**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.*

**JUDGMENT**

**KWACH, TUNOI AND KEIWUA JJA**: This is an appeal from the decision of the superior court (Mbaluto J) delivered on 13 August 1999, in its civil case number 382 of 1999 in which the Learned Judge granted the Plaintiff’s application brought under Order 6, Rule 13(*b*), (*c*) and (*d*) and under Order 35, Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application prayed for the defence to be struck out and summary judgment to be entered as prayed in the plaint which prayed for judgment in the sum of KShs 18 169 994-10 and interest on that sum at the rate of 40% per annum from 1 January 1999. The Plaintiff’s claim stemmed from a hire purchase agreement between the Plaintiff and the Defendants in respect whereof the Defendants defaulted in performance, in that they did not remit to the Plaintiff the agreed hire rentals payable for hire and use of the Plaintiff’s lorry registration number KAA 088V Isuzu. The Defendants had admitted the defaults on their part and have also admitted a further breach of the agreement of hire purchase when they removed and took the vehicle out of jurisdiction to Zaïre. The Defendants under the hire purchase agreement had the option to pay the Plaintiff a cash price of KShs 5.3 million which they did not go for but that sum together with hire purchase charges amounting to KShs 2 695 610-80 became payable by 36 monthly hire rentals of KShs 222 100-30 commencing on 19 November 1994. The Defendants were on 17 May 1995, notified by the Plaintiff that their account was in arrears to the tune of KShs 1 402 964 and should be paid within 14 days thereof. On 30 April 1996 another letter was sent indicating that the account was at that time in arrears to the tune of KShs 2 797 746-25 and payment was requested, failing which, the Plaintiff was to charge penal interest at the rate of 40% per annum. The Defendant replied and promised payment without raising any objection as to interest or the rate of it. The Defendants did not respond thereafter and did not inform the Plaintiff that the vehicle, under hire to them, had been commandeered by insurgents in Zaïre. The Plaintiff attempted through repossessors to repossess this vehicle but all efforts came to nought. It seems that the first time the Defendants disclosed that the vehicle was lost was when their defence was filed in court in May 1999. In that defence the Defendants, surprisingly, blamed the Plaintiff for failing to retrieve the vehicle from the insurgents. That accusation by the Defendants sounds thoroughly dishonest. The Defendants were, under the hire purchase agreement, bound not to take the vehicle out of Kenya, unless prior agreement to do so was obtained from the Plaintiff. To our minds the alleged disappearance of the vehicle is suspect in the extreme. The Defendants did not deem it fit to place any evidence of disappearance of the vehicle before either the superior court or this Court. There is no proof that any report had been made to the authorities, either in Zaïre or in Kenya. There is yet another riddle in the case, which is this. In their joint defence, the Defendants plead that, because of the feigned disappearance of the vehicle, the hire purchase agreement had been frustrated and the Defendants were no longer under a duty thereafter, to pay for the hire of the lorry. In our judgment such a defence is does not avail to the Defendants because the hire purchase agreement did not provide for such an eventuality, to enable the Defendants to take refuge in the doctrine of frustration of contract. The other reason why that plea will not do, is because the hire purchase agreement prohibited the taking or removal of the vehicle out of Kenya. But, in defiance of that provision, the Defendants brazenly opted for that risk. In our judgment, the Defendants should not be heard to want to blame the Plaintiff for their own deliberate and indefensible misadventure. We were addressed at length on the chargeability of interest under the agreement either at penal rates or at all. We have elsewhere in this judgment, pointed out that the Plaintiff had, before it brought the suit, warned the Defendants of risking a charge of penal interest at the rate of 40% per annum unless they paid all the sums they were in arrears with. The Defendants did not heed, and only have themselves to blame. The plaint in paragraphs 6 and 7 together with prayer (b) thereof claimed interest at the rate of 40% per annum. The Defendants in their sham defence did not plead to those claims in the plaint with the result that the claim for interest, either at penal rate or otherwise, has not been challenged by the defence filed on behalf of the Defendants. In view of all these failings on the part of the Defendants to bring to the fore their defences, we do not see how the Learned Judge can be blamed for not exercising his discretion, in their favour, to grant leave to defend the claim. We accordingly dismiss the appeal with costs to the Respondent. For the Appellant:

*Information not available*

For the Respondent:

*Information not available*