



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 36 OF 2010

GLOBAL BABIPO HOLDINGS LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

THAARA AUCTIONEERS.....2ND DEFENDANT

JUDGMENT

1. The proceedings herein were commenced through a plaint dated 12th November 2010 and filed on the 16th November 2010, seeking Judgment to be entered jointly and severally against the defendant for:-

(a) A statement of account for all the money paid by the plaintiff to the 1st defendant;

(b) A declaration that the attachment and sale of motor vehicles KBF 512B/023A/595B/597B, KBD 986U/ZD 0463, ZC 9864, ZC 9863 and ZC 9862 was illegal and void ab initio and the same should be restituted to the Plaintiff;

a) Damages incurred by the plaintiff due to the illegal attachment of motor vehicles KBF 512B/023A/593B/579B, KBD 986Z from the 15th June to date; and

b) Costs of the suit.

2. The defendant filed a statement of defence on 16th December, 2010. In the counter-claim, the defendant seeks prayers for the plaintiff's suit to be dismissed with costs and for judgment be entered in its favour as against the plaintiff for:-

a) A mandatory injunction compelling the plaintiff to produce motor vehicles ZC 9863, ZC 9864 and ZC 0463 and avail the same to the 1st Defendant for purposes of inspection;

b) The sum of Kshs. 25,409,278/68 together with interest thereon at the rate of 19% per annum from 23rd November 2010 until payment in full;

c) Costs of the suit together with interest thereon at court rates from the date of Judgment until payment in full;

d) Such other and/or further relief as this Honourable Court may deem fit and just to grant.

3. The plaintiff thereafter filed a reply to the 1st defendant's statement of defence and counter-claim on the 13th January, 2011 praying for the 1st defendant's counter-claim to be dismissed.

The plaintiff's case

4. The plaintiff's evidence was adduced through PW1, Asimwe Evans, who is the owner of the plaintiff company. He testified that he did not have prime movers registration Numbers KBF 512B, KBF 023B, KBF 595B and KBF 957B in his possession since they were taken away from his yard in Kibarani by the Auctioneer (2nd defendant) in June 2010. PW1 further testified that the outstanding payment for all vehicles in 3 months as per the figures given by the Auctioneer was Kshs. 3 Million as at 16th June 2010 and that the plaintiff had already paid Kshs. 9.7 Million as per the schedule which was produced as P. exhibit 4.

5. It was PW1's testimony that trailer ZC9862 was repossessed by the Auctioneer while trailers ZC9864 and ZC9863 were in Uganda. On the issue of repossession of lorries, PW1 testified that the plaintiff had repaid Kshs. 9.2 Million and had in total repaid a sum of Kshs. 22 Million.

6. PW1 further testified that the repossessed vehicles were sold for a paltry sum and the plaintiff was not served with a demand letter. It was only after making an inquiry on what had happened to the motor vehicles that a demand letter was sent to the plaintiff on the 22nd October 2010.

7. In cross-examination, PW1 admitted that before the repossession he was in arrears and that the 1st defendant had helped him to enlarge his business by advancing to him Hire Purchase (HP) facilities. He also admitted he was in arrears as per P. exhibit 4 with regard to the 4 prime movers but he was not aware that the bank was entitled to repossess the vehicles if he fell into arrears. On being referred to clause 4 of the Hire Purchase Agreements in the 1st defendant's bundle of documents, PW1 confirmed that the 1st defendant had the right to repossess the motor vehicles.

8. PW1 in further cross-examination stated that the trailers in his possession could not be availed in court for inspection since it was impossible to move them, as the prime movers that were supposed to move them were repossessed.

9. He also stated that he did not know the number of times the vehicles were advertised in the newspapers for sale but after being shown a newspaper advertisement of 9th August 2010 he confirmed the sale was advertised. He further stated that the sale was slated for the 17th August 2010. PW1 confirmed that the bids were too low and the sale was re-advertised on the 20th September 2010.

10. In re-examination, PW1 indicated that the letter from the Auctioneer to the 1st defendant was not signed. The said letter and another one dated 20th September, 2010 had not been stamped by the 1st defendant as proof of their receipt of the same. About the bids being below the reserve price, PW1 stated that no valuation (report) was availed to him.

11. PW1 further indicated in re-examination that after repossession he paid Kshs. 1 Million in good faith to the 1st defendant so that the trucks could be released to him but they were never returned. He also stated that the plaintiff was never supplied with a statement showing the amount of money the trucks were sold for.

The defence case

12. The defence called a total of three witnesses. DW1, Mr. Lwanga Mwangi, a Debt Recovery Officer of the 1st defendant testified that they financed the plaintiff to acquire the motor vehicles in issue after execution of letters of offer. They were for the purchase of prime movers and trailers, on a hire purchase basis.

13. He further testified that the parties entered into a Hire Purchase Agreement on the 31st October 2008 and another facility was through a letter of offer dated 11th November 2008 for Kshs. 13,120,000/= to finance trailers ZC9862, ZC9863 and ZC9864, one unit of a 3 axle low loader and one unit of a semi-trailer. Through a letter dated 24th November, 2008 the plaintiff was offered USD 240,000 for purchase of 4 FAW prime movers as evidenced on pages 25-28 of the 1st defendant's bundle of documents. The security for the bank was the motor vehicles and trailers and a guarantee from the Directors of the plaintiff.

14. It was the evidence of DW1 that the plaintiff did not make regular payments in installments, as required. Various notices were sent to the plaintiff and failing payment, the 1st defendant instructed an Auctioneer (2nd defendant) on the 15th June, 2010 to repossess all the motor vehicles, trailers and the 3 axle low rider so as to recover the outstanding amount of Kshs. 8,000,000/=. He testified that as at that date, the outstanding amount was Kshs. 3,137,853.31 and United States Dollars (USD) 5,855.22, which comprised arrears in the plaintiff's hire purchase facility. He indicated that as at the time this instant suit was filed, the plaintiff owed the 1st defendant Kshs. 25, 409,278.68.

15. DW1 further testified that PW1 proclaimed the motor vehicles on the 16th June 2010 and repossessed the motor vehicles on the 5th July 2010. The 1st defendant sold the motor vehicles, namely, 3 prime movers and one trailer. He explained that prime mover registration No. KBL 512B was repossessed but never sold.

16. In cross-examination, DW1 stated that the repossessed vehicles were sold for a global figure of Kshs. 2.6 Million but the same was not disclosed to the Plaintiff.

17. In further cross-examination, he stated that the repossession order was dated 15 June 2010 and the demand (letter) was dated 22nd October 2010 which was not procedural. In the demand letter, the 1st defendant demanded Kshs. 8 Million but in the order for repossession the 1st defendant demanded Kshs. 3.3 Million. He indicated that after recovering Kshs. 2.6 Million, the 1st defendant was still demanding Kshs. 8 Million on account of the facility that was still running.

18. DW1 stated that no demand notice was served upon the plaintiff prior to the repossession. He stated that the Hire Purchase Agreements were terminated upon repossession but the lending agreement still subsists.

19. In re-examination DW1 stated that the bank had no duty to disclose to the plaintiff the amount of money that was recovered from the auction and it was not necessary for a demand to be made before repossession. He stated that a Hire Purchase Agreement can be terminated without notice.

20. DW2 was Rosemary Njeri Waweru, who is the proprietor of the 2nd defendant. She testified that she was instructed to repossess motor

vehicles KBF 512B, KBF 023A, KBF 595B, KBF 597B, KBD 986U, ZD 0463, ZC 9864, ZC 9863 and ZC 9862. She proceeded to issue a 7 days' proclamation notice to the plaintiff and after the expiry of the 7 days, she proceeded to repossess motor vehicles KBF 023A, KBF 595B, KBD 986U and ZC 9862. However, motor vehicles ZD 0463, ZC 9864, ZC 9863 could not be traced and she duly informed the 1st defendant of the same.

21. DW 2 further testified that she advertised the motor vehicles in the Dailies but on the day of the auction the motor vehicles attracted very low bids due to the bad condition they were in. She stated that after the 1st defendant was informed of the same, they duly instructed her to re-advertise the motor vehicles for auction in the Dailies. She testified that when the auction day reached, the vehicles still attracted very low bids.

22. In cross-examination, DW1 indicated that she was to attach a total of 11 vehicles as per the proclamation to attach. She stated that the proclamation for attachment was for 7 trailers and all the vehicles had to be valued after physical removal and that after valuation, the 1st defendant gave instructions for the vehicles to be sold.

23. In further cross-examination, DW2 testified she did not sell the vehicles and only learnt that the motor vehicles were sold when she was served with a court order. She also stated that all the letters she produced in court were file copies from her office and that was the reason were unsigned.

24. DW3 was Peter Sakwa, a Motor Vehicle Assessor. He testified that he was not involved in assessing the motor vehicles in issue but his office did the assessment. He went ahead to state that the vehicles were Chinese made and they did not have a resale value after use. Relying on the 1st defendant's supplementary list of documents, DW3 produced a valuation report by Trans Europa Assessors in respect to the motor vehicles he assessed.

25. In cross-examination, DW3 stated the valuation report showed that the year of manufacture for the motor vehicles was 2008 but being long distance vehicles, the speedometer readings would have been accurate or may have been tampered with. He explained that a prime mover's value drops after use and the resale value depends on the maintenance of the vehicle.

Analysis and determination

26. The plaintiff's submissions were filed on the 28th November, 2018 which was after the defendant's submissions that were filed on the 19th November, 2018. I have considered the same, the evidence adduced and the authorities cited in support of each party's case.

27. It is a common ground that that the plaintiff took out hire purchase facilities aggregating to Kshs. 54,328,000/= through four Hire Purchase Agreements. The plaintiff was already in arrears by the time the 1st defendant issued instructions to the 2nd defendant to carry out repossession. In reaching a decision in this case, this court has considered the evidence tendered before it as well as the written submissions and authorities cited by both Counsel.

Issues for determination

28. The plaintiff and the Defendant filed separate issues for determination which have been consolidated as follows:-

- (i) Whether the 2nd defendant was an agent of the 1st defendant;**
- (ii) Whether the plaintiff was in breach of the Hire Purchase Agreements;**
- (iii) Whether the 1st defendant perpetrated fraud against the plaintiff;**
- (iv) Whether the motor vehicles were sold at a fair market value;**
- (v) Whether the plaintiff is entitled to damages for loss of business; and**
- (vi) Whether the 1st defendant is entitled to the amount claimed in the counter-claim.**

Whether the 2nd defendant was an agent of the 1st defendant

29. DW2 testified that she was instructed to repossess motor vehicles registration KBF 512B, KBF 023A, KBF 595B, KBF 597B, KBD 986U, ZD 0463, ZC 9864, ZC 9863 and ZC 9862. On the 15th June 2010 she proceeded to issue proclamation notices for a period of 7 days. Following instructions by the 1st defendant she later on repossessed the vehicles save for 3 trailers. It was her evidence that the vehicles attracted low bids on 2 occasions following advertisement and she did not sell the said motor vehicles.

30. It is this court's finding that the 2nd defendant acted lawfully under the instructions of the 1st defendant. The 2nd defendant as such, should not have been made a party to this suit.

Whether the plaintiff was in breach of the hire purchase agreements

31. PW1 in cross-examination admitted that he was in arrears as per P. exhibit 4 which involved 4 prime movers and he was not aware that

the bank was entitled to repossess the vehicles if he fell into arrears. Therefore, it is not in dispute that the plaintiff's failure to punctually pay the 1st defendant by way of rent as provided for under clause 2(d) of the Hire Purchase Agreements meant that the plaintiff was in breach of the said agreement. Consequently, as a result of the said breach, the rights of the 1st defendant under clause 4 of the Hire Purchase Agreements crystallized.

32. The 1st defendant terminated the Hire Purchase Agreements after the plaintiff was in continuous breach of clause 4(a) of the said agreements. This led to the 1st defendant exercising its right of repossession of the financed motor vehicles with the aim of recovering the total outstanding sums due and owing to it by the plaintiff.

33. I hold that the 1st defendant was entitled to terminate the Hire Purchase Agreements and retake possession of the vehicles as provided for under clause 4(g) of the said agreements. It is the finding of this court that the plaintiff was not entitled to any notice under the Hire Purchase Agreements when in default and that the instructions for repossession of the motor vehicles given by the 1st defendant to the 2nd defendant were lawful.

34. The plaintiff is bound by the terms of the Hire Purchase Agreements. The Court of Appeal in **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."

35. Since the repossession and subsequent sale of the motor vehicles was lawful as provided under the contract, the plaintiff's claim for damages for breach of contract fails.

Whether the motor vehicles were sold at a fair market value

36. The legal burden of proof lies upon the party who invokes the aid of the law in accordance with Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya, which provides as follows:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

37. Further, Sections 109 and 112 of the said Act state as follows:-

"(109) The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

"(112) In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

38. DW1's evidence was that the plaintiff was in breach of clause 2(d) which was an express term of the hire purchase agreement to keep the hired motor vehicles in a good state of repair in order to forestall rapid depreciation. PW1's claim that the vehicles were undervalued was dispelled by DW3, the Motor Vehicle Assessor. The plaintiff's actions therefore contributed to the low resale price for the vehicles.

39. Through DW2 and DW3, the 1st defendant proved on a balance of probabilities that the repossessed motor vehicles were not in a good condition of repair and that FAW being a Chinese model had a very low resale value. The evidence adduced also indicates that the 2nd defendant had twice advertised the repossessed vehicles for auction but they received bids which were very low and this was due to the poor state of the vehicles.

40. In **Nairobi HCCC Number 573 of 2011 Talewa Road Contractors Limited & Another-vs- Jamii Bora Charitable Trust Registered Trustees & Another**, Judge Kimondo while noting that parties to a commercial contract are bound by the terms thereof, observed that a party should not be permitted to benefit from breach of the terms of the contract.

41. Similarly, in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others, Nairobi (Milimani) HCCS No. 1243 of 2001**, the Judge therein when citing the decision in **Talewa Road Contractors Limited and Another vs Jamii Bora Charitable Trust Registered Trustees and Another** (supra) stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings.

42. The fact that no evidence was led by the Plaintiff to prove that the motor vehicles in issue were sold at a paltry sum means that the 1st defendant's evidence remained uncontroverted. As a result, the 1st defendant proved on a balance of probabilities that the repossessed motor vehicles were sold at a fair market price.

Whether the 1st defendant perpetrated fraud against the plaintiff

43. In **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others**, NAI Civil Appeal No. 215 of 1996(UR), the Court of Appeal in considering the standard of proof required where fraud is alleged, stated thus:-

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

44. In **Kinyanjui Kamau vs George Kamau** [2015] eKLR, the Court expressed itself as follows:-

*“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo vs Ndolo** (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”*

45. On the allegation of fraud, the plaintiff did not lead any evidence of the fraud that was perpetrated by the 1st defendant against it. Since the burden of proof in fraud cases is slightly higher than proof on a balance of probabilities, it is my finding that the defendant failed to prove fraud against the 1st defendant.

Whether the plaintiff is entitled to damages for loss of business.

46. For the plaintiff to be entitled to special damages in the form of loss of income, the same must be specifically pleaded and strictly proved. The said position was stated in the case of **Peter Njuguna Joseph and EARS vs. Anna Moraa** Civil Appeal number 23 of 1991, where it was held that special damages must be pleaded with particularity and must be strictly proved. Loss of user is a special damage claim, which must be pleaded and proved.

47. The Plaintiff has not adduced evidence to support the figure claimed. As was correctly submitted by the 1st defendant, special damages must be specifically pleaded and proved. That has not been done in this case. Special damages cannot be awarded on the basis of speculation and conjecture. It was so held in the case of **Equity Bank Ltd vs Gerald Wang’ombe Thuni** [2015] eKLR that *it is trite law that a party is bound by his pleadings.*

Whether the 1st defendant is entitled to the amount claimed in the counter-claim.

48. The 1st defendant herein being a Financial Institution was legally bound to account to the plaintiff and/or guarantor for any of the proceeds received and for the surplus to be given to the owner of the property. The 1st defendant produced a statement of accounts in relation to the 4 hire purchase accounts as evidenced in paragraph 7 of the 1st defendant's statement of defence and counter-claim, as at 23rd November, 2010. The plaintiff disputed the accounts by stating that they did not know how the same were arrived at. The plaintiff never tendered evidence to show that the said accounts were overstated and inaccurate. He did not tender evidence to controvert the statement of accounts. Therefore, the plaintiff failed in its duty of proving that the statement of accounts produced by the 1st defendant did not reflect the true position of the outstanding amount.

49. PW1 testified that the sum of Kshs. 2.6 Million was realized following the sale of the motor vehicles. The 1st defendant however failed to account on how they utilized the said sum of Kshs. 2.6 Million. PW1 in his evidence indicated that after his motor vehicles were attached, he was advised by an Officer from the 1st defendant to pay Kshs.1,00,000/= and his vehicles would be returned to him. He dutifully paid the said amount but the vehicles were never released to him.

50. The foregoing means the sum total of Kshs. 3.6 Million ought to be deducted from the outstanding balance of Kshs. 25,409,278.68/= claimed by the 1st defendant. The outstanding sum due and owing from the plaintiff to the 1st defendant is therefore Kshs. 21, 809,278.68.

51. PW1 gave evidence that the trailers in Uganda could not be moved without the use of prime movers. It will therefore be up to the 1st defendant to arrange for collection of its trailers from Uganda.

52. It is my finding that the 1st defendant's counter-claim succeeds in terms of prayer (ii) (a) and (b) of the counter-claim. The sum of Kshs. 21, 809,278.68 is awarded to the 1st defendant together with the contractual interest of 19% per annum from 23rd November, 2010 until payment in full. Having failed to account for the Kshs 3.6 Million, mentioned in paragraph 50 of this Judgment, the 1st defendant shall not have the costs of this suit. The 2nd defendant shall have its costs borne by the plaintiff.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF JUNE, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Paul Magolo holding brief for Mr. Tindi for the plaintiff

Mr. Egunza holding brief or Mr. Kisinga for the defendants

