



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NUMBER 24 OF 2013

DAVID KAROBIA KIIRU.....PLAINTIFF

VERSUS

LAVERAGE COMPANY LTD.....DEFENDANT

JUDGMENT

1. Background and Pleadings

The plaintiffs claim against the defendant is stated in his plaint dated 7th February 2013 and filed on the 25th February 2013 and is his statement of even dates.

He states that by a Hire Purchase Agreement dated 31st August 2004 with the defendant company, he hired a vehicle Registration number KAJ 570V – Pick up upon the following terms:

- (a) **Cash Price** - **Kshs.780,000/=**
- (b) **Hire purchase price** - **Kshs.200,000/=**
- (c) **Other charges** - **Kshs. 20,000/=**
- **Kshs.982,000/= ? (1,000,000/=)**

2. That as at 27th February 2007, it is his statement that he had paid a sum of Kshs.793,334/= being more than 2/3 of the agreed price but despite such payments, the defendant attached, repossessed and sold the vehicle.

It is his claim that the defendant was in breach of the contract of the Hire Purchase Agreement and its terms and seeks judgment for the said sum of Kshs.793,334/= plus interest at 14% per annum from 27th February 2007 upto payment in full.

3. In its defence dated 11th April 2013 the defendant states that the total Hire Purchase price of the vehicle was Kshs.702,000/= and admits having received Kshs.793,334/= from the plaintiff which is more than 2/3 of the hire purchase price and denies having attached or sold the vehicle, and puts the plaintiffs to strict proof.

4. The defendant however states that during the subsistence of the agreement, and in total breach of the

Hire purchase agreement, the plaintiff issued several bad cheques and mortgaged the vehicle using forged documents which forced the defendant to repossess the vehicle and therefore denies being in breach of the Hire Purchase Agreement and further states that it was perfectly right to repossess the vehicle despite the payments made, and states that the plaintiff owes it Kshs.152,855/= and particulars stated, plus additional costs by way of counter claim.

5. **Plaintiff's Case**

The plaintiff's evidence was taken before the Hon. H. Omondi J. His evidence is captured in paragraph 1 and 2 of this judgment. He further testified that as at 30th March 2006, he had paid Kshs.513,334/=(PEXt 2A(1) and that by its letter dated 25th May 2006 (PEXt 3), the defendant confirmed the outstanding sum of Kshs.208,000/= and indicated that upon payment the defendant would release the vehicle's logbook and other transfer documents that he had deposited with the defendant.

Thereafter, it was his evidence that the defendant repossessed the vehicle on the 27th February 2007 without any notice to him.

It was his evidence that at the date of repossession, he had paid Kshs.793,000/= more than 2/3 of the hire purchase price.

He urged the court to order refund of the sum of Kshs.793,334/= plus interest as the defendant repossessed the vehicle, and sold the same.

6. Upon cross examination, the plaintiff admitted that some of his payment cheques were dishonoured but stated outstanding that at time of repossession the balance was only Kshs.208,000/=. He denied owing the defendant Kshs.152, 855/= as stated in the counterclaim.

He denied shylocking the vehicle or borrowing any money using forged vehicles logbook, resulting to criminal case **No. 887 of 2013** (Nairobi) which is still on going.

7. **Defendant's Case**

Lilian Nyawira Kimeu described herself as the defendant's accountant for five(5) years. She testified that the hire purchase agreement with the plaintiff was for Kshs.500,000/= and that the plaintiff failed to pay the monthly instalments and his postdated cheques were dishonoured.

She testified that the company repossessed the vehicle because it had been mortgaged yet the vehicle's original documents were in its possession, that the plaintiff forged documents to facilitate the mortgage. She produced as DEXh 9 (a-d) the original logbook, transfer form and others and the forged documents as DEXh 8(a-d).

This witness stated that a notice to the plaintiff was given on grounds that the motor vehicle had been mortgaged and failure to pay the instalments. A proclamation and notification of sale of the motor vehicle and the advertisement were produced as exhibits and eventually the motor vehicle was sold for Kshs.200,000/=: leaving a balance of Kshs.352,855/30. She denied that the vehicle was repossessed unlawfully nor was there any breach of the Hire Purchase agreement. The accountant confirmed payment of more than 2/3 of the purchase price.

8. On the defendant's counterclaim, the witness stated that the sum Kshs.152,855/30 was balance due to the company after the sale of the vehicle.

Upon cross examination, she stated that the company did not obtain a court order to repossess the motor vehicle and that was not lawful.

9. **DW2 was Edwin Mwangi** a licenced Auctioneer t/a Garam Investments Auctioneers. He confirmed having received instructions for repossession and sale of the suit vehicle which he did and eventually sold

it in a public auction and realised Kshs.200,000/=.

10. Upon completion of the parties evidence written submissions where filed through their advocates. The plaintiffs submissions are dated 7th October 2016.

Mr. Murimi for the plaintiff put forth one issue, the interpretation of the Hire Purchase Agreement as the plaintiff had paid 2/3 of the price and the legality of the repossession and sale of the suit vehicle.

He cited two cases **Simon Muiruri Wanjohi -vs- Resma Commercial Agencies Nakuru HCA No. 91 of 2002 and Pals Car Ltd -vs- CMC Motors Ltd & 2 Others – Nakuru HCCC No.171 of 2005** where the court having made findings that 2/3 of the hire purchase price was paid nullified the repossession of the vehicle and ordered restitution. He also relied on Section 15 of the Hire purchase Act to enforce the plaintiff's rights.

11. Mr. Githiru for the defendant filed his submissions on the 4th November 2016. It was his submission that the Hire Purchase Agreement had been terminated and therefore provisions of **Section 15(2) Hire Purchase Act** do not apply due to breaches by the plaintiff by mortgaging the vehicle and none payment. He supported this contention on **Clause 2(7) of the Hire Purchase Agreement** that forbade vehicle being put in jeopardy. He urged that the court dismiss the plaintiff's case and allow the counterclaim. He too cited several authorities among them – **Mburu Gatheree t/a Gathe Enterprise -vs- National Industrial Credit Bank Ltd (2015) e KLR, and Silvester Momanyi Marube -vs- Gulzar Ahmed Motors and Another (2012) e KLR.**

12. Analysis of Evidence and Submissions.

Both the plaintiff and the defendant agree on several issues. That the plaintiff had paid more than 2/3 of the Hire Purchase price, being Kshs.468,000/= out of the total sum of Kshs.500,000/=.

It is not in dispute that the plaintiff defaulted in paying the monthly instalments for some time. It is also not in dispute that the instructions for the repossession of the vehicle to the Auctioneers and eventual sale were issued without a court order and therefore unlawful.

What is in dispute and for the courts determination, in my view are two issues:

(a) Whether the plaintiff breached the Hire Purchase Agreement dated 31st August 2004.

(b) The legality of the repossession and sale of the plaintiff's motor vehicle when 2/3 of the price had been paid.

13. I have perused the Hire Purchase agreement executed by the parties herein. Clause 6 provides for automatic termination of the agreement if there is threat to distrain the goods (vehicle) or an act of bankruptcy by the hirer, or an act of distress upon the hirer.

Clause 7 thereof allows termination if there is outstanding payments or if the goods are in jeopardy.

Clause 8.2 provides that upon termination, the hirer is to pay the outstanding sum and cost of repairs to the goods to put them in a condition consistent with the performance of the Hirer's obligations and damages, if any, for prior breach.

14. **Section 15 of the Hire Purchase Act, Cap 507 Laws of Kenya** prohibit repossession of goods under a Hire Purchase Agreement when 2/3 of the Hire Purchase price has been paid whether in pursuance of the agreement or of a Judgment or otherwise.

It is specific that under such circumstances, the owner of the goods shall not enforce any right to recover possession of the goods from the hirer other than by a suit.

Section 15 (ii) states:

“if an owner retakes possession of the goods in contravention of subsection (1), the Hire Purchase agreement if not previously terminated shall terminate and the Hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner by suit all sums paid by the hirer under the agreement or under any security given by him in respect thereof.”

15. That is the position of the law. The Hire purchase agreement was terminated upon which repossession followed and eventual sale of the vehicle. The sums paid by the Hirer as at that time, the 27th February 2007 was Kshs.498,334/= more than 2/3. These facts and figures as I have stated above are admitted by the parties.

The defendant by its accountant, and also captured in its defence confirms payments by the plaintiff of Kshs.498,334/=.

It is on record that the defendant was aware that no repossession and sale of the vehicle should have been done without a court order as confirmed by its accountant, DWI.

In my view, the defendant therefor knowingly took the law into its own hands and therefore was ready for the consequences.

In the case **Simon Muiruri Wanjohi -vs- Resma Commercial Agencies (Supra)**, **Kimaru J** rendered that:

“The 1st respondent took the law into his own hands and unlawfully took possession of the said motor vehicle from the Appellant.

In the event of breach of the agreement the 1st respondent was required to seek the intervention of the law and not use the law of the jungle to take away the appellants property --- the 1st respondent robbed the appellant of his motor vehicle.”

Further in **Pals Car Ltd case (Supra)**, the court held that if there was breach of the agreement, the defendant ought to have filed a suit to obtain and enforce the agreement, and obtain an order to repossess, and therefore repossession without a court order was unlawful.

16. There is no dispute that the plaintiff breached the agreement by default in payment of the balance of the purchase price which was less than 1/3.

Clause 7.1 and 2 and 8.2 of the agreement did not however empower the defendant to repossess and sale the vehicle. The procedure for repossession in such circumstances is provided under the Hire Purchase Act. See **Section 15**, thereof. Provisions of the agreement cannot be allowed to supercede clear provisions of the law. Reasons advanced by the defendant that it did not have time to obtain a court order for the repossession and sale is indeed bad submission, and not backed up by any law.

17. I fully associate myself with the holding in C.A decision in **Mburu Gatheo T/A Gatheo Enterprises (Supra)** that

“the Respondent was contractually within its rights to terminate the hiring by reasons of default or breach by the appellant to pay the rentals under the agreement.”

The circumstances in the above case are different. The respondent had gone to court and obtained an order restraining the appellant from repossessing the vehicle. In the present case, the defendant failed to file a suit for enforcement of the agreement. It is therefore distinguishable, and wholly in support of my findings.

Likewise, in the case **Silvester Momanyi Marube (Supra)**, circumstances were different. The issues before the Court (J. Odunga) was who between the parties was to pay Auctioneers charges for the repossession of the vehicle, which had been declared unlawful.

18. To sum up, and for the reason stated above, it is my findings on the issues framed that the plaintiff was indeed in breach of the hire purchase agreement dated the 31st August 2004 but the defendant took the law in its hands knowingly and repossessed and sold the plaintiff's vehicle, and without due process being followed as provided under the **Hire Purchase Act, Cap 507 Laws of Kenya**.

This was done when the plaintiff had paid more than 2/3 of the Hire Purchase price, contrary to express provisions under the said Act.

19. For those reasons, the plaintiffs claim is meritorious. I find that the plaintiff has proved his case on a balance of probability against the defendant whose defence and counterclaim are found to be devoid of any merit.

The upshot is that there shall be judgment for the plaintiff against the defendant as follows:

(a) The defendant shall pay to the plaintiff the sum of Kshs.498,334/= with interest at court rates from the 7th February 2007 until payment in full.

(b) The defendants counterclaim is dismissed with costs.

(c) Costs of the suit shall be borne by the defendant.

Dated, signed and delivered this 6th Day of April 2017.

J. N. MULWA

JUDGE