



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 118 OF 2002**

**TAAAWAWA SUPERMARKET LIMITED .....APPELLANT**

**AND**

**FINA BANK LTD .....RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Milimani Commercial Court Nairobi  
(Mwera, J.) dated 20<sup>th</sup> December, 2001***

**in**

**H.C.C.C. NO. 544 OF 2000)**

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**JUDGMENT OF THE COURT**

This is a first appeal against the decision of the superior court (Mwera, J.) made on 20<sup>th</sup> December, 2001 in which the court dismissed the suit filed by the appellant on the basis, firstly, that the hire purchase agreement signed between the parties was unenforceable and, secondly, that the suit was not meritorious. The appellant now challenges that decision on five grounds set out in the memorandum of appeal as follows: -

1. *THAT the learned Judge erred in Law and fact in dismissing the Plaintiff (sic) suit thus totally disregarding the weight of the Plaintiff's evidence.*
2. *THAT the Learned Judge erred in Law in failing to find that the HIRE PURCHASE AGREEMENT was illegal for want of registration hence unenforceable.*
3. *THAT the Learned Judge erred in Law and fact in making a finding that it is the Appellant (Original Plaintiff) who was relying on the HIRE PURCHASE AGREEMENT whereas it is the Respondent (Original Defendant) who had enforced it.*
4. *THAT the Learned Judge erred in Law in failing to apply the express provisions of S 5 (4) of the HIRE PURCHASE ACT CHAPTER 507 Laws of Kenya.*
5. *THAT the Judgment by the Learned Judge was against the weight of the evidence adduced during trial."*

Grounds 2 and 3 were abandoned at the hearing of the appeal and we shall presently consider the remaining grounds and the submissions thereon. What was the dispute between the parties?

The appellant, **Taawawa Supermarket Ltd** (“the company”), was locally incorporated and was operating a supermarket in Nyahururu town. Its two shareholders/directors were **Michael Wangonde Githumbi** and his wife **Margaret Wambui**. The company intended to buy a new Mitsubishi Canter for its business and on 23<sup>rd</sup> January, 1998 it made an application to the respondent, **Fina Bank Ltd** (“the Bank”) for Hire Purchase finance. The bank gave a written offer to finance the purchase on 2<sup>nd</sup> February, 1998 and on 3<sup>rd</sup> March, 1998, the company accepted the terms of the offer. Among the terms of the offer were, that a minimum interest rate of 24% p.a would be amortised over a period of 36 months subject to change at the bank’s discretion; and an interest rate of 45% p.a would be charged on overdue rental arrears. A commitment fee of 2% or Shs. 37,120 was also to be paid as account service charge. Subsequently on 8<sup>th</sup> April, 1998, the parties executed a standard “*Hire Purchase Agreement*” (“the agreement”) drawn by the bank and endorsed thus:

**“HIRE PURCHASE AGREEMENT COMMERCIAL**

**(outside Hire Purchase Act)”**

The financing was summarized in the agreement as follows: -

“Cash price of goods (a)	Shs.2,320,000=
Less initial payment	Shs. 464,000=
Balance of Cash price	Shs. 1,856,000=
Breach of warranty (b)	Shs. ....
Sub-Total	Shs. 1,856,000=
Add HP charges (c)	Shs.1,336,320=
Balance HP price	Shs.3,192,320
Option payment	
(see Clause 4) (d)	Shs. 5,300”

The hire purchase price of Shs.3,192,320 and the option payment fee of Shs.5,300 (Total Shs.3,197,620) was to be paid by 35 monthly instalments of Shs.88,900 with effect from 8<sup>th</sup> May, 1998 upto 8<sup>th</sup> April, 2001. The company directors provided a guarantee and indemnity for payment of the hire purchase loan. The agreement was subsequently stamped and registered with the Registrar of Documents.

The company was able to remit the monthly rentals regularly between May 1998 and September, 1999 when problems set in. The bank served no less than 10 monthly demand notices between September, 1999 and January, 2000 for payment of the arrears and penalties accruing due to the delay, but there was no positive response. By January 2000, the arrears of rentals had accumulated to Shs.478,270/= and the company wrote on 25<sup>th</sup> January, 2000 to explain the delay. It blamed it on Income Tax and V.A.T. Revenue problems and also a robbery which had taken place in their premises. It requested for time upto 25<sup>th</sup> March, 2000 to organize refinancing from another bank which would pay off the loan balance. On 26<sup>th</sup> January, 2000 the Bank served the following letter on the company: -

**“HIRE PURCHASE AGREEMENT NO. LN. 7537**

VEHICLE NO. KAK 037E

Due to non-payment of hire rentals the above agreement now stands **TERMINATED** from 16<sup>th</sup> February, 2000.

The Bank may, however, without prejudice allow you to purchase the vehicle for Kshs.1,390,556.78 plus other charges including Advocates and Repossessors charges that may subsequently accrue. This option to purchase the said vehicle is subject to payment in cash or bankers cheque within twenty one (21) days from the date of this letter. Should you however, fail to exercise the offer to purchase the vehicle within the prescribed period, then the Bank shall have no alternative but to execute its right under terms and conditions of Hire Purchase Agreement without further reference to you.

In pursuance of the foregoing, we shall be arranging for sale, so that there will be the minimum of delay in disposing off should you fail to exercise your option to purchase.

Furthermore, in event of any shortfall after realizing the sale proceeds, the balance with the interest charges will be payable by yourselves.

Yours faithfully,

For: FINA BANK LIMITED”

When full remittance was not made by the 16<sup>th</sup> of February, 2000 the bank repossessed the vehicle and it was sold on 24<sup>th</sup> March, 2000 for Shs.1.5 million which was credited to the account and cleared the loan balance.

The company felt aggrieved by that turn of events and three days later on 27<sup>th</sup> March, 2000, it filed suit in the superior court. A chamber summons seeking to restrain the bank from selling the vehicle, and to restore possession of the vehicle to the company was also taken out but was never pursued after the initial order was made *ex parte* maintaining the *status quo* pending hearing *inter partes*. A replying affidavit confirming that the sale had taken place before the filing of the suit was filed by the bank. The company subsequently amended its plaint in May 2000 and invoked the terms of the agreement asserting that it complied with the agreed repayments until February, 2000 when the bank repossessed the vehicle without notice. It also pleaded that there was another oral agreement with the bank after repossession of the vehicle followed by a letter dated 7<sup>th</sup> March, 2000 which stated as follows:

**“Following our meeting of today the 7/3/2000, I wish to confirm that, between one week of working days to ten days I shall pay a service of 200,000/= in addition to 50,000/= Thousand already paid to make a total of 250,000/= in reduction of the arrears of my account.**

**Meanwhile I attach a copy of a loan offer issued to me by Barclays Bank of (K) Ltd who are assisting me to reorganize my supermarket.**

**I hope that, the vehicle will be released to me upon payment of the above mentioned amount.**

**Your faithfully.”**

According to the company, the balance of Shs.200,000 was to be paid by 24<sup>th</sup> March, 2000 and was tendered but rejected by the bank. In its calculations, the company had paid Shs.2,527,720/= towards the purchase of the vehicle and it was the intention of the bank to defraud it by selling the vehicle at a fictitious price and enrich itself unjustifiably. It also pleaded that it had paid more than 2/3 of the purchase price and the bank was not therefore entitled to repossess it. It termed the repossession as unlawful and in contravention of the **Hire Purchase Act, Cap 507**, (“the Act”) and in the end sought the following orders:-

- a. *Injunction to retrain the defendant by themselves, agent (sic) and/or servants from disposing, alienating, selling, transferring or in any other manner dealing with the plaintiff's motor vehicle.*
- b. *A declaration that the repossession of the plaintiff's motor vehicle was illegal and/or unlawful and should be released forthwith. Alternatively a refund of Kshs.2,527,720/= plus interest at Bank rate.*
- c. *Damages.*
- d. *Costs of this suit."*

As expected the bank in its defence cited and relied on the written terms of the agreement and averred that it had given due notice of default and the consequences thereof. It denied any oral agreement for return of the repossessed vehicle upon payment of Shs.250,000/= and averred that the proposal made for such payment was not accepted due to the company's track record of defaulting. All particulars of fraud were denied.

Both parties agreed on 11 issues for determination by the court:-

1. *Whether the Defendants Act of reposing (sic) Motor Vehicle KAK 037E is unlawful and contravenes the provisions of the Hire Purchase Act.*
2. *Whether the total Hire Purchase Price is Kshs.3,197,620/= or Kshs. 2,656,000/=.*
3. *Whether the Plaintiff was in default as per the Hire Purchase Agreement and whether the Defendant without notifying the Plaintiff or alternatively without complying with the requirements of the Hire Purchase Agreement in the event of Default repossessed and sold the subject Motor Vehicle.*
4. *Did the letter dated 7<sup>th</sup> March, 2000 by the Plaintiff to the Defendant amount to an agreement and whether the Defendant was bound by the said letter.*
5. *Whether the Plaintiff had promised the Defendant in his letter dated 7<sup>th</sup> March, 2000 to pay Kshs.200,000/= within one week to ten days. And whether the Plaintiff on the strength of the agreement averred to in paragraph 4 herein paid a sum of Kshs.50,000/= and agreed with the Defendant that he would pay it Kshs.200,000/= on 24/3/200/*
6. *Whether the Plaintiff had by 24/3/2000 paid a total sum of Kshs.1,690,600/= directly to the Defendant towards the purchase of the subject Motor Vehicle*
7. *Whether the Defendant by reposing (sic) and selling the Plaintiff's Motor Vehicle acted fraudulently and in bad faith and further whether the repossession and sale is justifiable under the Hire Purchase Act.*
8. *Has the Plaintiff established a prima facie case with a probability of success?*
9. *Is the Plaintiff entitled to a declaration that the repossession and sale of the Motor Vehicle was illegal and unlawful.*
10. *whether the Plaintiff is entitled to any order by this Honourable court and more particularly an order that it be refunded Ksh.2,527,720/= plus interest at bank rates if the repossession and sale is declared illegal and unlawful.*
11. *Is the plaintiff entitled to costs in this matter?"*

The parties largely relied on the written documents exchanged between them and only called one witness for either side to testify. In the oral evidence, it turned out to be common ground that both parties had executed the "Hire Purchase Agreement" which governed their relationship. The divergence was the

contention by the company that it discovered on 31<sup>st</sup> March, 2000, after filing the suit, that the agreement was not registered with the Registrar of Hire Purchase agreements and it was therefore unenforceable by the bank; while the bank contended that the agreement was outside the Act. It also turned out from the evidence of the company that by 24<sup>th</sup> March, 2000 when the vehicle was sold, it had paid just over Shs.1.5 million out of the total of Shs.3,197,620/= and thus the payments were below 2/3 of the hire purchase price. A statement produced in evidence by the bank showed payments of Shs.1,690,600 as at 21<sup>st</sup> March, 2000 which was about 52% of the hire purchase price. The balance due on the loan inclusive of interest was Shs.1,347,823/= at the time of repossession.

The learned Judge considered the documentary evidence, the oral evidence, and submissions of counsel and in finding that the agreement was unenforceable by the company delivered himself thus:

**“To begin with the provisions of the Hire Purchase Act (Cap 507) the Act, which the defendant seemed not to have much said about, the defendant only showed the court that the hire purchase agreement here was duly stamped by the registrar of documents on payments or appropriate fees.- S.5 of the Act requires that every hire purchase agreement shall be delivered to the registrar of such documents, and from Exh. P7, it is the Registrar General, who will then register the same after ensuring that stamp duty has been paid. So it appears that the defendant had duly paid duty on the agreement but it did not have it registered by the Registrar of Hire Purchase Agreements (Exh. P7). That same section also says:**

**“(4) Unless a hire purchase agreement has been registered under subsection (2) –**

**(a) No person shall be entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer; and**

**(b) .....**”

Leaving any person who may wish to enforce the unregistered hire purchase agreement against the hirer (here, the plaintiff), the law is specific that the owner (here the defendant) shall not be entitled to enforce any right to recover the goods from the hirer. Here it is the hirer who has come to wage his rights and he is relying on the unregistered agreement. If S. 5 (4) (a) of the Act is strictly read, it does not seem to bar such an action. But if an unregistered agreement cannot be enforced by the owner via the courts is it logical to conclude that the hirer can do so? The law does not say so and this court is not inclined to infer such an implication. If the Parliament in its wisdom did not state so in the Act, this court sees no reason to allow a hirer (the plaintiff) to rely and, as it were, enforce anything under such an agreement. Otherwise where parties are brought together by an unregistered hire purchase agreement and have benefitted under it, each side should be content to remain in a position it finds itself when the act of non-registration surfaces. That would then mean that the plaintiff has no right to the motor vehicle or what he had paid for it now that the aspect of non-registration has found him in that circumstance. This would then mean that the suit be dismissed. The defendant should however look out and begin to comply with the Act.”

The last sentence, we may observe in passing, was gratuitous and unnecessary advice to the bank. The learned Judge went further, on the assumption that the company could rely on the agreement, and found as follows on the merits of the case:

**“The purchase price of the motor vehicle was shs.3,192,320/= (see Exh. P2). The defendants repossessed the motor vehicle after due notice in accord with the agreement. The plaintiff was in default and was notified by the defendant. The letter of 7.3.2000 did not form part of the hire purchase agreement or vary it. The defendant did not accept its contents and payments made or promised to be made could not be expressed as in any way altering the terms of the agreement. Whatever the plaintiff paid as at 24.3.2000 was accepted by the defendant and the account was given to the plaintiff (Exh. P4). The court was unable to find fraud in the conduct of the defendant here. This court is unable to find a basis on which Shs.2.5m may be refunded to the**

**plaintiff.”**

The suit was dismissed, hence this appeal.

We have examined the evidence on record in some detail because it is our duty as the first appellate court to do so, with a view to arriving at our own independent conclusions. We must however pay homage to the findings of fact made by the superior court on the basis of credibility of the witnesses because that court was better placed to judge credibility, having seen and heard the witnesses. Nevertheless, as this Court has stated before, findings of fact made by the trial court may be interfered with if they are based on no evidence at all or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings. – see **Mwanasokoni v Kenya Bus Serviced Ltd [1985] KLR 931.**

We must now advert to the issues raised before us in this appeal. As stated earlier, learned counsel for the appellant Mr. A.O. Ombwayo, abandoned two issues of law and argued one. He also argued one ground on the factual findings made on the merits of the case.

The first ground relates to the construction of **section 5(4)** of the Act which the superior court cited in its judgment above but which Mr. Ombwayo submitted, was misapplied. The superior court found that the agreement was governed by the Act; that it ought to have been registered with the Registrar of Hire Purchase agreements under **section 5 (1)** of the Act; that it was not so registered but only stamped on payment of stamp duty; and that as a consequence, it was unenforceable, not only by the bank (owner), but also by the company (hirer). Mr. Ombwayo supported all those findings except for the consequence flowing from non-registration. In his view the purpose of the Act was to protect the hirer, in this case the company, and if there was a breach by the bank which the company did not condone, then the bank bears the consequence and is barred from enforcing the hire purchase agreement. In this case, he submitted, it was not the company which was enforcing the hire purchase agreement as erroneously stated by the superior court, but the bank which repossessed the vehicle. Mr. Ombwayo further submitted that there was no exception under **section 5** of the Act as to which hire purchase agreements ought to be registered since the section refers to “Every hire-purchase agreement...” which would include hire purchase agreements, not covered under the Act. Whether the hire purchase agreement between the parties was endorsed as “Outside the Hire Purchase Act” as it purported, was therefore of no consequence since the parties could not by their action remove it from the operation of **section 5 (1)** and the consequences of **section 5 (4)**.

In response to those submissions, learned counsel for the respondent, Mr. D.N. Mbigi submitted that the agreement between the parties was not governed by the Act and the parties expressly so intended and stated by endorsement before execution of the agreement. Furthermore, he submitted, the Act was created to govern defined hire purchase agreements only, and these were specifically those that did not involve sums of money in excess of Shs.80,000/= (amended to Shs.300,000/= in 1992 and Shs.4million in 2007) and where the hirer was a body corporate, thus removing the matter from the provisions of the Act. In any event, Mr. Mbigi submitted, the issue of non-registration of the agreement was not pleaded but was only raised during oral testimony by the company’s witness who produced a letter from the Registrar which was of no evidential value. At all events, Mr. Mbigi submitted, the consequence of non-registration, was not a return of the repossessed vehicle or refund of all money paid under the agreement. On the contrary, he submitted, the agreement would remain valid and enforceable between the parties and the bank would still be entitled to rely on the provisions of the agreement to recover the money admittedly advanced to or on behalf of the company. The company would be estopped from re-claiming the money and the money would be recoverable as money had and received. Finally Mr. Mbigi pointed out that the agreement was duly stamped and registered with the Registrar of Documents and was therefore enforceable.

We have anxiously considered that issue of law and we think it would stand or fall on the determination of the related issues as to whether the agreement executed by the parties was a “Hire Purchase Agreement”; if so, whether **section 3(1)** of the Act applies to it; and in any case whether it was registrable under **section 5(1)** of the Act.

The Act came into operation on 2<sup>nd</sup> November, 1970 and its preamble, as relevant states:

**“An Act of Parliament to make provision for the regulation of certain hire purchase agreements.....”**

The logic in that preamble is that the Act does not cover all hire purchase agreements or put another way, some hire purchase agreements are outside the Act even when the definition of “hire purchase agreement” in the Act is the same. As defined in the Act, hire-purchase agreement means:

**“an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee.....”**

That is also the definition in common law and the general characteristics are therefore that:

- a) There is delivery of goods to the hirer who obtains possession thereof;
- b) The property in the goods remains in the owner;
- c) The hirer agrees to pay the purchase price thereof by instalments, and the owner agrees to transfer the property in the goods to the hirer on completion of the payment.

(See **“The Law relating to Hire Purchase”** by Robert Dustan, 4<sup>th</sup> Edn.)

The agreement in issue here had clear provisions relating to those characteristics and we did not understand any of the parties or their advocates to contend that it was anything other than a “Hire Purchase agreement.” We find it was one. Did the Act govern the agreement?

**Section 3 (1)** of the Act states as follows:

**“3. (1) This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of four million shillings other than a hire purchase agreement in which the hirer is a body corporate wherever incorporated; but that monetary limitation does not apply so as to affect the definition of “hire-purchase business” in section 2 (1).”**

That section is not, with respect, happily worded. In our view it is capable of two constructions, namely: that the Act does not apply at all where the hirer is a corporation, which is the construction adopted by Mr. Mbigi; or that the monetary threshold applies only to individual hirers but not corporate hirers who will be covered by the Act regardless of the monetary consideration in the transaction, which is the construction adopted by Mr. Ombwayo. None of the advocates cited any authority for their respective propositions and we have not been able to find any. We must therefore decide the matter on first principles.

There is no doubt that the Act would be inapplicable on the basis of the monetary threshold since the subject matter was here beyond the upper limit of Shs.300,000/= at the time of the transaction. A pertinent hypothetical question may be asked: why would an individual hirer take advantage of the Act to a limited extent when a body corporate would not be limited by any monetary threshold? No compelling reason presents itself to us and we find in the circumstances that the intention of Parliament was to exclude purchases made by co-operative societies and registered companies from the operation of the Act, and not merely to remove the monetary threshold for corporations. With that finding, the issue of registration of the agreement under **section 5 (1)** does not arise and we reject the argument by Mr. Ombwayo that it applies to all agreements even where the Act is not applicable. Once again, logic dictates the construction that the section is applicable to hire purchase agreements to which the Act applies and requires due registration. The finding by the superior court that registration was necessary in the circumstances of this case was also erroneous and we set it aside. Both parties consciously, and it must be presumed, freely and intentionally stated that the agreement was *“outside the Hire Purchase Act”* It was

duly stamped and registered with the Registrar of Documents and all the clauses thereunder bound the parties. If it was otherwise within the Act, the parties could not by so stating remove it from the provisions of the Act, but it was not. We may add that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement. It retained its validity as a contract *inter se* and was enforceable as such – see **Walsh v Lonsdale [1982] 21 Ch. C.9**, **Clarke v Sondhi [1963] EA 107** and **Meralli v Parker [1956] 29 KLR 26**. The upshot is that we reject the submissions of the appellant on that ground of appeal.

It remains to consider whether, as argued in the second ground, the bank was in breach of the agreement or the further oral agreement pleaded by the company. On the basis that the agreement was subject to the provisions of the Act, Mr. Ombwayo submitted that the company had paid 80% or over 2/3 of the purchase price and the bank could only repossess the vehicle subject to **section 15** of the Act. There was contravention of that section and therefore, in his submission, all the money paid under the agreement was refundable. Furthermore Mr. Ombwayo submitted, despite termination of the agreement by the bank, more money was received by the bank on representation that the vehicle would not be sold and therefore the subsequent sale was fraudulent.

For his part, Mr. Mbigi took us through the various clauses of the agreement which set out the terms in relation to interest rates, overdue interest rates, default termination, consequence of termination, amongst other clauses and submitted that the bank observed the agreement. No fraud was proved as pleaded since the company admitted default and in any event it was proved by production of numerous demand notices served by the bank on the company. It was further conceded by the company in evidence, he observed, that the payments made were just over 50% of the hire-purchase price and the statement produced in evidence so proved.

We have carefully examined the evidence on record and we think the superior court was right in its conclusion that the company had not proved its case as pleaded. The pleading was not made on the basis of the Agreement only, but also on the basis of an alleged oral agreement not to sell the repossessed vehicle if some Shs.250,000/= was paid. There can be no argument that the company was in breach of the written agreement and it admitted as much. There was provision in clause 7 of the agreement for repossession of the vehicle in the event of breach and the bank properly invoked that clause. We find no credible evidence that there was another oral agreement which could override the written agreement, and even if there was, in law it would not supersede the written hire-purchase agreement. The letter written by the company and dated 7<sup>th</sup> March, 2000 was not an agreement which could have altered the terms of the original agreement and in any event the terms stated in that letter were not complied with by the company. In sum, the company fell short of proving on a balance of probability what it pleaded and the superior court's reasoning on the merits of the case cannot be faulted. We dismiss that ground of appeal also.

The upshot is that this appeal has no merit and we order that it be and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 22nd day of October, 2010.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**