Case Number:	Civil Case 181 of 1991
Date Delivered:	13 Aug 1993
Case Class:	Civil
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	John Amonde Mango
Citation:	Vincent A Ogutu v Mercantile Co Ltd [1993] eKLR
Advocates:	Mr Onsongo for Plaintiff, Mr Siganga for Kibuth for Defendant
Case Summary:	**Vincent A Ogutu *v* Mercantine Co Limited** High Court, at Kisumu August 13, 1993 Mango J Civil Case No 181 of 1991 ***Contract*** *– Hire Purchase – where one enters into non-act hire purchase agreement with another – where contract stipulates that subject matter will become his property after payment of last instalment – where one defaults in payment of instalment, leading to repossession of subject matter - whether one has a valid action to claim that the repossession was illegal.* The plaintiff, Mr Vincent A Ogutu entered into a hire purchase agreement with the defendant, Mercantine Co Ltd on 8th December, 1988 for the purchase of a motor vehicle, Reg No KZM 460 – a Peugeot 504 Pick Up. The vehicle was, at a request of the plaintiff, purchased by the defendant, who then hired to the plaintiff at a monthly rental fee of Kshs 8,846/05 after paying the initial deposit. The above instalments were to be paid for 23 months and the final figure of

	8886/05 which included the option to purchase fee, was to be paid on the 24th month, after which the vehicle was then to become the property of the plainitff. The vehicle was repossesed on 27th July 1990, whereof it was later gutted down by fire. It was contended for the defendants that the plaintiff fell in arrears in his payment of the hiring charges and in accordance with the terms of the agreement, repossessed the vehicle which had not yet become the property of the plaintiff. **Held:** 1. Until the final instalment was paid and the nominal 40/= option to purchase fee were paid, the vehicle still remained the property of the defendant. 2. The plaintiff had no legal or equitable right over the said vehicle at the time it was seized. *Suit dismissed with costs to the defendant.* **Cases** *Mohamed, Sheikh Osman v National Industrial Credit (EA) Ltd* Civil Appeal No 28 of 1985 **Statues** No statutes referred. **Advocates** *Mr Onsongo* for Plaintiff. *Mr Siganga for Kibuth* for Defendant
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit dismissed
History County:	-

Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE NO 181 OF 1991

VINCENT A OGUTU …….. PLAINTIFF

VERSUS

MERCANTINE CO LIMITED ..…….…….. DEFENDANT

JUDGMENT

This was a non-act hire purchase agreement involving Vincent A Ogutu – the plaintiff – on the one hand and Mercantile Finance Co Limited on the other.

The agreement is dated 8th December, 1988 and involves motor-vehicle KZM 460 – a Peugeot 504 Pick up. The vehicle was, at a request of the plaintiff, purchased by the defendant, who then hired it out to the plaintiff at a monthly rental fee of Kshs 8,846/05 after the plaintiff paid the initial deposit of Kshs 11,8125/-. The above monthly instalments was to be for 23 months and the final figure of 8886/05 which included the option to purchase fee was to be paid on the 24th month after which the vehicle would then become the property of the plaintiff.

The plaint states that the plaintiff complied with all the terms of the agreement till the 27th July 1990 when the defendant unlawfully and wrongly acted in breach of the said agreement by repossessing the vehicle. The vehicle was soon thereafter gutted by fire while in custody of the defendants' agents.

The plaintiff therefore prays for judgment against the defendant for

(a) A motor – vehicle in replacement of the one destroyed by fire or a refund of all the moneys paid to the defendant under the agreement plus interest thereon at the rate of 18% per annum.

(b) Damages for loss of use and for public humiliation suffered and,

(c) Costs of the suit.

The suit is bitterly contested. The defendants line of defence is that the plaintiff fell in arrears in his payment of the hiring charges and in accordance with the terms of the agreement repossessed the vehicle which had not yet become the property of the plaintiff.

The crucial part or clause of the agreement which is admitted by both parties existed in Clause 4 which states, *inter-alia*, that the goods shall remain the absolute property of the owner – the defendant herein – and the hirer (plaintiff) shall have no right in the same other than that of hirer and that:-

"If the hirer shall:-

(a) default in punctually paying the first payment or any of the rentals or of any sum payable hereunder …

then it shall be lawful for the owner … forthwith to determine this agreement whereupon the hiring hereby constituted shall for all purposes determine and thereupon consent by the owner to possession of the goods by the hirer shall forthwith cease."

As it is, the defendant contends that as at the time of the repossession, the plaintiff was owing rentals amounting to over 31,000/- which would be about three and a half months rent. The plaintiff admits he was in arrears but says that these were for only one and a half months. In this, I can hardly see salvation for the plaintiff. The position was this – that until the final instalment was paid and the nominal 40/= option to purchase fees were paid, the vehicle still remained the property of the defendant. That is the agreement that the plaintiff signed. It may have been unconscionable – but that is neither here nor there. It is also true that by the time, the repossession was done, the plaintiff had paid a large part of the money, if the deposit is included, but as was stated in the case of *Osman Sheikh Mohamed v/s National Industrial Credit (EA) Ltd* Civil Appeal No 28/85 (CA – Nairobi):

"It may be thought that this is a harsh result, the appellant having paid so much money, and indeed it may be that the protection of the Act ought to be extended to higher monetary limit. But as the law stands, the appellant was in arrears of payment and the respondent company was entitled to repossess the vehicle."

The position is the same here. The law still stands as it did and so this Court apart from offering its sympathy can do very little else.

Before I came to this finding which would appear to be painful to the plaintiff, I have with a bird's eye view gone through the written submission by counsels. The issues were framed by the parties and my answer to them would be this:-

(1) Yes, as at the time of the seizure, the plaintiff was in breach of one of the terms of the agreement.

(2) Yes, the defendant seizure of the motor-vehicle was lawful and justified at least in so far as the plaintiff agrees that he was in default of paying one and a half months instalments.

(3) No, the plaintiff had no legal or equitable right over the said vehicle as at the time it was seized.

(4) No, the plaintiff's not entitled to any compensation and/ or payment.

(5) Not applicable

(6) The winner takes even the costs as costs follow the event.

The upshot is this:

The plaintiff's suit is dismissed with costs to the defendant.

Dated and delivered at Kisumu this 13th day of August, 1993

J.A. MANGO

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JUDGE