IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, GITHINJI & DEVERELL, JJ.A.
CIVIL APPEAL 190 OF 2001

BETWEEN

BENSON NGUGI MUIRURI …….. APPELLANT

AND

KENYA NATIONAL CAPITAL CORPORATION LTD ……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi
(Mr. Justice Moijo Ole Keiwua) dated 10th February, 1998
in
H.C.C.C. NO. 1981 OF 1993)
****

JUDGMENT OF THE COURT

The appellant is aggrieved by the judgment of the superior court dated 10/2/1998 whereby the appellant's suit against the respondent the Kenya National Capital Corporation Ltd was dismissed with costs and the respondent's counter claims allowed with costs.

Sometime in 1989 the appellant and one Gitau Kimani applied for a loan from the respondent to finance the purchase of motor vehicle registration No. KAA 439D Isuzu Mini Bus operated as a matatu from Nairobi Motor Corporation (1987) Ltd. By a letter dated 7/8/1989 the respondent agreed to finance the purchase of the vehicle on the conditions contained therein.

The conditions were, inter alia, that the facility was to be in the form of lease hire; that the applicants would be required to contribute Shs 200,000 as down payment; that the vehicle would be registered in the name of the respondent but would be transferred to the applicants at a nominal fee of Shs. 20,/- after the expiry of the lease.

The offer was accepted and the vehicle was registered in the name of the respondent on 6/10/1989. Gitau Kimani later withdrew from the deal and the respondent made a fresh loan offer to the appellant vide a letter dated 29/11/1991 which offer was accepted by the appellant. By Lease Hire Agreement dated 30/11/1991, the respondent financed the appellant for purchase of the motor vehicle in the sum of Shs. 425,318/05 repayable with interest by 18 monthly rentals of Shs 27,545 commencing on 30th December, 1991 and expiring on 30/5/1993.

The loan was secured by the lease hire agreement over the motor vehicle, a fixed legal charge for Shs.441,350 over L.R. No. 209/8553/194 registered in the name of Gitau Kimani and an irrevocable and continuing guarantee of Gitau Kimani for the sum of Shs 441,350.

The appellant did not service the account regularly and was often in arrears. In 1993 the vehicle broke down and the appellant took it to a garage for an engine overhaul. The appellant whose account was already in arrears wrote to the respondent on 3/3/1993 asking for time to look for money to repair the vehicle and clear the outstanding arrears.

By a letter dated 11/3/93 the respondent confirmed that the vehicle was undergoing repairs and informed the appellant:-

"Consequently, we have allowed you indulgence until 15th April, 1993 to clear all the arrears which would be Kshs. 100,526.80."

However, by two separate letters both dated 30/3/1993, the respondent demanded the payment of arrears of Shs. 72,486/40 and instructed M/s Dolphin Auctioneers to repossess the vehicle. By a letter dated 6/4/93 the respondent wrote to the appellant as follows:-

"As you are aware we have repossessed our chattel due to the poor manner in which you have been conducting your account in our books.

As you are in breach of our lease hire agreement we hereby terminate the contract with immediate effect. We are also placing you on a 14 days notice to let us have your payment of Shs.104,210.40 being the amount of arrears as of 6th April, 1993 failing which we should proceed to realize our security under the said agreement and follow you for the shortfall if any."

By a letter dated 21st April, 1993 the appellant demanded for the release of the vehicle. Subsequently, by a plaint dated 26/4/1993 the appellant sued the respondent praying for:-

" (a) An injunction restraining the defendant , its agents or servants from possessing or retaining motor vehicle KAA 435D

(b) Damages for unlawful seizure

(c) Costs of the suit

(d) Such further or other relief as this Court may deem just."

The suit was mainly based on the averments in paragraphs 7, 8, 9, 10, 11 thus:

"7. That as a result of the said breakdown the parties agreed that the installments that had fallen due could be repaid on or before 15/4/1993 and by a letter of 11/3/1993 the defendant so confirmed.

8 That the plaintiff so believing that he had up to 15/4/1993 to pay the arrears paid up the garage charges and put the vehicle back to the road.

9 That on 30/3/1993 the defendant without notice to the plaintiff or any reasonable cause unlawfully caused the vehicle to be repossessed by M/s Dolphin Auctioneers thus depriving the plaintiff of its use.

10 That as a result of the said possession the plaintiff has suffered and will suffer loss unless the defendant/ its servants and or agents are restrained from their unlawful act.

11 That at the time of the seizer (sic) of the vehicle the defendant had already been paid a total of and (sic) 907,287 and defendant therefore was not entitled to possession under the provisions of the Hire Purchase Act Chapter 507 of the Laws of Kenya."

On 22/4/93, the respondent advertised the sale of the motor vehicle by public auction fixed for 5/5/93 and by a letter dated 19/5/93 informed the appellant that the vehicle had been sold for Shs. 400,000 and

demanded Shs. 88,351/20 being the shortfall as at 31/5/93. The respondent denied the appellant's claim and counter-claimed for Shs. 88,551/20 with interest at 30% p.a.

The superior court considered the evidence and made, inter, alia, the following findings, namely, that there was a balance of the principal sum and substantial arrears owing at the time the vehicle was repossessed; that appellant was granted a Co-operative Society loan of Shs. 100,000 on 16/4/93 but failed to pay the arrears; that the appellant was always in arrears and the vehicle was therefore repossessed lawfully; that the vehicle was repossessed because there was real danger that it would be lost if any further delay occurred; that the Hire Purchase Act did not apply to the agreement as it was a "lease hire" and not a "hire purchase" agreement. The superior court further held that the Hire Purchase Act did not apply to the transaction in issue because the hire purchase price exceeded the threshold of Shs 300,000 stipulated in section 3 of the Hire Purchase Act. As we have said before, the superior court dismissed the appellant's suit with costs and allowed the counter-claim with costs.

There are eight grounds of appeal. However Dr. Khaminwa, learned Senior Counsel for the appellant only argued grounds 2,6,7, 8 together and abandoned the rest. The substance of those grounds is that the superior court erred in law and in fact in not holding that the respondent was estopped from repossessing the motor vehicle on 30/3/93 while it had given the appellant a grace period to pay the arrears and also in not holding that the respondent conducted itself in unconscionable manner.

Before we consider the grounds of appeal, it is important to appreciate the nature of the appellant's suit in the superior court. The plaint is dated 26/4/93. The actual date of the filing of the suit is not clear from the copy of the plaint on the record. In essence, the appellant complained that the repossession of the vehicle was unlawful for two reasons, firstly because the respondent had reneged on the letter of 11/3/93 giving the appellant up to 15/4/93 to pay the arrears, and, secondly, because, the repossession was in breach of the provisions of the Hire Purchase Act. By the time the plaint was filed, the respondent had already by a letter dated 6/4/93 terminated the contract with immediate effect. The evidence of the appellant in the superior court shows that he was aware of the letter of 6/4/93 terminating the contract for he explained that he did not pay the Shs. 100,000 he had obtained as a loan on 16/4/93 because he thought that the contract was effectively terminated by the letter of 6/4/93. The termination of the contract and grounds of termination were never challenged in the plaint. The subject matter of the suit is the repossession of the vehicle on 30/3/93 a week before the entire contract was terminated and the main remedies sought in the plaint was an order of injunction to restrain the respondent from repossessing or retaining the vehicle and damages for wrongful seizure. The suit was brought on the basis that the contract was still subsisting and was designed to restore possession of the motor vehicle to the appellants. Yet the appellant was aware that the contract had been terminated. Although this point was not raised or argued, it appears to us that the suit was misconceived and incompetent ab initio as it was based on a contract which had been terminated prior to the filing of the suit. The remedy of injunction sought could not have been granted as the termination of the contract was not being challenged and further because the motor vehicle was subsequently sold. And if damages for wrongful seizure were available at all, they would only have been awarded for a period from 30/3/93 when the vehicle was repossessed to 6/4/93 when the contract was terminated. It is apparent from the above analysis that it would be futile to allow the appeal.

The present appeal turns on the construction of the contract between the parties. The contract was exhibited in the superior court. It was a contract of "lease hire". The motor vehicle remained the property of the respondent but after the completion of payment of all instalments and the expiry of the lease the motor vehicle was to be transferred to the appellant at a nominal fee of Shs. 20.

Clause 22 of the agreement provides

"No relaxation forbearance indulgence by owner in enforcing any of the terms of the agreement or granting of time by the owner to the Hirer shall prejudice affect or restrict the rights and powers of the owner hereunder nor shall any waiver by the owner of any breach hereof operate as a waiver of any subsequent or any continuing breach hereof"

By clause 24 and 25 respectively the contract contains the entire agreement and the agreement may not be

modified or amended except by writing signed on behalf of both parties. By clause 12(1) the appellant was required throughout the term of the lease to pay punctually all amounts due to the respondent.

Dr Khaminwa contended, among other things, that clause 22 was not applicable because of the breach of the terms of the letter of 11/3/93 and that if it was, then the appellant was entitled to a reasonable notice that the letter of 11/3/93 was being cancelled. Mr Mose for the respondent on the other hand, contended that the doctrine of estoppel cannot be used to create new rights and is not available to the appellant; that clause 22 applied and that the appellant was given the required notice.

Clause 22 of the agreement deals with waiver and not estoppel. The distinction between waiver and estoppel is explained in the ***Nurdin Bandali v Lombank Tanganyika Ltd*** **[1963] E A 304 at page 314 para C, D** thus:

"waiver is based on a contract express or implied between the parties. Thus it arises from a term, express or implicit, of a contract, and before any such term can exist, a valid contract must be established. If it is found that a contract is established and it contains such a term, then that term like any other term in a contract may found a cause of action. Estoppel on the other hand, is primarily a rule of evidence whereby a party to litigation is, in certain circumstances, prevented from denying something, which he had previously asserted to be true. Estoppel either at common law or in equity, can never found a cause of action, though it may enable a cause of action, which would otherwise fail, to succeed."

In the same case (that was relied on by the appellant and which comprehensively dealt with a contract of hire purchase and the incidences of such a contract,) the Court said at page 313 para F:

"From the earliest days the rule laid down in Cramer vs Gile 1883 Cab & E, 151 that equity would not interfere to protect a hirer in default has been followed without any exception in so far as the owner's right to repossess is concerned…"

It is clear from para 7 and 8 of the plaint and from the submissions of Dr Khaminwa that the appellant is using the doctrine of estoppel as a sword to found a cause of action rather than using it as a shield or defence. The appellant was required to pay the monthly rental punctually and thus time was of essence to the contract. By clause 22 of the agreement there could not be any waiver of time. The agreement was an entire contract and could not be modified or amended except by writing signed on behalf of both parties. There was no dispute that the appellant was in breach of the agreement by the time the motor vehicle was repossessed as he was in arrears of the monthly instalments. The letter of 11/3/93 by its terms cannot be said to have varied the terms as to payment of the monthly rentals or arrears or to have varied the rights of the respondent under the contract. The letter was not in any case signed on behalf of both parties. There was no provision in the agreement for giving notice such as the one suggested by Dr Khaminwa. There is however a provision in clause 19(a) (1) for giving notice of not less than 14 days to the appellant before the sale of the motor vehicle. The appellant was given the 14 days notice by the letter dated 6/4/93. Moreover, it is explicit from the notice dated 6/4/93 and implicit from clause 19 that the appellant could have paid the arrears of rentals after the termination of the contract but before the vehicle was sold and in that event he could have recovered possession of the vehicle. He did not pay the arrears though he had 14 days notice.

For those reasons, we would agree with the finding of the learned Judge that the respondent repossessed the motor vehicle lawfully.

There is no appeal against the judgment on the counter-claim. We find no merit in the appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nairobi this 7th day of October, 2005

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR