

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

HCT-00-CC-CS-93/2008

COOPER MOTORS CORPORATION (U) LTD:.....PLAINTIFF

VS

1. GENESIS TRANSPORTERS LTD

2. CHRIS DATURAMU

3. ABEERA GRACE KATURAMU:.....DEFENDANTS

BEFORE: HON. JUSTICE MR. ANUP SINGH CHOUDRY

JUDGMENT

Cooper Motors Corporation (U) Ltd is the Plaintiff and supplier of buses and the Defendant are the purchasers under the Hire Purchase Agreement. CMC Holdings Ltd not a party to this suit are the Creditors under the Hire Purchase Agreement.

The plaintiff's claim against the Defendant is jointly and severally for contract sum of Shs. 257,255,580 plus interest and general damages. The claim arises out of alleged breach of 3 Hire Purchase Agreements (HPA).

The relevant documents entered into were the Hire Purchase Agreement for the sum of USD 339,000 dated 31st December 2004 and the Addendum signed on 26th October 2004.

The Hire Purchase Agreement of USD 113,000 on 30th April 2005 and the Addendum dated 11/3/2005.

The Hire Purchase Agreement dated 30/9/2002 in the sum of US\$117,200. There was no Addendum attached.

The Plaintiff's claim is that they were entitled to be paid for default of the HP agreement notwithstanding that they were the suppliers of the buses.

The first and second Defendants entered into personal guarantees with the Plaintiff in support of the principle Debtor i.e. first Defendant as per paragraph 1 of the guarantee.

Upon reading the file this court observed that the Hire Purchase agreement was entered into with a Kenyan registered company CMC Holding Ltd and not with the Plaintiff Cooper Motors Company (U) Ltd and the court expressed concern as it could not entertain proceeding where the parties have no locus standii nor could the court give any ruling or judgment on misconceived claim. If the Creditor was a Kenyan Company, there was a question of jurisdiction as well.

The court on 5/11/2008 at the hearing invited both Counsels to give explanation and the court gave directions to file skeleton arguments to clarify this legal preliminary point. Both parties filed the skeleton arguments which were heard today.

A Hire Purchase agreement is known as consumer-credit agreement and in this case it is creditor-supplier-debtor agreement in which there are 3 parties to the Agreement.

The mechanism of HP agreement is that the supplier is paid by the Creditor and upon receipt of the payment the supplier releases the goods to the purchaser in consideration of the purchaser agreeing to pay off the loan with the Creditor by installments. The Creditor remains the owner of the goods until the loan is paid off.

The tripartite agreement is made of 3 contracts between 3 parties and if any party fails to perform its part the whole contract is wrecked.

At the hearing today court gave leave to Jean Pierre Lequeux Managing Director of Plaintiff Company, to give evidence on the HP Agreement and in his words stated:

“We were not paid when we released the buses but only the deposit triggered the release of buses.”

The object of the Plaintiff Company was sale and after sale of the new vehicles. He also stated that sometimes the Plaintiff released buses on deferred payment terms; but did not enter into HP agreements.

All the payments made to the Plaintiff Company were passed to the Creditor and all the Plaintiff received was the profit element.

He also confirmed that the Plaintiff Company was a subsidiary Company and not a branch; although this was not their pleaded case.

Mr. Kibaya learned Counsel for the Plaintiff confirmed that the Plaintiff Company was not a branch because a branch cannot stand on its own unless a Certificate of Incorporation is issued as such.

It is patently clear that CMC Holdings were the creditor and the Defendant did not owe anything to the Supplier with respect to the supply of buses because the price of the buses was paid in full by the Creditor.

In normal situation the creditor would pay the supplier for goods that are sold but in this case it was the creditor who supplied the goods to the supplier who in turn sold them to the Purchaser and payment was deemed to have been made in full to the supplier.

Conversely, if the supplier had bought the goods from a third party, the supplier would have been reimbursed by the Creditor on sale to the Purchaser.

At all material times this was a Debtor-Creditor-Supplier agreement and the privity of contract on repayment of loan on the HP agreement was between the Creditor CMC Holding Ltd and the first Defendant Genesis Transporters Ltd.

The Plaintiff's role was simply to collect the installments and pay them to the Creditor in Kenya.

The HP agreement entered into with the CMC Holdings Ltd stipulates in paragraph 12 that any civil proceedings arising out of this agreement shall be filed in Nairobi. And paragraph 11 states that upon repossession the owner (Creditor) shall at the owner's discretion offer the goods for sale by auction and under paragraph 12 the owner (Creditor) may appoint any branch of the CMC Motor Group Ltd to represent them in enforcing any of the rights herein contained.

In my judgment under the HP agreement the Plaintiff had no privity of contract to bring the action which they brought against the 1st Defendant and it would be quite extraordinary if a supplier having been paid could enforce an HP agreement if the purchaser was in default, particularly when they were not appointed to enforce the arrears.

Mr. Kibaya the learned Counsel maintains that the Addendum to each of the agreement adopted the HP agreement in lieu of the Creditor or the parent company.

The Addendum states that Plaintiff are subsidiaries of CMC Holding, that the loan facility will be based on the CMC Holding Ltd HP Agreement form Owners Shall be CMC (U) Ltd as the sellers and having extended credit to the Borrower, CMC (U) Ltd it shall sign the CMC Holding Ltd HP form. None of this was done.

If this Addendum were to be relied upon the effect would be that HP agreement would no longer be an HP agreement but a straight forward loan agreement Jean Pierre the Managing Director of Plaintiff's Company confirms that the object of the Company is sale and after sales of their

vehicles. They do not enter into HP agreements although on few occasions they release vehicles on deferred payments.

Mr. Mutabingwa pointed out that for an Addendum to be binding it must be signed by both parties and this is not the case and that the Addendum cannot bind the agreements if it is pre-dated.

There is no addendum to the agreement dated 30/9/08 and the Addendum signed on 16/12/2004 by an unknown party was witnessed the following day on 17/12/2004; this cannot be right.

The evidence of Jean Pierre confirms that the Plaintiff did not extend any loan facility nor did the Defendant pay them any installment.

In my judgment the Addendum cannot be binding; it is not executed by both the parties and the monies were never advanced by the Plaintiff in respect of this HP agreement nor were they the Creditor or owner. On these counts alone the Addendum is a nullity and any suggestion that it is otherwise would fly on the face of his properly constituted HP agreement made with the Kenyan Company CMC Holdings Ltd and satisfactory concluded but for default in payments.

The pleaded case does not state that the Plaintiffs are a subsidiary of the Creditor or that the Creditor appointed them to enforce the agreement. The Plaintiff have no locus standi or any cause of action against the Defendant.

It is also doubtful if this court would have jurisdiction under Section 15 of CPA if this action were brought by the Creditors.

I note that Justice Bamwine had dealt with the jurisdiction on the basis that the Plaintiffs had the locus standi to sue in Uganda.

The case of Ahmed Ibrahim –VS- Car General Ltd raised an issue whether the contract of employment was binding or not.

In this case, in my judgment there is no contractual issued because the HP agreement was properly executed and the only party to the contract which could have brought the action was the Creditor and not the Supplier. The Creditor and Supplier in this case are different companies, with different objects and registered in different jurisdictions; have individual contracts with the Purchasers.

The case of **DHN Ford Distributors Ltd –v- Tower Hamlets Borough Council** was dealing with land owned by a subsidiary company and compensation for compulsory purchase where the assets belonged to the whole group even if they were owed by the subsidiary company which can be distinguished from this HP agreement where the issue is default of payment on the credit agreement that could only be enforced by creditor or one of their branches.

Learned Counsel invited the court to exercise power vested under order 1 Rule 10 when no such application is before the court. The court has no power to substitute a valid party to the contract that is the creditor in this case. The court is not satisfied that the suit has been instituted through a bonafide mistake and that is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as Plaintiff.

There is no mistake. The Defendants do not have any liability to the Plaintiff nor has the Plaintiff suffered any loss nor were the Plaintiffs authorised to bring the suit on behalf of the Creditor; they submit that they were the creditors themselves under the Addendum and this is not correct.

Mr. Mutabingwa learned Counsel for the Defendants submits that Section 98 of Civil Procedure Act states that nothing in the Act shall be deemed to limit or otherwise affect inherent power of the court to make such order as may be necessary for the end of justice or to prevent an abuse of the process of court.

Mr. Mutabingwa refers to case of Makula International VS Cardinal Nsubuga, in which according to learned Counsel it was held that once an illegality comes to the attention of the court, it transcends the question of pleadings and has to be dealt with at the earliest opportunity.

Mr. Mutabingwa also refer to order 7 Rule 11(a) of the Civil procedure Rules, where the Plaintiff shall be rejected where it does not disclose a cause of action. Cause of action was referred in the case of Sempa Mbabali –V- Kidze (1985) HCB pg 46 and Auto Garage –V- Motor mart (1971) EA pg 514, where it was held that for a plaint to disclose a cause of action, it must be shown:

- (a)** That the Plaintiff enjoyed the right.
- (b)** That the right was violated.
- (c)** That the Defendant is liable.

It can hardly be said that the Plaintiff enjoyed a right where the installments were paid to the creditor, or that their right to receive installment was violated and that the Defendants are liable to them. All the Defendants did was to make payment to CMC Holdings through the Plaintiffs because the Creditors were based in Kenya.

Mr. Kibaya also referred to the witness statement of Martin Foster Chief executive of CMC Motor Group. The statement refers to the Plaintiff Company as a branch. The learned Counsel has categorically denied that it was a branch explaining procedure to register a branch under the laws of Uganda.

Mr. Foster stated that the HP agreement was entered into with the Plaintiff Company. This is equally not correct for reasons already explained.

The suit was brought where the Plaintiff have no privity of contract; or authority to sue on behalf of the Creditor and in my judgment, concur with submission made by Mr. Mutabingwa and order that the suit be struck off under order 7 Rule 11(a) which mean that the counter claim also goes.

The guarantees by 2nd and 3rd Defendant are vitiated as there is no subject matter or liability to the Plaintiff by the Defendants.

I know that it is serious for the Plaintiff who may become liable for wrongfully possessing the goods, or for conversion or detinue. The Plaintiff would not doubt seeks independent legal advise.

As regards costs, there is no order. Each party should bear their own costs because the Defendant ought to have picked up the problem at the outset.

I gathered that the Plaintiff may wish to appeal, leave to appeal is granted although I do hope that any appeal will be based on the proper understanding of the consumer credit agreement.

Anup Singh Choudry

Judge

28/11/2008