



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, OUKO & GATEMBU, JJ.A)

CIVIL APPEAL NO. 37 OF 2006

BETWEEN

MBURU GATHEE T/A GATHEE ENTERPRISES APPELLANT AND

NATIONAL INDUSTRIAL CREDIT BANK LTD. RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Kasango, J.) dated 3rd October, 2005

in

MILIMANI H.C.C.C. NO. 881 OF 2000)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Mary

Kasango, J) delivered on 3rd October 2005, dismissing the appellant's claims for Kshs. 16,870,000.00 made up of loss of income, value of motor vehicle, loss of insurance premiums, accident repair charges, assessor's fees, legal fees, travelling and accommodation expenses; damages for wrongful detention or repossession of vehicle; an order for taking accounts and damages for breach of contract; and punitive/exemplary damages for wilful breach and contempt of court order.

2. Those claims were based on the grounds that the respondent breached the terms of a Hire Purchase Agreement entered into between the parties on 29th February 1996. The learned trial judge also dismissed the respondent's counterclaim for Kshs. 2,696,892.25 and interest at the rate of 39.25%, which according to the respondent remained outstanding and due from the appellant upon termination of the Hire Purchase Agreement and subsequent sale of the motor vehicle that was the subject of the Hire Purchase Agreement. There is however, no cross appeal by the respondent.

3. Our task in this first appeal is to reconsider the evidence, evaluate it, and to draw our own conclusions bearing in mind that we have neither seen nor heard the witnesses and making due allowance in that respect. As the Court put it in **Kenya Ports Authority versus Kuston (Kenya)**

Limited, (2009) 2EA 212: “ the responsibility of the court is to rule on the evidence on record”. In the often cited decision in **Selle and Another vs. Associated Motor Boat Company Ltd and others, [1968] E A 123** this Court held that an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally. Guided by those principles, we will first consider the background against which the appeal arises.

Background

4. In an amended plaint dated 9th February 2001 and filed in the High Court on 13th March 2001 the appellant pleaded that the parties entered into a Hire Purchase Agreement dated 29th February 1996 under which the respondent let to the appellant on hire purchase motor vehicle registration number KAG 664P. The hire purchase price of Kshs. 6,362,437.00 was payable by the appellant to the respondent by 35 equal consecutive monthly rentals or installments of Kshs. 181,420.00 commencing on 1st April 1996 and a final installment of Kshs. 182,202.00 that included the option to purchase the vehicle.
5. The appellant complained that despite having paid installments amounting to Kshs. 6,588,726.00, the respondent wrongfully repossessed the vehicle on two occasions. First on 12th May 2000 for an alleged outstanding amount of Kshs. 1,085,670.90 which amount included disputed penalty interest charges and other charges; subsequently on 6th July 2000 despite a court order restraining the respondent from repossessing the vehicle and interfering with the appellant’s business; and despite an order given by the court on 30th June 2000 directing the taking of accounts.
6. The appellant further asserted that the respondent secretly sold the vehicle at a throw away price of Kshs. 1,400,000.00. Based on those complaints, the appellant sought judgment against the respondent for Kshs 16,870,000.00 in addition to the other remedies to which we have referred. The claim for Kshs 16,870,000.00 was particularized in the amended plaint as follows:
 - a. Loss of income/hiring charges from Plaintiff’s contracts at Kshs. 30,000/= per day for 90 days from date of repossession to date of sale. Kshs. 2,700,000/=
 - (b) Value of the motor vehicle (lorry) Kshs. 7,000,000/=
 - (c) Loss of insurance premiums paid on lorry Kshs 1,050,000/=
 - (d) Accident repair charges Kshs. 3,805,000/=
 - (e) Assessors fees Kshs. 315,000/=
 - (f) Legal fees Kshs. 1,750,000/=
 - (g) Travelling and accommodation expenses Kshs.250,000/=
7. In its amended defence and counterclaim filed in court on 3rd April 2001 the respondent pleaded that at the request of the appellant (who was allegedly experiencing financial problems) the repayment of the monthly rentals or installments under the Hire Purchase Agreement was varied and rescheduled and the hire period extended to 45 months to end on 25th March 2001; that in breach of the Hire Purchase Agreement the appellant did not regularly and punctually make payment of the hire rentals in accordance with the Agreement.

8. The respondent further averred that as at 28th February 2001, the appellant had an outstanding balance on account of the principal amount in the sum of Kshs. 538,383.25 and past interest of Kshs. 2,158,509.00; that the respondent exercised its rights under the Hire Purchase Agreement to repossess the vehicle; that the appellant was duly given notice of default prior to the repossession; that the termination of the Hire Agreement was not in breach but in conformity with the court order given on 15th June 2000; that the appellant refused or neglected to have the accounts reconciliation exercise in terms of the court order given on 30th June 2000; that the sale of the vehicle was not undertaken secretly as it was duly advertised and the appellant had due notice and was invited to take part.
9. According to the respondent, after the sale of the vehicle, the appellant remained indebted to it for the principal amount of Kshs. 538,383.25 and past interest of Kshs. 2,158,509.00 as already indicated for which the respondent counterclaimed.

The respondent accordingly denied the appellant's claims.

10. After hearing the evidence and considering the closing submissions by counsel for the parties the learned trial judge took the view that neither party proved its case and proceeded to dismiss the claim and the counterclaim. Aggrieved, the appellant lodged the present appeal.

The appeal and submissions by counsel

11. Although the appellant set out nine grounds of appeal in his memorandum of appeal the main questions are whether the Hire Purchase Act, Chapter 507 of the Laws of Kenya applies to the hire purchase transaction between the parties herein; whether the appellant established breach of the Hire Purchase Agreement on the part of the respondent; whether the learned trial judge considered and determined all the issues placed before her for determination and whether the learned judge erred in dismissing the appellant's suit.

12. According to counsel for the appellant Mr. Jaoko the learned judge did not address all the issues that arose from the pleadings; the judge only considered the question whether two heads of claim had been proved; the repossession of the vehicle by the respondent was illegal, unlawful and unwarranted by reason of section 15 of the Hire Purchase Act Chapter 507 of the Laws of Kenya which restricts the right of the owner of goods to enforce the right to recover possession of goods from a hirer where two-thirds of the hire purchase price under a hire purchase agreement has been paid; based on the evidence the appellant paid a sum of Kshs. 7,136,567.00 yet the total hire purchase price or value was Kshs. 6,530,902.00; on the strength of the decision of **Credit Finance Corporation Limited vs. Abdul Aziz Lanani, Civil Case No. 284 of 1963 EA 317** the right to sell goods conferred on the owner of goods under a Hire Purchase Agreement is not absolute; and that in the instant case there was no outstanding installment to warrant the action taken by the respondent.

13. Counsel also referred us to section 29 of the Hire Purchase Act Chapter 507 of the Laws of Kenya, which contains further limitation on the right of enforcement by the owner of goods under a Hire Purchase Agreement by reason of the hirer's failure to carry out any obligations under a hire purchase agreement.

14. Counsel further contended that there was a dispute between the parties regarding the amount due under the hire purchase agreement; that an order for the parties to reconcile accounts was given by the court on 30th June 2000; that despite non compliance with that order the respondent went ahead to sell the motor vehicle; that by the time the respondent sold the vehicle, the time for payment had been extended to March 2001 and consequently the repossession and sale of the vehicle was unlawful. Had the learned judge directed her mind to all the matters, counsel urged, she would have found the respondent to be in breach of the Hire Purchase Agreement.

15. Opposing the appeal Mr. Nephath Momanyi Kiboi for the respondent submitted that based on the

pleadings, the appellant was seeking compensation for loss of user of the vehicle yet there was no proof of that loss presented before the trial court; that the documents the appellant produced did not include records of income derived from the vehicle and that the claim for loss of income was speculative without any record of the income claimed.

16. According to Mr. Kiboi, the provisions of the Hire Purchase Act relied upon by the appellant have no application to the Hire Purchase Agreement in this case because that Act does not apply to all hire purchase transactions or agreements but applies to only those agreement where the hire purchase price does not exceed Kshs. 500,000.00; that in the instant case the hire purchase price was far in excess of that amount and the transaction is therefore not controlled.

17. Mr. Kiboi stated that the appellant conceded during cross examination that he was not consistent in the repayment of the hire rentals; that the account was re-scheduled at the request of the appellant extending the duration of the agreement with the result that instead of the account ending in 1999 it was to end in March 2001; that the respondent did reconcile accounts and the reconciled statement of account is part of the record; that when the vehicle was repossessed, the appellant was in arrears and the respondent was therefore entitled to repossess the vehicle under the terms of the agreement.

18. Counsel urged that under the agreement the respondent was entitled, upon termination, to sell the vehicle and recover its costs if the appellant did not pay up. Counsel concluded his address by saying that in his amended plaint, the appellant sought damages and did not seek restoration of the vehicle and that under the agreement the appellant was under an obligation during the hiring to insure the vehicle and the claim for insurance premiums paid is not maintainable. With that counsel urged us to dismiss the appeal.

Determination

19. We have considered the appeal and submissions by learned counsel. Based on the memorandum of appeal and the arguments by counsel, there are essentially two issues for determination in this appeal. The first issue is whether the learned judge erred in adjudicating only on two issues and disregarding other critical issues. The second issue is whether based on the evidence the learned trial judge reached the correct decision.

20. On the first issue Mr. Jaoko argued, and Mr. Kiboi did not contest, that the learned trial judge in her judgment adjudicated upon the questions whether the appellant proved the claim for loss of use and the claim for insurance premium and disregarded other issues that formed the backbone of the appellant's case. We have reviewed the pleadings and the evidence and we think there is merit in that complaint.

21. When rendering her judgment, the learned trial judge took the view that only two issues required determination. It is necessary to reproduce at length what the learned judge stated in her judgment:

“Considering the evidence adduced before me there are two issues that arise. The first is whether the plaintiff has proved his claim for loss of user and for insurance premium.

The second issue is whether the defendant has proved its claim for counter claim of Kshs. 2,696,892.25.

In respect of the first issue I find that the plaintiff has fallen short of the burden of proof. The plaintiff in evidence stated that he had lost the use of the vehicle for 90 days. He proceeded to say that he earned Kshs. 700,000.00 per month. In support of that he produced two-payment voucher of a company called Bonston Industries Ltd. Those vouchers were for a period of March, April and February 2000. Those do not suffice to shift the burden. It was necessary for the plaintiff to produce statements of account to indeed prove that, that was the income on

average that he attained every month; for all we know the vouchers produced could be the only months that the defendant obtained business. They certainly did not suffice. The plaintiff's claim for insurance is not understandable. He is not claiming the loss of the vehicle but he claims the refund of insurance he paid when he had the use of the vehicle. That claim is not sustainable. The plaintiff in submission stated that his claim for loss of a consignment on the day of repossession valued at Kshs. 1,085,670.90, was not denied by the defendant in its defence, and accordingly the same should be granted. That position is not correct for indeed the defendant did not even have to tender evidence on the same but the plaintiff is on the other hand obligated to prove that claim. In other words the plaintiff had to prove that loss whether or not the same was denied by the defendant. That claim fails.

On the second issue the parties, accept that the plaintiff's accounts as rescheduled in 1997. The defendant claims that the plaintiff was indebted to it as at 28th February 2001 Kshs. 2,696,892.25. The defendant however did not prove this claim. The statements produced by the plaintiff do not reflect the stated amount. The defence witnesses did refer to a statement of account, but that was not produced in evidence, it was only marked for identification. That being so the defendant's claim fails.

The end result is that both the plaintiff's and defence cases fail and are hereby dismissed. Each party shall bear their own costs."

22. It is immediately clear from that extract of the judgment of the High Court that in as far as the appellant's case was concerned, the learned trial judge addressed herself to the questions whether "the plaintiff proved his claim for loss of user and for insurance premium." The learned judge did not substantively address the question whether the respondent breached the Hire Purchase Agreement.

23. Based on the pleadings, it is clear that the appellant's cause of action was premised on alleged breaches of the terms of the Hire Purchase Agreement. Indeed the thrust of the evidence presented to the court by the appellant was aimed at demonstrating that the respondent was in breach of the Agreement by repossessing and selling the vehicle. An inquiry as to whether the respondent breached the Agreement was therefore a necessary exercise that the trial judge ought to have undertaken in her judgment before addressing the questions of loss that the appellant allegedly suffered as a result of the claimed breaches. There is therefore merit in the appellant's complaint that the learned judge erred in failing to address all the issues that required determination.

24. We must therefore determine, based on the evidence on record, whether on a balance of probabilities the appellant established breach of the agreement on the part of the respondent. In doing that, we will in effect be addressing the second issue in this appeal, namely whether the learned trial erred in the decision she reached.

25. Counsel for the appellant argued before the trial court and before us that the actions by the respondent of terminating, repossessing and selling the vehicle were in breach of the Agreement to the extent that the respondent was not legally entitled, under sections 15 and 29 of the Hire Purchase Act to repossess the vehicle. Counsel for the respondent on the other hand maintained that that Act has no application to the transaction under consideration.

26. It is important therefore to determine whether or not the Hire Purchase Agreement in this case falls within the statutory control of the Hire Purchase Act, Chapter 507 that regulates certain aspects of hire-purchase transactions. The preamble to the Act makes it clear that the Act makes provision "for the regulation of certain hire-purchase agreements." Section 3 of the Act provides that the Act applies to and in respect of all hire purchase agreements entered after the commencement of the Act:

"...under which the hire-purchase price does not exceed the sum of four million shillings or such other higher or lower sum as the Minister may after taking into account market

forces from time to time prevailing, prescribe other than a hire purchase agreement in which the hirer is a body corporate...”¹

27. Although there was controversy in the course of trial between the parties regarding what the hire purchase price under the Agreement was, based on the appellant’s pleading at paragraph 4 of the amended plaint (which was admitted by the respondent in its amended defence), the hire purchase price under the Agreement was Kshs. 6,362,437.00. By reason of section 3 of the Act therefore the hire purchase agreement in this case is not subject to the Act.

28. The point of reference for purposes of determining whether the respondent was in breach of the Agreement is the Agreement itself. Under clause 2.2 of the Agreement, the appellant was under an obligation to “*pay the rentals punctually and without previous demand...*”

29. Clause 7.1 and 7.2 of the Agreement which dealt with termination by the owner stipulated that:

“ 7.1 The owner may on the happening of any of the events specified in clause 7.2 below

¹ The monetary limit as at 29th February 1996 when the Hire Purchase Agreement in this case was entered into was lower. The current limit was introduced by Act No. 7 of 2007

by notice in writing terminate the hiring and this Agreement and thereupon this Agreement and the hiring thereby constituted with the consent of the owner and, subject to the provisions of clause 8.2 below to the owner’s right to re-take possession of the Goods and to any pre-existing liabilities of the Hirer hereunder, neither party shall have any rights against the other

7.2 The following are the events referred to in clause 7.1 above:-

- i. any Rental or other unpayable hereunder by the Hirer to the owner remaining unpaid after the expiry of 14 days of becoming due;***
- ii. a breach by the Hirer of any of the provisions of this Agreement;***
- iii. the Goods being, in the sole opinion of the owner in jeopardy.”***

30. Contractually therefore, the respondent would be within its rights to terminate the hiring by reason of default or breach by the appellant to pay the rentals under the Agreement. In that regard, the learned trial judge found that the appellant defaulted in making rental payments. In the judgment the learned judge stated:

“On being cross examined by defence counsel the plaintiff accepted that he was not regularly (sic) in his remittance of his monthly installments. He accepted that he sometimes delayed in remitting the installments, whilst at other times he accepted he did not make any payment.”

31. We have ourselves reviewed the evidence. Whilst in his pleading the appellant asserted that he liquidated the debt, under cross-examination he readily accepted that he defaulted. Sample the following statements. “*There is a time I delayed payment. I did not pay sometimes as stipulated.*” “*If I did not pay I went to them and explained why I had not paid so they gave me more time to pay.*” “*In my payments, there were time I delayed but I went to defendant to explain my financial position. I was not making regular payment.*” “*On 19th*

June 1997 I wrote to defendant asking for rescheduling of account because of arrears. The account was rescheduling (sic). I went on to pay the loan.” “*What was making me not to be regular was economy and none payment by customers.*”

32. Indeed in his letter dated 19th June 1997 that was produced as an exhibit, the appellant made reference to outstanding arrears and requested for a reduction in the monthly rental amounts from Kshs. 181,420.00 to Kshs. 120,000.00 “to avoid delayance (sic) of the loan repayment.”

33. The defence witness Kenneth Kinuthia Kariuki a legal assistant at the respondent bank took the court through the statement of account produced before the court and was able to demonstrate that even after the rescheduling the appellant continued to default in the payment of the rentals precipitating the enforcement action by the respondent. The testimony of the witness which the learned trial judge accepted and which we have no reason not to accept was that the last payment the appellant made was on 24th March 2000; that the appellant was not regular in paying the monthly hire rentals; that the respondent issued notice of default to the appellant and collection/repossession orders. In the words of the witness:

“We issued default notices dated, 21st March, 1998, for arrears of Kshs. 190,294.00 dated 13th March, 2000 for arrears Kshs. 113,119.90. We also stated that the past due interest Kshs. 743,036.00. We had 3rd notice of default 12th April, 2000 for arrears Kshs. 135,509.90 further indication paid 1,774,058.00. Thereafter we finally issue collection repossession order dated 4th May, 2000. Addressed to Plaintiff. As of that date we did reposses the vehicle. After repossession the Plaintiff applied for court order to release the vehicle.

I am looking at Plaintiff Exhibit No. 3 is the order I referred to. Following that order we released the vehicle in compliance. They took possession of vehicle (P1) after complying with order we repossessed vehicle once again. We were served with the ruling of the court dated 15th June, 2000, (reads the last paragraph).

The Plaintiff did not pay arrears after release. The vehicle was repossessed, we first released on 21st June, 2000. I cannot remember the date of repossession. The defendant drafted a letter dated 17th May, 2000 to plaintiff and we informed Gathee Enterprise that their vehicle had been repossessed due to their failure to pay the hiring instalments. They were given 14 days to pay the full balance of 2,680,709.90 together with repossession storage charges and any other additional charges.”

34. Based on the above evidence, we are therefore not satisfied that the appellant established on a balance of probabilities breach of the agreement on the part of the respondent or that the enforcement of the respondent’s rights under the Agreement was in breach or contempt of a court order. In our view, the appellant’s actions were in accordance with the terms of the hire purchase agreement.

35. Having failed to establish liability on the part of the appellant, the appellant’s suit was liable for dismissal. And even if breach had been established, and in our view it was not, we concur with the finding of the trial judge that the loss claimed was not proved. The loss the appellant allegedly suffered was particularized under paragraph 12 of the amended plaint which is reproduced at paragraph 6 of this Judgment. It was incumbent on the appellant to prove that loss. In relation to the claim for loss of use for instance, the appellant stated that the gross earnings for the lorry were Kshs. 600,000.00; he produced no documents to support the operational costs, which he claimed in his evidence to have been Kshs. 200,000.00. His claim for the value of the vehicle was based on “all money I paid 1st April 1996 up to May 2000.”

He conceded that he was responsible for insuring the vehicle.

In effect, we are in agreement with the learned trial judge that it was necessary for the appellant to support his claims with evidence.

36. For those reasons the appeal fails and is dismissed. Each party shall meet its own costs of the appeal.

Dated and delivered at Nairobi this 20th day of March, 2015.

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR