**Sohrab v Coast Bottlers Ltd**

**Division:** Court of Appeal at Mombasa

**Date of judgment:** 29 November 1973

**Case Number:** 23/1973 (2/74)

**Before:** Spry V-P, Law and Mustafa JJA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Sir Dermot Sheridan, J

*[1] Pledge – Delivery – Vehicle registration and possession with pledgee – Whether delivery to pledgee.*

**JUDGMENT**

The following considered judgments were read. **Law JA:** This appeal arises out of a suit filed in the High Court by the respondent. The plaint claimed Shs. 19,563/50 being the balance of the price of goods allegedly sold and delivered to the appellant. By his defence, the appellant pleaded that he was the owner of a lorry of which he had been wrongfully and unlawfully dispossessed by reason of the respondent having forcibly seized it, and he counter-claimed damages for loss of use of the lorry at the rate of Shs. 3,000/- a month until the date of filing suit, or Shs. 42,000/- and continuing damages at the same rate thereafter. He prayed for a set-off of an amount sufficient to extinguish any sum found due by him to the respondent, and for judgment for any sum in excess thereof. By its reply, the respondent admitted that at all material times the appellant was the owner of the lorry, but contended that he had pledged it to the respondent as security for the debt which he owed to the respondent, in terms of a letter dated 30 January 1968, signed by the appellant. The respondent further pleaded that by virtue of its rights under that letter it had lawfully taken the appellant’s lorry into its fleet at an independent valuation of Shs. 5,000/- and it accordingly reduced its claim against the appellant from Shs. 19,563/50 to Shs. 14,563/50. At the trial, the following agreed issues were framed– (1) whether the vehicle was pledged by the appellant to the respondent as security until he had paid his debt to the respondent, and (2) was the respondent liable to the appellant in detinue or conversion. Evidence was led on both sides, and the following facts emerged as appears in the judgment. I have substituted the words “appellant” and “respondent” for the words “defendant” and “plaintiff” respectively. “Since 1965 the appellant had been a distributor of mineral waters for the respondent in the Malindi and Voi areas on a hire commission basis. In order to assist him in the performance of his duties the respondent sold him a Ford Thames Trader Diesel truck registration No. KAY 700 on hire purchase terms. By April 1967 the last instalment had been paid, and in the normal course of events the truck would have been transferred into the appellant’s name. This was not done. By 30 January 1968, the appellant was indebted to the respondent in the sum of Shs. 36,565/10. Kassamali Paroo the managing director of the appellant was unwilling to sell the appellant any more goods on credit unless he agreed to liquidate his indebtedness on terms as set out in a letter signed by him. The appellant continued to use the truck in the business but the registration book and certificate of insurance remained with the respondent in its name, the respondent paying the insurance premiums and debiting them to the appellant, and the truck was kept in the respondent’s yard, for security reasons as the appellant maintains. On 8 September the appellant made a last payment of Shs. 1,000/-. On 3 October he gave a cheque which was dishonoured. By letter dated 13 October the respondent’s advocate demanded payment of the outstanding balance of Shs. 19,563/50 and stated that the truck which the appellant had given as security for the debt would be valued by Hughes Ltd. and sold towards a reduction of the debt. By a further letter dated 25 October, the respondent informed the appellant that the truck had been valued at Shs. 5,000/- and that if he did not find a buyer who was prepared to pay a higher price within seven days it would be sold and his account would be credited with Shs. 5,000/- and he would be sued for the balance. . . . On 4 December the plaint was filed. After that the appellant came to see Mr. Paroo in his office. Mr. Paroo asked him if he had found a buyer for the truck. He replied that he had not, nor could he find any money. When Mr. Paroo said that they would have to take some action the appellant replied, ‘All right, do whatever you like.’ Mr. Paroo was not cross-examined about this conversation nor did the appellant deny in evidence that it took place. On 31 December the appellant was credited with Shs. 5,000/- thus reducing his indebtedness, which is not disputed, to Shs. 14,563/50. The truck was added to the respondent’s fleet of trucks. From October the appellant has not been allowed access to the yard or the truck. It was opened with the duplicate key. . . .” The letter of 30 January 1968 is of prime importance in deciding whether or not the lorry was pledged to the respondent as contended by it. It begins by admitting indebtedness of “Shs. 16,000/- to Shs. 17,000/-” and ends as follows– “In spite of above, I request you Sir to kindly give me one more chance to continue on both routes, viz, Voi and Malindi sides or any one of these two routes, preferably Malindi side, and I AGREE AS UNDER– 1. t o collect or gradually reduce the temporary credits given to me and they reduce your debt on me; 2. t o sell the stock held in my Malindi Depot and reduce your debt; 3. a nd gradually to repay you the difference of Shs. 16,000/- to Shs. 17,000/- which I am unable to explain; 4. a nd in the meantime to allow truck No. KAY 700 to stand in your name (on which I have already paid your instalments) as security until your debt on me is fully paid. Yours faithfully. Issa Sohrab.” There is no evidence as to who drafted this document, but clearly the expression “your debt” should be read as “my debt”. There is no suggestion that there was no consideration for the appellant’s undertakings, or that the respondent failed to honour its undertaking to allow the appellant to continue to operate on the Voi and/or Malindi routes. It is clear that some nine months later the appellant had failed to reduce his indebtedness at all. The substantial question for decision in this appeal is whether this letter, on which the respondent relies, effectually resulted in a pledge of the appellant’s lorry. According to Earl Jowett’s *Dictionary of English Law* (Vol. II), under the title “Pledge”– “A pledge is where the owner of a chattel agrees with another person that it shall be held by the latter (the pledgee) as security for the payment of a debt or performance of an obligation. This entitles the pledgee to hold the chattel until payment or performance, and, upon failure of payment or performance at the proper time, to sell it; but until he does so, the pledgor may redeem it by payment or performance.” Under the heading “Pawn or Pledge” in the same volume, the following appears– “But in a pledge, a special property only passes to the pledgee, the general property remaining in the pledgor. Also, in the case of a pledge, the right of a pledgee is not consummated except by possession. . . .” There must accordingly be delivery of possession, either actual or constructive, to constitute a pledge. The judge correctly directed himself as to this. He held as follows: “Apart from the wording of clause 4 of the letter that the truck was given as security for the debt what else could the appellant have done to show that he had delivered it as a pledge consistent with his continued user of it as a means of reducing his indebtedness? It remained with the respondent. I do not believe this was for security reasons. The respondent retained the registration card and certificate of insurance and had the duplicate key. The appellant’s resigned attitude at the interview before Christmas 1969 points to a pledge of the truck. Mr. Paroo would not have agreed to continue to give the appellant credit unless he knew he had the truck as security. I do not follow the defence that Ex. A was merely allowing the truck to remain in the respondent’s name so that the appellant could not sell it until the debt was paid in full. What security would that be if, as it appears, the appellant would never be in a position to repay the debt. Sale upon default in payment of the debt is an incident of pledge and here it was exercised only after two and a half months had elapsed from notice of intention to sell.” Mr. A. A. Lakha, for the appellant, submitted before us that the element of delivery, which is an essential ingredient of pledge, was completely lacking in this case, and he relied on *Dublin City Distillery v. Doherty*, [1914] A.C. 823. He pointed to the wording of clause 4 of the letter, whereby the appellant stated he would “allow truck No. KAY 700 to stand in your (respondent’s) name as security”. This was in Mr. Lakha’s submission no more than a maintenance of the status quo ante, as the lorry had always stood in the respondent’s name, and been kept on its premises for convenience, so that the respondent exercised some degree of physical control over it. There was in Mr. Lakha’s submission no evidence whatsoever of delivery of possession of the lorry to the respondent, whether actual or constructive. In my view the question depends entirely on what construction is placed on clause 4. Before the letter of 30 January 1968, was signed, the lorry was kept on the respondent’s premises. The appellant took it out whenever he needed it but it was registered in the respondent’s name and the respondent had a key to it. To that extent it provided some security for the appellant’s debt, as the respondent would not in practical terms be able to find a buyer for it, as the registration had not been transferred to his name. The parties obviously intended something to be achieved when the appellant signed his “agreement” of 30 January. He said he would “allow” the vehicle to stand in the respondent’s name. But it had always stood in the respondent’s name. Therefore the appellant must have meant something more. He was in my view waiving his right, as owner, to have his own name registered as the owner. He agreed to waive this right, so as to provide security for his debts. In this way, he was constructively delivering possession of the security to the respondent, subject to his being allowed to use it in reduction of his debt. Instead of the debt diminishing, it increased. After a reasonable time the respondent gave notice of its intention to sell the lorry at a valuation and after a further reasonable period it did so. It has never been suggested that the valuation was unreasonable. In my considered opinion, there was an effective pledge in this case. By not insisting in the lorry being transferred to him, and by leaving it in the respondent’s physical possession, a special property or interest coupled with possession was vested in the respondent, who thereafter held the lorry as security for the payment by the appellant of his debt. There was a constructive delivery of the pledge to the respondent. When the appellant failed to pay his debt within a reasonable time, the respondent as pledgor sold the lorry, as he was entitled to do. For these reasons, I think the trial judge came to a correct decision in this case. I would dismiss this appeal, with costs.

**Mustafa JA:** The facts in this case have been set out in the judgment of Law, J.A., and I will only refer to them briefly. The respondent had filed a suit against the appellant claiming a sum of money as due and owing for goods sold and supplied. The appellant in his defence admitted owing the sum claimed but denied liability and counterclaimed against the respondent. The appellant alleged that the respondent had wrongfully seized and detained the appellant’s vehicle and by reason thereof the appellant claimed general and special damages, and prayed for a set off sufficient to extinguish the sum due to the respondent, and for judgment for the balance. In its reply the respondent agreed that it had seized the vehicle, but claimed that the seizure was lawful as the vehicle was pledged by the appellant to it as security for the debt owed by the appellant.

There were two agreed issues at the trial. They were: 1. W hether the vehicle was pledged by the appellant to the respondent company as security until he had paid his debt to the respondent. 2. I s the respondent liable to the appellant in detinue and conversion. The appellant at one stage was an employee of the respondent and in 1965 the appellant was appointed a distributor for certain areas by the respondent for the sale of its soft drink products. To assist the appellant the respondent had sold a vehicle to him on hire-purchase or credit terms, and by April 1967 the appellant had paid off all the instalments for the vehicle. The vehicle was registered in the name of the respondent who also paid the registration charges and insurance premiums for it, but debited such expenses to the appellant. The vehicle was kept in a yard in the respondent’s premises. The appellant was using the vehicle to sell the respondent’s products in certain defined areas. It is not in dispute that by May 1967, the appellant was the full owner of the vehicle and could have transferred the registration of the vehicle in his name and removed it from the respondent’s yard. He did not do so. On 30 January 1968 the appellant was indebted to the respondent in the sum of Shs. 36,000/- odd. On that day he met the managing director of the respondent and wrote a letter addressed to the respondent containing *inter alia*, the following: [The judge set out the terms and continued.] It is common ground that for a pledge to be effective there must be a contract to pledge, coupled with delivery of the article pledged. Delivery may be actual or constructive. On this point the respondent’s managing director said in evidence: “By 30 January 1968 he (appellant) was indebted to the plaintiff for Shs. 36,565/10. I called him. He agreed to reduce the amount and in the meantime the truck remained as security with us in our name. I produce the letter which he signed. . . .” The appellant in evidence said: “I didn’t authorise them to use the truck. It was only to remain in their name until I paid the debt. I didn’t intend to pledge the truck. If I had I would have handed over the keys to them. . . .” In my view, the letter of 30 January 1968 signed by the appellant clearly constituted an agreement to pledge. The only point for consideration is whether there was delivery pursuant to the agreement. One pointer to delivery would be whether the appellant had handed over the vehicle keys to the respondent. The appellant contended that he had not. The judge found, on the evidence, that he had. From his evidence, the appellant was aware of the significance of the handing over of the vehicle keys. It is true the respondent’s evidence was not clear as to whether the vehicle keys were handed over by the appellant in pursuance of the agreement to pledge, but in my view the appellant’s denial was indicative that it was perhaps done in pursuance of it. Mr. Lakha submitted that the keeping of the vehicle in the respondent’s yard, the retention of the registration card and insurance certificate and the vehicle keys by the respondent could not constitute delivery because that was merely maintaining the status quo.

However when the appellant signed the letter of 30 January 1968, he agreed to allow the respondent to have a special property in the vehicle as security for the debt and to refrain from exercising his right to have himself registered as owner until the debt was paid off. Even if the respondent was merely reaffirming a situation which had been existing by leaving the vehicle and the vehicle keys in the possession of the respondent, he was doing so at that time as a result of his agreement to use the vehicle as security for the debt. That would, in my view, constitute constructive delivery. I would dismiss the appeal. I concur in the order proposed by Law, J.A.

**Spry V-P:** I have had the advantage of reading the judgment of Law, J.A., but, with respect, I am unable to agree. The suit, which was brought by the respondent, was not disputed but the appellant brought a counterclaim, alleging that the respondent had wrongfully seized and detained a truck belonging to the appellant and claiming special and general damages. In a reply to the counterclaim, the respondent alleged that the truck had been pledged to it on 30 January 1968. It did not deny seizure of the truck but claimed that such seizure was lawful and that the appellant had been credited with the value of the truck. The counterclaim was fought fairly and squarely on the issue whether there had been a pledge of the truck. At the hearing of the appeal, Mr. Gautama, for the respondent, made various suggestions, including one that the truck had been handed over by consent and another that the respondent might have had a lien on it, but, with respect, these were never part of the respondent’s case; they were not pleaded, or proved, or argued and it is too late to raise them now. As I have said, the pledge is alleged to have been created on 30 January 1968, and it was part of the allegation that it was created by a letter of that date signed by the appellant. This letter began with a statement of account between the parties. This showed a balance in favour of the respondent of Shs. 36,565/10. The appellant then stated that he had stocks and a small amount of cash due to him totalling Shs. 20,162/-. He went on to say that he could not explain the deficiency. The appellant, who was an agent of the respondent selling soft drinks on commission, then asked to be allowed to retain two routes on which he operated, and in return agreed to take certain steps to reduce his debt, concluding– “. . . and in the meantime, to allow Truck No. KAY 700 to stand in your name (on which I have already paid your instalments) as security until your debt on me is fully paid.” To understand this paragraph, it is necessary to look briefly at the history of this truck. It was sold by the respondent to the appellant in 1965 on credit terms and the appellant duly completed payment for it in March or April 1967. The truck remained registered in the name of the respondent and it was insured in the respondent’s name, the appellant repaying the premiums. When not in use, the truck was kept in the appellant’s yard. The appellant also kept the duplicate key (presumably the ignition key) of the truck. The appellant claimed that the truck was kept in the respondent’s yard as he had no safe place in which to keep it; the only witness for the respondent merely referred to the fact of the truck being kept there but gave no reason. Both sides agreed that the truck was the property of the appellant but that it was left in the respondent’s name until the appellant should have discharged his debt to the respondent. This, then, was the position when the letter of 30 January 1968, was written and it appears that that position remained unchanged until September 1969.

There are some minor differences in the evidence as to what happened then but they are not of any real importance. What is clear is that the appellant was still substantially in debt to the respondent and that the respondent seized the truck. On 13 October 1969, the respondent’s advocate wrote to the appellant threatening to sell the truck if the debt was not discharged within seven days. Twelve days later, a further letter was sent, saying that the truck had been valued at £250 and that unless the appellant could find a buyer at a better price, the respondent proposed to take over the truck and credit the appellant with the value. On 27 October 1969, the appellant’s advocate wrote to the respondent’s advocate complaining of the seizure of the truck and claiming compensation for its unlawful detention and for trespass. On 27 November, the respondent’s advocate replied, denying that the seizure had been illegal and asserting that the truck had been in the respondent’s possession with the “acquiescence” of the appellant. The respondent then filed suit against the appellant. After an interview between the parties, when the appellant is alleged to have said, “Do whatever you like”, the respondent, on 31 December 1969, credited the appellant with Shs. 5,000/- and began to use the truck as its own property. The judge rightly held that delivery, either actual or constructive, is essential to a pledge. He held that the truck “remained” with the respondent after the letter of 30 January 1968, and that the respondent retained the registration card, certificate of insurance and the duplicate key. He found constructive delivery in these facts and he also found some confirmation of the existence of a pledge in the “resigned” attitude of the appellant in December 1969. It has not at any stage been alleged that a pledge existed before 30 January 1968, and I cannot see that anything happened on that date that could constitute constructive delivery of the truck. The fact that it was kept in the respondent’s yard was merely a continuation of an existing arrangement. It was not mentioned in the letter and there was no undertaking, then or at any other time, that it would not be kept elsewhere. The respondent already had the registration card, the certificate of insurance and the duplicate key: there is no suggestion that these or any of them was handed over on 30 January 1968, and all the indications are to the contrary. Indeed, there seems to have been no change in the position, legal or actual, between April 1967, and September 1969. I cannot see that the attitude of the appellant in December 1969, is of any relevance and I can see no element of consent in it. At that time, the respondent had filed a suit to recover his debt and the appellant had already put forward what was to constitute the counterclaim. As I see it, the main purpose of the letter of 30 January 1968, was to record an agreed account. The paragraph on which the respondent relies, and which I have quoted above, seems to me to mean nothing more than it says, that is, that the truck was to remain in the respondent’s name so that the appellant could not sell it without the respondent’s consent. It follows that I would have allowed the appeal. As, however, the other members of the Court are of a different opinion, the appeal must be, and is, dismissed with costs. In the circumstances, no useful purpose would be served by considering what order would have been appropriate had the appeal succeeded, a matter on which Mr. Lakha addressed us at some length. There is one other matter that I would mention. I am by no means satisfied that even if a pledge existed, the respondent had the right to appropriate the truck, as opposed to selling it. This question was not considered at any stage and we were not addressed on it: on my view of the case, it does not arise and

I shall say no more on it.

*Appeal dismissed.*

For the appellant:

*AA Lakha* (instructed by *ASM El-Riami*, Mombasa)

For the respondent:

*SC Gautama* (instructed by *AYA Jiwaji*, Mombasa)