REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 17 of 1993

DIAMOND TRUST OF (K) LTD…….....…….PLAINTIFF

-VERSUS-

CAR & GENERAL (K) LTD……..…….DEFENDANT

RULING

In this case the plaintiff (called Diamond Trust) sued the defendant (called Car and General) to recover Shs. 428,871/30 and interest of 26%. It claims this was the amount still owed to it on the foot of a hire purchase agreement with Four Seasons in respect of a Toyota pick up No. KAB 110M (the vehicle), which was attached and sold in execution of a decree in favour of Car and General. In its defence Car and General contends that it is not liable to the plaintiff since no fraud or conversion was committed in regard to the attachment and subsequent sale of the vehicle.

Background Matters:

By a hire purchase agreement between Diamond Trust and Four Seasons dated 25th March 1991 the vehicle was hired to Four Seasons. Before the hire installments in respect of the vehicle had been fully paid Four Seasons became a judgment debtor in a subordinate court suit which had been brought against it by Car and General, who, subsequently, gave their warrant for execution of that decree to a Mombasa court broker called Kinyua & Company Auctioneers. The Court broker attached the vehicle; on 10th July 1992 Diamond Trust wrote a letter to Car and General in which it said:

Kindly note that the aforementioned vehicle is subject to hire purchase agreement with us, and that there is a substantial amount outstanding against it. As we are the owners of this vehicle kindly instruct your advocates to release it to us.

In their replying dated 14th July 1992 the advocates of Car and General asked for the relevant documents to show that Diamond Trust was the owner of the vehicle as asserted in its letter. But before this letter was answered by Diamond Trust (we are not even sure it was delivered) the vehicle was sold by a public auction which was conducted on the following day namely, 15th of July 1992. It is pertinent to observe here that this auction was advertised in the Kenya Times issue of the same date 15th July 1992.

In its defence to the suit herein Car and General contends that the sale of the motor vehicle was solely caused by the negligence of the Diamond Trust. Firstly, it is alleged that Diamond Trust was negligent in that it failed to terminate the Hire Purchase agreement as soon as it discovered that the vehicle was under

attachment. As I see it, the letter to the Car and General is evidence that Diamond Trust acted promptly and appropriately when it brought to the attention of Car and General that the vehicle it had attached did not at all belong to the judgment debtor (i.e Four Seasons). The second alleged aspect of negligence aspect of negligence of Diamond Trust is that it failed to commence appropriate legal proceedings to establish its ownership of the motor vehicle. From the correspondence exchanged between Diamond Trust and the advocate of Car and General it is conspicuously clear that legal proceedings would have been instituted if Car and General had properly and firmly indicated that it would proceed to sell the car in its bid to recover the sum it had claimed from Four Seasons. But it is clear that there was never such indication. On what basis then would Diamond Trust have presumed that Car and General would not accede to its assertion that it was the owner of the attached vehicle? Moreover, the vehicle was sold to a third party long before Car and General had had the opportunity to examine and consider the documentary material upon which Diamond Trust founded its interest in the vehicle. In those circumstances the allegation of negligence as averred in the defence is entirely untenable. It was not a bona fide assertion. The third allegation of negligence on the part of Diamond Trust is that it had endorsed in the log book that Four Seasons was one of the co-owners of the vehicle. Such endorsement is typical of motor vehicle hire purchase agreements. But an aspect of greater significance is the fact that Car and General does not even argue that it ever saw the log book and had thereby been misled by the endorsement thereon. As a matter of fact, the converse would be construed against it; if it had seen the log book it should have noticed that Diamond Trust was its owner and it would have only acted callously when it purported to attach it in execution of the decree against Four Seasons.

I have no reason to doubt that at the time when the vehicle was attached the hire purchase installments were still in arrears. The plaintiff shows, and, this is not controverted, that a substantial amount was still outstanding. It then follows that by virtue of clause 3 of the Hire Purchase agreement Diamond Trust were still entitled to seize and take away the vehicle from Four Seasons. It also follows that Four Seasons had not yet at all acquired any saleable interest in the vehicle; and so, the vehicle was not legally available for attachment in execution of a decree against Four Seasons.

The sum of the defence to this suit, as I have already shown, asserts that the right of Diamond Trust as the owner of the vehicle was prejudiced or affected by its own negligence. Is this a tenable defence?

The Present application:

By the present application under Order VI, rule 13 dated 12th of March 1993 Diamond Trust seeks and order striking out the defence on the ground that it discloses no reasonable defence and that it is otherwise an abuse of the process of the court. In the course of his arguments Mr. Khanna for Diamond Trust cited several cases. But I will only refer to those which, in my view, are sufficient for the disposal of this application. I therefore do feel warranted to embark on the profound analysis on all the cases to which I was referred. In the case of Fatma Fatin and Others v S.F. Dorbar (1964) E.A 662 the headnote reads:

The defendant having obtained judgment against the husband of the 1st plaintiff extracted a decree and sought to attach the husband's interest in the motor car belonging to the 2nd plaintiff which was on hire to the husband under a hire purchase agreement. The defendant intended to pay the 2nd plaintiff the balance due under the agreement and then upon the seizure and the sale of the vehicle to appropriate any balance towards the satisfaction of the decree. Before the attachment the husband transferred his interest in the car to the first plaintiff and the second plaintiff filed objections to the attachment.

HELD:

any interest the judgment debtor had in the car had no financial value which could be sold. Accordingly there was no interest upon which execution could be levied.

In the course of the judgment court referred to HALBURYS LAW OF ENGLAND vol. 19 at p. 562 para 912 which reads:

Seizing of hirers interest :

The property of a judgment debtor in a chattel which he has let out on hire purchase and to which he is not entitled to possession can not be seized under an execution but if the judgment debtor is the hirer, his interest in the chattel so hired may be seized and sold if the chattel is in his possession and the interest is a saleable one. If the hiring is in the nature that the debtor has not a saleable interest, or if his interest has determined before seizure the sheriff can not legally seize and sell…

The judge also read the following foot note to the passage quoted above:

See title execution vol. 16 p. 52. in practice modern hire purchase agreements provide that the owner shall be entitled to determine the hiring and resume possession of the chattels on the hirer suffering any execution to be levied on them and there is accordingly no interest for the sheriff to sell.

The case in thus valid basis for the contention in the present case that the vehicle should never have been attached in execution of a decree against Four Seasons. By clauses 3 of the Hire Purchase Agreement the owner i.e Diamond Trust had become entitled to retake possession of the vehicle as soon as there was a decree against Four Seasons, by reason of which the attachment of the vehicle became imminent. Moreover, as the authority shows, the judgment debtor – Four Seasons, had not yet acquired any saleable interest in the vehicle against which execution could be levied.

As I have already endeavoured to show the main defence put forward by Car and General to the suit is that Diamond Trust itself had acted negligently and in such unbusiness llike way that it should not recover the value of the car which should never have been attached and sold in execution of the decree against Four Seasons.

This is the kind of defence which was considered in the case of Farquharson Brothers and Co. v King & Co. (1992) A.C. 325

In the course of his forcible judgment Lord McNaughten at P. 335 said:

This defence, in my opinion, has no foundation in principle or authority… The right of a true owner is not prejudiced or affected by his carelessness in losing the chattel however gross it may have been. If I lose a valuable dog and find it afterwards in possession of a gentleman who bought it from somebody whom he believed to be the owner, it is no answer to me that to say that he never have been cheated into buying the dog if I had chaired it up or put a collar on it or kept it under proper control. If a person leaves a watch or a ring on a seat in the park or on the table at a café and it ultimately gets into the hands of a bonafide purchaser it is no answer to the true owner to say that it is his carelessness and nothing else which enable the finder to pass it off as his own. If that be so how can carelessness, however extreme in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him?… A man does not lose his right to his property if he has unnecessarily exposed his goods…but could recover against a bona fide purchaser of any article so lost notwithstanding the fact that his conduct had to some extent assisted the thief.

Having already analyzed the material events which culminated in the sale of the vehicle it is clear that the person who would be guilty of negligence or wrong-doing would be the advocate of a Car and General viz. for failing to stop the auction in order to allow Diamond Trust reasonable time to prove that it was the owner of the vehicle; or else the court broker for failing to give adequate notice of the auction which would have enabled Diamond Trust to institute objection proceedings against the attachment. But at any rate, no blame whatsoever can be leveled against Diamond Trust.

I therefore accede to Mr. Khanna's ingenious and painstaking submissions and hold that the defence in this case is frivolous and vexatious and does not disclose a triable issue.

Accordingly, I strike out and enter judgment for the plaintiff as prayed in the plaint. The plaintiff is also awarded the costs of this application.

Dated and delivered on the 23rd of March 1994.

I.C.C. WAMBILYANGAH

JUDGE