**Kungu v Diamond Trust (K) Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 31 July 2000

**Case Number:** 4/00

**Before:** Kwach, Tunoi and Keiwua JJA

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Hire purchase – Agreement – Interest – Penal interest – Whether a party who received notice that his*

*default triggered the levying of penal interest without demur is precluded from challenging the rate of*

*interest charged.*

*[2] Hire purchase – Contract – Frustration – Breach of hire purchase agreement – Whether defaulting*

*party can rely on its on breach as a basis of a claim that the contract had been frustrated.*

**Editor’s Summary**

By a hire purchase agreement for the hire and use of motor vehicle registration number KAA 088V between the Plaintiff and the Defendants, the Defendants, agreed, *inter alia*, to pay to the Plaintiff the hire purchase charges amounting to KShs 2 695 610-80 became payable by 36 monthly hire rentals of KShs 222 100-00 commencing 19 November 1994. The agreement also provided that the motor vehicle would not be taken outside Kenya without prior agreement in writing. The Defendants defaulted and after a demand which was not honoured, the Plaintiff on 30 April 1996 informed the Defendants that they were in arrears in the amount of KShs 2 797 746-25 which if not liquidated as requested would attract penal interest at the rate of 40%. The Defendants in their reply promised payment, which promise was not honoured. The Plaintiff’s attempts to repossess the vehicle did not succeed. The Plaintiff then commenced action. In their defence the Defendants stated that insurgents in Zaïre had commandeered the vehicle and that as the Plaintiff had failed to retrieve the vehicle from them, the contract between the parties was frustrated. The Plaintiff’s application for the defence to be struck out and summary judgment entered in the sum of KShs 18 169 994-10 with interest at 40% per annum was granted by the High Court. On the Defendants’ appeal.

**Held** –The hire purchase agreement had not been frustrated. There was no evidence that the vehicle had disappeared as alleged by the Defendants. As the contract did not provide for that eventuality, the Defendants could not successfully invoke the doctrine of frustration. Further, the Defendants could not rely on their own breaches of the contract to resist the Plaintiff’s claim against them. The Defendants were precluded from raising the issue of penal interest as they did not demur when the Plaintiff informed them that without payment of all sums due by them, interest would be charged at the rate of 40% and the issue of interest had not been raised in their joint defence.

Appeal dismissed.