



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 12 OF 2012**

**EUNICE KANUGU KINGORI ..... PLAINTIFF**

**VERSUS**

**NIC BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit against the Defendant vide a Plaint dated 16<sup>th</sup> December 2011 and filed in Court on 11<sup>th</sup> January 2012, seeking for several prayers as stated therein. It is the Plaintiff's case that on or about the 16<sup>th</sup> August 2007; she entered into a Hire Purchase Agreement (herein "the Agreement") with the Defendant for the purchase of an Isuzu Giga Truck Registration Number KAY 214N for the sum of Kshs. 4,640,000.

2. That upon the execution of the Agreement, she paid a deposit of Kshs. 2,320,000 towards the purchase thereof. That, it was a term of the Agreement that, he would pay the balance of the purchase price in Thirty Five (35) monthly installments of Kshs. 81,580.00 with the final installment of Kshs. 81,356.00 plus 2,000. That subsequently, on diverse dates between 9<sup>th</sup> October 2009 and 17<sup>th</sup> November 2010, the Defendant purported to and indeed repossessed the subject motor vehicle.

3. The Plaintiff averred that at that time of repossession, she had paid a total sum of Kshs. 5,266,738 and therefore the Defendant's actions are in blatant disregard of the law and contrary to Section 15 of the Hire Purchase Act, as she had paid more than two thirds of the purchase price. Further that, the Defendants actions have caused her to lose her source of livelihood thus putting her to great loss and damage and despite notice of intention to sue, the Defendant has declined to pay for the loss.

4. The Plaintiff therefore prays for Judgment against the defendant for;-

(a) *Kshs. 5,266,738/=*

(b) *General damages for breach of contract;*

(c) *Interest of (a) and (b) above at Court rates until payment in full;*

(d) *The costs of this suit;*

(e) *Such other relief as the Court may deem fit to grant.*

5. The Defendant entered appearance and filed a statement of defence dated 17<sup>th</sup> February 2012 denying liability. The Defendant averred that, upon the Plaintiff's application for a sum of Kshs. 2,330,000 to facilitate the purchase of the subject motor vehicle under a Hire Purchase Agreement (the 'Agreement') HPR-4-560-001298, it financed the Plaintiff, pursuant to which a Loan Account HPR-4-560-001298 was opened. That the Plaintiff never exercised the option to purchase clause in the Agreement.

6. Further that it was a term of the Agreement that there would be a specified flat interest rate of 8.86% per annum and a late payment interest rate of 30% per annum and that the Plaintiff, on several occasions between May 2009 and November 2010, in breach of the Agreement, defaulted in making payments in respect of the installments for which she incurred interest penalties. Pursuant to which the Defendant issued a repossession order to its agents for the recovery of the subject vehicle in accordance with the terms and tenor of the Agreement, since the Agreement provided for the right of repossession and under which the Defendant lawfully exercised, upon the

Plaintiff's default in making the installment payments. That by 1<sup>st</sup> December 2010, the Plaintiff had paid the total amount of Kshs. 3,275,310.54, towards the Loan Account HPR-4-560-001298, in respect of the subject vehicle.

7. The Defendant argued that the Hire Purchase Act, Chapter 507 of the Laws of Kenya has no application whatsoever to the Agreement and as such there cannot be a claim founded on a breach thereof. That the Agreement provides for a right of immediate repossession, which right crystallized with the Plaintiff's default in making the installment payments

8. At the hearing of the case, the Plaintiff reiterated the entire content of her pleadings in the Plaintiff save to add that she only received one repossession notice but the Defendant charged her repossession expenses and debited all these charges in her account and then proceeded to repossess the motor vehicle and sold the same to a third party without advertising the same or without any authority from the Agreement.

9. Further that, the Defendant did not disclose how much the motor vehicle was sold for or how the proceeds of sale were utilized to offset the amount due from the plaintiff. That she lost the contract she had with East African Portland Cement, where she would have earned Kshs. 10,000,000 lost more than Kshs. 5,200,000 shillings, money she spent to pay for the Hire Purchase Price for the Motor vehicle and the motor vehicle itself.

10. The Defendant's case was supported by the evidence of Kenneth Mawira the Assistant Legal Manager to the Defendant who also reiterated the averments in the statement of defence and basically relied on the statement and documents filed in support of the defence.

11. The parties subsequently filed submissions which I have considered alongside the evidence adduced. In that regard, I find that the following issues arise for determination;

*(i) What was the nature of the Agreement between the parties;*

*(ii) Whether the Plaintiff and/or the Defendant breach the Agreement; and*

*(iii) Whether the Plaintiff is entitled to the orders sought.*

12. In relation to the first issue, 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; the 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.

13. 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 agreement, the ownership of the goods remain with the owner.

14. Section 15 of the Hire Purchase Act of Kenya provides that, if the hirer has paid a sum equal to or in excess of two-thirds of the Hire Purchase price, the owner must not take possession of the goods in the event of default, except through the Courts or unless the hirer has terminated the Agreement.

15. If the owner breaches these provisions, then the Agreement is treated as terminated and the hirer is released from liability and can recover all payments made under the Agreement. Upon hearing the request for an order to repossess the goods, the Court can either order for the specific delivery of the goods to the owner or part thereof and to the hirer title to the remaining goods or suspect repossession on condition the hirer pays the balance.

16. The question that arises is whether, the Plaintiff had paid a sum equivalent to or in excess of two-thirds of the Hire Purchase price. There is no dispute that, the purchase value for the motor vehicle was Kshs. 5,258,656. According to the documents produced by the Plaintiff, she was financed in the sum of Kshs. 2,320,000 and was to make a deposit of a similar sum, repayable period is indicated as thirty six (36) monthly installments, and the finance charges was at 8.56 per annum flat, giving a total value of Kshs 616,656.00. Thus all sum financed was Kshs. 2,320, 000 plus Kshs 616,656.00 totaling Kshs. 2, 936,656.00.

17. Further evidence adduced by the Plaintiff vide a Customer Account Report indicates that, the loan amount as at 16<sup>th</sup> August 2007, was Kshs. 2,320,000, and as at 31<sup>st</sup> December 2010, the account was Kshs. 48,300 in debit. It is also evident from the statement that; there are several entries described as "late fees".

18. It suffices to note that, repossession expenses were levied on the Plaintiff's account on 9<sup>th</sup> October 2009 and the outstanding balance then was Kshs 1,082,355.91. If the amount payable was Kshs. 2,936,656.00, and the balance was as stated above, then the question that arises is whether two-thirds of the Hire Purchase price had been paid.

19. The Plaintiff testified and stated at paragraph 7 of the Plaintiff that, when the Defendant repossessed the motor vehicle she had paid an amount of Kshs. 5,266,738 of the Hire Purchase price. The Defendant on the other hand testified and averred at paragraph 9 of the defence, that as at 1<sup>st</sup> December 2010, the Plaintiff had paid the total sum of Kshs. 3,275,310.54 towards the loan account and at the point of repossession the Plaintiff had paid approximately Kshs. 2,800,000 towards the balance of the Hire Purchase price. Unfortunately, the parties did not explain how they arrived at these figures, but they supplied the court with a statement of the Plaintiff's account. I have calculated the sum paid and it indicates that the total credits made from the inception of the facility are Kshs. 3,275,310.54 and these tallies with the

Defendant's figure.

20. The Defendant has relied on the provisions of the Agreement executed by the parties and in particular Clause 7 to justify the repossession. That Clause states as follows:-

*“7.1 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 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;*

*7.2 The following are the events referred to in clause 7.1 above:*

*7.2.1 Any installment or other sum payable hereunder by the Hirer remaining unpaid after the expiry of Fourteen (14) days of becoming due.*

21. The Defendant also relied on the case of; *National Bank of Kenya Ltd vs Pipe Plastics Samkolit (K) Ltd & Another (2002) EA 503*. Similarly, the Defendant submitted that the Plaintiff admitted that she defaulted on repayments of the monthly installments on various dates as follows: 2<sup>nd</sup> April and 4<sup>th</sup> November of 2008; 12<sup>th</sup> January, 13<sup>th</sup> March, 14<sup>th</sup> May, 31<sup>st</sup> August and 14<sup>th</sup> November of 2009; 20<sup>th</sup> January, 23<sup>rd</sup> March, 5<sup>th</sup> June and 14<sup>th</sup> September of 2010. These submissions were not rebutted. If they are true, then the Plaintiff did not meet all payments as and when they fell due.

22. Be that as it were, I note from the documents produced by the Defendant that the Plaintiff was served with a letter dated 7<sup>th</sup> October 2010 to pay Kshs. 301,860.00 in respect of arrears and other charges plus a further sum of Kshs. 20,098.26 in respect of interest on late payments, and was warned that if the payment is not made, the vehicle would be repossessed.

23. Subsequently, on 10<sup>th</sup> November 2010, Westminster Commercial Traders which was instructed by the Defendant to seek for payment from the Plaintiff or repossess the vehicle if payment is not made. The said firm wrote to the Defendant in respect to the instructions dated 8<sup>th</sup> October 2010, informing the Defendant that after receiving their instructions, they proceeded to Ruiru and served the Plaintiff with a 7 days' notice to clear the arrears, she accepted but refused to sign the documents. That after the notice expired, they went back to the Plaintiff and demanded payments, but the Plaintiff informed them that, she had given the truck to her relative who was supposed to make the monthly payments but had refused to service the loan. That she directed them to Kajiado where the truck was allegedly operating. However the visit to the area revealed that the truck had broken down at Bisiel area near Namanga town. On arrival at Bisiel they found the vehicle and towed it in the condition in which it was and stored it at M/S Leakey's yard for safe custody. It is therefore clear, that before the vehicle was repossessed, the Plaintiff was given an opportunity to make good the arrears but did not.

24. The main issue however remains as to whether the repossession was lawful. Before I address and conclude on this issue, I wish to address some of the issues raised by the parties in the submissions. The first issue raised by the Plaintiff relates to the law applicable in this matter. The Plaintiff states that, the parties entered into a Hire Purchase Agreement and that under Section 3 of the Hire Purchase Act, the Act applies to Hire Purchase Agreements under which the Hire Purchase price does not exceed Kshs 4,000,000. The Plaintiff made reference to the cases of; *Imperial Bank of Kenya vs Kariuki Construction Company Limited and 2 Others (2015) eKLR*, and *John Mwangi Muchira vs Hyper Cars Limited HCCC No. 126 of 2008*, to argue that, where the sum exceeds the sum of Kshs 4,000,000, then under Section 2 of the Act, the contract would only be enforced under Contract law.

25. In considering this issue and the evidence adduced, it is clear from the parties that the Hire Purchase price for the truck was Kshs 5,258,656.00. The Plaintiff paid a deposit of Kshs 2,320,000.00 leaving a balance of Kshs 2,938,656.00. Obviously, this figure is below Kshs 4,000,000.00 and is properly under the Act. The argument that the matter is covered under the Law of Contract and not the Hire Purchase Act does not arise. It however suffices to note that the document signed by the parties is clearly stated to be a Hire Purchase Agreement and is a contractual Agreement.

26. The next issue raised by the Plaintiff is in relation to the breach of the contract by the Defendant. The Plaintiff submitted that, parties are bound by the terms of the Agreement they have executed. She relied on the cases of; *Gatobu M'Ibuutu Karatho vs Christopher Muriithi Kubai (2014) eKLR* and *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another (2002) EA 503*. The latter case was also relied on by the Defendant.

27. In relation to the alleged breach, the Plaintiff raises two issues namely, that although the Defendant relies on Clause 7, it does not give the Defendant the right to resale the goods upon repossession, secondly, that the Defendant has burdened her with irregular expenses and costs in relation to repossession, administration and insurance, yet only one repossession order was issued. In response to these submission, the Defendant submitted that the charges and costs of repossession were to be shouldered by the Plaintiff as per Clause 8 of the Agreement and denies having breached the contract. To the contrary, the Defendant blames the Plaintiff for the breach of the contract. I have already dealt with this issue of breach partly in this matter and will be concluding on it.

28. I shall now deal with the specific prayers. The first prayer seeks for a sum of Kshs 5,266,738. The evidence of the Plaintiff as aforesaid is that, when the Defendant repossessed the motor vehicle when she had paid an amount of Kshs. 5,266,738 of the Hire Purchase price. However, when the Court considered the amount paid in the statement produced by the Plaintiff, as aforesaid, it was established that the total sum paid was Kshs 3,275,310.54 as stated by the Defendant is the amount paid. It is therefore clear that the Plaintiff has not adduced evidence to support the figure stated. As properly submitted by the Defendant, Special damages, must be specifically pleaded and proved; that has not been done herein. The Special damages cannot be awarded on the basis of speculation and conjecture as held in the case of; *Equity Bank Ltd vs Geral Wang'ombe Thuni (2015) eKLR*.

29. The second prayer is for general damages for breach of contract. As already stated herein, the Plaintiff is alleged to have defaulted on

making payments on several occasions and/or paying late. The Agreement between the parties clearly stipulated for penalties for late payments. It is also not in dispute that at the time the vehicle was repossessed, the Plaintiff was in arrears. It is also a fact that eventually the motor vehicle was repossessed and sold. What is evidently missing in this matter is how much the vehicle was sold for and how much was owing as at that time. Unfortunately, the Plaintiff has not sought for any order for accounts in relation to the proceeds of sale. Had this been done, the Defendant would have been compelled to account and all allegations of extra charges imposed would have been dealt. All that the Plaintiff has done is to submit at length that the conduct of the Defendant is oppressive, was in breach of the contract, amounts to unjust enrichment and is calculated to impoverish her. These allegations can only be ascertained if the court is given evidence as to how much was payable, paid, realized from the sale and how it was all applied. These matters were purely within the knowledge of the Defendant and the Plaintiff has had all the rights to call for it and/or demand that it be provided. That was not done. In the given circumstances, the Court is not able to come to a conclusion that the Defendant realized more than was deserved and/or was in breach of the contract.

30. Even if the Court was to consider the evidence as it is, it does appear that, the total sum advanced was 2,938,658.00. It was repayable in 36 monthly installments. Payment of two-thirds thereof should have been made within 24 months. I note from the statement produced that the first installment was made on 31<sup>st</sup> August 2007 and so the 24<sup>th</sup> installment should have been made by 31<sup>st</sup> August 2009. The first 35 monthly repayments were Kshs 81,580.00 per month and so by 31<sup>st</sup> August 2009, the total amount that should have been paid if all payments were made on time should have been Kshs 1,959,105.34. However, according to the statement, the amount paid as at 31<sup>st</sup> August 2009 is Kshs 1,859,392.40 which is lesser than Kshs 1,959,105.34. Again, this sum represents 18 monthly installments and not 24 months. The sum has been credited towards payments of the principal sum, interest and late fees. It is therefore clear that the Plaintiff did not fully pay the total installments of the 24 months on the due date.

31. Therefore, the Defendant was entitled under Section 15 of the Hire Purchase Act of Kenya to repossess the vehicle as the Hire Purchase price paid was not more than two-thirds of the Hire Purchase price and basically, the Plaintiff was in breach of the Contract due to the non-payment. Therefore she cannot be entitled to general damages.

32. In conclusion I find that the Plaintiff has not adduced evidence to support the orders prayed for in the Plaint and I dismiss the suit. As regards the costs, I am aware that the costs follow the cause. I have however noted from the evidence herein that, the Defendant did not account for the proceeds of sale of the motor vehicle. In their submissions, they state as follows;-

*“the Plaintiff did not demand for any accounts of the proceeds of the sale and the same is not a claim in the current suit.”*

33. However, I disagree with the Defendant that, for it to account for the proceeds received from the sale, the Plaintiff needed to demand for the same. The Defendant herein is a Financial Institution and is legally bound when exercising its power of sale over a security offered in consideration of a credit facility to obtain the true market price for the property as held in the case of; Cuckmere Brick Company vs Mutual Finance Limited (1971). This requirement of the law is based on the fact that, the person selling the property is under duty to account to the owner of the property and/or guarantor for any of the proceeds and received and the surplus be given to the owner of the property. The Defendant having failed to prove that they discharged this duty in my considered opinion will not be entitled to any costs. As an obiter dicta basis, I think it will only be fair and just that they account to the Plaintiff for all the money received in this transaction. In that regard, each party will meet its own costs.

34. It is so ordered.

**Dated, delivered and signed in an open Court this 12<sup>th</sup> day of September 2018**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Ms. Minyiri for Mrs. Shaw for the Plaintiff

Mr. Onsero for Ms. Ahmed for the Defendant

Dennis .....Court Assistant