



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 13 OF 2006

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....PLAINTIFF

VERSUS

SAMUEL ORINDO MANAI OMOKAYA.....DEFENDANT

JUDGMENT

The Plaintiff's claim against the Defendant arises from three Hire Purchase Agreements the first one dated 10th December 2001 No. HP3-5-310-000844 for Scania Bus Registration Number KAN 484Y whose net purchase price was Kshs.5,931,692/= inclusive of hire purchase charges. Under this agreement the Defendant was to repay the Plaintiff by 23 monthly installments of Kshs.247,160/= each and a final installment of 248,512/= on 10th December 2003.

The second agreement for a net purchase price of 5,875,896/= was dated 10th May 2002 – HP3-5-310-000045 in respect of a Scania Bus KAP 506N was payable in 23 monthly installments of Kshs.244,830/= each with a final installment of Kshs.246,306/= which would have been paid on 13th May 2004.

The third agreement dated 24th April 2002 HP3-5-310-000472 for a Toyota Hilux Pick up Registration Number KAP 406K was for Kshs.1,553,367/= payable in 35 monthly installments of Kshs.43,150/= each and a final installment of Ksh.44,617/= payable on 7th May 2005.

It is the Plaintiff's case that the Defendant fell into arrears in all the three agreements and as at 1st August 2006 the sum owing for the first agreement stood at Kshs.3,055,321/42, while in the second and third agreements the sums due as at 1st August 2006 were Kshs.3,806,189.84 and Kshs.246,301/10 respectively. All these accounts were amalgamated into the Defendant's current account on 1st August 2006 as per "the express and implied terms of the banking facility". The Plaintiff avers that whereas the Defendant made part deposits in his current account the same did not reduce the outstanding debt and that he breached the condition to pay the instalments on their due dates despite numerous reminders to regularize the agreement. The Plaintiff avers that as at 31st October 2010 the amount owed by the Defendant stood at Kshs.13,935,747.70 which the Plaintiff now claims together with interest at the contractual rate of 30% from the date of filing this suit till payment in full. The Plaintiff also claims costs of this suit with interest at court rates.

In his written statement of defence which was filed before the Plaintiff's statement was amended the Defendant denies the Plaintiff's claim in toto.

At the hearing Edwin Mutuma Mbaabu (PW1), a Legal Officer at the Plaintiff Bank exhibited the three hire purchase agreements, the Plaintiff's statements of accounts, notices and other letters sent to the Defendant when he defaulted. He stated that on 4th December 2004 Motor Vehicle KAN 484Y was repossessed and valued by Filex Assessors vide a report dated 12th January 2005 and by Maka

Automotive Works and Assessors vide a report also dated 12th January 2005. The valuers charged 4,500/= each which was paid. The vehicle was then advertised in the Daily Nation of 5th October 2005 and in the Standard Newspaper of 4th October 2005 following which there were several bidders but the sale did not fall through until 14th November 2006 when it was sold at Kshs.300,000/=. By then the storage charges for the two years had accumulated to Kshs.165,952/=. Motor Vehicle KAP 506N was also repossessed but the Plaintiff could not sell as there was an objection by a third party to whom it had been sold at a public auction pursuant to a court order in **Migori Senior Principal Magistrate's Court Civil Case No. 1305 of 1999**. The Pick-up KAP 406K was involved in an accident and could not be repossessed. He disputed the Defendant's averment that these agreements were covered by the Hire Purchase Act and reiterated that the interest levied was contractual.

On his part the Defendant conceded that he entered into the three hire purchase agreements upon the terms set out in the Amended Plaintiff. He however testified that in respect of Motor Vehicle KAN 484Y he made twenty installments of Kshs.250,000/= each the last one being on 5th September 2003. Thereafter on 25th October 2003 the Plaintiff repossessed the motor vehicle and he ceased payments. He contended that there was default for only one month and that he later learnt that the vehicle had been sold to one Martin Luande Oguna for 300,000/=. He contended that the sale price was unreasonable given the valuations done by Phoenix Assessors and Maka Automotive Works. He contended that even the proceeds of sale were not credited to his account.

In regard to Motor Vehicle KAP 506N his testimony was that he paid fifteen installments but the vehicle was repossessed on 25th October 2003 and to date he does not know where it is.

For the Pick-up Registration Number KAP 406K his evidence was that out of the twenty four installments he had paid twenty three before the vehicle broke down in June 2004 and he could not repair it. It stayed in the garage until 2008 when it was attached by an auctioneer. He duly informed the Plaintiff who went and repossessed it but it was vested to a third party who had purchased it at an auction. He stated that though the Plaintiff defended the suit that gave rise to the order of attachment it did not succeed. He stated that by the time the Pick-up broke down only one installment of Kshs.44,670/= was due. He contended that all the buses having been repossessed he closed his current account and therefore it could not have been available for amalgamation as alleged by the Plaintiff. He denied that he owes the Bank the sum claimed and stated that had the Bank credited his payments to his accounts that would have cleared his indebtedness. Asked if he had the deposit slips evidencing payment he stated that whatever payments he made were reflected in statements annexed. He also stated that whereas he never defaulted there were times when his payments were late. He however regularized the account upon receiving demand letters from the Plaintiff.

He conceded that after repossession he made no efforts to make monthly installments. On being cross-examined further he conceded that a sum of 300,000/= in respect of HP3-310-0844 was credited into the amalgamated account. He however maintained that the sale price was undervalued. He denied that Motor Vehicle KAP 506N was involved in an accident while in his possession and maintained that it was repossessed by the Plaintiff. He vehemently denied that it was still in his custody and further disputed that he wrote a letter admitting it was.

The Advocates agreed to sum up by way of written submissions but none were forthcoming for several months. Indeed those of the Plaintiff Bank only arrived on 28th February 2017 following an ultimatum by this Court that it would deliver judgment on 2nd March 2017 with or without them. I have combed the file for the Defendant's submissions but I did not find them. Regrettably on 2nd March 2017 this Court was involved in another matter at the High Court in Kakamega and the judgment was deferred to 9th March 2017. This Court was also hoping that the Defendant's Advocate would take advantage of the deferment and file his submissions but that was not to be.

On 22nd May 2009 the Advocates for the parties filed a statement of agreed issues which this Court shall determine but bearing in mind the Amended Plaintiff. The agreed issues are:-

“1. Whether or not the Plaintiff and the Defendant entered into a Hire Purchase Agreement

Number HP3-5-310-00845 concluded on diverse dates ending on 16th May 2002.

2. **Whether or not the Plaintiff financed the purchase of Motor Vehicle Registration Number KAP 506N Scania F94 bus for the sum of Kshs.4,810,000.**
3. **Whether or not it was a term of the Agreement that the finances advanced were to be repaid in 23 Monthly installments of Kshs.244,830/= commencing 13th June 2002 and a final installment of Kshs.246,306/=, payable on the 13th May 2004.**
4. **Whether or not it was the term of the said Agreement between the Plaintiff and the Defendant that the Defendant pay a late penalty interest at the rate of 30% per annum in the event of default of any installment.**
5. **Whether or not the Defendant defaulted in making repayments to the Plaintiff, and whether as at 29th December 2005, the indebtedness stood at Kshs.3,770,123.17.**
6. **Whether or not the Plaintiff served the Defendant with a Notice to regularize the Defendant's loan account and whether or not the Defendant failed to respond to the Notice.**
7. **Whether or not the Defendant has fully paid the debt owing to the Plaintiff.**
8. **Whether or not the Plaintiff is entitled to a claim against the Defendant for the sum of Kshs.3,770,123.17/=, as at 29th December 2005 plus interest at the rate of 30% per annum and incidental charges till full payment.**
9. **Whether or not the interest of 30% per annum was contractual and whether it contravenes the provisions of Banking Act.**
10. **Whether or not the Plaintiff repossessed the suit/subject Motor Vehicle.**
11. **If so, what was the amount of monies due and outstanding at the time of the repossession?**
12. **Whether the Hire Purchase Act applied to the suit transaction.**
13. **Whether the suit is mischievous, misconceived and bad in law.**
14. **Who should be condemned to pay the costs of this suit?"**

The Defendant's Advocate filed a separate statement of issues of law which I shall determine at the same time as the agreed issues.

Issues 1, 2 and 3 were admitted by the Defendant in his testimony and I need not go into them. In order to answer issues 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 we must look at the subject Hire Purchase agreements. We do not have a shortage of them as both parties have included them in their bundles of documents. All three agreements contain more or less similar terms save for the vehicles and the amounts concerned. In all three agreements the interest that was to be levied on the principal sum

was 11.08% per annum. The same is referred to as a specified flat interest rate. However the agreements also provide for a late payment true interest rate of 30% per annum. In the terms and conditions interest is stipulated at paragraph 3.4 while late payment is stipulated at paragraph 3.5 which states -

“3.5 Late payment

3.5.1 The hirer shall pay interest to the owner at the Late Payment Rate specified in the Schedule on all overdue payments of installments such interest to accrue on a daily basis after as well as before judgment from the due date until payment in full.

3.5.2 The Hirer shall pay interest to the owner at the Late Payment Rate specified in the Schedule on all other sums due to the owner under this Agreement such interest to accrue on a daily basis after as well as before judgment from the date demanded until payment in full.

3.5.3”

The rate of interest specified in the schedule is 30%. Issue No. 4 is therefore answered in the positive. It was indeed a term of the agreements that a late payment interest of 30% per annum would be levied.

In his own testimony more so in cross-examination the Defendant admitted that he sometimes defaulted and also paid late and received demand notices from the Plaintiff. He also admitted that once the vehicles were repossessed and the other had an accident he stopped making any payments. That therefore partly answers issue No. 5. Under the agreements both the Plaintiff and the Defendant could terminate the agreement, but relevant to us is termination by the owner, in our case the Plaintiff. The grounds for such termination are provided for at paragraph 7.2 of course one of them being default of payment of the instalment. The agreements also provide for the liability of the Hirer, defendant in our case, after such termination. Clause 8 provides:-

“Liability of Hirer on termination

If the hiring of the Goods is terminated pursuant to Clause 5, 6 or 7 above the Hirer shall become liable to pay to the owner (in addition to all other sums [if any] in respect of which the Hirer shall be indebted to the owner).

8.1 any overdue installments with interest thereon as herein provided;

8.2 any other sum due under this agreement with interest thereon as herein provided;

8.3. any expenses and costs incurred by the owner in tracing, storing, insuring and/or recovering possession of the Goods;

8.4 the cost of all repairs required to be done to the Goods to put them in a condition consistent with the performance of the Hirer's obligation under this agreement;

8.5 as agreed compensation for the owner's loss the Balance of the Hire Purchase Price of the Goods specified in the schedule less the aggregate of:-

8.5.1 the instalments previously paid under the Agreement.

8.5.2 the overdue instalments due under the Agreement up to the date of termination; and

8.5.3 the proceeds of sale of the Goods if repossessed and sold and if not, not sold, their value as certified by a person (acting as an expert) nominated by the owner and who habitually deals in Goods of a similar nature of the Goods.

8.6 interest at the Late Payment Rate on the amount of the agreed compensation payable under Clause 8.5 above from the date of termination until the date of payment;

8.7 damages (if any) for any breach of this Agreement.”

The above are the terms and conditions to which the Defendant appended his signature. It is not correct that the agreements were subject to the Hire Purchase Act because the Hire Purchase Act does not apply to goods whose value is in excess of Kshs.4 Million (see Section 3(1) of the Hire Purchase Act). That being the case the Defendant was bound by the terms of these agreements.

The question however is whether it has been proved that he owes the sum of Kshs.13,935,747.70?

It was the Plaintiff's evidence that Motor Vehicle KAN 484Y was repossessed on 4th December 2004 by which time the Defendant owed Kshs.2,886,818/42 although a letter from the Bank to the Defendant advising him of the repossession indicates the balance was 2,648,973/=. Paragraph 8 of the agreement contains the formulae by which the amount payable upon termination was to be calculated. In the first instance the Hirer was liable to pay any instalment due (the instalments in default) with interest as agreed; any other sum overdue say bank charges under the agreement with interest as agreed, any expenses and costs incurred by the owner in storing, insuring and/or recovering possession of the vehicle(s) and lastly the cost of all repairs required to be done to the vehicles to put them in a condition consistent with the performance of the Hirers obligations under the Agreement. The agreement further provided that as compensation the owner was to be paid the balance of the Hire Purchase Price of the Goods less the aggregate of the instalments previously paid; the overdue installments due under the agreement up to the date of termination; and the proceeds of Sale of the Goods if repossessed and sold and if not sold their value upon a valuation by an expert. The Hirer was then liable to pay interest at the Late Payment Rate in this case 30% on the amount of the agreed compensation payable under Clause 8.5 above from the date of termination until the date of payment.

It is not clear from the Plaintiff's evidence how the amount sued for was computed and whether in fact it was computed as provided under Clause 8 of the agreements. Other than for the Pick-up Registration No. KAP 406K the Plaintiff's witness did not tell this Court what instalments had been previously paid and what instalment or instalments were due up to the date of termination. Neither the schedule nor the Terms and Conditions state the date on which the installments were payable. The schedule indicates only the date of the first installment and the date when the last installment would be payable. It would have helped if the Plaintiff clarified the issue of when an installment became overdue. As it stands it appears as if the amount claimed in the Plaintiff was calculated regardless of the terms set out in Clause 8 of the Agreements. Indeed we heard the Plaintiff's witness testify that there was no requirement for valuation immediately before the sale. Clause 8.5.3 however made it clear that upon termination the Hirer was entitled to a credit for the proceeds of sale of the goods if repossessed and sold, and if not sold their value as certified by an expert. By the time of filing this suit and indeed by the time of amalgamating the accounts the motor vehicle had not been sold. The statement at page 43 of the Plaintiff's Supplementary bundle and the evidence are to the effect that although the vehicle was repossessed in 2004 it was only sold in 2006. In fact it was released to the purchaser on 14th November 2006. That being the case the applicable method of calculating the Hirer's liability under Clause 8.5.3 should have been the value of the vehicle as in the valuation report which according to the report by Maka Automotive was Kshs.1,200,000/=. In my view the Hirer should have been entitled to a valuation done within a reasonable time of the repossession. If the Plaintiff decided to retain the vehicle for so long before selling it thus causing it to depreciate and also attracting very high storage charges the Defendant could not be blamed for it. The long and short of all this is that whereas it is apparent that the Defendant does in fact owe it has not been demonstrated that he owes the sum claimed in the Plaintiff. The Plaintiff Bank was bound by these agreements as much as the Defendant was and should not have gone outside of it upon termination. It has not proved on a balance of probabilities that the sum of Kshs.13,935,747/70 is what is due to it. What was produced was a running account. It has been said now again that a party must prove its case but not throw statements at the court to decipher for itself the evidence contained therein which is what the Plaintiff has done in this case.

Issue No. 12 has also been answered – the Hire Purchase Act does not apply to Hire Purchase Agreements where the value of goods exceeds Kshs.4 Million. So the two buses were not covered by the Act. As for the Pick-up whose price was Kshs.1,553,367/=. unless there is evidence to the contrary the same was subject to the Act and the Plaintiff could only recover its balance as provided in the Act.

In the upshot I find that the Plaintiff Bank has not proved its case on a balance of probabilities and dismiss it with costs to the Defendant. It is so ordered.

Signed, dated and delivered at Kisumu this 9th day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Kagoya for the Plaintiff holding brief for Mr. Oguttu

Mr. Ragot for the Defendant holding brief for Mr. Kalya

Court Assistant – Serah Sidera