REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, TUNOI & OWUOR, JJ.A)
CIVIL APPEAL NO. 285 OF 1998
BETWEEN

DIAMOND TRUST BANK KENYA LIMITED
(formerly DIAMOND TRUST OF KENYA LIMITED) .....APPELLANT
AND
JASWINDER SINGH ENTERPRISES.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Hon. Justice Kuloba) dated 26th November, 1998 in H.C.C.C No. 657 of 1998)
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JUDGMENT OF OWUOR, J.A

The appellant herein, Diamond Trust Bank Kenya Ltd., formerly known as Diamond Trust Kenya Limited is dissatisfied with the ruling of the superior court (Kuloba J.) in which the learned Judge granted the respondent/plaintiff's application and thereafter ordered the release of several vehicles that had been repossessed by the appellant/defendant. The facts of the case as stated in the plaint dated and filed in court on 29th October, 1998 were not in much dispute.

The respondent who described itself in the plaint, as "a firm" engaged in the business of transportation of goods mainly in the Preferential Trade Area, entered into four hirepurchase agreements with the appellant between the 16th of June, 1997 and 25th of June, 1997. The respondent took possession of all the vehicles, thirteen volvo prime movers with eleven dolls or trailers. The amount of money financed by the appellant was agreed to be payable in thirty-six equal monthly instalments and was inclusive of all interest payable for the hire period, which was calculated in advance and debited to the accounts.

It was the respondent's case that, the hire-purchase transactions were subject to the provisions of the Hire- Purchase Act (Cap 507) (the Act) and that at the time of repossession on 25th July, 1998 it had made the following payments under the various contracts:-

Contract No. 191000107 (829814015) dated 16th of June, 1998 principal amount borrowed was Ksh.83,090,000. Amount paid was Ksh.62,367,354.05.

Contract No. 191000118 (8298148012) dated 20th of June, 1997 amount borrowed was Ksh.35,960,000.00. Amount paid was Ksh.24,253,022.40.

Under contract 191000121 (8298148006) amount borrowed was Ksh.8,9990,000.00 and amount paid was Ksh.6,069,237.40.

Finally under contract 191000131 (8298148003) amount borrowed was Ksh.2,788,560.00 and amount paid being Ksh.1,634,667.00.

The amounts paid under the various contracts were more than two thirds of the hire-purchase price as at the time of repossession of ten of the vehicles in the fleet. These were vehicles in respect of the first two contracts alluded to earlier. They were repossessed in the period between late July and mid August, 1998 and thereafter advertised for sale by tender in early October, 1998.

The respondent's contention was that the appellant's action in repossessing the vehicles was malicious, illegal and contrary to the provisions of the Act. More so when they were loaded with third parties' goods, thereby exposing the said goods to damage and thefts. As a result of this action, the respondent contended that it had suffered in its reputation and lost business, hence its claim for damages.

Various reliefs were sought in the plaint, most of them with a view to restraining the appellant from dealing with the vehicles in any manner detrimental to the respondent's interest and rights. The appellant was to be restrained by way of injunction from selling the repossessed vehicles, opening any tenders in respect of the vehicles or entering into any agreements with prospective purchasers, repossessing or interfering with the ownership of the remaining vehicles and in addition, an order for the release of the repossessed vehicles, plus the load thereon and thereafter declarations that the repossessing of the vehicle was illegal, null and void, and that the interest charged by the appellant was illegal, unconscionable, harsh and excessive.

That was the basis upon which the respondent claimed for damages for loss of business and a sum of Ksh.3,641,414.90, money that had been placed in a fixed account by it and which the appellant took.

Filed simultaneously with the plaint under a Certificate of Urgency, was a chamber summon seeking for the restraining order that I have alluded to before, but in the interim. One Gurbux Singh Suri, the administrator of the plaintiff's firm swore an affidavit to support the application. He reaffirmed on oath all that had been stated in the plaint and supplied copies of the hire-purchase agreements. He was in no doubt that the transaction between the parties were governed by the provisions of section 3(1) of the Act. He conceded that indeed there had been some late payments due to financial problems that the firm was undergoing but that the appellant was always informed about the defaults. However, on the 25th day of July, 1997 when the appellant caused the vehicles to be repossessed, 2/3 of the agreed hire-purchase price had already been paid and therefore the repossession was carried out in complete disregard of the provisions of section 15(1) of the Act, since at that time the only option open to the appellant was for it to file a suit for recovery of the outstanding amount.

The vehicles were repossessed from all over Kenya and some in Uganda and accordingly advertised for sale in the Daily Nation newspaper of 1st October, 1998. According to Mr. Suri the appellant's actions were motivated by other reasons, namely, to bring down the respondent's business and sell the vehicles to their business competitors at throw-away prices.

In that regard the respondent stood to lose a colossal investment of worth more than Ksh.100,000,000.00. To the contrary, the appellant stood to lose nothing since he was well protected by law and could still sue for the remaining money. The balance of convenience therefore laid with the respondent for the granting of the orders sought.

The application first came up for hearing on 30th October, 1998. The same was adjourned to enable the respondent to file a replying affidavit. However, interim orders were given restraining the appellant from otherwise dealing with the vehicles that it had repossessed.

In the replying affidavit placed before Kuloba J., the appellant through one Miss Nasim Devji, its Regional Finance Manager, admitted the agreements but contented that the respondent persistently defaulted in performance of its obligation under the agreements, in particular, it had failed to insure the vehicles and defaulted in payment of the agreed hire rentals on time thereby entitling the appellant to charge further interest. These are the exorbitant interests that the respondent complained of.

This, however, was a matter that had been clearly admitted by the respondent in Suri's affidavit par. 17;

"The plaintiff paid the instalments as required, however, later due to financial constrains there were some late payments of which the defendant was always informed".

In the grounds of objection filed by the respondent in terms of Order 50 rule 16 of the Civil Procedure Rules, and in its replying affidavit the appellant categorically stated that the hire-purchase transactions between them were not subject to the provisions of the Act and that the appellant was completely within its rights to repossess the vehicles as he did in case of default in payment by the respondent, notwithstanding the fact that 2/3 of the hire-purchase price may have been paid. The appellant had issued a repossession notice on 10th of May, 1998 pursuant to which four motor vehicles were repossessed. The respondent promptly paid a sum of Ksh.10,000,000.00 and the repossessed vehicles were released. Thereafter the appellant issued another repossession notice, it was renewed on 27th of July, 1998 and the same resulted in the repossession, the subject matter of the suit. In these circumstances the appellant contended that the respondent had not made out a prima facie case to entitle it to the orders sought.

On 10th of November, 1998 the application came up for inter-parties hearing only in respect of prayer (5) of the chamber summons which prayed for an order that;

"All the repossessed motor vehicles being held by the defendant or its agents together with the load thereon be released to the plaintiff forthwith without any condition".

That was the prayer on which both counsel were heard and a considered ruling the subject matter of this appeal delivered on 26th of November, 1998. All the other prayers having been previously granted and the appellant restrained accordingly.

Mr. Billing's submission on behalf of the respondent in the superior court were very precise: that the respondent was a firm and therefore a body corporate. In that regard, the agreements between the parties were subject to the provisions of the Act, section 3(1) in particular. Consequently, the appellant having admitted that 2/3 of the purchase price had been paid, it was not entitled to repossess the vehicles, in terms of section 15 of the Act. The only cause of action available to it was to file a suit for recovery of the remaining amount. He further submitted that the agreements were null and void for lack of registration in accordance with section (5) of the Act and section 31 of the Stamp Duty Act (Cap 480). As a result of the continued repossession, the respondent was incurring loss that could not be compensated by way of damages. Therefore the criteria for granting of an interlocutory injunction as set out in the case of *Giella -vs- Casman Brown (1973) EA 358* had been made the respondent having established a prima facie case with a probability of success.

Mr. Sheth appearing for the appellant argued to the contrary: that section 3(1) of the Act did not govern these transactions. Both the agreements and the Hirer were outside the scope of the Act. According to him the respondent was not a body corporate but an individual who by its own agreements had taken itself out of the protection of the Act. He however during the hearing of the application he offered to have the agreements stamped in case it was found that they should have been stamped as prescribed under section 31 of the Stamp Duty Act (Cap 480).

The learned Judge in his ruling stated that he had considered the submission and affidavits and was satisfied that the provisions of the Act applied to the transaction, so did the Stamp Duty Act (Cap 480). Relying on the ruling of Ole Keiuwa (J) in the case of *Fidelity commercial Bank Ltd - vs- Vinay Shah H.C.C.C No. 10 of 1998 (unreported)* , he found that failure to register the hire-purchase agreements and stamp the same violated the two Acts and therefore disentitled the parties to the agreement enforcing their right under them.

The appellant was therefore estopped from repossessing the vehicles since the respondent had paid more than 2/3 of the hire-purchase price.

The learned Judge went further and stated that in case he was wrong in his appreciation of the statute law, it was all the same against "equity and good conscience" to allow a party to cripple the business of another in the name of exercising of its rights. He also faulted the appellant for repossessing the vehicles

when they were loaded with third party's goods for which the respondent was going to be liable. For the above reasons, he was convinced that the damage caused by the appellant's action could not be compensated for in monetary terms.

He consequently made an order for the release of all the vehicles and added that in the event he was wrong in doing so and the appellant suffered any loss, the same could be atoned for in damages.

This was the ruling that the appellant challenged in a total of thirty three grounds of appeal, that were argued generally but could be safely dealt with as two main issues, namely:- did the learned Judge correctly interpret section 3(1) of the Act in the circumstances of the case and secondly, did he grant the mandatory injunction based on the right principles?

In respect of the first issue, Mr. Nagpal argued that a reading of section 3(1) of the Act clearly precludes the agreements between the parties from its provisions. In that they were for a hire-purchase price of more than Ksh.300,000/=. It therefore followed that registration of the same under section (5) of the Act was not necessary in the circumstances of the case, nor does the 2/3 rule under section 15 of the Act apply. Thus, the relationship between the parties was solely governed by the terms and conditions of the agreements. The appellant was therefore entitled to repossess the vehicles following the default by the respondent in paying the instalments as agreed.

He further submitted that it was the respondent that had come to court seeking to enforce its rights under the agreement. Its case was mainly founded on the agreements. The injunction orders sought were based on the agreements that the learned Judge found to be unenforceable. So having rejected the agreements, there was no case left as its substratum had been destroyed.

The learned Judge also found as a fact that the agreements were not stamped in contravention of section 31 of the Stamp Duty Act. Mr Nagpal agreed that the same should not have been accepted in evidence as they contravened section 19(1) of the Stamp Duty Act. However, the learned Judge ought to have held this against the respondent who executed the agreements last and had the responsibility to have them stamped in terms of the schedule to the Stamp Duty Act. Having failed to do so, the respondent should not rely on the omission to invalidate the agreements. Least of all, counsel for the appellant should have been let to go and rectify the position as offered to do and as provided for in the Act. Therefore the learned Judge misdirected himself in holding that the agreements automatically became unenforceable by virtue of their not being stamped.

The counter arguments by Mr. Billing on this point were that the hire-purchase agreements were subject to the provision of the Act because the respondent was a body corporate and therefore qualified to be protected under the Act even though each of the contracts was for sums higher than the statutory ceiling of Ksh.300,000/=.

Having brought the respondent under the protection of section 3 of the Act, he went on to submit that failure to register the agreements under section 5(2) of the said Act was fatal and the agreements could not be enforced against the hirer. Therefore the repossession of the vehicles was unlawful. The appellant having admitted that 2/3 of the hirepurchase price had been paid, his only remedy was by way of a suit as provided for by section 15 of the Act.

On this first issue, the learned judge was persuaded that the Act applied to the contract between the parties. Section 3(1) thereof provides as follows:

> "This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of three hundred thousand shillings other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated; but that monetary limitation does not apply so as to affect the definition of "hirepurchase business" in section 2(1)".

My understanding of the section is that the Act does not apply to a contract of hire-purchase where the

hire-purchase price is in excess of Ksh.300,000/=. Each of the hirepurchase agreement between the appellant and the respondent was for hire-purchase price in excess of Ksh.300,000/=. Each of them is for several millions. In the result that the respondent was not protected by the provisions of the Act and could not therefore obtain an injunction on that basis. Mr. Billing has impressed on us to hold that in the absence of the definition in the Hire-Purchase Act of "body corporate", we should assign to it the meaning given in Stroud's Judicial dictionary to mean "Body of persons corporate or unincorporate" and find that the respondent was a body corporate in terms of section 3(1) of the Act. Save for the monetary limitation. Hence his view that, the respondent who described itself as a "firm" in the pleadings is indeed a body corporate and so protected by the Act. His misconception to my mind arises out of his interpretation of the words "other than" to mean that the Act applies where the hirer is a body corporate. To my mind to understand section 3(1) of the Act it should be read as follows:-

> "3(1) The Act applies to and in respect of all hirepurchase agreement ... other than a hire-purchase agreement in which the hirer is a body corporate whichever incorporated".

The words "other than" should be read to mean `except'. The section therefore excludes all the agreements where the hirer is a body corporate from the protection of the Act.

That notwithstanding I am satisfied that the respondent cannot be a body corporate. The respondent described itself in the pleadings as a "firm operating in Nairobi". A firm by definition under the Registration of Business Names Act (Cap 499) section 2 is;

> "an unincorporated body of two or more individuals, or one or more individuals and one or more corporations, who or which have entered into partnership with one another with a view to carrying out business for profit".

I am satisfied that a firm in law and for the purpose of the Act is an unincorporated body and even in the particular circumstances of this case, whether the respondent was a body corporate or not, nothing much turns on that point since the Act does not apply where the hirer is a body corporate. Our Act is drawn from the English Statute of 1965. The English Act expressly provides that it does not apply to agreements where the hirer is a body corporate. The reason for this is that body corporates are deemed to be sophisticated enough when entering into commercial transactions and therefore with more bargaining power. The Act is instead meant to provide statutory protection to hirers who are individual traders from exploitation by hire-purchase companies.

In the Kenyan situation the Act was meant to protect, as it should, the small man or woman who goes to buy the common households goods eg. a bicycle, television e.t.c. Indeed that is why a monetary limitation was placed on the applicability of the Act.

I am satisfied that the agreements in question are not subject to the provision of the Hire-Purchase Act for the reasons I have given, the rest therefore falls in place. It follows that the relationship between the parties were solely governed by the terms and conditions as set out in the agreements. It was therefore not necessary to register the agreements in terms of section 5(1) of the Act. Furthermore the 2/3 rule contained in section 15 of the Act had no application and therefore the appellant was not obliged to enforce his rights to recover the amounts owed by way of a suit. I have considered the two authorities relied upon by Mr. Billing and have reached the conclusion that they are of no assistance to me in circumstances of this case.

The upshot of the matter is that the learned Judge was wrong in holding that the agreements herein were subject to the provisions of the Act in particular section 3(1).

The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (Cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21 and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of *Suderji Nanji Ltd. -vs- Bhaloo (1958) EA 762 at page 763* where Law J., (as he then was) quoted

with approval the holding in *Bagahat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854* that:

> "before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ...
>
> The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity".

Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant's counsel to be given a chance to have the agreements stamped.

This in my view was the correct step in terms of section 19(3) of the Stamp Duty Act.

Once more the learned Judge misdirected himself on this point and could not therefore fault the appellant and indeed grant the orders sought by the respondent on this basis.

I now come to the second issue as to whether the learned Judge was alive to the fact that he was making a mandatory order of Injunction and whether he applied the right principles in the particular circumstances of this case. Mr. Nagpal's submissions to us were that the judge did not appreciate the fact that in his granting the application, he was issuing a mandatory order. That he applied the principles for granting a mere prohibitory injunction which were not applicable in the circumstances of this case, even worse still the tests for the granting of a prohibitory injunction as set out in the case of *Giella -vs- Cassman Brown* had not been satisfied.

On the point that the granting of a mandatory injunction at the interlocutory stage is a serious matter that should be approached with great care and concern. Mr. Nagpal relied on several authorities in particular *Civil Application No. Nai. 72/94 (UR.35/94) East African Spinners Ltd and Another -vs- Bedi Investment Ltd. unreported* where Gicheru J.A, quoted Megarry J. (as he then was) in the case of *Shepherd Homes Ltd -vs- Sandham (1971) I Ch. 340* , extensively and set out the principles and matters to be considered in cases of a mandatory interlocutory injunctions.

Mr. Nagpal further contented that the Judge did not appreciate that by granting the injunction the order had the effect of putting to an end the whole action without giving the appellant a chance to be heard in the trial and thereby occasioning injustice. The Judge did not also consider the fact that the Respondent was an admitted defaulter and by ordering the release of the motor vehicle unconditionally, the appellant was left empty-handed despite the fact that he also had rights under the agreements that required to be protected.

Mr. Billing on his part argued that the learned Judge having found that the transactions between the parties were subject to the Hire-Purchase Act, the appellant's action in repossessing and tendering the vehicles for sale, (the provision of section 15 notwithstanding) were illegal, null and void. Those were the special circumstances upon which the Judge could rely on and grant the Mandatory Injunction. Mr. Billing also sought to find support in the case of *Daima Bank Limited and K. H. Osmond C.A No. 82 of 1998* for his complaint that the appellant had further to the interest agreed upon at the commencement of the hiring also continued to charge further interest which was manifestly excessive and unreasonable. But unlike in this case, there was no real evidence of the exorbitant interest placed either before the superior court or before us. On that basis he insisted that we should find that there was no merit in the appeal even on this ground.

I have carefully considered the facts and submissions that were placed before the Judge. Did the learned Judge properly address his mind to the mandatory injunction that he gave? As was stated by Megarry J. (as he then was) in the case of *Shepherd Homes Ltd. vs. Sandham 1971) 1 Ch. 340;*

> "At the end of the action the court will, of course grant such injunction as justice of the case require, but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a Mandatory Injunction will be granted even if sought to enforce a contracted obligation".

I wholly agree with Megarry J.'s view that in the cases of Mandatory Injunction indeed a higher standard is required by way of establishing certain special circumstances before the same is granted. In this case the appellant was exercising a contractual right. It had previously warned the Respondent through several letters. There had been a repossession before. The Respondent was well aware of the consequences of his default. It was stipulated in the agreement that in default of payment the vehicles would be repossessed. Under the contract there was no responsibility placed on the appellant in as far as care for other third parties's goods were concerned. That notwithstanding there had been communication between counsel of the parties calling for the Respondent to off-load the goods from the vehicles just as there was evidence that only one vehicle had goods on it contrary to the Judge's finding. The Respondent decided not to take the offer and off-load the goods thereby mitigating its damages. I am not satisfied that with all these factors, indeed any special circumstances existed to warrant the granting of the mandatory order.

In as far as the issue of the element of interest in the accounts of the appellant is concerned, it was not argued in the superior court nor were we sufficiently directed to such errors in the accounts or improper claims in the appellant's accounts that would have the effect of completely extinguishing the respondent's debt to the appellant. I found no such challenge in any form prior to the repossession.

Clause (8) of the Hire-Purchase agreement also shows that the appellant did not Act without a basis in law. It provided that:-

> "Unless and until all sums due by the hirer (the respondent herein) to the owner (the appellant herein) hereunder shall have been duly paid to the owner and the option contained in Clause (6)(b) hereof shall have been exercised the vehicle goods shall remain the absolute property of the owner (the appellant herein) and the hirer (respondent herein) shall have no right or interest to or in the same other than as a mere bailee thereof".

In these circumstances this argument would have even if placed before the superior court failed.

As a result of the Mandatory order that the learned Judge granted, the vehicles subject matter of the whole action were released. As held in the case of *Cryne & Another vs. Global Natural Resources DIC [1984] 1 ALL. ER 225 .*

> "Where the grant or refusal of an Interlocutory Injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving them judgment against the defendant without permitting the defendant the right of trial.
>
> Accordingly the established guideline requiring the court to look at the balance of convenience when exercising justice or not to grant or refuse an Interlocutory Injunction do not apply in such as case, since whatever the strength of the case, the defendant should not be precluded by the grant of an Injunction from disputing the plaintiff's claim at the trial".

In this case the granting of the Injunction clearly in my view ended the action. The appellant's rights were left unprotected entirely despite the fact that the value of the vehicle was considerable and substantial. This was despite all the misdirections I have alluded to in this judgment and which I have found should have been resolved in favour of the appellant, can it therefore be said that in deciding on the alternative basis as the learned Judge did, that he correctly founded his granting of the Mandatory Injunction on "equity and good conscience"? This by itself and as impressed upon us by Mr. Nagpal is not

a basis for granting an interim Injunction. The Respondent showed us no authority in law for such a proposition. Nevertheless I shall consider whether it was unconscionable for the appellant to have exercised its contractual rights in the manner it did. The pleadings and submissions before us and which I have considered carefully show that save to invoke the protection of the Hire-Purchaser Act the plaintiff has not otherwise impugned the said contract. I have held that the Act does not apply. Thus the respondent's grounds that the contracts were not registered; that the 2/3 of each purchase price had been paid and that the plaintiff is a body corporate and subject to the protection of the Act could not be grounds for injunction. I have also dealt with the issue of the stamp duty. It can be clearly seen that none of those grounds relied on by the respondent challenges the validity of the contract. Instead the respondent sought to challenge their enforceability, but as set out in this judgment none of the grounds is sustainable in law. If there is no challenge to the validity of the contract (and the challenges to their enforceability have been found not to be sound in law) then it cannot be unconscionable for the contracting parties to proceed in terms of the contract. Furthermore in all the circumstances it cannot be said that the applicant had acted in an unconscionable manner or that in "equity and good conscience" it was necessary and proper for the court to interfere with agreed contractual rights and issue the injunction order as was done.

For all the reasons I have given, I find that the learned Judge's discretion in his equitable jurisdiction was wrongly exercised and on this ground as well, this appeal should be allowed. I am satisfied that the learned Judge erred in granting the orders sought on the material before him.

I would order that this appeal be allowed, the orders of the superior court dated 26th November, 1998 be set aside, the respondent's application dated 29th October, 1998 be dismissed and that the respondent do pay the appellant the costs of this appeal and the costs of the application in the superior court.

Dated and delivered at Nairobi this 2nd day of July,1999.

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR