No.KCK 025D** make **Toyota Vitz** valued at Kshs.500,000/= leaving a balance of Kshs.1,100,000/=, which amount was reduced by Kshs.420,000/= which had been paid on various dates between **5<sup>th</sup> January, 2017** to **14<sup>th</sup> November, 2017**. On the other hand, for **Motor vehicle Registration No.KCH 953L**, the Appellant was required to pay equal monthly instalments of Kshs.130,000/= and as at **10<sup>th</sup> January, 2018**, only Kshs.90,000/= had been paid by the Appellant.

41. The Respondents claimed that the Appellant was sent several demands to pay the outstanding total sum of Kshs.2,290,000/= for the two vehicles, but he neglected and or ignored to do so. And on **5<sup>th</sup> April, 2018**, through **Tigwood Auctioneers**, the Respondent repossessed the said vehicles as a matter of right as provided for in the sale agreements.

42. It was after the repossession that the Respondent filed a suit before the subordinate to recover the balance of Kshs.2,290,000/= and storage charges of Kshs.1,000/= per day for each vehicle, which were awarded by the said court on the **11<sup>th</sup> July, 2019**. The Appellant is dissatisfied with the said decision and has preferred the instant Appeal.

43. It is noteworthy that the Appellant in his submissions has referred to the two agreements as Hire Purchase Agreements which necessitates that before delving into the grounds of Appeal, the issue of whether the agreements are hire purchase in nature be established first.

44. **Section 2** of the **Hire Purchase Act** defines a ‘hire purchase agreement’ as follows: -

***“hire-purchase agreement” means an agreement for the bailment of goods under which the bailee may buy the goods OR under which the property in the goods will or may pass to the bailee; and, where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of those agreements was made;***

45. I agree with the court in the case of **Eunice Kanugu Kingori –vs- NIC Bank Limited [2018]eKLR**, where a ‘Hire Purchase Agreement’ was defined as follows: -

***“...Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying instalments. The hirer has an option to buy the goods at the end of the Agreement if all instalments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner...”***

46. It is therefore clear that for an agreement to pass as a hire purchase agreement it must be one for the bailment of goods that does not necessarily require the hirer to purchase the same in the end.

47. The agreements produced before court are entitled “**Motor Vehicles Sales Agreement**”. From this title it is very clear that they are contracts of sale for motor vehicles hence, they were agreements for the purchase of the motor vehicles where clearly ownership was to pass after the full purchase price has been settled.

48. That being the case, the court moves on to determine the Grounds of Appeal. With regard to grounds number one (1), two (2) and three

(3), I find it is not in contention that the Appellant was not the owner of the two motor vehicles. The sale agreements for the two motor vehicles are clear that ownership of the said motor vehicles would only be transferable to the Appellant after he has paid the full purchase price.

49. In regard to grounds four (4) and five (5), the Appellant's contention is that the trial court erred in awarding storage charges when the same had not been provided for in the two sale agreements. Further, he contends that the Respondent was not entitled to claim storage charges after the motor vehicles were repossessed as there was no longer a binding relationship between the parties herein.

50. The Appellant has claimed that the storage charges were specific damages that ought to have been strictly proved and thus the award of Kshs.1,000/= per day per motor vehicle as storage fees had no basis. In addition, the Appellant contends that it is unfair that he is charged for storage charges when the motor vehicles were kept at the Respondent's yard.

51. On this, the Respondent submitted that it was irrelevant that it was still the owner of the motor vehicles. The Respondent stated that the sale agreements were very clear that the Appellant was responsible for all expenses and charges during repossession and storage charges qualify as an expense.

52. The Respondent further stated that the Appellant should not be allowed to claim that there existed no legal relationship between the parties herein, as the repossessed motor vehicles were already damaged and of no value to the Respondent.

53. I have carefully looked at the two agreements, and find that it is stated therein that *"all the expenses and charges during repossession of the vehicle will be the sole responsibility of the buyer."* This confirms the Respondent's contention that storage charges fall under the said provision of the sale agreements as expenses. However, as submitted by the Appellant, the award for storage charges, for all intents and purposes, comprises special damages which should not only be pleaded but must be proven. In this case, the Respondent only claimed that after repossession of the vehicles, they were kept in a yard at a cost of Kshs.1,000/= per vehicle per day as storage charges. The Respondent has neither given the name of the said yard nor provided any receipts to prove that indeed it was being charged the said Kshs.1,000/= per day per motor vehicle for storage.

54. I therefore find that the trial court erred in awarding storage charges of Kshs.1,000/= per vehicle per day as storage charges without any such proof of the such claim. The claim for storage charges is a claim for Special Damages and therefore, it ought to have been specifically pleaded and thereafter strictly proven, which although the Respondent in this case has indeed pleaded for, it has not strictly proved the same as required under the law.

55. Finally, as for grounds No. six (6) and seven (7), the Appellant's contention is that the legal relationship between the parties herein terminated when the vehicles were repossessed, and thus the Respondent should not have been allowed to sue for the purchase price and at the same time keep the deposit.

56. I have looked at the pleadings before the trial court and find that the Appellant did not pay any deposit towards the acquisition of the motor vehicles herein. Nonetheless, the agreements signed by the parties herein were very clear that the deposit was not refundable once the agreements were signed.

57. It is not in contention that the Appellant defaulted in paying for the motor vehicles as had been agreed in the sale of motor-vehicles agreements. It is clear that the sum of a total of Kshs.2,290,000/= was outstanding for both motor vehicles and on **5<sup>th</sup> April, 2018** both vehicles were repossessed as provided for in the said agreements of sale.

58. The Respondent submitted that after repossession and as evidenced by the Appellant's testimony, both vehicles were involved in separate accidents being that **Motor Vehicle Registration No.KCH 953L** was swept away by flood waters at Kinango while **Motor Vehicle Registration No. KCH 133M** was involved in an accident at Voi on **1<sup>st</sup> September, 2017**.

59. It was further submitted that **Motor Vehicle Registration No.KCH 953L** has not been fully restored and as per the letter dated **25<sup>th</sup> May, 2017**, it has been rendered useless. The Respondent has stated that due to those accidents, it was unable to exercise its right to resell the motor vehicles, thus sued the Appellant to recover the sums owed.

60. The trial court awarded the Respondent Kshs.2,290,000/= and held that the fact that the vehicles had been involved in accidents did not absolve the Appellant from its obligation to make monthly payments.

61. In this case, it is clear that the agreements provided that the motor vehicles would be repossessed and sold without notice in case of default to recover the balance owed. It is clear, therefore, that the Respondent had legal remedies available to it under the said agreements.

62. The Respondent in this case has only shown that it could not exercise its right of resale for **Motor Vehicle Registration No. KCH 953L** that was swept by flood waters at Kinango. The remaining balance for **Motor Vehicle Registration No. KCH 953L** was Kshs.1, 610,000/=.

63. As for **Motor Vehicle Registration No. KCH 133M** that was alleged to have been involved in an accident at Voi, the remaining balance was Kshs.680,000/=. The Respondent has not shown any reason as to why it did not exercise its right of resale as there is no proof that **Motor Vehicle Registration No. KCH 133M** had been rendered useless as compared to **Motor Vehicle Registration No. KCH 953L** which was swept away by flood waters. This court thus finds that the Respondent ought to have recovered the said balance of Kshs.680,000/= for **Motor Vehicle Registration No.KCH 133M** by exercising its right of resale, but it did not utilize the same.

64. Like in all cases where terms are set out in contracts, the parties herein are bound by the terms of the Motor Vehicle Sale Agreements. The Court of Appeal in the case of **National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Limited, Court of Appeal Civil Appeal No.95 of 1999**, held 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.”***

65. Since the repossession and subsequent sale of the motor vehicles was lawfully provided for under the contracts, the Respondent had a legal remedy available to it to recover the remaining balance, which was to repossess and resell the motor vehicles upon default. It was therefore unfair for the trial court to order the Appellant to pay Kshs.2,290,000/= while the Respondent had a legal remedy under the sale agreements.

66. It is clearly evident that the only amount owed to the Respondent is Kshs.1,610,000/= for **Motor Vehicle Registration No. KCH 953L** which the Respondent has been unable to liquidate due to the irredeemable damage on the engine of the said vehicle.

67. In view of the foregoing, the Appeal succeeds only to the extent that Judgment is entered for the Respondent as against the Appellant in the sum of Kshs.1,610,000/= for **Motor Vehicle Registration No. KCH 953L** that the Respondent has been unable to liquidate so as to redeem the balance owed. As for **Motor Vehicle Registration No. KCH 133M**, the Respondent was and is still at liberty to exercise its legal right of resale.

68. Further, the award of storage charges of Kshs.1,000/= per day for each **Motor Vehicle Registration Nos.KCH 953L and KCH 133M** respectively, be and is hereby set aside as there is no proof of the same before court.

69. For avoidance of doubt, the Appellant is hereby ordered to pay to the Respondent a sum of Kshs.1,610,000/= with interest at court's rate from the date of filing of the suit before trial court until payment in full, together with costs.

70. Each party to bear their own costs.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**