REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPEAL NO. EO12 OF 2019

NIC BANK LIMITED.....APPELLANT/PLAINTIFF

- VERSUS -

BALUME LAURENT MBOTAZ.....RESPONDENT

(Being an appeal from a Judgment of the Senior Resident Magistrate's Court

at Milimani in Civil Suit No. 2442 of 2017 by the Honourable D. W. Mburu

dated 18th April 2019)

JUDGMENT

1. This appeal is filed by **NIC BANK LIMITED** (the Bank) against the decision of **Hon. D.W. Mburu SRM** of 18th April 2019 in Chief Magistrate Milimani Civil Case No. 2442 of 2017. The trial court by its judgment of that date entered judgment in the following terms:

> a. A declaration be and is hereby issued that the Defendant's (here the appellant*) repossession of motor vehicle registration number KCA 8542/ZE 8341 on 28th March 2017 was illegal, null and void in law;*
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> b. The plaintiff (here the respondent*) is awarded Ksh 10,800,000 in damages for loss of user out of which the outstanding loan balance as at 28th March 2017 of Ksh 4,752,683'89 shall be deducted to give a net figure of Ksh 6,047,316.11;*
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> c. The defendant shall unconditionally release the plaintiff's motor vehicle registration number KCA 854Z/ZE8341 to the plaintiff;
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> d. The plaintiff is also awarded costs of the suit and interest at court rate. There shall be no order as to costs with regard to counter claim.

BACKGROUND

2. The Bank and **BALUME LAURENT MBOTAZ,** the respondent, entered into two agreements. One dated 7th November 2014 was for the purchase on hire purchase of motor vehicle registration number KCA 854Z Mercedes Benz Actross. The respondent, under that agreement undertook to pay 47 monthly instalments of Ksh 157,180 and a final instalment of Ksh 162,000. The second agreement was a Chattels Mortgage dated 19th November 2014. This was for the purchase of Motor vehicle a trailer registration No. ZE 8341. The respondent under that agreement was to repay the Bank 47 monthly instalments of Ksh 56,100 and a final payment of Ksh 61,159 starting 14th December 2014.

3. It is admitted that the vehicles were re-possessed by the Bank on 28th March 2017 for what the Bank alleged was respondent's default in the repayment of installments. The respondent before the lower court however contended that he was not in arrears at the time of attachment.

4. Following that attachment, the respondent filed a case before the Chief Magistrate's Court alleging that the Bank attached the vehicle when he was on course to honouring the installments. The respondent pleaded that the repossession by the Bank was illegal and fraudulent. Respondent also pleaded that following that repossession of the motor vehicle he lost the use of the same and therefore claimed for loss of use. Respondent also sought a permanent injunction to restrain the Bank from selling the vehicle.

5. The Bank denied the claim of the respondent and pleaded in its defence that the vehicle was registered in both the respondent's and the Bank's name as security. The Bank's interest in that registration was as the financier. The Bank further pleaded that it reserved its right, under the agreement, to repossess and sell the said motor vehicle, and to levy penalty interest in case of default. The Bank also filed a counterclaim claiming that the interlocutory injunction issued by the trial court, over the motor vehicle, be lifted and in the alternative that the respondent be ordered to pay the total outstanding in its account with the Bank.

6. The case, before the trial court proceeded to full hearing. At that trial the respondent testified in chief, that he was in the transport business. He purchased the subject motor vehicle and trailer which purchase was financed by the Bank. His monthly installments were Ksh 213,290 for a period of 47 months. He had paid a total of Ksh 5,545,540, in the 26 months, before the same was repossessed by the Bank on 28th March 2017. He stated:

> **"…the defendant (***the Bank***) *repossessed the motor vehicle without any justifiable reason since I was paying monthly installments only failed to pay the month of January 2017 and despite my promises to clear the defendant did not listen."***

7. The respondent further stated that he used "to get over Ksh 450,000 per month" from the motor vehicle but after its repossession he was rendered "incapable of doing normal business." He said that he would have completed repaying the loan by November 2018 had the repossession not taken place. After repossession he was unable to service his loan as the motor vehicle was his only source of income. He prayed for the return of the motor vehicle and for damages for loss of user.

8. On being cross examined respondent stated that the Bank used to recover his installments from his account. That although the Bank claimed he had arrears in his repayment he never received notification of arrears. He confirmed he wrote to the Bank his letter dated 29th March 2017 with a view to offer to repay the entire debt by July that year.

9. The evidence of the Bank was adduced by its legal officer Fridah Mongele. This witness testified that the respondent made part payments of the loan amount which was in breach of the provisions of the agreements. That the Bank by letters did bring to the respondent's notice of these defaults. That it was due to the respondent's default that the Bank was forced to terminate the agreements and to recover the debt. The Bank's witness stated that the Bank, in repossessing the vehicle followed due process.

10. The Bank's witness also testified that the respondent had insurance premium finance (IPF) loans and their repayments were Ksh 62,726 and Ksh 69,175 per month.

11. Further that the respondent had one current account where all his loan repayments were deducted. At the time of repossession of the vehicle the respondents had an outstanding amount of Ksh 4,753,638.89 of the asset finance loan.

12. The Bank was aggrieved by the trial courts judgment and in filing this appeal presented 8 grounds of appeal as follows:

> i. The learned Trial Magistrate erred in finding that the Appellant's repossession of Motor vehicle registration number KCA 854Z/ZE was illegal, null and void in law.
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> ii. The learned trial magistrate erred in law and in fact by awarding general damages for loss of income, which damages fall under the category of special damages.
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> iii. The learned trial magistrate erred in fact and in law by awarding the respondent damages for loss of income, when such damages were neither specifically pleaded nor strictly proven by the respondent at trial.
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> iv. The leaned trial magistrate erred in law and in fact by applying the Hire Purchase Act to the present case whereas the Hire Purchase Amount was in excess of Kshs Four Million (Ksh 4,000,000/-), an amount that is outside the ambit of the Hire Purchase Act.
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> v. The learned trial magistrate erred in law and in fact by holding that the Respondent had repaid about 77% of the principal amount, a position that is incorrect as the magistrate ought to have determined this percentage based on the Hire purchase amount and not the principal amount.
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> vi. That the magistrate erred in law and in fact by failing to consider that the hire purchase price includes interest and other costs charged and the same does not include the principal amount advanced only.
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> vii. That the magistrate erred in law and in fact by treating the principal amount and the hire purchase amount as the same thing whereas the two terms refer to different items in hire purchase.
>
> viii. The trial magistrate erred in law and in fact by considering extraneous issues that were not placed for consideration before the court by either party."

ANALYSIS

13. Those grounds will be determined by consideration of three issues. They are:

> **a. Does the evidence and the law support the trial court's finding on repossession of the motor vehicle; or**

b. On the award of damages.

c. Who shall bear the costs.

In consideration of these issues, I have considered the parties written submissions.

14. In order to consider the first issue it will be necessary to interrogate findings made by the trial court by its judgment.

15. The trial court found that the Bank unilaterally decided to apply funds debited from the respondent's account to pay for IPF in priority to asset finance. This is what the learned trial magistrate stated:

> **"From the testimony of DW1, it is not hard to see that after making the deductions from the plaintiff's accounts, the defendant unilaterally decided to apply the funds to the IPF in priority to the Hire purchase facility."**

16. It is important to reconsider the evidence adduced at trial. It is the Bank's witness who first broached that issue of IPF. The witness in testifying and while being cross examined stated that the respondent also had insurance premium loan IPF whose payments were recovered from the respondent's account. There was no mention by that witness that IPF was prioritized in payment and it is not clear where the trial court found that evidence. Over and above that it was not denied by the respondent that he had that loan but perhaps more importantly that issue was brought out by the respondent's learned counsel as he cross examined that appellant's witness. In my view the existence or nonexistence of IPF was not material before the trial court and the trial court did err to give that evidence such prominence and to proceed to fault the Bank for what the court found to be prioritization of its repayment. That error further led the trial court to find that there was confusion which was disadvantageous to the respondent. This is what the trial stated:

> **"This unilateral decision (the supposed prioritization of IPF) by the defendant appears to be the sole cause of confusion in this matter to the disadvantage of the plaintiff. It is also obvious the amounts deducted from the plaintiff's (respondents)account each month were sufficient to service the hire purchase facility…the primary agreement between the parties is the hire purchase agreement."**

17. That statement by the trial court has no basis in the facts before the court or the documents produced. In my view both the asset finance facility and the IPF were all facilities granted to the respondent by the Bank and all those facilities required to be serviced as provided in the agreements of the parties. The trial court in my view imposed its own standard of importance of one facility as against the other and thereby the trial court was re-writing the parties contract. Such an act was frowned upon by the court of appeal in the case **National Bank of Kenya Limited v Hamida Bana & 103 others (2017) eKLR** thus:

> **"24. A concomitant of the doctrine of freedom to contract is the binding force of the contracts. See Chitty on Contracts (supra) Para 1-036. As such, the learned Judge by holding otherwise re-wrote the terms of the VER contrary to the intention of the parties. It did not matter that the respondents got less favourable terms than those that were provided for under the HR manual or CBA. What matters is that the parties voluntarily agreed on the terms of the VER which ought to have been enforced. We agree and adopt the reasoning of Lord Hoffman in Attorney General of Belize vs. Belize Telecom Ltd [2009] UKPC 10 to the effect that:-**
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> **"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute, or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means … It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would be reasonably available to the audience to whom the instrument is addressed."**

18. The trial court also erred to find that:

> **"Throughout the trial, the court noted that at no point in time did the defendant write to the plaintiff advising him of any arrears in respect of either the Hire purchase or the IPF. The defendant's witness did not have any documentary evidence of the amount outstanding, if at all, at the time of repossession. In short the plaintiff was kept in the dark about the deductions which the defendant was making from his account only to later be ambushed with repossession of the very motor vehicle which was the source of the funds which he had been using to service the loan."**

19. That finding by the trial court did not have a basis in the evidence adduced and the documents produced. The plaintiff did not testify that he was ambushed when the vehicle was repossessed. I am not sure where the trial court obtained that evidence from. This is especially when one considers that under the asset facility agreement as well as in the Chattels mortgage there is therein provided a clause of the action or consequences when the respondent would be in default. In the asset facility it is worded thus:

> **"The owner may on the happening of any of the events specified in clause 7.2 below, without notice to the Hirer terminate the hiring of the goods in consequence of which the hirer shall no longer be in possession of the goods with the consent of the owner and the owner shall have the right to immediately retake possession of the goods."**

20. One of the happening which would trigger the repossession described above is default in repayment of installments. Contrary to the find of the trial court the Bank provided current bank statements of the respondent where the installments for the loan were debited. A careful look at the bank statements reveal that more than once there was insufficient funds in the respondent's account to meet the monthly installment of Ksh 213,290. For example, in the month of June 2016 the respondents account had insufficient funds and the Bank was only able to debit Ksh 157,180. Similarly, in July 2016 the Bank debited Ksh 184,415. That short fall in the repayment's payment of the asset

facility persisted and the Bank wrote demands by email on 28th January 2017 demanding from the respondent Ksh 116,127.85 an account No100234343432 and Ksh 263,278.79 on account 1002341219. The Bank again made demand on 24th February 2017 by email to the respondent demanding Ksh 403,544.8 on account 1002341219 and Ksh 154,667.98 on account 1002343432. Those demands were part of the Bank's bundle of documents before the trial court and the respondent did not deny receipt of them. Was the respondent in arrears to justify repossession of the vehicle?

21. The Bank produced the respondent's loan account and those accounts reveal, just like the current account shows, that the respondent was from time to time defaulting on his repayments. But perhaps the most glaring evidence that he was in default is the respondent's letter written in Kiswahili and dated 29th March 2017. That letter was addressed to the Bank and was written a day after repossession. If indeed the respondent had no arrears on his facilities this being a day after repossession would have been the ideal time to point out exactly that. But what did he do. By his said letter he requested the release of vehicle on promise to pay 'arrears' by paying Ksh 100,000 in April, May and June and to repay all of it, presumably the arrears, by July. There was no mention in that letter that the respondent had been ambushed or that he was not in arrears. Even in his evidence before the trial court the respondent admitted being in arrears for the month of January 2017 and said he tried to persuade the Bank to give him time to settle but the Bank did not heed his request.

22. The trial court undoubtedly fell in error in not considering the bank statements produced by the Bank and failing to consider the letters of demand and more importantly failing to consider that the respondent admitted being in arrears by his letter and by his evidence.

23. The trial court also fell in error in relying on the provisions of section 5 of the Hire Purchase Act, which section forbids repossession of the goods where the hirer has repaid two thirds of the debt. What the trial however failed to consider was that the hire purchase agreement between these parties was for an amount for total sum of Ksh 7,544,560.00. By virtue of the amount of that facility the agreement was exempt from the provisions of that Act as provided under Section 3 of the Hire purchase agreement. That section provides:

> 3. Application
>
> (1) 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 or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated:
>
> Provided that monetary limitation does not apply so as to affect the definition of "hire-purchase business" in section 2(1).

That section was discussed in the case **John Mwangi Muchira v Hyper Cars Limited & 2 others (2013) eKLR** thus:

> **"With the above provisions in mind and from the contents of the agreement before court, it would seem clear that the Hire Purchase price for the suit vehicle was Kshs.4,019,490/=. This included the hire purchase charges made of Kshs1,010,890/= and the sum financed by the 2nd Defendant of Kshs. 3,008,600/=. With Section 2 (sic) [Section 3] of the Hire Purchase Act in mind, it is clear that the Hire Purchase Act would not apply to Hire Purchase Agreement whose purchase price is in excess of Kshs.4million. In this regard, I am of the view that the Act would not apply to the agreement between the parties to this suit. "**

24. Following the above discussion, I find in respect to issue number 1 that the evidence and the law did not support the trial court's finding on repossession of the motor vehicle. To recap, the trial court found that the repossession of the vehicle by the Bank was illegal null and void in law. To the contrary this court finds that the evidence and the law supported the repossession undertaken by the Bank. That repossession was lawful.

25. The second issue calls on this court for determination of whether the award of damages made by the trial court, in favour of the respondent, was supported by the evidence or the law.

26. The trial court made a finding that as evidenced in the respondent's bank account the respondent was earning Ksh 16,457,228.29 on average monthly. The learned magistrate in this regard stated in his judgment:

> **"The plaintiff relied on his statement of account for the period 1st November, 2014 to 31st March 2017 to show the funds which he used to move through his current account. According to the plaintiff the monies deposited into his said account were proceeds of the transport business done using the subject motor vehicles. The statement show total credit of Ksh 16,457,228/- for the entire period of 29 months. Going by these figures the average monthly income would be Ksh 16,457,228.29 months (sic) ksh 567,490 which is even more than the amount claimed by the plaintiff. On the face of the Bank statement, it is rather obvious that the plaintiff actually used to make not less than Ksh 450,000 from his transport business".**

27. The above finding by the trial court was made when the respondent did not specifically plead the special damages awarded as loss of use. The respondent by his amended plaint pleaded:

> **"As a result of the illegal repossession of the motor vehicle the plaintiff has lost the use of the motor vehicle and shall claim for loss of use of the same."**

28. In his final prayer in that amended plaint he prayed for:

> **"Loss of earning from 29th March 2017 to the date of Judgment."**

29. That pleading does not satisfy the requirement that such a claim should be specifically pleaded and proved. In the case of **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR** the court of appeal stated:

> "Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR."**

30. Similarly, the court of appeal in the case **Kantilal Khimji Patel & another v Joseph Mutunga Wambua (1994) eKLR** stated:

> **"The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded."**

31. In this case the respondent did not plead that he lost one shilling four hundred shillings or a million for that matter. He did not specifically plead his claim for loss of user. He also failed to specifically prove any loss. His evidence was that he was in the business of transport. He did not produce evidence of that loss for example business accounts or tax returns. He stated that the vehicle that was attached was the only means of running that business. Again no evidence, documentary or otherwise was adduced to prove this. It was not enough for the appellant to simply state he was earning Ksh 450,000 from the air.

32. The award of damages by the learned trial magistrate was not supported either by evidence or by law. The award of Ksh 10,800,000 as damages, for the reason set above was very unsatisfactory. The learned trial magistrate also erred in deducting the damages awarded with the loan balance due and then further ordering the release of the repossessed vehicle.

33. On the whole having found that there was no basis for finding the repossession of the vehicle was unlawful and that there was no basis of awarding the respondent damages for loss of user it follows that the appellants appeal does succeed.

34. I shall now proceed to consider the last issue, that is, who shall bear the costs.

35. Section 27 of the Civil Procedure Act provides that the award of costs is at the discretion of the court and that costs shall follow the event unless the court or the judge shall for good reason otherwise order.

36. I must start by saying that this is a case that was poorly prosecuted and poorly defended at the trial court. Parties and this is more on the part of the Bank simply threw documents at the trial court without discussing them and leaving not only the trial court but myself in the quagmire of documents which, not being familiar to the court, may very well have misled the trial magistrate. I have myself spent far too much time on this appeal than needed to be if the Bank's counsel had taken the trouble to lead its witness to explain the documents. For example it took me quite sometimes to distinguish the respondents current account statements from his loan account statements. No wonder the trial magistrate found that the respondent was not in arrears. It is because of the above that I find that although the Bank has succeeded in this appeal the appeal will succeed with no orders as to costs.

CONCLUSION

37. The Judgment of this court is as follows:

a. The trial courts finding/declaration that the Appellant's repossession of the Motor vehicle registration No KCA 854Z/ZE8341 was illegal null and void is hereby set aside.

b. The trial courts award of damages is hereby set aside.

c. This appeal succeeds to that extent but with no order as to costs.

d. The trial court's order of costs is set aside and an order is hereby made that each party shall bear their own costs of lower court.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **1ST** day of **JULY** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Appellant:

For the Respondent:

ORDER

This decision is hereby virtually delivered this 1st day of July, 2020.

MARY KASANGO

JUDGE