



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1860 OF 2016
(CONSOLIDATED WITH CAUSES 1858, 1859, 1861 1862, 1863 AND 1864 OF 2016)

THOMAS OUNDO PAMBA

ELIZABETH NDINDA MUTHOKA

GEOFFREY WANGA KACHISA

EVANS OTIENO.....CLAIMANTS

JACOB WAMALWA WERUNGA

JULIANA NDANO MUENDO

VINCENT BIRUNDU OMURWA

-VERSUS-

BEVERLY SCHOOLS OF KENYA LIMITED....RESPONDENT

AND

NCBA BANK KENYA PLC.....OBJECTOR

RULING

1. The Objector filed a Notice of Objection and Notice of Motion dated 8.4.2021 seeking orders inter alia, that the Claimants through Digits Auctioneers be permanently restrained from selling the Objector's Motor Vehicle Registration Number KCW 177H. Subsequently, the Claimants filed a Notice of Preliminary Objection dated 19.4.2021 which raises the following grounds:

a. THAT the documents provided by the objector alleging that motor vehicle KCW 117H is a property on hire purchase do not meet the threshold of a hire purchase agreement as required under the Hire Purchase Act and thus the purported Hire Purchase Agreement is invalid and a nullity ab initio.

b. THAT the Objector's objection being solely based on an invalid Hire Purchase Agreement cannot therefore stand as the same is misconceived, scandalous, frivolous , vexatious and a blatant abuse of the court process.

2. The Notice of Preliminary Objection was disposed of by written submissions .

Claimants' submissions

3. They submitted that the hire purchase amount quoted by the Objector is in contravention of section 3 (1) of the Hire Purchase Act which provides that the Act applies to agreements where the price does not exceed the sum of Kshs. 4 Million. In this regard, they submitted that the Schedule to the Agreement provides that the balance is Kshs. 7,976,251, Clause 3.2 quotes the total cost as Kshs. 6,400,000 and the payment schedule indicates the amount financed as Kshs. 5,643, 407.99.

4. They cited the definition of a hire purchase agreement under section 2 of the Hire Purchase Act and submitted that a contract of hire purchase agreement retains the ownership of the property with the owner while possession passed to the hirer until the hirer opts to purchase the goods. In support of this submission, they relied on the decision in **Civil Appeal No. 173 of 1992 National Industrial Credit Bank Limited v Equator Bottlers Limited**.

5. They argued that the terms of the Hire Purchase Agreement neither have a repossession clause nor an option to purchase clause. It was therefore their submission that the motor vehicle which is jointly registered in the name of both the Respondent and the Objector did not create a hire purchase relationship or an agreement that can be enforced by the objector.

6. They relied on section 5 (4) of the Hire Purchase Act and the holding in **Taawawa Supermarket Ltd v Fina Bank Ltd [2010] eKLR** and submitted that the objector cannot enforce under the unregistered hire purchase agreement but can enforce the agreement as a contract. They further submitted that the objector has not demonstrated that it was licensed to carry a hire purchase business hence they engaged in an illegal business punishable by law to a fine of Kshs. 200,000.

7. In conclusion, it submitted that the objector moved the court with an invalid hire purchase agreement which is unenforceable and should meet the costs of the application.

Objector's submissions

8. The Objector submitted that the burden of proof is upon the objector to establish that it is entitled to or has legal or equitable interests in the attached movable assets. In support of this position, it cited the finding in **Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR**.

9. It submitted that it is not in dispute that it financed the purchase of the motor vehicle and it is possession of the original logbook registered in its and the Respondent's names.

10. It argued that until and unless the Respondent pays the loan balance and it discharges the motor vehicle, it remains as the sole and exclusive owner of the motor vehicle and the Respondent has no interest or rights over it save for its use. It relied on **Eunice Kanugu Kingori v NIC Bank Limited [2018] eKLR** where the Court held that although the hirer has the right to use the goods, he is not the legal owner during the term of the agreement and ownership remains with the owner.

11. It submitted that it has demonstrated that it is the sole and exclusive owner of the motor vehicle and the Respondent has no ownership over it hence he Claimants are devoid of *locus standi* to attach or sell its goods.

12. It relied on the definition of the doctrine of privity of contracts in Chitty on Contracts, 31st Edition and submitted that the Claimants who are third parties to the hire purchase are misguided that they can benefit or acquire rights from the agreement. It relied on the Court of Appeal's decision in **Aineah Likuyani Nnjirah v Aga Khan Health Services [2013] eKLR** where the Court held that a third party has no rights under a contract unless it expressly gives that third party a right to enforce the contract.

13. It submitted that any legal questions regarding the hire purchase agreement can only be raised by either the Respondent or the Objector.

14. It relied on Order 22 of the Civil Procedure Rules and Rule 12 (1B) of the Auctioneers (Practice) Rules and submitted that the issuance of warrants of attachment precede issuance of proclamation notices. It argued that the Claimants proclamation notice dated 20.1.2021 preceded the Warrants of Attachment dated 3.3.2021, thus the documents cannot stand on the face of the record.

15. Finally, it urged the Court to dismiss the Notice of Preliminary Objection as it had demonstrated that the motor vehicle is registered in its name.

Issues for determination

16. The main issues for determination are whether the Notice of Preliminary Objection raises a pure point of law, and whether the objection is merited.

17. A Preliminary Objection was defined by the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”

18. The Claimants' objection is that the documents produced by the objector do not meet the threshold of an agreement under the Hire Purchase Act and that the agreement is invalid. The Objector on its part submitted that it has proved that it is the sole and exclusive owner of the motor vehicle and the Respondent has no interest in the attached property

19. In essence the Claimants preliminary objection requires this court to examine the hire purchase agreement as against the Hire Purchase Act. The Court is therefore to look into the evidence produced by the objector then proceed to address the terms and registration of the agreement and ownership of the motor vehicle.

20. Since it is inevitable to consider the Objector's evidence, I do not find that the notice of Preliminary objection raises any pure point of law. In support of this finding I rely on the Supreme Court's decision in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. . . the preliminary objection targets this single prayer. The first ground in the preliminary objection is that the Orders sought have been overtaken by events. Prima facie, this is a factual issue, to be established by evidence from both parties. The Court is unable to dispose of the question, without first evaluating evidence from the parties. It is relevant, at the same time, that this ground raises no pure point of law, on its own...”

21. Having found that the Preliminary objection does not raise a pure point law, I proceed to dismiss the same with costs. The application by the Objector shall be determined on merit. To save time, I grant the Claimants leave of 14 days hereof to file response to the said application if they have any.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE