IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GACHUHI, KWACH & OMOLO JJ A)

CIVIL APPEAL NO 159 OF 1994

BETWEEN

CAR & GENERAL (K) LIMITED .....APPELLANT

AND

DIAMOND TRUST OF KENYA LIMITED .....RESPONDENT

(Appeal from the ruling and subsequent decree of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 23rd March, 1994

in

HCCC No 17 of 1993)

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JUDGMENT OF THE COURT

We think this appeal is clearly devoid of any merit. The appellant attached a motor vehicle belonging to the respondent. The attachment was levied on or about the 10th July, 1992. The attached motor-vehicle registration number KAB 110M belonged to Diamond Trust of Kenya Ltd, the respondent herein, but was on hire to a company called Four Seasons Resort Ltd. Car & General (K) Ltd, the appellant herein had obtained a decree from the Court of the Resident Magistrate, Mombasa against Four Seasons Resort Ltd. Armed with that decree, the appellant, through M/s Kinyua & Co Auctioneers of Mombasa, seized the respondent's vehicle. The respondent through its letter dated the 10th July, 1992, immediately informed the appellant that the vehicle belonged to them and not to Four Seasons Resort Ltd. The appellant passed this letter to its advocates M/s Marende & Company Advocates and on the 14th July 1992, those gentlemen wrote a letter to the respondent asking the respondent to provide relevant documents to prove their ownership of the vehicle. The letter reached the respondent on the 17th July, 1992 and the respondent supplied the information on the 18th July,1992. But all this was wasted labour because the vehicle was sold on the 15th July, 1992. It was advertised for sale in the Kenya Times newspaper of the same day, i.e. 15th July 1992.

In those circumstances, it was not surprising that the respondent sued the appellant claiming from it Shs 428,871/30 which was said to represent the aggregate principal amount of the installments due and owing under the hire purchase agreement between the respondent and Four Seasons Resort Ltd. Interest was claimed on that sum at the rate of 26% per annum from 1st January, 1993. In the alternative the respondent claimed Shs 436,000/- by way of damages, that sum being the value of the motor vehicle. The

appellant filed a defence but the respondent immediately moved the High Court under order 6 rule 13 of the Civil Procedure (Revised) Rules for that defence to be struck out on the grounds that it disclosed no reasonable defence, was scandalous, frivolous or vexatious and was otherwise an abuse of the process of the court. The High Court (Wambilyangah, J) obliged the respondent and struck out the defence. After analyzing the conflicting contentions of both sides, the learned judge delivered himself as follows:

> "Having already analysed 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 Car & 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 levelled against Diamond Trust.
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> ...I hold that the defence in this case is frivolous, vexatious and does not disclose a triable issue."

With respect, we would not agree more, The advocates for the appellant were warned that the vehicle was not the property of Four seasons Resort Ltd; the same advocates wrote asking that they be supplied with proof of ownership and even before this could be done, the vehicle had already been sold. The sale was done in flagrant violation of order 21 rule 62 which requires that where movable property is attached and is to be sold, the sale shall not, without the written consent of the judgment debtor, take place before 15 days from the date on which the advertisement of the sale is affixed in the precincts of the court. The hand-bill advertising the sale and which it is alleged was fixed on the court notice board was dated the 8th July, 1992. In the face of this kind of evidence, we cannot see what possible defence was open to the appellant. Indeed the only conclusion open from these facts is that the appellant was rushing the sale to defeat any claim that the respondent was entitled to make.

On the question of what judgment was given, we are satisfied the judge could only and must have entered judgment for the sum of Shs 428,871/30 which was the sum claimed in the plaint. The other claim for Shs 436,000/- was in the alternative and could only be awarded if the main claim had failed. On the issue of interest the plaint claimed 26% per annum and the hire purchase agreement provided for interest "at the ruling rate" —clause 2(c) of the hire-purchase agreement. It is clear to us that the rate of 26% per annum claimed was "the ruling rate". Interest to be paid on a decretal sum is a matter for the discretion of the trial judge. In the end, we would only clarify that the judge entered judgment for the respondent in the sum of Shs 428,871/30 with interest thereon at 26% per annum as claimed in the plaint. Otherwise this appeal fails and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 10th dayof July, 1995 .

J.M GACHUHI

JUDGE OF APPEAL

R.O KWACH

JUDGE OF APPEAL

R .S .C OMOLO JJ A

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.