**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MWERA, AZANGALALA & SICHALE, JJ.A)**

**CIVIL APPEAL NO.54 OF 2007**

**BETWEEN**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED…..…..APPELLANT**

**AND**

**AQUINAS FRANCIS WASIKE…….……..1ST RESPONDENT**

**LANTECH LIMITED…….2ND RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at Nairobi (Ibrahim, J.), dated 24th May, 2005***

***in***

***H.C.C.C. No. of 1414 of 2001)***

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**JUDGMENT OF THE COURT**

The judgment we are about to deliver arises from the appeal filed herein in a memorandum containing twenty-six grounds. It followed the decision of the High Court (***Ibrahim J,*** as he then was) delivered on 24th May, 2005 in H.C.C.C. No.1414/2001.

By the plaint filed in the High Court the appellant, National Industrial Credit Bank Ltd, sued the two respondents, ***Aquinas Francis Wasike*** and ***Lantech Ltd*** seeking to recover a total of Sh.1,018,892/= as at 4th September, 2001 at a rate of 33.9% p.a. until payment in full plus such other commercial rates of interest as the appellant deemed entitled to. The claim was premised on a hire-purchase agreement entered into between the appellant and the 1st respondent on 3rd September, 1998, in which the appellant financed the 1st respondent to buy motor vehicle registration No. KAK 136T BMW for a principal sum of Sh.3,412,500/=. The agreement stated that the repayment was to be spread over 47 months at Sh.130,250/= per month. The hire purchase interest was agreed at Sh.2,871,960/=, worked on a flat rate of 21.04% p.a., with the motor vehicle as security. The total purchase price was Sh.6,284,460/=. It was further agreed, and so the appellant averred, that the last instalment would be paid on 4th September, 2002 whereupon the 1st respondent would opt to buy the subject motor vehicle. Further to the hire purchase

agreement, on the 29th February, 1998, the 2nd respondent signed a deed of guarantee and indemnity in favour of the appellant, standing surety for the 1st respondent in the respect of the repayment of the hire purchase sum. In the alternative, it was also agreed that the 2nd respondent, by the said deed of guarantee, undertook to repay all the sums due and payable by the 1st respondent in event of a default. It was pleaded that it was an express or implied term of the said hire purchase agreement that in addition to paying the hire purchase price, the 1st respondent would also pay related bank charges accruing, repossession expenses, if they arose, any administration costs plus interest on arrears of the principal sum at the rate of 21.04% p.a. at any given time. Thus the 2nd respondent was bound to pay any sums due under the guarantee, on demand. It was averred further that pursuant to the foregoing, the 1st respondent paid a total of Sh.4,564,478/= between 6th October, 1998 and 21st December, 2000. The payments were made in arrears whereby they attracted interest and bank charges stated above. That a default occurred on the part of the 1st respondent whereupon the appellant repossessed the said motor vehicle and sold it for Sh.2,033,898/=, crediting the sum to the 1st respondent's account to reduce the subject debt. That the appellant then allowed a rebate of Sh.1,289,451/=, crediting it to the 1st respondent's account thereby reducing the owed sum further. And with that the 1st respondent remained in arrears of Sh.445,531/=. To this, the appellant added sh.103,969/= on account of bank charges, repossession expenses and administration costs and another Sh.469,392/= interest charged on late payments. The total came to Sh.1,018,892/= which was then demanded from the respondents. No payment was forthcoming and so the suit in which judgment was prayed as against the respondents jointly and severally with interest and costs, was instituted.

On or about 25th October, 2001, a defence was filed on behalf of the 2nd respondent and on/or about 1st November, 2001, the 1st respondent filed a defence together with a counter-claim.

The 2nd respondent filed the defence admitting that it executed the deed of guarantee and indemnity herein but denied that it was ever served with a notice or a valid demand notice regarding the 1st respondent's default or its obligation to pay up. So its liability did not arise. The 2nd respondent also denied having been served with the notice of intention to sue by the appellant.

And on its part the 1st respondent accepted that the hire purchase charges of Sh.2,871,960/= were pre-calculated at the rate of 21.04% p.a. as the specified flat rate. Further, that it was an express term of the hire purchase agreement, that the 1st respondent would be liable to pay bank charges, repossession charges and administration costs but denied that he was liable to pay interest on outstanding amounts because there was no specified rate for such. However, the 1st respondent admitted that he was bound to pay the hire purchase price as agreed. He paid a total of Sh.4,564,478/= in instalments between 6th October, 1998 and 21st December, 2000. He averred further that:

> ***"6. (b) …notwithstanding that some of the payments were late, the plaintiff accepted such payments unconditionally despite the express provision at clause***
>
> ***2.1.1… to the effect that punctual payment of the monthly instalments was of essence…",***

whereby the 1st respondent would have been deemed to have repudiated the agreement if any instalments remained unpaid for more than 14 days.

Acknowledging that the appellant repossessed the subject motor vehicle the 1st respondent denied that the said motor vehicle was sold for Sh.2.03 million aforestated, or that such a sum was credited to his account along with a rebate of Sh.1.2 million also afore-referred. The respondent further denied that his account fell in arrears for a total sum of Sh.445,531/= or at all but specifically asserted that the appellant was not entitled to apply bank charges, expenses or alleged interest on any late payment. The 1st respondent disputed that the appellant was entitled to repossess the subject motor vehicle for which the former had paid Sh.4.5 million a sum the appellant unconditionally accepted, representing 34.8 monthly intalments. It

was further denied that the 1st respondent owed Sh.1,018,892/= as at 4th September, 2001 and at the claimed interest of 33.9% p.a.

The 1st respondent then set out his counter-claim joining issue with the appellant in some parts of the plaint but claiming that the latter was not entitled to repossess the motor vehicle when it did, thus breaching the hire purchase agreement. That no instalments were outstanding and the act of repossession caused the 1st respondent to lose the value and use of the subject motor vehicle whereupon the appellant was liable to pay:

> ***"14. …general damages for breach of the hire purchase agreement and the true value of the said motor vehicle …,"***

which was sold below its value.

The appellant filed a reply to both defences and a defence to the counter-claim lodged by the 1st respondent. It maintained its averments in the plaint and asserted that its claim against the two respondents was valid. It added that the guarantee and indemnity deed signed by the 2nd respondent to pay in the event the 1st respondent defaulted, was a continuing one. It remained valid at all times. That due notice was served on the 2nd respondent as to the default of/by the 1st respondent and also of the intention to sue. At no time was the 2nd respondent discharged from liability even if the 1st respondent defaulted and made late payments.

Regarding the issue of interest rates, the appellant pleaded that:

> ***"5. …under the subject Hire Purchase agreement, the plaintiff was at its sole discretion entitled to vary the rate of interest charged on late payments and on all sums due or in arrears."***

The appellant then pleaded that the right to repossess the motor vehicle in the event of default, was provided for under the hire purchase agreement. The 1st respondent paid a total of Sh.4.5 million in reduction of the debt owed but not as discharge of liability under the said agreement. And even if the appellant received the late payments, the appellant continued, that did not bar it from moving to recover all sums due. The 1st respondent breached the hire purchase agreement and it had admitted that. He fell into arrears and that entitled the appellant to levy bank charges, expenses and interest on late payments. It properly repossessed the motor vehicle and sold it at a price that was not an undervalue. Thus the 1st respondent suffered no loss or damage.

The parties initially filed eleven (11) agreed issues for determination, later adding two more. The record has a chamber summons dated 15th April, 2004 by which the 1st respondent sought orders to amend his defence to claim general as opposed to special damages.

During the hearing the appellant called three witnesses while the respondents called only one - the 1st respondent. Both sides filed submissions and the learned judge proceeded to render his decision. In it ***Ibrahim J***, set out the pleadings, the issues for determination and the evidence from either side. The judge also noted that some of the issues agreed for determination overlapped but he set them out one after another, making his determination with due reference to the hire purchase agreement, the evidence, the submissions, the law applicable and treatises available.

Beginning with whether the 1st respondent was liable to pay interest on all outstanding sums and if so whether the appellant was entitled to revise the original interest rate stated in the agreement, the judge paid particular attention to Clause 3.5 of the agreement which stated that the 1st respondent was liable to pay interest on late payment as "specified in the schedule." There being no rate specified in the schedule to the agreement, the judge concluded that in the absence of an express agreement on payable interest or without stating an applicable dealing or custom to that effect, it could only be concluded that such interest

was not payable. He thus dismissed the claim that the 1st respondent was liable to pay interest on late payment of instalments. In the same vein, the judge found that the appellant could not vary the rates of such interest as it wished. That the parties did not intend that such an interest should be levied, or that it could be varied by the lender. The judge found that the rate of interest payable on the principal sum had been specified and agreed by the parties at 21.04% p.a. That was an agreed flat rate and so the appellant could not vary it to 33.9% p.a.

Moving to payment of bank charges and repossession costs the judge noted that the 1st respondent had admitted this in his defence and so he was liable:

> ***"I hold that the plaintiff was entitled under the Agreement to levy bank charges, repossession expenses administration costs on account of the hire purchase."***

The learned judge then considered whether the appellant's accepting late instalment payments prejudiced its right to repossess the subject motor vehicle. The 1st respondent conceded that under Clause 2.1.2 of their agreement the appellant could repossess the motor vehicle in the event of default. The judge considered that there were three incidents of repossession but they were resolved when the 1st respondent paid repossession charges and was left in possession of the motor vehicle, and thus continued paying the hire purchase sum. The trial judge made reference to Clause 14 in the hire purchase agreement and found that the appellant could extend indulgence/forbearance in such situation without prejudice or waiver of its right to repossess. But on moving to the last effective repossession which took place on 17th July, 2000, the judge was not satisfied that the repossession was validly carried out because the sum allegedly owed as at that date, included interest levied on late payments and on arrears of the principal sum. The judge having found that such interest rates were not provided for in the hire purchase agreement, as alluded to earlier, he concluded that the sum that precipitated the repossession had not been properly computed since it included the interest rate levied on late payments and arrears. In his calculation at Sh.130,930/= per month over 22 months between 6th October, 1998 and 17th July, 2000 the judge found that the sum that stood in arrears on the principal sum was Sh.349.880/=. This, the learned judge said, was arrived at strictly going by the pleadings and evidence that the specified flat interest payable by the 1st respondent and calculated in advance amounted to Sh.2,871,960/= and the same was not variable. This, added to the hire purchase price of Sh.3,412,500/=, gave a grand total of Sh.6,234,460/=. The judge therefore found that as at 17th July, 2000 the 1st respondent was in arrears by Sh.349,880/= less than what would have been owed over 3 months in unpaid intalments. That would indeed entitle the appellant to repossess the motor vehicle as provided for in the agreement but because the appellant had burdened the correct outstanding sum with late payment interest and other sums and applied interest on the arrears of principal sum from the specified 21.04% p.a. to 37%, the owed sum was wrongly inflated to over Sh.445,531/= leading to the repossession which the judge declared unlawful. He said:

> ***"From the foregoing, it is clear that the amount outstanding and in arrears in the plaintiff's books was far much more than the amount truly due and owing from the first defendant at the time of the final repossession."***

So, after stating that the correct sum due that would have given the appellant the right to repossess and terminate was, Sh.349,880/= and not more as claimed, and that the appellant did not produce a demand letter addressed to the 1st respondent specifying the sum and how it was made up, the judge found that:

> ***"The amount for which and on the basis on which the hire purchase agreement was terminated and the vehicle repossessed was not the amount truly and justly owing to the plaintiff on the material date."***

Accordingly, the termination and repossession of the motor vehicle was found to have been unjustified and premature.

As for the rebate the appellant claimed to have credited to the account of the 1st respondent who insisted that this was never notified to him, the judge found that indeed an amount Sh.1,289,451/= was credited to

his account on 21st December, 2000/= on the basis that he had made accelerated payments, even as evidence thereof was not readily offered. The payments reduced the debt owed but after the motor vehicle was sold following two newspaper advertisements by the appellant on 30th and 31st August, 2000. The motor vehicle was sold for Sh.2.4 million.

The judge also considered the claim that Sh.366,102/= of the sale sum was deducted as Value Added Tax and paid to Kenya Revenue Authority. The appellant, however did not exhibit evidence for such remittance.

The next issue the learned judge addressed was the sale of the subject motor vehicle for which the appellant appointed an assessor who valued it at Sh.2.2 million. The 1st respondent said that he got a second opinion from the dealers, M/S Mashariki Motors, who put its value at Sh.3m. And because the appellant did not avail to the court offers of bidders other than the ultimate purchaser, whose name was not disclosed either, the trial judge opined that:

> ***"…it is difficult to determine with certainty that the price at which the vehicle was sold was the best obtainable in the circumstances."***

All in all the judge found and did hold that:

> ***"…the plaintiff did not carry out the sale of the vehicle in a transparent, reasonable manner."***

The trial court added that the appellant was bound to act as if it was a mortgagee auctioning mortgaged property, where it had the duty to behave as if the property was its own and meant to realize fair value. That the appellant did not appear to have acted so, the trial judge concluded by inference that the value obtained at the sale of the motor vehicle, adversely affected the 1st respondent. The sum, of Sh.2.4 million could have been an undervalue. And with no evidence that part of that sum, Sh.366,102/= was remitted to KRA as VAT:

> ***"I can only conclude that that in fact no such deduction and remittance was even made… This aspect shows bad faith on the part of the plaintiff and further taints the sale of the vehicle."***

The trial judge next addressed the deed of guarantee and indemnity executed by the 2nd respondent. He was of the opinion that since he had found that the termination of the hire purchase agreement and repossession were wrongful and the vehicle was irregularly sold, that deed could not be enforced in favour of the appellant, who led no evidence to show that it had served the requisite notice on the 2nd respondent. And in any event liability against that respondent had not arisen at the time of filing the suit, in the light of the foregoing narration involving the 1st respondent.

In conclusion, the 1st respondent was found to have suffered loss and damage when the appellant sold his motor vehicle. And because the parties had submitted that they left the nature of damages to be determined by the court, whether special or general, the learned judge, while dismissing the appellant's suit with costs, made an award in:

> ***"…a sum of Kshs.2,800,000/= to the first defendant as general damages for the loss and damage resulting from the termination of the Agreement Repossession and Sale of motor vehicle."***

In arriving at a sum of Sh.2.8 million, the learned judge noted that he had found the Sh.2.4 million realized at the sale to have been an undervalue.

So considering the evidence of 1st respondent, the valuer and the actual sale price, the judge held the view that the award of Sh.2.8 million represented a fair and true market value. The 1st respondent was awarded costs on his counter-claim plus interest at court rates. The appellant was also ordered to pay the costs:

***"…of the counterclaim… to the second defendant."***

For this last bit we may observe that the 2nd respondent was not a party to the counter-claim. The foregoing decision provoked a 26-ground memorandum of appeal with orders sought that the judgment given in favour of the respondents on their counterclaim be set aside; judgment instead be given in favour of the appellant in the sum of Sh.1,018,892/= together with interest at 33.9% p.a. with effect from 5th September, 2001 until payment in full; the respondents also do bear the costs of the suit and he counter-claim while costs of this appeal go the appellant.

When the appeal came up for hearing, both sides opted to file and rely on written submissions without highlighting. We rose to consider the case in the light of the pleadings, the evidence, the submissions, the law and cases cited.

The appellant's submissions opened with an introduction of the dispute herein and proceeded to present the grounds of appeal in clusters or individually. On their part the respondents argued the appeal under four broad headings. In a condensed manner, we proceed to lay out the arguments for and against this appeal determining each noted ground as we go along. But before that we take cognizance of the fact that this being the first appeal, we are bound to approach it as a retrial of the case, whereby we have to review the evidence on record and come to our own conclusions of matters of fact, and not be bound by the findings of the trial judge. (See ***Selle & Another vs Associated Motor Boat Co. & Others [1968] EA 123***).

***Reuben Nyanganga*** (PW1), an employee of the appellant, whose duties included processing claims, told the trial judge that he was acquainted with the suit before court which involved the 1st respondent who entered in a hire purchase agreement (H.P) on 3rd September, 1998 with the appellant to buy a BMW motor vehicle whose cost was Sh.4,550,600/=. The 2nd respondent executed a guarantee and indemnity deed in that regard. The 1st respondent paid a deposit of sh.1,137,500/=; leaving Sh.3,412,500/= to be financed by the appellant. The respondent/hirer was to repay the sum over 47 monthly instalments. The hire purchase charges were calculated at Sh.2,871,460/=.

The total H.P. sum was therefore payable at Sh.132,250/= p.m. on a flat interest of 21.04% p.a. The agreement contained clauses which gave the appellant absolute discretion to vary the interest rates without notice to the hirer. The agreement also reserved a right to the appellant to levy late payments interest on the principal sum and late instalment payments. The 1st respondent/hirer was also liable to pay sums that included bank charges and other costs which could also be levied by the appellant bank without prior notice to the 1st respondent. Clause 7 gave the appellant the right to repossess the motor vehicle in the event of default in making repayments. The 1st respondent's application to the bank was produced together with the H.P. agreement, as well as the deed of guarantee and indemnity executed by the 2nd respondent in favour of the appellant in the subject transaction. The deed contained due clauses.

The H.P. agreement also contained a clause that time extended and indulgence accorded to the 1st respondent, did not affect the right of the appellant to enforce the guarantee, which would continue in effect until the entire account was settled. The statements of account produced by the appellant would be sufficient evidence of the debt. All payments were not made on due dates and the debt was never disputed by the respondents.

PW1 produced schedules of accounts prepared on 4th September, 2001 which showed the total principal amount plus charges payable (Sh.6,299,460/=) and the total sum paid to be Sh.4,564,498/= including the sale proceeds of the vehicle. The amount due in arrears was indicated as Sh.1,734,982/=. The witness then said:

***"We did not demand the entire sum. We gave a rebate of***

***Sh.1,289,451/=. He paid ahead. Accelerated balance***

***Sh.445,531/=. We incurred further expenses totaling***

***Sh.103,969/=."***

A schedule "A" was produced in evidence. The witness said that the sum owed by the 1st respondent was never paid. He told the court that the total interest incurred was Sh.469,392/= at the original rate. All put together, the appellant claimed as due and owing, Sh.1,018,892/= plus interest. Schedule B was exhibited; the HP agreement was terminated on 17th July, 2000, followed with a letter dated 18th July, 2000, to the hirer and a copy to the guarantor. Both responded to the notification.

The court heard that the 1st respondent was the executive director of the 2nd respondent. When the 1st respondent acknowledged the notice to terminate the agreement on 1st September, 2000, he asked for indulgence to organize his finances which the appellant granted. Action was withheld but when further indulgence was sought on 14th September, 2000 the appellant declined and the process to sell the motor vehicle commenced with M/S Finex Assessors carrying out the motor vehicle valuation. The valuation report dated 27th July, 2000 gave the value of Sh.2.2. million. That valuation followed a sale advertisement earlier carried in the **Daily Nation** and **Standard** newspapers.

The sale sum was reduced by Sh.366,102/= VAT paid to KRA and the balance of Sh.2.03 million was credited to the 1st respondent's debt account. He was notified on 22nd November, 2000 by letter. The VAT remittance did not appear in the debt account. The respondents raised no complaint in this regard or as concerned the variation of bank charges. The 1st respondent denied knowledge of the rebate credited to his account but it was there. He did not ask for it. The appellant did not agree to waive its charges or the terms and conditions of the agreement. The appellant's lawyers sent demand notices dated 27th April, 2000 to the respondents with copies to the appellant. All the documents and letters referred to by this witness were produced.

PW1 then moved to the counter-claim whose particulars and claim he denied. He stood by their accounts, adding that instalments were due and owing in substantial amounts. The 1st respondent replied to the appellant's letter of termination and to PW1, the valuation report was only a guide but not reflecting the market value of the given car. There was no claim for loss nor a valuation report tendered by the 1st respondent.

In cross-examination PW1 said that the sale of the subject motor vehicle was advertised in the newspapers. The offers were received and the highest bidder bought the car. He, however, did not place before the court the other offers. The actual realized price was Sh.2.4 million, part of which went to pay VAT and the balance was credited to the 1st respondent's loan account. The witness did not exhibit the appellant's circular requiring payment of VAT but he maintained that the defence did not raise that.

PW1 repeated the pleading in the plaint that the 1st respondent paid a total of Sh.4,564,478/=. In the HP agreement there was:

***"No rate specified for late payment. We levied late interest payment on charges on the basis of Clause 3.5 schedule."***

He added that:

***"Late payment true interest rate in blank. Not specified. We levied the specified flat rate of 21.04% p.a. the bank did not vary the interest rate."***

PW1 then referred to Exh.P5(b) which contained interest at 37% p.a. thereafter it reduced to 33.9/% p.a. levied as simple interest.

The purchase charges were calculated up front on the basis of 21.04% p.a flat rate. In an ideal situation,

the court heard, the bank was bound to honour that and no more. Nothing else could be levied. Charges would be levied on the flat rate but in this case there was a default. The appellant could not operate outside the H.P. agreement. PW1 noted payment of Sh.1 million in the said Exh.P5(b) for which the appellant gave rebate.

As for the expenses on repossession that involved the acts of repossession on 19th October, 1999, 2nd November, 1999, 27th March, 2000 and finally on 27th July, 2000 due to default on the part of the 1st respondent, such expenses had been admitted in the defence. The repossession which was discretionary was effected on the first 3 occasions without terminating the agreement. The last one came with termination and all involved insurance and administration charges, the witness told the judge.

Regarding the valuation by M/S Finex Assessors, the court heard that it stood at Sh.2.2 million; it was not described as representing a market or forced value. That the repossession of the car preceded termination of the HP agreement and at that time Sh.1,838,500/50 was demanded, Sh.661,226/= of it representing late payment interest. Of the grand total of Sh.2,250,176/50, PW1 said, the appellant sued for a lesser sum after it granted the rebate. Then the 1st respondent requested for a second valuation by Mashariki Motors who, as dealers, gave a higher value of Sh.3 million.

Re-examination followed with PW1 more or less repeating what he said before, except to maintain that:

> ***"The bank adopted a process of transparency to yield the best price. Valuation and advertising for tenders."***

And as for late payment interest:

> ***"It was not predetermined fixed. Interest was variable.***
>
> ***There was no agreement to exclude the said Clauses. There was o ceiling or limit. Depended on market."***

That closed PW1's testimony and ***Thomas Koech Bett*** (PW2), employed in the appellant's Debt Management Unit stepped in the witness box. PW2's duties included keeping a register of possessed items and preparing a list of assets authorized for sale. He handled the subject motor vehicle by preparing notifications and advertisements for sale. He produced advertisements carried in the two newspapers aforesaid.

***Davies Irungu Njoroge*** (PW3), a trained mechanical engineer was the motor vehicle valuer and assessor whom the appellant instructed to value the subject motor vehicle. The car was two and half year old, worth Sh.2.2 million after depreciation from Sh.4 million, at a rate of 13%p.a. PW3 arrived at the said value after considering factors like the age of the motor vehicle compared with market value. He produced the valuation report and proceeded to explain how he went through the motions to assess the value of the motor vehicle.

That included asking the dealers, Mashariki Motors for the value:

> ***"They said sh.3.6 million exclusive of Value Added Tax. It was rounding up to Sh.4 million. Net cost reading***
>
> ***Sh.4,550,000/=… I test-drove within the warehouse… not…outside…."***

In re-examination PW3 said that the value of Sh.4 million included VAT. He depreciated the vehicle from that base. That closed the appellant's case.

The 1st respondent (DW1) gave evidence in defence for himself and the 2nd respondent company, of which he was the chief executive and shareholder.

The 1st respondent acknowledged entering into the HP agreement in question but insisted:

> ***"I was not told that I would be charged any interest against apart from what was agreed – flat rate."***

He paid a deposit to Mashariki Motors, the dealers and approached the appellant to finance the balance – Sh.3,412,5000/=. The HP charges were calculated at Sh.2,871,960/=. The car was new with a cost tag of Sh.4.5 million.

The respondent was to pay Sh.130,930/= per month with effect from 4th October, 1998. However, he told the trial judge that between 6th October, 1998 and 21st December, 2000, over some 26 months, he paid an average of Sh.175,556/85 per month, way above the contracted sum. Thus, he was well ahead of the scheduled payment period. No other rate of interest was specified but whenever the 1st respondent foresaw a problem/delay in payments, he could notify the appellant.

Looking at the statement of account (Exh.P5,5A) DW1 told the court that he had not had sight of it before the hearing. But he said that he had therein seen rates of interest applied which they had not agreed on. Whenever the appellant made moves to sell the car the 1st respondent, would approach it for negotiations not to sell. The appellant could then write a letter to him, extending indulgence, copied to the 2nd respondent. The motor vehicle was initially given a valuation of Sh.2 million. DW1 protested; he requested the motor vehicle to be sent to Mashariki Motors for another valuation which was given as Sh.3 million. It was sold by the appellant for Sh.2,033,989/=, a sum

DW1 did not accept because he had proposed that he scouts for a buyer himself. After the sale, the appellant informed the 1st respondent that the vehicle went for Sh.2.4 million, some of which was paid to cover VAT. The respondent did not understand why the motor vehicle was repossessed and sold in a hurry. The final bidder /buyer was not disclosed to him. His counterclaim was that the sale was not right. The respondent had not been in arrears and so he had sued for general damages.

In cross-examination, the trial judge heard that the 1st respondent was only aware of the flat rate of 21.04% p.a. which was computed in advance. If clause 3.4.2 granted the bank discretion to vary the interest rate, it was bound to notify the 1st respondent for consent/refusal. The court heard that clause 3.4.3 provided for revised rate of interest but no fixed amount was stated. The

1st respondent agreed that there were clauses for charging of interest on late payments. The car was sold on the fourth repossession. The respondent did not accept the amounts stated which precipitated the repossession. His request to indulge him as in the past was refused. His request to get a buyer himself was also refused. In the past, he had paid whatever was due and the car would be released to him. The 1st respondent was in a position to dispute the amounts in the statement of account exhibited in court; he would not confirm that all the payments he made were entered either. Therein, he noticed extraneous charges to the scheduled repayments. He admitted that he received the letter from the appellant's lawyers demanding the amount allegedly due from him. The same amount was demanded from the 2nd respondent under the guarantee deed. The respondent was not aware of sums due outside the H.P. agreement which were being demanded. He added:

> ***"I raised the issue of penalties and interest,"***

which the appellant promised to work out at the end. At the termination of the agreement, the 1st respondent was given a rebate of Sh.1,289,451/=. No letter was written to him waiving the amounts due. He learned of the deduction of VAT via the appellants' letter dated 29th November, 2000 (Exh.P 9(b)). There was no reason given as to why the rebate was granted. To the 1st respondent, the motor vehicle was sold at an undervalue. It should have gone for Sh.3 million; no late payment was owing. In re-examination, DW1 repeated that there were no interest charges specified for late payments and looking at all the circumstances, the bank charges were not proper.

At the close of the trial, both sides filed submissions and the learned judge delivered his decision now impugned.

We have set out the pleadings, the evidence recorded, and referred to the subject judgment. After carefully perusing the submissions herein it appears to us that some four broad grounds fall to be determined and these we list as follows:

1. **Interest charged on late payments;**

2. **The repossession of the motor vehicle and termination of the subject agreement;**

3. **The award of general damages or award for the worth of the motor vehicle;**

4. **The effective date of interest awarded in respect of the counter-claim; and**

any other point that may emerge then finally the outcome of this appeal.

(1) The Rates of Interest.

Beginning with the ground on interest, both sides were agreed that the HP agreement provided for the modes including the rate payable on the principal sum. The rate on the principal sum was a flat one set at 21.04% p.a, worked out upfront. It formed the hire purchase charges which amounted to Sh.2,871,960/=, and with the loan of Sh.3,412,500/=, that gave the total sum agreed to be paid at Sh.130,930/= over 47 monthly instalments beginning from 6th October, 1998. (Clause 3.4.1.) The specified flat interest rate was clearly entered in the section of the HP agreement called FOR NIC USE ONLY (where the total balance price to be paid was noted as Sh.6,284,460/=). There is no dispute about this and both ***Mr. Nyangang'a*** (PW1) and ***Mr. Wasike*** (DW1) testified accordingly.

It is the question of the charges in the agreement titled: Late Payment true interest rate that has led to the dispute herein. While the appellant maintains that under clauses 3.4.2 and 3.5.3, there was interest to be levied on late payment of instalments and that the flat rate of 21.04% stood to be revised and varied to 37% and then reduced to 33%p.a. as the appellant felt necessary, the respondents hold the view that the flat rate was not revisable and there was no provision for levying of any interest on late payments.

In our view, the flat rate of interest was not revisable or variable even as the agreement contained clauses that appear to suggest that. That rate was given at the commencement of the agreement. The workings based on it were called HP charges Sh.2,871,960/= calculated upfront and added to the balance of the cost of Sh.3,412,460/= to amount to a total cost of Sh.6,284,460/= for the car. This constituted the balance of HP price to be paid in 47 monthly instalments, which formed the basis of the agreement; the two minds of the appellant and the 1st respondent met on this sum. They then voluntarily appended their signatures to that on 31st August, 1998. The agreement contained the subject matter being sold: the motor car registration number KAIK 136T BMW 523 i MANUAL; the total contract sum of Sh.6,284,460/= representing the value of the subject matter, to be repaid over 47 monthly instalments at Sh.130,930/=. It was also by that contract agreed and accepted that the 1st respondent had paid the deposit of Sh.1,137,500/= to Mashariki

Motors, the dealers from whom he collected the car. This was a complete contract in all respects voluntarily executed. It does not contain any room for variation because the flat interest rate had been calculated upfront and incorporated in the loan to be repaid. Probably if the interest rate had been left to float along, the appellant could have invoked the reserved right to vary it and, if we may add, in accordance with the Banking Act. So all in all we find that the specified flat interest rate could not be varied/reviewed. Both parties signed to that state of affairs which bound them all the time.

Regarding the payment of interest on late payments the agreement provided that:

> ***"3.5.1. The Hirer shall pay interest to the owner at the Late Payment Rate <u>specified in the schedule</u> on all overdue payments of instalments such interest to accrue on a daily basis after as well as before judgment from the due date until payment in full."*** (underlining added.)

We have looked at the "FOR NIC USE ONLY" part of the HP agreement herein. The space for "Late Payment true rate" has no indication as to the percentage rate payable. Unlike the specified flat interest rate space containing 21.04% p.a., the late payment part has no rate to be paid. The space was left blank. Which means that no interest was intended or payable on any instalments that were not paid on time. If the parties intended that a charge of interest be levied on this, they would have said so by stating the rate of interest in the agreeemnt. Therefore, there was no interest payable, on late payment of instalments. We do not agree that the trial judge should have implied that without inserting the rate of interest payable, then 21.04% p.a. was applicable.

This is what the appellant asked us to imply but that cannot be. A written contract is read, understood and applied by what it expressly says. Implication is out of question and that is the position here.

In this regard we agree with the quotation alluded to by the trial judge from ***<u>Chitty on Contract</u>, 27th Edition Volume 2 paragraph 36-224***:

> ***"At Common Law the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect."***

That seals the fate of this ground on the flat rate of interest on the principal sum and whatever the appellant purported to levy on the late payment of instalments. The subject agreement did not provide for in either case and no course of dealing or custom or trade usage was pleaded and proved in this regard. There can be no useful argument on what the appellant claimed to be market forces, which in any event were not disclosed. Therefore the 1st respondent was not liable to pay late interest rate or any rate of interest whatsoever, on any outstanding sums under the agreement in any way.

The case of ***<u>Orion East Africa Ltd vs Housing Finance Co. of Kenya Ltd</u> Nbi HCCC 914/2001*** may have been right to hold that penalty interest can be charged on a loan account which goes into arrears, but we do not know if in that case the parties executed an agreement with similar terms as the HP agreement herein. Likewise, we are unable to read implied terms in a contract for the sake of giving efficacy to that contract. The contract before us was specific and it stated what the parties needed to bind them and omitted what they did not wish to apply. They did not wish to have any interest or penalty levied on any instalments paid late or any arrears for that matter. We agree with the finding of the trial court and dismiss this ground.

At this point we are obliged to remark that the 1st respondent admitted in the defence that he was bound to pay bank charges, repossession charges and administration costs. However, those are not in issue here and so we ought not go into them.

(2) <u>The Repossession & Termination of Agreement.</u>

The appellants' position was that the 1st respondent's account fell in arrears and so the motor vehicle was repossessed when a default occurred. We are not in doubt that that was the right to be exercised by the appellant when, according to the H.P. contract, sums fell due and remained unpaid for 14 days (Clause 7.1, 7.2, 7..2.1) following a notice. The 1st respondent paid a sum of Sh.4,564,478/= of the whole total of Sh.6,284,460/= by the time of repossession. It needs no effort to see and arrive at the conclusion that he had not paid the full balance of HP price as at 17th July, 2000 when the appellant caused the motor vehicle to be repossessed. In essence the repossession spelt the termination of the agreement. On the face of it the appellant was entitled to move as it did. But we are minded to say that the sums due as at the time of termination included a variation of the specified flat interest from 21.04% p.a. raised to 37% and back to 33.9% p.a. (Exhibits P5A(b)) contrary to the HP agreement. Also loaded on the sum that gave rise to the repossession were amounts levied by way of interest on late payments of instalments. We have found

that varying the flat interest rate was not permitted, since it had been calculated upfront and charged to form the full balance of the H.P. price to be paid. We have also found that the appellant could not levy interest on late payments. So all in all, the appellant repossessed the motor vehicle and terminated the contract on a wholly wrongly and improperly computed sum, which it considered as due and owing in order to precipitate repossession.

There was an element of default payment owing but the total sum taken to constitute the sum defaulted had been inflated by unwarranted and unjustified levies arrived at by varying the specified flat interest rate and imposing a late payment interest which was not provided for or stated. In this state of things, we find that the repossession and termination were not validly effected. The 1st respondent was expected to comply with the agreement and pay up in time. But similarly the appellant was bound by the agreement only to demand the sums due and properly computed as provided for in the agreement. That it did not do. It incorporated sums arrived at by the varied specific interest rate added on the interest not stated for late payment of instalments, to put forth a figure upon which it moved to repossess and terminate. To us, all that was unwarranted, unjustified and even probably premature because later there followed a rebate given by the appellant - a substantial sum.

In that regard we conclude that the repossession was unlawful, if not premature, and the appellant was not entitled to it. The appellant was entitled to exercise the right to repossess, but not in the way it went about it. It used a wrong computation to arrive at the sum, that informed the move to repossess and terminate. We have found that that sum was not true and correct as per the HP agreement and so repossession and termination ought not to have taken place. This ground, too, is dismissed.

(3) The Award: General Damages or Other

In his counter-claim the 1st respondent prayed for:

(i) General damages equivalent for breach of the HP agreement;

(ii) Special damages equivalent to the true value of the motor vehicle as at the time it was sold;

and then, of course, costs and interest.

Having found that the repossession followed with termination of the agreement was wrongful, we now address the issue as to whether the 1st respondent was justified in praying for award of damages. He pleaded that he was entitled to general damages on account of the breach of contract and special damages for the loss of the motor vehicle.

We saw that in the chamber summons dated 15th April, 2004 the 1st respondent sought to amend the defence and counter-claim herein so that the prayer to be determined was to focus on general damages and not special damages. The learned judge allowed that prayer and in his judgment awarded Sh.2.8 million as general damages.

While the respondents submitted that that award in general damages was warranted in the light of the fact that by its acts of repossession and termination a breach of contract had taken place and the 1st respondent lost ownership, use and enjoyment of the subject motor vehicle, the appellant's position is that general damages could not issue in a case of breach of contract. Citing the case of ***Kenya Power & Lighting Company Ltd vs Abel Momanyi Birundu [2015] eKLR*** we were reminded that:

> ***"Authorities are legion to the effect that no general damages may be awarded for breach of contract."***

In arriving at the award in general damages the learned judge referred to the pleadings, including the intended amendment we have alluded to earlier, together with agreed issues. He allowed the amendment to the counterclaim and said:

***"Besides this I would think that prayer (i) could easily cover the intention of the first defendant to claim general damages."***

Then after going over the aspect of the case wherein he found that the motor vehicle was sold at an undervalue in the circumstances, concluded that:

***"I hereby award a sum of Kshs.2,800,000/= to the first defendant as general damages for the loss and damage resulting from the termination of the agreement repossession and sale of the motor vehicle."***

The respondents' submission was that we should consider the sum awarded in general damages as constituting what amounted to applying the principle of *restitutio in integrum* – which means in English as per ***Trayner's Latin Maxims 4th Edition***:

***"Entire restitution; restoration to one's former condition."***

This author continues and adds that for instance where a contract has been entered into under essential error on the part of one or both of the contracting parties, the contract will be set aside but only on *restitutio in integrum* being made and the parties restored to the same position in which they were before the contract was made.

We are not satisfied that the above is the state of affairs attending the dispute between the parties herein. The trial court found and we have also found that the repossession and termination were premature and/or effected on the wrong sums levied by the appellant to form a basis to re-possess the motor vehicle and terminate the agreement. This constituted a breach of contract.

In the circumstances, we hold that the correct course the trial court should have taken is not to award general damages as it is trite law and in many cases of this Court including the ***Kenya Power*** case (supra), that general damages do not normally fall to be awarded where a breach of contract has been proved. In the present case the 1st responded pleaded that the subject motor vehicle was sold at an under-value whose purchase price was Sh.6,284,460/= yet it was sold for Sh.2.4 million.

In the evidence of ***Njoroge*** (PW3), the assessor/valuer answered in cross-examination that:

***"I asked the main dealer – Mashariki Motors for the value.***

***They said Sh.3.6 million… exclusive of Value Added Tax."***

On his part the 1st respondent said that he visited Mashariki Motors after the motor vehicle and been sold for Sh.2 million by the appellant, who had informed him accordingly. He had contested the sum so he went to the dealers, Mashariki Motors, who gave him the value of Sh.3 million. They knew the motor vehicle which they had been servicing but the value was not given by way of a written report at all. Necessarily, the 1st respondent could not plead in his counter-claim a specific sum to represent the value of the said motor vehicle. To us, and in the circumstances, we accept that the pleading in the counterclaim, that the car was sold at an under-value and the prayer for:

***"(ii) special damages equivalent to the true value of the motor vehicle at the time it was sold,"***

sufficed. The motor vehicle was a specific item. While the dealers told PW3 that the motor vehicle was worth Sh.3.6 million and they gave the 1st respondent the figure of Sh.3 million, the trial court was in a position to determine the dispute but not on account of general damages as those do not normally fall to be awarded in cases where breach of contract has been alleged and proved. Neither was this a case to apply the principle of *restitutio in integrum*. An error had not been found on the part of either or both of the parties who executed the H.P agreement herein. Therefore, the learned judge should have considered to award special damages, if the same had been pleaded and proved, and not general damages as he did.

The 1st respondent had pleaded and led evidence, with which the trial agreed or found, that the repossession was unlawful and the termination led to the loss of the motor vehicle. We also have found that that act was improper. The learned judge then awarded Sh.2.8 million to the 1st respondent after he reviewed the manner in which, first, the sale was conducted. It was advertised before sale. PW3 told the court that bidders were received but he did not place before the court their details regarding the offers; he did not obtain a valuation report from the dealers or even disclose the name of the buyer either. Second, the appellant claimed that from the sale price of Sh.2.4 million, Sh.366,102/= was deducted and remitted to KRA yet no evidence of this was tendered. All this seen in the light of the offer and attendant factors obtaining, led the trial judge to conclude that:

> ***"On the balance of probability (sic) he (sic) hereby hold that the sale carried out by the plaintiff was wrongful irregular in the manner that it was carried out and that the logical inference and conclusion is that the (sic) adversely affected the value obtained. The sum of Kshs.2,400,600/= (sic) in the circumstances not the true market value or best price obtainable in the circumstances. …the sale…was an undervalue."***

Specifically about the claim by the appellant that it remitted part of the sale sum Sh.2.4 million to KRA, yet presented no evidence, the judge concluded that no such remittance was ever made.

In the circumstances, the learned judge awarded a sum of Sh.2.8 million to the 1st respondent as general damages to represent the loss of the subject car. The appellant desired us to take it that the judge had made himself an expert in assessing values of motor vehicles which, to it, was not tenable. We are not in agreement with the appellant on this point and in the circumstances. However, our conclusion is that since general damages are not normally awardable in disputes revolving around breaches of contracts, the judge fell in error when he awarded the same.

Having found as we have done above, we conclude that the appeal herein partly succeeds on the basis that the trial court erred to make an award of general damages. We therefore:

> **(i) set aside the award to the 1st respondent of Sh.2.8 million in general damages.**
>
> **(ii) order that the appellant and the 1st respondent do bear their own costs in the suit and the counterclaim.**
>
> **(iii) order that the suit against the 2nd respondent remains dismissed with costs. It also gets costs of this appeal.**

Orders accordingly.

**Dated and delivered at Nairobi this 16th day of October, 2015.**

**J. W. MWERA**

**…….....**

**JUDGE OF APPEAL**

**F. AZANGALALA**

**…….....**

**JUDGE OF APPEAL**

**F. SICHALE**

**…….....**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**