REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT NO 142 OF 1989

THOMAS NYAIBURU NYAKANGO ……..…… PLAINTIFF

VERSUS

DIAMOND TRUST OF KENYA LTD……...… DEFENDANT

JUDGMENT

On 16th June 1988 the plaintiff entered into a hire purchase agreement to purchase motor vehicle registration No KZB 139, Nissan Sahara Pick-up from the defendant. The total purchase price was Kshs 273,400/-. The plaintiff deposited a sum of Kshs 109,000/- and was to pay the balance by instalments of Kshs 8,187/55 per month with effect from 2nd July, 1988. The plaintiff collected the vehicle and started paying the required instalments. He said he was to use that vehicle for his own business. All this information is contained in the plaintiff's exhibit one (exhibit 1).

On 8th August, 1989 some people from a securicor firm known as Opiss re-possessed the vehicle from the plaintiff informing him that they had instructions from the defendant that he had breached one of the conditions of the hire purchase agreement by using the vehicle as a *matatu*. In line with that allegation the plaintiff received a letter from the defendant dated 21st August, 1989 to confirm this breach. This is confirmed by plaintiff's exhibits 3 and 4 produced herein.

However, in another letter dated the same day (21.8.89) the defendant told the plaintiff that they had re-possessed the vehicle due to his failure to meet the instalments as agreed in the hire purchase agreement adding that as a result they had terminated the agreement forthwith.

The defendant's, however, in the same letter gave the plaintiff the option to re-purchase the same vehicle by paying Kshs 108,717.20 plus other charges "that may subsequently accrue." This offer was subject to payment in cash within 28 days from 21.8.89. But attempts by the plaintiff to pay the instalments sometimes later were refused by the defendant where-upon he filed this suit in Court on 25th October, 1989. Attempts to make up instalments after the vehicle was re-possessed are supported by exhibit 7 & 8. In the suit he claimed general damages, costs of the suit and such other relief the honourable Court may deem fit to grant after complaining in vain that the defendant had unlawfully terminated the hire purchase agreement and/or re-possessed the said vehicle.

In a defence filed in this Court on 9th November, 1989 the defendant denied liability and counter-claimed that the plaintiff do pay Kshs 103,624.45 being the balance of the sum due and owing and in connection with the chattel's mortgage. Later the plaintiff filed an amended plaint in which he still claimed for general damages, costs of the suit and any other relief which court may deem necessary to grant.

In his testimony in court the plaintiff stated that at the time of re-possession of his vehicle on 8th August, 1989 his payment of instalments was up to date and that it was after the vehicle was repossessed that he was unable to raise the instalments. He also stated that he had purchased road licence and insurance for the motor vehicle and therefore that he was not indebted to the defendant as at that date. He was actually supported in his evidence by the letter addressed to him by the defendant and dated 21st August, 1989 (exhibit 4) in which the only breach he is alleged to have committed was:-

> "Illegally used as a *matatu*"

Even when the defence witness testified in the case he said that this vehicle was repossessed because it was found being used by the plaintiff as a *matatu* not because he had failed to meet his monthly instalments or any other reason. This information, the defence witness said, was received by the defendant discretely. No evidence was adduced in this case to support the discrete advice to the defendant that the vehicle was being used as a *matatu*.

The defence witness also said that when the plaintiff entered into the agreement to purchase this vehicle he said the he would use it for his own business. To any reasonable person using a motor vehicle for one's own business would surely include using it as a *matatu* if this be his own business. There was no specific agreement that the plaintiff would never use the vehicle in question as a *matatu*.

The defence witness produced to the Court defence exhibit 5 where the plaintiff signed that the vehicle being financed by the defendant would be used by him for transportation of his own goods only and that it would not be used for general cartage, whatever this meant to the defendant. General cartage in this case implies he may be hiring out the vehicle, otherwise using the vehicle as a *matatu* is not hiring it out to other people.

In any case there was no evidence adduced, apart from the discrete advice to the defendant, which, to this Court is hearsay, that the vehicle was found carrying passengers at the time of repossession. There was no independent evidence to support this discrete advice to the defence witness.

Having found that the defendant would not make out a good case on the breach quoted in the letter dated 21st August, 1989 they apparently made up another letter of the same date to say the plaintiff had failed to meet his instalments and therefore that they were terminating the hire purchase agreement forthwith. This Court views this 2nd reason as an after-thought and if the defendants wanted to get out of the mess they would have accepted the arrears of instalments offered even as late as 13th October 1989 but they refused this offer and insisted on holding the vehicle. They later sold it at 120,000/-.

Defence witness even went out to get a reason for terminating the hire purchase agreement by saying there was a letter from Ken/India Assurance Company advising that the cheques the plaintiff had issued had been referred unpaid with remarks "refer to drawer" just to attempt another reason for terminating the hire purchase agreement, yet it was not the initial reason for repossessing the motor vehicle in question!

The reason was illegal use as a *matatu* which this Court discounts as invalid.

Therefore having initially repossessed the vehicle un-lawfully the defendants could not have sold it validly at 120,000/-. Moreover, in the valuation report which was made out by Collin Patrick McNaughton, he placed a value of between Shs 14,000/- to 145,000/- on the motor vehicle. At the same time when the vehicle was advertised for sale the reserve price placed thereon was Kshs 210,000/-. No valuable reason has been given why the reserve prices was not followed or the value given for it by the valuer.

This is a case where the defendant acted in a high handed manner without regard to the interest of the plaintiff. In view of the invalid reason given for repossession of the vehicle on 8th August, 1989, the defence witness did not give any good reason to show that the defendant's security in the vehicle was threatened. The reason that the plaintiff had used the vehicle as a *matatu* to cause repossession of the same was of the defendant's own making otherwise I have found no evidence to support that reason.

On selling the vehicle at 120,000/- when even in the valuation report the same had been described as being in fair condition was a price which I consider as throw away.

I agree with the defence submission that no special damages were pleaded in the plaint and as such no such special damages can be awarded. See *Bullen and Leak*, 12th edition at p 379 and a claim for special damages must be expressly claimed in the pleadings with full particulars of how it is made out.

This is intended to enable the defendant to know not only what is the amount of loss or damages which the plaintiff alleges he suffered but also how such amount is made up or calculated."

This the plaintiff failed to do in this case and cannot come up to claim such special damages in his written submissions and hope to be awarded the same by this Court.

Nevertheless, by the time this vehicle was re-possessed the plaintiff had paid up to 215,884.10 and according to him he had as less as 70,000/- to pay which if this unlawful repossession had not occurred he could have completed the total amount. Thus he was deprived of the vehicle as well as instalments which he had paid. He also said he was using the vehicle for his business which collapsed as a result of the un-lawful re-possession of his motor vehicle. He must therefore have suffered substantial damages for which he should be adequately compensated. In the circumstances and doing the best I can, an award of Kshs 250,00/- in general damages would meet the ends of justice.

I therefore award the plaintiff a sum of Kshs 250,000/- in general damages plus costs of the suit and interest from the date of this judgment.

Dated and delivered at Eldoret this 5th day of October, 1993

S. K. AGANYANYA

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JUDGE