National Industrial Credit Bank Ltd v Omokaya (Civil Appeal 19 of 2019) [2024] KECA 126 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 126 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 19 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 9, 2024

BETWEEN

NATIONAL INDUSTRIAL CREDIT BANK LTD ..... APPELLANT

AND

SAMUEL ORINDO MANANI OMOKAYA ..... RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu (Maina, J.) dated 9th March 2017 in HC. COMM. CASE NO. 13 OF 2006)

JUDGMENT

1. This is an appeal from the judgment of Kisumu High Court (Maina, J) in Commercial Suit No. 13 of 2016 delivered on 9th March 2017, where the appellant, National Industrial Credit Bank Limited, had sued the respondent, Samuel Orinda Manani Omokaya, claiming the sum of Kshs 13,935,747.70/-; interest at the contractual rate of 30% from the date of the suit till payment in full; costs of the suit plus interest thereon at court rates. The respondent had denied liability, and upon hearing the matter, the High Court dismissed the claim with costs awarded to the respondent. The appellant was dissatisfied with the outcome, and preferred an appeal against it in its entirety. This is what is now before us.

2. The dispute stemmed from the appellant's claim against the respondent arising from 3 hire purchase agreements which were presented in the plaint as follows:

    i. That pursuant to a hire purchase agreement dated 10th December 2001, between the parties (HP3-5- 310-000844), the appellant financed the respondent a sum of Kshs 5,931,692/- for the purchase of Motor Vehicle Registration Number KAN xxxY (Scania Bus); to which the Respondent agreed to settle the loan in 23 monthly instalments of Kshs 247,160/- each, and a final instalment of Kshs 248,512/= payable by 10 December 2003.

    The respondent defaulted in payments of the facility advanced on their due dates; eventually falling into arrears which as at 1st August 2006, stood at Kshs 3,055,321.42/-

ii. The parties had entered into another hire purchase agreement dated 24th April 2002 (HP3-5-310- 000472), where the appellant further financed the respondent a sum of Kshs 1,553,367/- to purchase Motor Vehicle Registration Number KAP xxxK (Toyota Hilux Pick up); the respondent agreed to settle the loan in 35 monthly instalments of Kshs. 43, 150/= and a final installment of Kshs. 44,617/= payable on 7th May, 2005.

The respondent defaulted in payment of the facility advanced on their due dates and as a result he fell into arrears which by 1st August 2006, stood at Kshs 246,301.10/=.

iii. The appellant, pursuant to a Hire Purchase Agreement dated 10th May 2002 (HP3-5-310-000045), further financed the respondent a sum of Kshs 5,875,896/- for the purchase of Motor Vehicle Registration Number KAP xxxN (Scania Bus); the Respondent agreed to settle the loan in 23 monthly instalments of Kshs 244,830/= each and a final instalment of Kshs 246,306/- to be paid by 13th May 2004.

The respondent defaulted in payment of the facility advanced on their due dates and as a result he fell into arrears which by 1st August 2006, stood at Kshs. 3,800,189.84/=.

3. The appellant, realizing that the respondent had fallen into arrears on all 3 agreements, then invoked what it termed as the express and implied terms of the banking facility, and amalgamated all 3 accounts into one current account on 1st August 2006. Consequently, the three loan accounts were amalgamated with the respondent's total outstanding amounts being Kshs. 7,401,543.15/-; and which continued to accrue interest at the rate of 30% per annum until payment in full. It was thus the appellant's complaint that as at 31st October 2010,

the Respondent's outstanding balance was Kshs 13,935,747.70/- with an accompanying ever present contractual interest rate of 30% per annum until payment.

It was this indebtedness that necessitated the institution of the suit by a plaint dated 5th September 2006 and amended on 14th October 2011.

4. The appellant avers that while the respondent made partial deposits into the current account, the same did not reduce the outstanding debt, that the respondent breached the condition to pay in installments despite several reminders and that as at 1st October, 2010 the amount owing was Kshs. 13,935,747.70 a sum upon which the appellant claimed interest at the contractual rate of 30% until payment in full.

5. The respondent, while denying the appellants claim in totality, conceded entering into the three hire purchase agreements to an aggregate sum of Kshs.3,770,123.17 only as at 29th December 2005, and not Kshs.4,810,000/= , as alleged by the appellant; that he promptly and punctually made the installment payments, on their due dates. He had pleaded in the alternative and on a without prejudice basis, that the only time he fell in arrears was in the year 2004, culminating into the repossession of the Auto Bus Registration Number KAP xxxN, Scannia F94; that at the time of the repossession, the subject loan had substantially been paid, consequently, the repossession was illegal and thus terminated the appellant's claim; that the contractual interest was not 30% per annum;

was/is illegal and if it was debited into his account, then the same was done without authority and in gross contravention of the provisions of the Banking Act.

6. At the hearing, the appellant's only witness at the hearing, Edwin Mutuma Mbaabu (PW1), a Legal Officer at the appellant Bank, exhibited the three hire purchase agreements, the statement of accounts, notices and letters sent to the respondent when he defaulted. It was his evidence that on 4th December, 2004 KAN xxxY was repossessed and valued by Filex Assessors and Maka Automotive works and Assessors and both reports are dated 12th January, 2005, and both assessors charged Kshs4,500/= which

was paid. The vehicle was then advertised on 4th and 5th October 2005 in both the Daily Nation and Standard Newspaper, and the same was only sold on 14th November, 2006. The storage charges had accumulated to Kshs. 165,952/=. KAP xxxN was also repossessed but could not be sold as there was an objection by a third party to whom it had been sold at a public auction pursuant to a court order in Migori Senior Principal Magistrate's Court Civil Case No. 1305 of 1999. By then the storage charges for the two years had accumulated to Kshs. 165,952/-; that the motor vehicle registration KAP xxxN was involved in an accident while in the respondent's possession, thus could not be repossessed. This witness disputed the claim that the agreements were covered by the Hire Purchase Act, maintaining that the interest levied was contractual.

7. With regard to motor vehicle registration KAN xxxY the respondent was insistent that he had made 20 installments of 250,000/=, the last one being on 5th September, 2003; that at the point that the appellant repossessed the said motor vehicle on 25th October, 2003, there was only one month's default; and this prompted the respondent to cease payments. He lamented that the vehicle was sold at an unreasonable price of Kshs 300,000/- taking into account the valuations done by Phoenix Assessors and Maka Automotive Works; and that even the proceeds of sale were not credited to his account; and that the proceeds of the sale were not credited to his account.

8. For the 2nd motor vehicle registration KAP xxxN, the respondent contended that he had paid 15 instalments, yet the vehicle was also repossessed on 25th October, 2003. For the 3rd motor vehicle KAP 406K, the respondent avers that he paid 23 out of 24 installments, when the car broke down and he could not repair it; that by the time the Pick-up broke down only one installment of Kshs. 44,670/- was due. The car stayed in the garage until 2008 when it was attached by an auctioneer. The appellant then repossessed it and vested to a 3rd party who purchased it at an auction.

9. It was the respondent's contention that all the buses having been repossessed, he closed his current account, as such the accounts were not available for amalgamation; he denied owing the amount claimed, arguing that, had the bank credited his account that would have cleared his indebtedness. The

   respondent argued that whatever payments he made were in the statement provided by the appellant, that he had never defaulted although there were times his payments were late, and that he always regularized his account whenever he received a demand.

10. The respondent conceded that after repossession he made no attempt to make the monthly installments and that a sum of 300,000/= had been credited into his amalgamated account in respect of only one vehicle.

11. The trial court noted that the 3 agreements had similar terms save for the type of vehicles and amounts concerned. The agreements provided for a late payment interest rate of 30% per annum, as per clause 3.5 and that the interest levied on the principal sum was 11.08% per annum as per clause 3.4. The learned trial Judge noted as follows:

> " In all three agreements the interest that was to be levied on the principal sum was 11.08% per annum. The same is referred to as a specified flat interest rate. However, the agreements also provide for a late payment true interest rate of 30% per annum. In the terms and conditions interest is stipulated at paragraph 3.4 while late payment is stipulated at paragraph 3.5 which states •
>
> "3.5 Late payment

1. The hirer shall pay interest to the owner at the Late Payment Rate specified in the Schedule on all overdue payments of installments such interest to accrue on a daily basis after as well as before judgment from the due date until payment in full.

2. The Hirer shall pay interest to the owner at the Late Payment Rate specified in the Schedule on all other sums due to the owner under this Agreement such interest to accrue on a daily basis after as well as before judgment from the date demanded until payment in full."

The rate of interest specified in the schedule is 30%...It was indeed a term of the agreements that a late payment interest of 30% per annum would be levied."

12. The court noted that the respondent in his testimony as well as during cross examination admitted that sometimes he defaulted; that he also made late payments; and that once the vehicles were repossessed, he stopped making payments. Further, that under clause 7.2, the agreements provided for termination by either party, and that one such ground was breach in default of payment of instalments; and clause 8 also provide for the liability of the hirer, i.e. the respondent

defendant, after such termination; to which the respondent agreed to and appended his signature; and as such was bound by the terms thereto. In addition, the learned Judge pointed out that the agreements were not subject to the Hire Purchase Act as the Hire Purchase Act does not apply to goods whose value is in excess of Kshs.4 Million (see Section 3(1) of the *Hire Purchase Act*), so the respondent was bound by the terms of the agreements.

13. In considering whether the appellant had proved that the respondent owed the sum of Kshs. 13,935,747.702, the learned Judge took into account the evidence that as at 4th December 2004 when Motor Vehicle registration KAN xxxY was being repossessed, the respondent owed a sum of Kshs. 2,886,818. 42, whilst observing that the letter from the Bank to the respondent advising him of the repossession, however indicated the balance as Kshs. 2,648,973/-. Drawing from Paragraph 8 of the agreement which contained the formulae by which the amount payable upon termination was to be calculated, the learned judge found that the respondent was, in the first instance, liable to pay any defaulted instalment due with interest as agreed; any other sum overdue such as bank charges under the agreement with interest, any expenses and costs incurred by the owner in storing, insuring and/or recovering possession of the vehicle(s) and lastly the cost of all repairs required to be done to the vehicles to put them in a condition consistent with the performance of the respondent under the Agreement. The learned Judge also observed that the agreement also provided that:

> "... as compensation the owner was to be paid the balance of the Hire Purchase Price of the Goods less the aggregate of the instalments previously paid; the overdue installments due under the agreement up to the date of termination; and the proceeds of sale of the goods if repossessed and sold and if not sold their value upon a valuation by an expert. The Hirer was then liable to pay interest at the Late Payment Rate in this case 30% on the amount of the agreed compensation payable under Clause 8.5 above from the date of termination until the date of payment."

14. The court noted that it was not clear how the sum of Kshs. 13,935.747.70 sued for was computed; and whether in fact the said sum was computed in accordance with clause 8 of the hire purchase agreements; that other than for the Pick-up Registration No. KAP xxxK the appellant's witness did not in fact tell the court what instalments had been previously made, and which ones were due for termination; that neither the schedule nor the terms of the agreements stated the dates that the instalments were payable, and merely stating when the 1st and last installments were due.

15. The trial court found that the amount claimed was calculated outside of the terms set out in clause 8; in particular the requirement for valuation before a sale; observing that upon termination the respondent was entitled to a credit of the proceeds of sale of the goods repossessed and sold; further the respondent was to be compensated on the balance of the agreement less any instalments paid, overdue installments, proceeds of sale; and if the goods were not sold then their value upon valuation.

16. The court was of the view that the respondent, as the hirer, was entitled to a valuation done within a reasonable time frame after repossession; and that if the appellant decided to retain the vehicle causing it to depreciate, the respondent could not be blamed. The court found that in as much as the respondent owed the appellant, the appellant had not demonstrated that the respondent owed the sum claimed in the plaint. The learned Judge thus held that the appellant had not proved its case on a balance of probabilities, thus dismissed it.

17. This being a first appeal, as has been reiterated in several decisions of this court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 31 (1) (a) of the *Court of Appeal Rules*. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

18. The Appellant challenges the ruling of the High Court on 10 grounds of appeal, which it condensed to the following:

    a. Whether it was contractually agreed that a 30% interest be charged on late payments of agreed instalments?

    b. Whether the respondent defaulted in making the repayments?

    c. Whether the respondent owed Kshs. 13,935,747.70/ as at 29th December, 2005 which amounts continued to accrue interest until payment in full?

19. This appeal was canvassed by way of written submissions, but as at the date of hearing, we only had the appellant's submissions on record. It is apparent from the finding of the trial court that the 30% interest on late payment, respondent's default to make late payment on the instalment are not disputed. The contested issue is whether the appellant proved the amount owing as claimed for in the plaint. In its judgment the trial court was of the opinion that both parties had signed the agreements, and both parties were bound. The trial court also noted that the appellant failed to do valuation in time or any valuation at all contrary to clause 8, and as such without the appellant leading sufficient evidence to prove the amount owed.

20. The appellant contends that the outstanding amounts were computed in accordance with the agreements. We are persuaded that this cannot be the correct position, as it has been established by the appellant's own admission that there was no requirement for valuation to be done immediately before the sale (in contravention of clause 8); and some of the proceeds had not been credited to the respondent's account. We take note that the appellant credited 300,000/- to the respondent's account but the two valuation reports show that the vehicle was worth Kshs. 900,000/- and Kshs. 1,200,000/- at forced sale value. This is in regard of KAN xxxY which was repossessed on 4th December, 2002 and was only sold in November, 2006, just a few months shy of two years since repossession. We find that the trial court was correct in its finding that valuation ought to have been done within reasonable time after repossession, and that the appellant's choice to take almost two years before selling the same was unreasonable and as such any storage charges should not have been lumped on the respondent.

21. The appellant further contends that for the court to delve into the issue of computation of the amounts due and the specific dates as to when the instalments were due was overstepping its role. This goes further to show the inadequacy of the appellant's explanation as to the sum claimed in the plaint. If the court did not interrogate this, then how would it make a sound finding on the amount owing? The appellant is correct in stating that the duty of the court was to interpret the agreement between the parties. There is no way the court can do that without going into detail, especially when the amount in question was colossal.

22. This Court is of the view, in agreement with the findings of the trial judge, that the amount claimed by the appellant was calculated outside the terms of clause 8 of the agreement. Clear evidence has been led that the appellant, by their own testimony that they believed that there was no legal requirement for immediate valuation. Clause 8 is clear that on termination of the agreement the respondent was entitled to credit of proceeds of sale of the goods repossessed and sold, and if not sold, their value as certified by a valuer. The only vehicle that was sold was KAN xxxY. As already stated, the said vehicle was repossessed and sold almost two years later and at a very low price of Kshs. 300,000/- despite the forced sale value by two valuation reports being placed at Kshs. 900,000/= and 1.2M. This Court agrees that the storage charge for the two years ought not be lumped on the respondent. According to clause 8, upon termination the respondent was to be paid the balance of the hire purchase price of the goods, less previous installments paid, less the overdue instalments. The respondent's account was then under clause 8 to be credited with the proceeds of sale, and if not sold then the value upon valuation by an expert.

23. It is not disputed that only one vehicle was sold, being KAN xxxY. The remaining two vehicles from the appellant's own testimony were not sold for one reason or another. These remaining two vehicles were also not valued in lieu of sale as per clause 8. We are of the view that the first vehicle being sold for was less than the forced sale value, as well as the time it took for sale, and the remaining two vehicles not having been sold and subsequently not valued, the appellant could not on a balance of probabilities show the amount owed by the respondent.

24. In our view, the greatest undoing of the appellant is that it computed what was owing by the respondent outside of the provisions of clause 8, thereby failing to reflect the true picture of the amount owing. The statements then provided by the appellant clearly do not show the deductions and credits to the respondent's account, and we concur with trial court that the production of statement of account showing the amount owing by the respondent without these deductions and credits did not aid the appellant in proving its case.

25. Ultimately, for the reasons set out, we find the appellant's appeal lacks merit and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR