REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 1367 OF 2001

CFC STANBIC BANK LIMITED............................PLAINTIFF

VERSUS

SAMUEL NG'ANG'A GITAU.............................DEFENDANT

JUDGMENT

1. The plaintiff herein, CFC Stanbic Bank, sued the defendant through a plaint dated 6th September 2001 seeking the following orders:

> ***A. Kshs 1,853,158.83 together with interest thereon at 2.75% per annum from 31st July, 2001 until payment in full.***
>
> ***B. Costs of this suit together with interest at court rates from date of judgment until payment in full.***
>
> ***C. Such other or further relief that this honourable court may deem fit to grant.***

2. A summary of the plaintiff's case is that through a Hire Purchase Agreement (hereinafter "the Agreement") dated 21st June 2000, the plaintiff let to the defendant a motor vehicle Registration number KAM 816Q on hire purchase terms at the total hire purchase price of Kshs 5,883,984 inclusive of hire charges payable by an initial payment of kshs 2,605,400/=and thereafter 25 monthly installments of kshs 163,444 and one final payment of kshs 164,444/=.

3. It is the plaintiff's case that in breach of the said Agreement, the defendant defaulted in the payment of the hire rentals leaving a balance of Kshs 1,853,158.83 as at 31st July 2001 which amount continues to accrue interest at the rate of 2.27% per month till payment in full.

4. Through the defence and counterclaim filed on 30th October 2001, the defendant admits that he entered into a hire purchase agreement with the plaintiff but denies that he defaulted in the payment of the hire rentals as alleged by the plaintiff. He further denies that he is indebted to the plaintiff and states that the plaintiff unlawfully repossessed motor vehicle registration No. KAM 816Q (hereinafter "**the suit motor vehicle"**) from Bruce Trucks and Equipment where the defendant had in July 2000 taken the suit motor vehicle for repairs and that the plaintiff then proceeded to sell the said vehicle without the defendant's knowledge and consent thereby occasioning the defendant loss and damage.

5. In the counterclaim, the defendant claims the sum of kshs 2,605,400 being the difference between the value of the suit motor vehicle of Kshs 6,455,400 and the amount financed by the plaintiff being Kshs 3,850,000/=. The defendant also claims interest on the said amount at commercial rates from 15th August 200 till payment in full together with the costs of the case.

6. At the hearing of the case, the plaintiff presented the testimony of three witnesses while the defendant called one witness.

Oral evidence.

The plaintiff's case.

7. PW1 **Winfred Wambui Mwaniki**, the plaintiff's employee at its debt management and hire purchase department, testified that in the year 2000 the defendant obtained a hire purchase facility of Kshs 6,455,400/= that from the plaintiff to enable him purchase the suit motor vehicle. He produced the plaintiff's exhibits comprising the following documents:-

> *a) Hire purchase application – P exhibit 1*

b) Proposals and Declaration form (exhibit 2)

c) Hire purchase agreement (exhibit 3)

d) Chattels Mortgage (exhibit 4)

e) Right of set off- Accounts and securities (exhibit 5)

f) Delivery receipt- (exhibit 6)

g) Authorized letter of delivery (exhibit 7)

h) Statement of Account from the bank (CFC exhibit 8)

i) Letter dated 24th August 2000 (exhibit 9)

j) Letter dated 5th January 2001 (exhibit 10)

k) Assessors report (exhibit 11)

l) Letter dated 6th June 2001 (exhibit 12)

m) Letter dated 13th August 2001 (exhibit 14)

8. She testified that the plaintiff signed the proposal and agreement as well as the dealers invoice acknowledging the receipt of the suit motor vehicle. She stated that the plaintiff financed the purchase of the suit motor vehicle to the sum of kshs 5,883,984/= made up of the principle sum of Kshs 3,850,000 which was to be payable over a period of 36 months and Kshs 2,0339,841 being interest over the said period. The firstly monthly payment of kshs 163,444 was due on 24th July 2000.

9. She testified that the defendant offered additional security of Kshs 1.5 million for which he gave his motor vehicle registration No. KAD 195C Isuzu FVR as security.

10. She stated that it was agreed that the bank would charge interest 2.75% monthly and 33% annually for any account in arrears. She added that for additional security, the client signed Chattel's Mortgage (exhibit 4) and that for the time the loan was booked, the defendant did not make any payment until April 2001 when he paid a cheque of kshs 400,000 yet the first payment was due on 24th July 2000. According to PW1, the arrears in the defendant's account stood at Kshs 1,006,768/12 and that sometime in August 2000, the defendant called the plaintiff to inform it that he had not been paying the monthly installments as the suit motor vehicle developed mechanical problems and had to be taken back to the dealers. Through a letter dated 24th August 2000, the plaintiff informed the defendant that he was in breach of their agreement and asked him to pay kshs 4,041,301/= within ten days as an option to buy the vehicle but that the defendant did not comply thereby prompting the plaintiff to engage the services of Assessors and Valuers who valued the suit motor vehicle at market value of Kshs 6,365,000/= and forced sale value of 3.5 to 4 million.

11. She testified that the vehicle was sold in June 2001 for Kshs 3.6 million thereby leaving a shortfall of kshs 1,753,725/88 as at 31st May 2001 that is the subject of the instant suit. She also testified that the bank was not able reposes motor vehicle registration No. KAD 195C that was offered by the defendant as additional security because the said vehicle had been vandalized. She stated that even though the cost of motor vehicle was kshs 6,455,400, the plaintiff only financed the plaintiff to the tune of Kshs 3,850,000 which is the principal sum while the defendant paid kshs 2,605,400 to the dealers directly. He confirmed that the defendant's counterclaim of Kshs 2,605,400 is in respect of the deposit that he paid to the dealer.

12. On cross examination, she testified that the defendant came to the bank on 16th August 2000 and informed the bank officer one **Mr. Origo** that the suit motor vehicle had a mechanical problem. She confirmed that the contract was terminated on 29th August 2000 and that as at 24th August 2000, the sum due to the plaintiff was Kshs 187,775/44.

13. She further stated that as at the date of the termination of the contract, the suit motor vehicle was stored at Lonhro Motors East Africa on the plaintiff's order as the defendant was supposed to clear the arrears on 17th August 2000 which he did not pay. She confirmed that the bank wrote to Lonhro Motors to hold the suit motor vehicle which had been delivered to the plaintiff on 29th June 2000.

14. She confirmed that the bank was aware that for the two months that the defendant has the suit motor vehicle, it had been returned to the dealers for repairs 3 times. She stated that the suit motor vehicle was advertised for sale and that several bids were received.

15. On further cross examination, PW1 testified that the new buyer of the suit motor vehicle paid a deposit of Kshs 590,000 after which the bank financed him with a loan of Kshs 3,010,000. She denied that there was any insider dealings on the sale of the suit motor vehicle. She confirmed that there were several bids and that the highest bid was Kshs 4.3 million.

16. PW2 **Henry Kuria Karara** was the auctioneer engaged by the plaintiff to reposes motor vehicle registration No. KAD 195C that was offered by the defendant as additional security for the loan. His testimony was that he was unable to reposes the vehicle as he found it

grounded at the defendant's compound at Kinoo Kikuyu.

17. PW3 **Fredrick Njeru Njagi** was the valuer/assessor working with Motech Assessors & Valuers. His testimony was that he valued the suit motor vehicle at market value of kshs 6,365,000 but gave it a forced sale value of between Kshs 3.5 to 4 million. He testified that he was aware that the suit motor vehicle was sold at Kshs 3.644, 067/80. He further stated that he was aware that the suit motor vehicle was supplied by Bruce Trucks & Equipment and that the said motor vehicle had mechanical defects. He produced the motor vehicle assessment, photographs sand fee note as exhibit P11. On cross examination, he stated that the suit motor vehicle was in running state having covered 9000km and was basically new.

Defendants case.

18. The defendant's case was presented by the defendant himself (DW1) who testified that he entered into a Hire Purchase Agreement with the plaintiff to purchase the suit motor vehicle which he intended to use in transporting lubricants from Mombasa to Nairobi. He testified that he however did not use the suit motor vehicle for the intended purpose as no sooner had he received the motor vehicle than it developed mechanical problems thereby prompting him to take it back to the dealer/supplier for repairs. He confirmed that the plaintiff financed him for the purchase of the suit motor vehicle for the sum of Kshs 3,850,000/=.

19. He testified that he was not aware that the suit motor vehicle had been sold by the plaintiff and that he only came to learn of the sale when the auctioneers went to his home to attach his property. He testified that his counterclaim is for the refund of the deposit that he paid for the suit motor vehicle together with the costs of the suit and interest.

20. On cross examination, he testified that when the suit motor vehicle got mechanical problems, he personally went to the plaintiff's bank and informed the manager of the unfortunate turn of events. He added that he did not pay any installments to the plaintiff for the suit motor vehicle because he did not even use it for a day. He conceded that Clause 5 of their contract stipulated that on default, the bank would repossess the vehicle without notice. He also confirmed that he received the plaintiff's letter dated 24th August 2000.

21. At the close of the trial parties filed written submissions which I have carefully considered in conjunction with the pleadings and the evidence.

Analysis and determination.

22. I find that the main issues for determination are as follows;-

> ***a) Whether the plaintiff has made out a case for the granting of the prayers sought in the plaint and if not;***
>
> ***b) Whether the defendant is entitled to the prayers sought in the counter claim.***

23. A determination of the first issue will require a determination of whether the defendant owes the plaintiff the sum claimed in the plaint. I will start my analysis by highlighting the undisputed fact of the case.

> a) That on 21st June 2000 the plaintiff and the defendant entered into a Hire purchase/Lease Hire/Chattels Mortgage Agreement in respect of the suit motor vehicle that was purchased from one Bruce Trucks & Equipment Limited.
>
> b) That the purchase price of the said motor vehicle was kshs 6,455,400 out of which the defendant paid a deposit of kshs 2,605,400/=and obtained financing from the plaintiff for the balance of Kshs 3,850,000/=.
>
> c) That the suit motor vehicle was delivered to the defendant on 29th June 2000 as shown in plaintiff exhibit 6.
>
> d) That the suit motor vehicle developed mechanical problems on the defendant first trip that necessitated its return to the dealers, Bruce Trucks and Equipment Limited for repairs.
>
> e) That no monthly loan repayment for the facility were made by the defendant thereby precipitating the repossession and sale of the suit motor vehicle.

24. The question that this court has to grapple with is whether, in the circumstances of this case, the plaintiff was justified to repossess and sell the suit motor vehicle for the amount that it alleges that it sold it for thus giving rise to the shortfall.

25. A perusal of the plaintiff's exhibit 1 shows, at the description section of the suit motor vehicle, that it was a new vehicle and that its use was for commercial purposes to transport lubricants. The defendant's case was that he did not use the suit motor vehicle for its intended purpose for even one day as no sooner had it been delivered to him than it immediately developed mechanical problems thus prompting him to return it to the dealers for repairs. Clearly therefore, at no time did the defendant use the suit motor vehicle for its intended purposes due to its mechanical defects.

26. It also emerged from the evidence of both plaintiff and the defendant that the defendant took the earliest opportunity to report the motor vehicle defects to the plaintiff bank and in this regard PW1 testified as follows:

> ***"The defendant came and informed the bank that he was liable to pay because of certain agreements. He saw Origo who was an***

officer of the bank. The defendant notified the bank that the motor vehicle had a problem (mechanical). The defendant came on 16th August 2000."

27. On his part, the defendant testified as follows regarding the condition of the suit motor vehicle:

"I did not use the motor vehicle. The driver took the motor vehicle but on reaching General Motors, it started wobbling. I took it for repairs but the second time it stalled near JKIA. I went to CFC bank and informed the manager. I did not write to the bank. I went personally. I did not pay any installments because I did not use the motor vehicle even for a day."

28. From the above extracts of the testimonies of PW1 and DW1, it is clear to me that even though the suit motor vehicle was reported to be new as at the time it was purchased and delivered to the defendant, the defendant was not able to use it for its intended purpose, which was to transport lubricants, due to the mechanical defects that it had. This court takes judicial notice of the fact that brand new vehicle is not ordinarily expected to have mechanical defects. In the circumstances of this case, I find that the defendant was prevented from using the suit motor vehicle due to unforeseeable circumstances that were not of his own making and was by reasons of the said circumstances not able to fulfil his obligations of repaying the monthly loan/hire repayments as was stipulated under their agreements.

29. It came out clearly from the evidence that the defendant took the earliest opportunity to inform the plaintiff of the unfortunate turn of events. The plaintiff did not take any steps to address the defendant's predicament and instead went ahead to terminate their contract and repossess the suit motor vehicle that had hardly been in the plaintiff's possession for two months. My finding is that the Hire Purchase Agreement placed the plaintiff in the position of the owner of the suit motor vehicle in which case, it was in the interest of the motor vehicle owner to ensure that the vehicle that it had leased out to the defendant was in good working condition. Nzioka J. had the following to say on the relationship between the hirer and the owner in the Hire Purchase Agreement in ***Eunice Kanugu Kingori v NIC Bank Limited Civil Suit No. 12 of 2012***;-

"I note from the documents produced by the defendant, a document entitled "Hire Purchase Agreement" entered into between the parties herein. It is therefore clear that the parties herein entered into a Hire Purchase Agreement. The said agreement provides for the terms and conditions that govern inter alia; Hirer's obligations in relation to: payments, use of goods, loss, damage and repair, insurance, bank and other legal charges. The agreement also provides for issue relating to: interest payable, late payment, termination by the Hirer and liability on termination.

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 installments. The hirer has an option to buy the goods at the end of the agreement if all installments 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 agreements, the ownership of the goods remain with the owner."

30. In the present case, I note that no sooner had the suit motor vehicle been delivered to the defendant than it was returned to the dealers for repairs a fact which was admitted by PW1 who testified as follows:-

"Sometimes in August 2000, the client called in which he had not been paying the monthly rental installments, which indicated that the vehicle had mechanical problems and then he took back the motor vehicle to the dealers……..

.........It was less than two months when he returned the motor vehicle, the client came stating that the vehicle had been faulty so he could not repay the due remaining balance. Within a period of two months from the date of release, the bank knew that the motor vehicle had been returned for repairs 3 times……the banks motor vehicle was breaking down………."

31. From the above extract of the testimony of PW1, it is clear to me that the plaintiff was aware that the motor vehicle that they had hired to the defendant was faulty. The plaintiff did not however indicate what action they took to mitigate/address the issue of the condition of the suit motor vehicle. It would then appear that the plaintiff's sole concern was to recover its debt irrespective of whether the vehicle that they hired to the defendant was faulty or not.

32. 16 of the Sale of Goods Act Cap 31 Laws of Kenya provides as follows on implied warranties and quality of fitness of goods supplied under a contract:

"16 <u>No implied warranty as to fitness, except in certain cases.</u>

Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale, except as follows;

a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, as to show that the buyer relied on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply(whether he be the manufacturer or not,) there is an implied condition that the goods shall be reasonably fit for that purpose: provided that in case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

b) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;

c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

d) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith."

33. In the present case, the parties were not clear on the kind of agreement that the parties had with the dealer who supplied the suit motor vehicle to the plaintiff. It is noteworthy that the defendant's attempts to include the dealer in this suit as a third party were rejected by this court, differently constituted, in the ruling delivered on 22nd September 2003. What is striking is that the plaintiff entered into a hire purchase agreement with the defendant which, as I have already found in this ruling, placed it in the position of an owner of the said vehicle for all intents and purposes until such a time that the defendant purchased the said vehicle by paying all the monthly installments due to it.

34. In the present case, it was not in dispute that the suit motor vehicle, the subject of the hire purchase and chattels mortgage agreement was not fit for the purpose for which it was leased to the defendant by the plaintiff.

35. In the present case, it was not in dispute that the suit motor vehicle, the subject of the hire purchase and chattels mortgage agreement was not used by the defendant due to the defects that were noted on it on its maiden trip to Mombasa. It was also not in dispute that the defects were mechanical in which case, they could not be attributed to the fault of the parties herein as only the dealer could shed light on their cause and the possible remedy. The scenario presented regarding the condition of the suit motor vehicle is undeniably that of a product that was not suitable for its intended purpose thus frustrating the contract between the parties herein as there is no way that the defendant could have been expected to service the loan facility extended to him if the motor vehicle was not being used in the intended business of transporting lubricants.

36. In the present case, it was not in dispute that the suit motor vehicle, the subject of the hire purchase and chattels mortgage agreement was not fit for the purpose for which it was leased to the defendant by the plaintiff.

37. The doctrine of frustration, as I know it, is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract which cannot be performed at a particular point in time. The Court of Appeal in ***Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR*** stated as follows;

"This now leads us to the issue of whether the agreement was genuinely frustrated.

In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-

"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

In the case of;- **Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe** at page. 729 held:

"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".

38. In the present case, I find that the action taken by the plaintiff on noting that the defendant was unable to use the suit motor vehicle due to no fault on his part was unjustified and oppressive to say the least. This court finds that even though the general rule is that parties are bound by the terms of their agreement, the present case is not one where one can say that the defendant was in deliberate default when his intended business venture was frustrated by circumstances beyond his control.

39. My above findings on the circumstances under which the suit motor vehicle was repossessed notwithstanding and assuming that I am wrong on the said findings, I will turn to examine the circumstances of the sale of the said vehicle and if the plaintiff is entitled to the shortfall claimed or if the defendant is entitled to a refund of the deposit he had paid towards the purchase of the suit motor vehicle.

40. Firstly I note that the vehicle had hardly been in the custody of the defendant for two months before it was repossessed. As I have already noted in this judgment, the defendant was during the said period unable to use the said vehicle due its mechanical defects. In other words, besides the mechanical defects, I find that the suit motor vehicle was still as good as new a fact which was confirmed by the plaintiff's

evidence in the valuation report (P exhibit **"11A"**) where the valuer indicated that the suit motor vehicle was *mechanically sound and basically new*.

41. My finding is that in the circumstances of this case and bearing in mind the fact that the defendant had put in the sum of at least 2.6 million towards the purchase of the suit motor vehicle, the plaintiff was if indeed has to sell the suit motor vehicle, under a duty to sell it at the best price possible in order to recover not only its share of the purchase price, but also the amount that was paid by the defendant who did not even get a chance to use the said vehicle. In my view the best option that ought to have been taken by the plaintiff should have been to return the defective motor vehicle to the dealer, as indeed, it was in the first place reported to have been at the dealers at the time it was repossessed.

42. I find that nothing would have been easier than for the plaintiff to return the suit motor vehicle to the dealer and claim a refund or its replacement. I however note that no evidence was led by both parties on the position of the dealer regarding the reported mechanical defects.

43. Be that as it may and reverting back to the sale of the suit motor vehicle, no material was placed before this court to show that the plaintiff was, under the terms of their agreement, entitled to sell of the suit vehicle at the forced sale value and not the market value.

44. Even assuming that the suit vehicle was sold at the alleged forced sale value, I note that no evidence was presented by the plaintiff to show that the highest bid was for Kshs 3,644,067/80 or that the vehicle was indeed sold at the said price.

45. PW1 testified as follows regarding the circumstances of sale:-

> ***"There were several bids and the highest was Kshs 4.3 million. The motor vehicle was sold for Kshs 3,644,067/80. There is a difference of Kshs 700,000/= between the sale price and the highest bids and the same was communicated to the client through a letter dated 6th June 2001 of the shortfall realized of Kshs 1,753,725/25 and we were giving him 15 days to settle that amount.***
>
> ***The letter dated 6th June 2001 was informing the client that the motor vehicle had been sold by tender to the highest bidder for kshs 3,644,067/80. The highest bid was Kshs 4,300,000/=.***

46. I further note that no material was placed before the court to show that there were tenders or bids for the suit vehicle and that the alleged purchaser was the highest bidder. Furthermore, no evidence was presented to show that the suit motor vehicle was ever advertised for sale thus lending credence to the defendant's claim that there were insider dealings in the entire exercise. I am therefore not satisfied that the said sale was above board and that there was a shortfall as alleged by the plaintiff. In a nutshell, I am unable to find that the plaintiff's case was proved to the required standards.

47. As regards the defendant's counterclaim, I find that it was not in dispute that the defendant paid a deposit of Kshs. 2,605,400 towards the purchase of the suit motor vehicle which amount it lost following the repossession and sale of the suit motor vehicle when he was not able to use it for its intended purpose. My finding is that the defendant proved his case on a balance of probabilities.

Disposition

48. In sum and having regard to finding that I have made in this judgment, I find that the plaintiff case was not proved to the required standards and I therefore dismiss it with costs to the defendant.

49. I however allow the defendant's counterclaim for the sum of kshs. 2,605,400 together with interest at court rates from the date of this judgment till payment in full. I am alive to the fact that the defendant claimed interest on the principle sum at commercial rates from 15 th August 2000 till payment in full. I however note that such a tabulation of interest will not be just in the circumstances of this case as the delay in the hearing and conclusion of this case cannot wholly be attributed to the plaintiff.

50. I also award the costs of this suit to the defendant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 21st day of May 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

C/A & DR – Hon. Wanyama