



**Advance Auto Import Ltd v Sewe (Civil Appeal E070 of 2023)
[2024] KEHC 409 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E070 OF 2023
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

ADVANCE AUTO IMPORT LTD APPELLANT

AND

KENNEDY ODUOR SEWE RESPONDENT

(An appeal arising out of the Judgement of the Honourable K. Cheruiyot in the Chief Magistrate's Court at Kisumu delivered on the 10th June 2022 in Kisumu CMCC No. E18 of 2020)

JUDGMENT

Introduction

1. The appellant herein Advance Auto Import Ltd was sued by the respondent Kennedy Oduor Sewe vide a plaint dated 1st October 2020. The respondent sought from the appellant a mandatory injunction restraining the defendant/ respondent herein from breaching the terms of the contract by selling motor vehicle registration No. KCB 234R and compelling him to release the vehicle to the respondent or in the alternative, refund the entire purchase price already paid by the respondent, specific performance of the contract between the parties, general damages against the appellant for trespass and unlawful repossession of the suit motor vehicle as well as costs of the suit.
2. In response, the appellant filed a statement of defence and counterclaim dated 27th October 2020 in which it denied the averments by the respondent and counterclaimed for a sum of Kshs. 220,000 being the balance remaining on the contract for sale, 30% of the purchase price due to the respondent's breach of contract amounting to Kshs. 270,000, Daily storage charges of Kshs. 500 from the 17th September 2020 until determination of the suit as well as costs of the suit with interest.
3. The trial court found that although the parties referred to the agreement as one for sale, it was a hire purchase agreement and thus the appellant had no right to repossess the suit motor vehicle as the



agreement was not registered. The trial magistrate ordered that the appellant releases the suit motor vehicle to the respondent and further pays Kshs. 270,000 in general damages.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 22nd May 2023 raising the following grounds of appeal:
 1. The learned magistrate erred in law and fact by finding that the motor vehicle sale agreement dated 20th April 2019 is a hire purchase agreement thereby misapplying the Hire Purchase Act to the sale agreement and purporting to find a breach in respect thereof.
 2. The learned magistrate erred in law and in fact by holding that the appellant had no right to repossess motor vehicle registration number KCB 234R thus finding repossession thereof unlawful even when the sale agreement dated 20th April 2019 provided a right of immediate repossession, which right crystallized with the respondent's default in making the instalment payments.
 3. The learned magistrate erred in law and fact by awarding a sum of Kenya Shillings 270,000 to the respondent for loss of use of the motor vehicle and inconvenience both of which take a form of special damages albeit the same were not pleaded and proved as required by law.
 4. The learned magistrate erred in law and in fact by awarding general damages to the respondent that are so inordinately high which amounted to an erroneous estimate.
 5. The learned magistrate erred in law and fact by declining to award storage charges to the appellant and yet they were pleaded in the defence and counterclaim and proved as required by law.
5. The appeal was prosecuted by way of written submissions.

The Appellant's Submissions

6. It was submitted that the learned magistrate erred in law and in fact by finding that the motor vehicle sale agreement dated 20th April, 2019 was a hire purchase agreement thereby misapplying the Hire Purchase Act to the sale agreement and purporting to find a breach in respect thereof. Further, the appellant submitted that for an agreement to pass as a hire purchase, it must be one for the bailment of goods that does not necessarily require the hirer to purchase the same in the end as was clear from the provisions of clause 11 of the agreement of sale and from the holding in the case of Eunice Kanugu Kingori v NIC Bank Limited [2018] eKLR.
7. The appellant submitted that the learned magistrate erred in law and in fact by holding that the appellant had no right to repossess motor vehicle registration number KCB 234R thus finding repossession thereof unlawful even when the sale agreement dated 20th April, 2019 provided a right of immediate repossession, which right crystallized with the respondent's default in making the instalment payments. It was submitted that the parties herein were bound by the terms of the motor vehicle sale agreement dated 20th April 2019 and that the court could not interfere with the same as was held by the Court of Appeal in National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd Civil Appeal No. 95 of 1999.
8. It was further submitted that because repossession of the suit motor vehicle was lawfully provided for under the sale agreement dated 20th April, 2019, the appellant had a legal remedy available to, it to recover the remaining outstanding balance which remedy had crystallized with the respondent's default in effecting monthly instalments, a finding the trial magistrate had already made at paragraph 7 of his judgment. Reliance was placed on the case of Patrick Otieno Nyapanda v Autozone Motors



- (K) Limited [2021] eKLR where it was held inter alia that Since the repossession and subsequent sale of the motor vehicles was lawfully provided for under the contracts, the respondent had a legal remedy available to it to recover the remaining balance, which was to repossess and resell the motor vehicles upon default.
9. It was submitted that since repossession upon default of any one instalment was provided for under the agreement, the appellant had a legal remedy available to it to recover the remaining balance and as such, such an exercise would in no way amount to trespass. Reliance was placed on the case of CFC Stanbic Bank Limited and Anor v MidGeley Mark Gogo [2020] eKLR where the court found that because there existed a breach of a hire purchase agreement by failure to pay monthly rental instalments, a claim for general damages for trespass would not be sustained.
 10. The appellant submitted that that it was incapable of committing a tort of trespass in exercise of a legal remedy provided to it under the sale agreement mutually executed by the parties herein and that therefore, the sum of Kshs. 270,000.00 awarded to the respondent as damages for trespass ought to be set aside.
 11. It was submitted that the learned magistrate erred in law and in fact by awarding damages to the respondent that were so inordinately high as to amount to an erroneous estimate because the damages awarded to the respondent were in the nature of pecuniary loss which the law does not presume to be a direct, natural or a probable consequence as they are a subject of ascertainment by court through evidence and application of the law relating to the measure of damages, which evidence the respondent failed to adduce as was held in the case of Samuel Kariuki v Johaan Distelberger [2017] eKLR.
 12. The appellant submitted that storage charges of Kenya Shillings Thirty-Two Thousand only should have been awarded to the appellant as they were specifically pleaded and proved.

The Respondent's Submissions

13. It was submitted that as at the 14th day of September 2020, the respondent had paid a total sum of Kshs 722,000/- leaving a balance of Kshs 178,000/- which despite the harsh economic times caused by government restriction during the Covid19 pandemic, he made attempts to ensure that he submitted some amount in a bid to offset the balance of the hire purchase agreement.
14. The respondent submitted that there was an agreement between himself and the appellant to the effect that the appellant would not repossess the suit motor vehicle as long as he kept on making some payment on a monthly basis and that they would resume normal installment after the pandemic but that on the 14th September 2019, the appellant repossessed the suit vehicle.
15. It was submitted that the respondent aligned himself with the decision of the learned magistrate made on the 10th day of June 2022 which declared that the suit motor vehicle was sold through hire purchase mode and that the repossession of the vehicle was illegal hence awarding the Respondent nominal damages for the illegal repossession of his motor vehicle.
16. It was the Respondent's humble submission that the sale agreement forming the cause of action herein did not qualify as such therefor it was right for the learned magistrate to describe the agreement dated 20th April 2019 as a hire purchase agreement.
17. The respondent submitted that as at the time of repossessing the motor vehicle, he had settled a total sum of Kshs 722,000 out of the possible Kshs 900,000 which sum of monies had surpassed the two thirds threshold and as per the provision of section 15 of the Hire Purchase Agreement Act Cap 507 Laws of Kenya, the hirer cannot repossess goods where more than two thirds of the purchase price has



been paid as was held in the case of *The Wellness Health & Fitness Center Ltd v Shampher Kenya Ltd* [2008] eKLR hence, he was entitled to damages that were rightfully awarded by the trial court.

Analysis and Determination

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach its own conclusions. This is what section 78 of the Civil Procedure Act espouses. The court must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand and so, give an allowance for that. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

19. Thus, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

20. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, I find the issue for determination in this appeal is whether the agreement entered into between the parties herein on 20th April 2029 is a sale agreement or hire purchase agreement as was held by the trial court and if the answer is that it was a sale agreement and not a hire purchase agreement, what orders should this court make?

21. From the onset, the agreement between the parties herein which is dated 20th April 2019 is titled “Sale Agreement.” The agreement provides for the terms which the parties are to comply with. Nowhere in the agreement does it provide for hire purchase, rather it provides that the balance of the purchase price is to be paid by monthly installments.

22. Section 2 of the Hire Purchase Act defines a ‘hire purchase agreement’ as follows: -

“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; and, where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of those agreements was made

23. In the case of *Eunice Kanugu Kingori v NIC Bank Limited* [2018] eKLR, a ‘Hire Purchase Agreement’ was defined as follows: -

“...Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying instalments.



The hirer has an option to buy the goods at the end of the Agreement if all instalments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner...”

24. It is therefore clear that for an agreement to pass as a hire purchase agreement, it must be one for the bailment of goods that does not necessarily require the hirer to purchase the same in the end.
25. I reiterate that the agreement produced before court is entitled “Sale Agreement.” From this title, and the terms thereunder, for each of the parties to the sale agreement, it is very clear that it is a contract for sale of a motor vehicle hence, it was an agreement for the purchase of or sale of the motor vehicle where clearly, ownership was to pass after the full purchase price had been settled.
26. Accordingly, I find and hold that the trial court erred by regarding the said agreement as a hire purchase agreement.
27. Having so found, I must now examine the merits of the other grounds of appeal as pleaded and argued by both parties to this appeal. I have perused the pleadings before the trial court and find that the respondent failed to complete payment of the purchase price as agreed. It is not in contention that the respondent defaulted in paying for the purchased motor vehicle as agreed in the sale agreement. The appellant then repossessed the suit motor vehicle. An order for status quo was then sought and granted by the trial court pending hearing and determination of the suit.
28. Like in all cases where terms are set out in contracts, the parties herein are bound by the terms of the Motor Vehicle Sale Agreement produced as an exhibit, which agreement was never challenged as being illegal, unconscionable or having been entered into by mistake, coercion, fraud, undue influence or misrepresentation. The Court of Appeal in the case of National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Limited, Court of Appeal Civil Appeal No.95 of 1999 held that:

“...a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved.”
29. Since the repossession and even sale of the motor vehicle in the event that the respondent defaulted in paying the balance of purchase price as agreed, was lawfully provided for under the contract, the appellant had a legal remedy available to it in the contract.
30. It was therefore unfair for the trial court to order the Appellant to pay Kshs. 270,000 to the Respondent while the appellant had a legal remedy under the sale agreement.
31. I therefore find that the trial court erred in finding in favour of the respondent and as such the judgement entered by the trial court for the respondent against the appellant is hereby set aside and substituted with an order dismissing the respondent’s suit against the appellant.
32. On the counterclaim by the appellant which was dismissed, Clauses 5, 6 and 12 of the sale agreement are clear that the appellant had the right to repossess the vehicle where there was default by the respondent, that that if the buyer did not pay the outstanding sums within 14 days of repossession, the appellant would sell the motor vehicle, that upon repossession, the respondent would meet the repossession and incidental charges. I find that the appellant proved on a balance of probability, its claim in the counterclaim as pleaded which was based on the terms of the sale agreement which was breached by the respondent.



33. The appellant had prayed for storage charges from the date of repossession to the date of conclusion of the suit. From the judgment of the lower court delivered on, 10th June, 2022, the vehicle was in possession of the appellant during the entire period of the suit hence the order issued by the trial court that the appellant releases the vehicle to the respondent forthwith is subject to payment of storage charges being incidental charges, up to the date of judgment from date of repossession of the vehicle KCB 243R.
34. In conclusion, albeit the respondent claimed that the default was due to the Covid 19 pandemic and that there was an agreement to delay payment of purchase price, no such agreement was produced in evidence. Section 98 of the Evidence Act is clear that an oral agreement cannot vary a written agreement.
35. The section provides that:
- “ 98 When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:
- Provided that-
- (ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph or this proviso applies, the Court shall have regard to the degree of formality of the document;
 - (iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved.”
36. Thus, the respondent was not entitled to introduce new terms to the written contract through alleged verbal undertakings. See the case of *Kinyanjui and Another v Thande & Another* [1995-98] EA 159 where the Court of Appeal held that an agreement which is by law required to be in writing cannot be amended or varied by oral representations. The same position was taken in *Matiri & sons v Nithi Timber Co-operative Society Ltd* [1987] LLR 1512 and *Deposit protection Fund Board v Sunbeam Supermarket Ltd & 2 Others* [2004] I KLR 37 where the court held that Section 98 of the Evidence Act is clear that parole evidence shall not be admitted to vary the terms of a document which is required to be in writing.
37. In addition, nothing prevented the respondent from writing to the appellant and seeking for a moratorium on the agreement and in writing since the terms of the agreement were clear as far as breach thereof was concerned.
38. The upshot is that the appellant succeeds in its counterclaim and it is thus ordered that judgment of the lower court dismissing the appellant’s counterclaim is set aside and substituted with an order entering judgment for the appellant on the counterclaim as follows:
- a. Kshs. 270,000 being a sum equivalent to 30% of the purchase price for breach of contract
 - b. Daily storage charges at the rate of Kshs. 500 as from 17th September 2020 until the judgement date, 10th June 2022.
 - c. Costs of the suit in the lower court



- d. Costs of this appeal assessed at Kshs 30,000 to be paid by the respondent to the appellant within 30 days of this judgment and in default, execution to issue.
- e. As the motor vehicle was not sold hence the storage charges sought and awarded, the respondent shall also pay to the appellant the balance of purchase price of the motor vehicle Kshs 220,000 upon which he shall have possession of the said motor vehicle

I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

