



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 191 OF 2011

MAKAVE INVESTMENT COMPANY LIMITED.....PLAINTIFF

- VERSUS -

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff's claim against the defendant is for a Permanent Injunction, restraining the defendant from transferring to any person other than the plaintiff, the Lorry Registration Number KBL 228K.
2. Secondly, the plaintiff prayed for a Mandatory Injunction to compel the defendant to restore the lorry to the plaintiff.
3. Thirdly, the plaintiff prayed for an award of General Damages to compensate it for Loss of User and for the inconveniences suffered by the plaintiff.
4. It is common ground that the defendant had provided a financial facility to the plaintiff, which enabled the plaintiff to purchase the lorry which is the subject matter of this suit.
5. The lorry was repossessed by an agent appointed by the defendant. Later, the lorry was sold off.
6. It is the plaintiff's case that the repossession and sale of the lorry was unlawful and illegal.
7. But the defendant avers that the repossession of the lorry and its subsequent sale were neither unlawful nor illegal.
8. The defendant pointed out that the plaintiff was in arrears by the time the lorry was repossessed.
9. And whilst the sale was later conducted by a different entity from the agent who had repossessed the lorry, the defendant emphasized that such action was well within its rights and legal authority.
10. The defendant added, that if the sale of the lorry was causing the plaintiff to incur any financial losses, such losses cannot be attributable to the wrongful acts of the defendant. It was the defendant's contention that the losses, if any, which the plaintiff was suffering, were attributable to the plaintiff's own failure to meet its contractual obligations under the Hire Purchase contract.
11. During trial, one witness testified for the plaintiff, whilst two witnesses testified for the defendant.

12. It is common ground that when the defendant advanced a financial facility to the plaintiff, the security provided to the defendant were;

a) **The lorry which was bought using the facility;**

b) **A legal charge registered over L.R. No. 337/933, ATHI RIVER; and**

c) **Personal Guarantees by the Directors of the plaintiff, MAKAVE INVESTMENT COMPANY LIMITED.**

13. It is admitted by the plaintiff that it had fallen into arrears as at February 2011, and that it is the said default which triggered the repossession of the lorry.

14. According to the plaintiff, the defendant flouted the law by repossessing the lorry without first giving a Notice to the plaintiff. But the plaintiff did not specify the law which had allegedly been flouted by the defendant.

15. **PW1, GERVASIE M. MAINGI**, is the plaintiff's Managing Director. He confirmed that the plaintiff was bound by the terms of Hire Purchase Agreement.

16. Pursuant to Clause 4 of the Agreement, if the plaintiff had failed to pay any of the Hire installments on due date, the defendant was;

“...entitled immediately to terminate this hiring without notice to the hirer and to retake possession of the Vehicle/Goods?.

17. On the strength of that clause, I find that the defendant was entitled to repossess the lorry because the plaintiff was in default. I further find that the defendant did not need to issue a notice to the plaintiff, prior to taking steps to repossess the lorry.

18. The plaintiff reasoned that although it had been in default in February, March and April 2011, it paid to the defendant the sum of Kshs. 995,000/- in May 2011.

19. The explanation for the failure to remit payments in February, March and April 2011, was that the lorry had broken down.

20. But as the plaintiff's Managing Director conceded, there was no provision in the Hire Purchase Agreement which exonerated the plaintiff from remitting payments even when the lorry was not in working condition.

21. Another issue which was raised by the plaintiff was that even if the Agreement permitted the defendant to repossess the lorry without first giving notice to the plaintiff, there was no provision in the Agreement which allowed the defendant to sell-off the lorry without notice to the plaintiff.

22. The plaintiff added that when it is considered that a payment of Kshs. 995,000/- was remitted to the defendant, there would then have been no arrears.

23. When giving evidence, **DW1, LWANGA MWANGI**, said that the debt was Kshs. 5,979,618.46, as at the date when the lorry was repossessed.

24. **DW1** was not working with the defendant at the material time.

25. However, he reasoned that **DALALI AUCTIONEERS** had only been instructed to conduct the process of repossession.

26. It was his understanding that repossession was the process through which an asset was recovered.

27. **DW1** testified that **DALALI AUCTIONEERS** was never instructed to sell the asset which they had recovered.
28. And whilst conceding that the defendant and its agents did not notify the plaintiff of the intention to sell-off the lorry, **DW1** said that there was no requirement that the defendant should have given notice to the plaintiff.
29. In the opinion of the witness, the auction at which the lorry was sold, was not unprocedural. His view was that the bank had exercised due diligence when selling-off the lorry.
30. Finally, the witness said that in the Hire Purchase Agreement, the primary security was the asset which the bank was funding. Therefore, even when the borrower had provided other security, the bank would first realize the primary security.
31. **DW2, JOB OMBOGA NYAMUMBO**, was a Legal Officer at the bank's Debt Recovery unit.
32. **PW1** had testified that Job Omboga had given an assurance to him that the lorry would not be auctioned prior to 19th May 2011. It was alleged that that assurance is what led **PW1** to do everything possible to raise the sum of Kshs. 995,000/-, which he handed over to the bank on 16th May 2011.
33. But **DW2** categorically denied giving any assurances to the plaintiff's Managing Director.
34. According to **DW2**, a cheque for Kshs. 995,000/- was left at the bank on 16th May 2011. However, the said cheque was, according to **DW2**, never presented for payment.
35. I find that although the plaintiff did hand over a personal cheque, (*as opposed to a banker's cheque*), for Kshs. 995,000/-, to the defendant, there is no evidence that the cheque was ever presented by the defendant, for payment.
36. The plaintiff could have made available evidence in the form of statements of the drawer's bank account, to show that the amount was debited.
37. Meanwhile, the defendant backed its assertion with the statement of the plaintiff's bank account, which does not reflect the credit of Kshs. 995,000/-.
38. On the basis of the evidence provided, I find that the sum of Kshs. 995,000/- was not paid to the defendant.
39. The contention in the affidavit of the plaintiff's Managing Director, that he paid Kshs. 995,000/- is thus, factually incorrect.
40. The fact that a person hands over a cheque to his creditor does not, of itself, prove that payment had been made. It is only after the cheque is cleared that it can be said that payment had been made.
41. Sometimes cheques are dishonoured by the drawer's bankers.
42. At other times, the drawer can decide to instruct his bankers to stop the payment of the cheque.
43. In such instances, although the cheque may have been received by the creditor, that fact alone would not constitute payment.
44. In this case the plaintiff was communicating with the defendant's legal officer, Mr. Job Omboga Nyamumbo. And it is common ground that it is the said legal officer who had instructed **DALALI TRADERS** to repossess the lorry.

45. As I have already held, the defendant had no obligation to give notice to the plaintiff prior to the repossession of the lorry.

46. After the lorry was repossessed, the legal officer did not give instructions to the auctioneers to sell it.

47. The defendant did not make available to the trial court, evidence of how **WESTMINSTER COMMERCIAL TRADERS** were given instructions to sell-off the lorry. However, there is no doubt that the said Westminster Commercial Traders were duly instructed. I so find because by a letter dated 16th May 2011, messrs Westminster Commercial Traders wrote to the plaintiff, making reference to the instructions which the plaintiff had given to them.

48. The defendant also made available evidence which showed that prior to the sale on 14th May 2011, there were 2 advertisements in the local dailies.

49. The advertisements were placed by Westminster Commercial Traders.

50. I hold the considered view that the plaintiff must have known that if the arrears were not paid within 7 days from the date when the lorry was repossessed, the defendant would have it sold.

51. Ordinarily, the person who carried out the exercise of repossession of goods, would also be the one who would auction the goods if the hirer had not remedied the breach which had given rise to the repossession.

52. Therefore, it would be expected that the hirer would be on the look-out for advertisements being placed by the person who had repossessed the goods.

53. In this case, the plaintiff would have been expected to keep a look-out for advertisements by Dalali Traders. That was a legitimate expectation.

54. The defendant was not under an obligation to utilize one person or firm to sell the lorry after that person or firm had repossessed it.

55. However, it is possible that the plaintiff could have been on the look-out for advertisements place in the press by the firm which had repossessed the lorry. By replacing the person who had repossessed the lorry with another person, who would sell it, the defendant may have deliberately or inadvertently caused the plaintiff to miss seeing the advertisements in real time.

56. The defendant's legal officer denied, during cross-examination that he had told the plaintiff's Managing Director that the lorry would be released to the plaintiff on 19th May 2011.

57. However, the said legal officer did not provide any explanation why he did not respond to the plaintiff's letter dated 18th May 2011. By that letter, the plaintiff's Managing Director has said that the defendant's legal officer, Job, had told him that a;

“...letter of release will be issued to me after four (4) days i.e. 19th May 2011 when the cheque clears.

On the 16th May 2011 I called Mr. Job Obonga again and assured me that I should collect the motor vehicle on 19th May 2011 since I had over-paid the arrears and there was enough money for the repossession charges”.

58. The defendant may have denied having given assurances to the plaintiff, that the lorry would be released on 19th May 2011. But that denial was first made in the Defence which was lodged in court on 11th July 2012.

59. When a person does not respond to an issue in real time, the court is entitled to make a presumption that a response which is made much later, and more so, when such response is made after a suit had been instituted, would probably be an after-thought.
60. In this case, I note that Job is not the person who instructed Westminster Commercial Traders to sell-off the lorry. Indeed, Job was not even aware whether the instructions to Westminster Commercial Traders were oral or in writing.
61. Thirdly, Job received the cheque from the Plaintiff, on the date just before the auction was scheduled to take place. That fact, when considered within the perspective of the circumstances prevailing at the material time, leads me to find that it is more probable than not that the defendant's legal officer, Job, had given an assurance to the plaintiff's Managing Director, that the lorry would not be sold.
62. But then again, it cannot be ignored that Job did not cause the cheque to be presented for payment.
63. The plaintiff's Managing Director knew that the cheque was simply being held by Job; and he said so in the letter dated 18th May 2011.
64. As the cheque, was never presented for payment, the plaintiff remained in arrears. Therefore, the event which could have triggered the release of the lorry was never actualized.
65. I also find that although the defendant was holding a Legal Charge which provided adequate security for the facility it had given to the plaintiff, that did not preclude the defendant from repossessing the lorry, and then selling it off, if the plaintiff continued to be in arrears.
66. If anything, the Hire Purchase Agreement expressly authorized the defendant to repossess and to later sell the lorry if the plaintiff was in breach of the said Agreement. And there was no requirement, whether express or implied, that before selling-off the lorry, the defendant should first have sold-off the land which was charged to it.
67. I find that the plaintiff has failed to prove that the defendant was in breach of the contract between the 2 parties. Therefore, there is no foundation in fact or in law for ordering the defendant to compensate the plaintiff.
68. It is common ground that the lorry had been sold to a Third Party. The purchaser is named **BARASA MAMO GOSA**.
69. There was no allegation by the plaintiff, that the purchaser had acquired title of the lorry, in an irregular manner.
70. Secondly, the purchaser was not enjoined to this case. Therefore, even if I had found that the defendant had acted irregularly, it would have been improper to order the Third Party to return the lorry to the plaintiff. Such an action would have been tantamount to condemning the said Third Party without according him a hearing.
71. As the repossession was lawful and regular, the consequences following the said act cannot lead to an order that the plaintiff be compensated as claimed or at all.
72. In the result, the plaintiff's suit is dismissed. I order the plaintiff to pay to the defendant, the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of January 2017.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Mutinda for the Plaintiff

Shah for the Defendant

Collins Odhiambo – Court clerk