

HIRE PURCHASE LAW IN KENYA: A CASE FOR
CONSUMER PROTECTION

BY

MARARIA ANNE WANJIKU

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DEDICATION

I dedicate this piece to my husband who has taught me the virtue of love, to my parents and siblings for their confidence in me, and for encouraging me to go for the best in life.

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TABLE OF CONTENTS

Dedication	i
Acknowledgement	ii
Table of contents	iii
Table of cases	v
Scope of the study	1
1.1 Background	1
1.2 Statement of the problem	2
1.3 Justification of the study	2
1.4 Objectives	3
1.5 Hypothesis	3
1.6 Reaserch questions	3
1.7 Methodology	4
1.8 Literature review	4
1.9 Chapter breakdown	6
Meaning and nature of hire purchase	8
2.1 Definition	8
2.2 General nature of hire purchase transactions	8
2.2.1 Subject matter	9
2.2.2 Hire	10
2.2.3 Option to purchase	10
2.2.4 Right to terminate	11
2.2.5 The hirers interest	12
2.3 Hire purchase and other transactions	12
2.3.1 The Simple Hire	13
2.3.2 Sale	13
2.3.3 Credit Sale Agreements	14
2.3.4 Conditional Sale Agreements	14
2.3.5 Agreement to Buy	15
2.4 Criticism to hire purchase	16
2.5 Conclusion	17
Regulation of hire purchase transactions	18
3.1 The Kenyan Hire Purchase Act	18
3.1.1 Protections of the hirer	19
A Helping the hirer understand the transaction	19
B Making the agrement coincide with the reasonable expectations of the hirer	20

C Restricting the owners right to repossess the goods and other remedies	23
D Allowing the hirer to terminate on a reasonable basis	24
E Miscellaneous protections	25
3.2 Other regulatory mechanisms	27
3.2.1 The hire purchase agreement	27
3.2.2 The Common law	29
3.3 Conclusion	30
Adequacy of the hirers protection under the Kenyan Hire Purchase Act: A comparative study	31
Conclusions and recommendations	41
Selected bibliography	51

TABLE OF CASES

Bentworth Finance v Lubert	(1968) 1 Q.B 680
Bigeni v Drummond	(1953) 71 NSW 242
Bridge v Campbell Discount Co Ltd	(1962) 1 All E.R 385
Felston Tile Co Ltd v Winget	(1936) 3 All E.R 473
Galbraith v Mitchenall Estates Ltd	(1965) 2 Q.B 473
Helby v Matthews	(1895) A.C 471
Karflex Ltd v Poole	(1933) 2 K.B 251
Karsales (Harrow) v Wallis	(1956) 2 All E.R 866
Kays Leasing Corporation Ltd v Fletcher	(1965) A.L.R 673
Lee v Butler	(1893) 2 Q.B 318
Mercantile Union Guarantee Corporation v Wheatley	(1938) 1 K.B 490
Rv R.W Proffott Ltd	(1954) 2 All E.R 14
Warman Ltd v Southern Counties Car Finance Corporation Ltd	(1949) 2 K.B 576
Whiteley Ltd v Hilt	(1918) 2 K.B 808
Yeoman Credit Ltd v Mclean	(1962) 1 W.L.R 131

CHAPTER ONE.

SCOPE OF THE STUDY.

1.1 BACKGROUND

The Hire Purchase system is, for a private individual, a common and popular method of acquiring property, which due to the high costs involved he would be unable, in most cases, to purchase through the cash sale system. It is used as a convenient way of equipping a home or obtaining a car and paying for the goods over a period of time while having at the same time possession and use of the goods. It is also used by commercial and industrial undertakings, which find it advantageous and convenient when purchasing machinery and equipment because they can budget for regular periodical payments towards the cost of the machinery or equipment. To both the private individual and the commercial or industrial undertaking the Hire Purchase system is a comfortable and convenient way of obtaining goods. It is also an income generating system used by the finance houses and the owners of the property.

Hire Purchase legislation was introduced into Kenya in 1968¹. It was based mainly on the English 1938 Hire Purchase Act. The Kenyan Hire Purchase Act² is the regulatory mechanism for Hire Purchase in Kenya. It is meant to regulate the legal relations between parties to Hire Purchase transactions. It has provisions that protect the owner, dealer and the finance companies from exploitation by dishonest and calculating hirers or customers. Protection is also offered to the hirer. The object of legislation as per Magure J in Bigeni v Drummond³ was

To confer a remedy where through oppression, abuse of power or the unfair taking advantage of the necessities of another, that other has entered into an agreement the terms of which are harsh and such as would be an affront to the conscience of an honest and right thinking person.

¹ Act 42 of 1968.

² Cap 507, Laws of Kenya.

³ (1953) 71 NSW 242 at 246.

It is therefore evident that legislation is meant for the protection of all the parties involved. The protection accorded to the hirer under the Act is however inadequate. There is need therefore for comprehensive legislation to regulate this large and growing system of trading. This predictable expansion makes it particularly urgent to look into the legal aspects of hire purchase, to see whether the legal form in which hire purchase is based approximates to social needs and whether it operates fairly in so far as the consumer is concerned.

1.2 STATEMENT OF THE PROBLEM.

In a nutshell, this study seeks to analyse hire purchase law in Kenya and to find out to what extent the legislation has accorded protection to the parties to a hire purchase transaction, how adequate this protection is and especially that accorded to the hirer. This study will stress more on the protection accorded to the hirer.

1.3 JUSTIFICATION OF THE STUDY.

This study can be justified on several grounds. First, it will attempt to address the existing hire purchase law and its regulation in Kenya. By analysing the existing law on hire purchase, it seeks to find out the adequacy of the law and to what extent it offers protection to the parties to a hire purchase transaction.

By comparing the Kenyan law on hire purchase with that of the UK from which Kenya heavily borrowed but which has since been amended and subjected to reform and is therefore far much advanced, and by comparing it also with other Acts flaws in the current Act will be identified. The writer has for comparative purposes selected the New South Wales Hire Purchase Act, the Indian Hire Purchase Act-1972 and the Tanzania Hire Purchase Act. This study proposes ways to enhance our archaic laws, which are not able to meet adequately the regulatory needs of hire purchase transactions.

It is worth noting also that Kenya lacks a comprehensive consumer protection law and consumers get only incidental protection from other pieces of legislation. The protection offered in such instances is minimal and does not take into consideration

all the interests of the consumer as shall be seen in this study, as is the case in hire purchase in Kenya.

The Hire Purchase Act does not meet the local needs of Kenyans, According to Hodgin, RW⁴, the legislature has made little effort to suit the Act to local conditions. The Act for instance requires that the hire purchase agreement be written in English while Kiswahili is the national language in the country.

1.4 OBJECTIVES.

The study has the following research objectives. First, to review the working of the existing legislation relating to Hire Purchase in Kenya. Second, to look at the English Hire Purchase law and the amendments since 1938 and to find out what prompted these reforms and to examine also the legislation of other selected case studies, which in this case are the New South Wales and India and Tanzania. Lastly this study seeks to identify areas in which the Kenyan law is lacking and to consider and report what changes, if any, and what measures are desirable for the further protection of the consuming public. This study will therefore make some recommendations for reform.

1.5 HYPOTHESES.

This study proceeds on an assumption that the legislature has made little effort to suit the Act to local conditions or to changing circumstances. The writer is also of the opinion that the Kenyan Act is based on the assumption that the owner needs to be protected from exploitation by dishonest and calculating hirers. The Act is also based on the assumption that some hirers do not deserve to be offered any protection under the Act, these are corporate hirers, those who take goods on hire purchase whose value is more than three hundred thousand shillings and those who buy second hand goods on hire purchase. The writer, in this study, will seek to prove the above hypotheses and make some suggestions for reform.

1.6 RESEARCH QUESTIONS.

This study grapples to address the following main questions. First, what mechanisms are in place for the regulation of Hire Purchase transactions in Kenya? What

protections if any are offered to hirers under the selected case studies? Are the regulatory mechanisms under the Kenyan Act adequate and do they offer protection to all the parties involved? Are there ways in which these mechanisms can be strengthened by, for example, reform? Lastly another question this study seeks to address is why the hirer needs protection under the Act.

1.7 METHODOLOGY.

This study relies on both primary and secondary sources. Statutes in the area of Hire Purchase and other related areas like the Sale of Goods shall be used to describe the existing legal mechanism for Hire Purchase regulation. Books and journal articles are some of the secondary sources of the material that shall be used in this study. Internet sources shall also be used. The study shall analyse and make a comparative study of Hire Purchase regulation in Kenya with that of the U.K. The study shall also be prescriptive and shall make some recommendations for reform where the regulatory mechanism of Hire Purchase is not adequate.

1.8 LITERATURE REVIEW.

Hodgin, R.W in his article "The Kenyan Hire Purchase Act, 1968"⁵ analyses the Kenyan Act. His article does a comparative study with the English Act of 1965. The writer only relies on the English Hire purchase law for a comparative study. In this Article, the writer seeks to undertake a comparative study with New South Wales, India and Tanzania as well so as to be able to capture well areas in which the Kenyan hire purchase law is lacking or lagging behind.

Else-Mitchell, R and Parsons, RW in their book, "Hire Purchase Law"⁶ examine the New South Wales Hire Purchase Law. In the drafting of the New South Wales Act an endeavour was made to adopt the best features of already existing legislation in the area of hire purchase e.g. the New Zealand Act, that of the U.K., and other Australian state Acts. Else-Mitchell and Parsons carry out a comparative study of the New South Wales Act, which has not undergone through any considerable amendments with

⁴ Hodgin, RW "the Kenyan Hire Purchase Act, 1968" (1970) 6 *East African Law Journal* 198

⁵ Hodgin, RW "The Kenyan Hire-Purchase Act, 1968" (1970) 6 *East African Law Journal* 198.

⁶ Else- Mitchell, R and Parsons RW (1968) "Hire Purchase Law" 4th Edition The law Book Co. Ltd.

various Hire Purchase Acts of the Australian states and the Australian capital territory.

Goode, R.M. in his book "Hire Purchase Law and Practice"⁷ gives a general overview of the Hire Purchase regulation in the U.K. His book is a useful insight of the Hire-Purchase law and helps one understand the general hire purchase law and their regulation.

"The law of Hire Purchase"⁸ by Guest, A gives definitions and the nature of hire purchase transactions. It goes further and distinguishes Hire purchase from other credit transactions, which it closely resembles. The book is therefore helpful if one needs to understand the constituent elements of a hire purchase transaction and be able to identify one from other similar transactions in consumer credit.

"Instalment credit"⁹ a book compiled by Diamond, A.L is primarily made up of presentations by various persons that were made at the conference on instalment credit at Cambridge in July 1968, some of the writers for instance Farnsworth, EA¹⁰ take the approach of a comparative survey in analysing consumer instalment credit law. These articles shall be a useful and necessary guide and insight to the writer.

Harvey, B.W in "The Law of consumer protection and fair trading"¹¹ looks at the weaknesses in the law of consumer credit with special reference to provisions that favour the owner or seller to the detriment of the consumer or hirer. He goes on to give reasons for the justification of consumer protection measures. The existing law on consumer credit, he says is still founded on the principle caveat emptor, meaning 'buyer' beware. This principle was effective when trade was carried out by non-organised and untrained persons and the buyer and seller were at par, but it cannot hold today since the untrained consumer is no match for the businessman who attempts to persuade a consumer to buy goods and services on terms and conditions

⁷ Goode, RM (1970) "Hire Purchase Law and Practice" Butterworths & co Publishers.

⁸ Guest, AG (1966) "The law of Hire Purchase" Sweet & Maxwell.

⁹ Diamond, AL (1970) "Instalment Credit" Stevens and sons Publishers.

¹⁰ Farnsworth, EA "A modern Instalment Sales ale: A comparative survey" in *Ibid* pg 91-116.

¹¹ Harvey, BW "The law of consumer protection and fair Trading" Butterworths & Co (Publishers) Ltd.

suitable to him. This is the reason why a consumer needs protection by the law. The book shall guide the writer in presenting a case for consumer protection on the law of Hire Purchase in Kenya.

Campbell, S in "Hire Purchase and Credit Sales Law and practice"¹² compares provisions of the Hire-Purchase Act and those of the Sale of Goods Act in the U.K and puts forth the argument that Hire purchase transactions are not subject to the sale of Goods Act. This argument helps one differentiate a hire-purchase transaction from a sale of goods transaction.

Finally in their article, "The Impact of Tanzania Hire Purchase Act, 1966" Picciotto, S and Whitford, WC¹³ give an account of the implementation of the Tanzanian Act. From the article it is evident that if there are too liberal measures and the consumer is heavily protected, there is bound to be considerable opposition from those firms supplying credit.

Although much has been written in the area of Hire Purchase, there is not much written about hire purchase in Kenya. What has been written was written soon after the legislation came into being and therefore cannot be said to have had a clear insight of the impact of the legislation on Hire-Purchase transactions.

1.9 CHAPTER BREAKDOWN

This first chapter deals with the scope of the study. It introduces the study and the issues that will be addressed and gives objects and justification for the study.

In the second chapter, the Hire-Purchase transaction will be defined, its nature will be discussed and it will be distinguished from other transactions that resemble it like simple hire, credit sale agreements and conditional sale agreements.

¹² Campbell – Salmon, E (1962) " Hire purchase and Credit Sales Law and Practice" Sir Isaac Pitman & Sons Ltd.

¹³ Picciotto S, and Whitford, WC "The Impact of Tanzania Hire-Purchase Act, 1966" (1969) 2 *East African Law Review* 11.

In the third chapter, the Kenyan Hire Purchase Act will be examined. Other mechanisms for the regulation and governance of Hire-Purchase transactions and the various clauses and provisions in the Hire Purchase contract will also be examined,

The fourth chapter will then critically examine the Kenyan Hire Purchase Act undertaking a comparative study and a case for consumer protection.

The fifth and last chapter will deal with conclusions and recommendations.

CHAPTER TWO

THE MEANING AND NATURE OF HIRE PURCHASE

2.1 DEFINITION

A hire-purchase agreement according to the Kenyan Hire-Purchase Act¹⁴ means “an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee.” This definition is similar to that in the 1965 English Hire-Purchase Act.

At common law a hire-purchase contract may be defined as

...an agreement under which an owner lets goods of any description out on hire and further agrees that the hirer may either return the goods and terminate the hiring or elect to purchase the goods when the payments of hire-rent have reached a sum equal to the amount of the purchase price stated in the agreement or upon payment of a stated sum¹⁵.

In Scammell (G) and Nephew Ltd v Ouston¹⁶ Lord Maugham said that hire purchase had been understood to mean “a contract of hire by the owner of a chattel conferring on the hirer an option to purchase on the performance of certain conditions” which conditions are set out in the hire-purchase agreement.

2.2 GENERAL NATURE OF HIRE PURCHASE TRANSACTIONS

A hire-purchase agreement is a hybrid form of contract. Goddard J in Karflex Ltd v Poole¹⁷ said,

I do not think that hire purchase is an ordinary contract of bailment. The bailor who lets out the goods is not an ordinary bailor, nor is the customer

¹⁴ Sec 2 (1) Hire Purchase Act, Cap 507 Laws of Kenya.

¹⁵ As per Guest, AG (1966) “The Law of Hire-Purchase” Sweet and Maxwell at pg 9

¹⁶ (1941) 1 ALL ER 14 at pg 17

¹⁷ (1933) 2 KB 251 at pg 265

who agrees to pay these instalments with the hope and intention of becoming the full owner, an ordinary bailee, and there are special contracts and special representations in such an agreement.

The contract is not a simple bailment¹⁸ and neither is it a sale of goods contract but it is a combination of both these elements; bailment because it prescribes terms for the use of the goods whether the hirer exercises his option to purchase the goods or not and sale because the right is given to the hirer to obtain title to the goods. Lord Wright¹⁹ states the following of a hire purchase agreement “a hire purchase agreement is therefore in practice a complex arrangement.” It is complex because it is not merely a simple hire because it contains an element of sale in the option to purchase that is given to the hirer and that the hirer can choose to exercise.

A hire purchase transaction has several unique features that serve to distinguish it from other transactions. These features are discussed below and serve to distinguish hire purchase from other transactions it closely resembles.

2.2.1 SUBJECT MATTER

The subject matter of Hire Purchase according to the definitions of hire purchase is goods. Section 2(1)²⁰ defines a hire-purchase agreement as “an agreement for the bailment of ‘goods’” Under the section²¹ ‘goods’ have the same meaning as that under the Sale of Goods Act²² where they are defined as

All chattels personal other than things in action and money and all emblements, industrial growing crops and things attached to or forming part of land, which are agreed to be severed before sale or under the contract of sale

It is therefore not possible to have hire purchase of land and fixtures on land unless they are severed. It is also not possible to have hire purchase of services.

¹⁸ The Oxford Dictionary of Law defines bailment as “the transfer of the possession of goods by the owner (the bailor) to another (bailee) for a particular purpose ... Ownership of the goods remains in the bailor, who has the right to demand their return or direct their disposal at the end of the period”

¹⁹ *Supra* n.16 at P. 270

²⁰ *Supra* n.14

²¹ *Ibid*

²² Sec 2(1) Sale of Goods Act Cap 31 Laws of Kenya.

2.2.2 HIRE

Under a hire-purchase agreement, the hirer is given possession of the goods and the right to use them in return for payment of a certain amount which may be termed as a rental if the hirer does not exercise the option to purchase, but returns the goods and which will become part of the purchase price if he exercises the option to purchase. The hirer therefore enters into a contract for the temporary use of another's goods at a fee, in which case he is a bailee under a hiring contract. The hiring contract subsists until he exercises his option to purchase. During the continuance of the hiring, the hirer must pay the instalments of hire-rent stated in the agreement.

The reason why 'hire' is introduced into what is essentially a sale of goods is to provide a legal basis for the owners desire to retain a security interest in the goods, that is the power to get them back or to threaten to take them back if the consumer defaults in payment or wrongly sells the goods.

2.2.3 OPTION TO PURCHASE

A hire purchase agreement confers upon the hirer an option to purchase the goods the subject matter of the agreement. Section 2(c) of the Indian Hire Purchase Act defines a hire purchase agreement to mean an agreement under which the hirer has an option to purchase.²³ Scott L J in Felston Tile Co Ltd v Winget Ltd²⁴ states

the purchaser is given by it (the agreement) the right to turn the contract into a contract of sale for all purposes and to bring about an actual sale by exercising the option which the terms of the contract give him.

This right given to a hirer to convert the agreement into a contract of sale is what is termed as an option to purchase.

By granting the option to purchase, the owner makes an irrevocable offer to sell the goods to the hirer if the hirer fulfils the conditions of the contract. The hirer is however under no obligation to exercise the option and buy the goods, under the option to purchase the hirer may exercise an option to terminate the contract. Sec

²³ Act 26 of 1972 (accessed from www.taxmann.com on 2nd August, 2004)

²⁴ (1936) 3 ALL ER 473 at pg 481.

12(1) of the Hire-Purchase Act²⁵ provides that the hirer may terminate the contract by returning the goods to the owner and giving him written notice of termination at any time before the final instalment falls due. The hire purchase agreement confers upon a hirer the option to purchase the goods; he is however not bound to accept this offer.

This was so held in the leading case of Helby v Matthews²⁶ when Lord Watson said,

The only obligation, which is laid upon the hirer, is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing or to pay a price for it. There is no purchase, and no agreement for purchase, until the hirer actually exercises the option given to him.

2.2.4 THE RIGHT TO TERMINATE

At Common Law the hirers right to terminate could be made subject to onerous conditions in the agreement. The Hire Purchase Act limits the availability of such conditions and sets the conditions under which the hirer may terminate. To do this he must terminate at any time before the final payment falls due. He must give written notice of termination to the owner and he is then liable to pay the amount necessary to bring his total payments to fifty per cent. He also remains liable for any liability that accrued before termination and for failure to take reasonable care of the goods. It is the hirer's duty to return the goods to the premises he originally received them. The owner can direct him to return them to another place but he will meet the additional cost.

The hirer has two options; to exercise his right to purchase the goods or to terminate the agreement before the final payment. Sec 12(1) of the Hire Purchase Act²⁷ provides

At any time before the final payment under a hire purchase agreement falls due, the hirer may terminate the agreement by returning the goods to the owner and giving him written notice of termination of the agreement.

²⁵ *Supra* n.14

²⁶ (1895) A.C 471 at page 479

²⁷ *Supra* n.14

On termination the hirer shall however be liable

To pay the amount, if any by which one-half of the hire purchase price exceeds the total of the sums paid and the sums which were due in respect of the hire-purchase price.

It is therefore very likely that the hirer will not choose to terminate the agreement and will opt to exercise his option to purchase the goods.

2.2.5 THE HIRERS INTEREST

A question arises as to the nature of the interest the hirer has under a hire-purchase agreement. In Helby v Matthews²⁸ Lord Mac Naughten said

It was the intention of the parties ... that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last should confer upon the customer any proprietary right.

In Whiteley Ltd v Hilt²⁹, which is more recent, it was held that the option to purchase conferred upon the hirer a proprietary right distinct from the right to use and possess the goods. Swinfen Eady MR said “the whole terms of the agreement show that the contract was not merely a bailment for reward, but that it conferred upon the bailee an interest in the chattel”. The proprietary interest is divided between the owner and the hirer. This is why when an owner brings an action to recover the value of the goods from the hirer the measure of his loss is determined by reference to the damage of his reversion and not the full value of the goods.

The owner of the goods only parts with the possession of the goods but he still remains the absolute owner of the goods taken on hire purchase, the hirer on the other part cannot claim ownership and he holds the goods only on hire.

2.3 HIRE PURCHASE AND OTHER TRANSACTIONS

Hire purchase is similar or resembles several types of transactions.

²⁸ *Supra* n.26 at pg 481

²⁹ (1918) 2. K.B 808

It is important to distinguish hire purchase from other types of credit transactions to which it bears some resemblance. Here it is important to consider the elements of a hire-purchase transaction as discussed above.

2.3.1 THE SIMPLE HIRE.

Under the simple hire, the hirer is entitled to use and have possession of the goods the subject matter of the agreement. He is however not at liberty, under the terms of the agreement, to purchase the goods. It is not contemplated under the agreement that the hirer will ever buy the goods.

Hirers under a simple hire do not enjoy the protection of the Hire-Purchase Act. In **Galbraith v Mitchenall Estates Ltd**³⁰ the hirer entered into a simple hire, which gave him no right to purchase the caravan. Sachs J commented that finance companies had a tendency of entering into contracts of simple hire with unsuspecting hirers. He said "The sooner the legislature is apprised of this tendency and the sooner it takes in hand the problem, the fewer will be the occasions when finance companies are able to inflict on an unwary hirer hardships of the type manifest in the present case."

A question might arise as to whether a perpetual hiring may amount to a hire purchase agreement. Such a hiring agreement may provide that at the end of a fixed period the hirer shall remain in possession of the goods at a nominal hire rent of say, ten shillings an year. In **R v R.W Proffitt Ltd**³¹ where the agreement took this form, with a contingent option to purchase superimposed, neither the crown nor the court suggested that in the absence of the option the agreement would still have been a hire purchase agreement on account of the purely nominal rent being charged for the hirers continued possession.

2.3.2 SALE

The Sale of Goods Act describes a buyer as a person who buys goods or agrees to buy goods. The buyer must commit himself to acquire ownership of the goods. If he does not do so, there is no contract of sale and it is indeed inaccurate to term him a 'buyer'.

³⁰ (1965) 2 QB 473

³¹ (1954) 2 All E.R 798

The House of Lords in the leading case of Helby v Matthews made this clear³². The agreement in that case was between the owner of a piano and his customer. The latter agreed to hire the piano for thirty-six months at a rent of 10s.6d per month. The agreement provided that the piano would become the property of the customer on payment of all the instalments of rent but that he could at any time before then terminate the hiring by returning the piano to the dealer. In the event of the hiring being terminated, the hirer would be liable only for arrears of rent in respect of the period prior to termination. The House of Lords held that this agreement was not a contract of sale and that the customer was not a buyer. The fact that he could terminate the hiring meant that he was under no commitment to acquire ownership of the goods. He had an option to purchase which he could exercise by not terminating the agreement and by paying all thirty-six instalments.

2.3.3 CREDIT- SALE AGREEMENTS.

Guest, MA³³ defines a credit-sale agreement as “ an unconditional contract for the sale of goods under which the whole or part of the purchase price is payable by instalments.” It is therefore a contract of Sale of Goods and the terms implied in it are those implied into any other contract of Sale of Goods. ‘Unconditional’ means that the property in the goods is transferred to the buyer under the contract. The feature, which distinguishes a credit sale from a hire-purchase agreement is therefore, that the buyer is not a mere bailee of the goods, but a person to whom the property in the goods has been transferred. If the buyer defaults, the only remedy of the seller is to sue for the price; he cannot recover possession of the goods, which are the property of the buyer. The buyer has a right to sell the goods and can pass a good title to a third person by virtue of his ownership.

2.3.4 CONDITIONAL SALE AGREEMENTS.

A conditional sale agreement, may be defined, according to Guest, MA³⁴ as

³² *Supra* n.26

³³ *Supra* n.15 at pg 14.

³⁴ *Ibid* pg 15.

an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller until conditions as to payment of instalments or as specified in the agreement are fulfilled.

This type of agreement is more likely to be confused with a hire-purchase agreement because the property in the goods remains with the seller. In both, the hirer or buyer has mere possession of the goods.

These two agreements are however different in that the buyer under a conditional sale agreement is bound to buy the goods. The hirer under a hire-purchase agreement on the other side has an option to purchase the goods. He is not under any obligation however to do so.

In **Lee v Butler**,³⁵ an agreement of hire and purchase was entered into. The agreement provided that the customer should have immediate possession of the goods and should pay £1 on May 6 and £96 on August 1. These sums were termed “rent”. The agreement further provided that the furniture would become the customers property when the instalments had both been paid and not before. There was no clause in the agreement giving the customer the right to terminate it although there were provisions entitling the dealer to do so and to repossess the goods if the hirer defaulted. The hirer wrongfully sold and delivered the furniture before payment of the second instalment. In an action by the plaintiff for the return of the goods the Court of Appeal held that the defendant had acquired a good title to the goods and it was therefore a conditional sale agreement. This decision was approved and distinguished by the House of Lords in **Helby v Mathews**³⁶, where it was pointed out that the hirer was ‘bound’ by the agreement to purchase the goods. Lord Herschel said, “ as soon as the agreement was entered into there was an absolute obligation to pay ... which might be enforced by action”

³⁵ (1893) 2 QB 318

³⁶ Supra n.26 at pg 477,478

2.3.5 AGREEMENT TO BUY

A true hire purchase agreement by definition can never amount to an agreement to buy since there is a vital characteristic in a hire purchase agreement which is the power of the hirer to terminate the agreement before the property in the goods is due to pass to him. If such power does not exist, the agreement is not a hire purchase agreement even though it may be so described but an agreement to purchase.

In Lee v Butler³⁷ there was no clause in the agreement giving the hirer the right to terminate it although there were provisions entitling the dealer to do so. It was held that the agreement was an agreement to buy within section 9 of the Factors Act.

2.4 CRITICISM TO HIRE PURCHASE

Hire purchase has been criticised in several ways. First it has been said that hire purchase encourages reckless people to take more goods than they can really afford to pay for. Most people enter into a hire purchase agreement with the belief that as long as they can meet the initial deposit, the instalments will somehow take care of themselves, that they will only need to have the instalments ready at a future date and they somehow believe they will have the instalments ready by then though it might not be within their capabilities.

Hire purchase is seen by many people as not been quite respectable. It is seen as a last resort for the consumer who cannot ordinarily afford to purchase a product. The better off consumer who is unable to pay cash for a product may thus prefer to obtain an overdraft from his bank or make any other arrangement to find an alternative source for a loan to purchase the product rather than enter an arrangement for hire purchase.

The aggressive sales techniques used in hire purchase are also a subject for criticism. These techniques when employed ensnare people into signing agreements for goods they cannot afford and may not even want. Gordon B and Diamond A.L.³⁸ refer to an instance where a county court judge is credited with the remark that hire purchase

³⁷ *Supra* n 35

consists in being persuaded by a man whom you do not know to sign an agreement you do not read to buy furniture you do not want with money you haven't got.

2.5 CONCLUSION

The different definitions given of hire purchase and the features given of hire purchase transactions help one understand the nature of hire-purchase transactions and also assist in identifying these transactions. This chapter has further distinguished hire purchase from other similar credit transactions, which it closely resembles. The chapter therefore helps shed light on the legal meaning and nature of hire purchase and assists in doing away with the layman's misconceptions of hire purchase and despite the criticism given of hire purchase as a method of purchasing there has been a steady growth in the hire purchase industry.

³⁸ Gordon B and Diamond AL (1973) "The Consumer Society and the Law" Hazel Watson and Viney publications 159

CHAPTER THREE

REGULATION OF HIRE PURCHASE TRANSACTIONS.

3.1 THE KENYAN HIRE PURCHASE ACT

Hire Purchase transactions in Kenya are governed by the Hire-Purchase Act³⁹. The Hire Purchase Act 1968 was as a result of a private members bill introduced in the National Assembly by the Late J. M Kariuki⁴⁰. There had been earlier drafts to which finance companies had objected on the ground that they favoured hirers too much. The bill finally presented to parliament was a compromise measure.

The 1968 Act has gone through no major amendments. The only amendment is in relation to section 3(1). This was in 1991. The amendment raised the upper financial limit for the application of the Act to the sum of Kenya shillings three hundred thousand. The financial limit was raised to reflect the changes in the economy. Nearly two decades later this figure still remains despite the changes in the economy of the country. Despite this evident inequity, the Act limits its application to transactions where the hire purchase price does not exceed this financial limit.

The also does not apply where the hirer is a body corporate. Section 3(2) further stipulates that the Act does not apply to any scheme controlled, managed or guaranteed by the Government for the purpose of providing loans to any persons for the purchase of motor vehicles.

For purposes of this study, the protections afforded to the owner, those afforded to the hirer, and those afforded to other third parties under the Act shall be examined. This is for the purpose of ascertaining the adequacy of such protection and also to ascertain whether it has been arbitrarily granted.

³⁹ *Supra* n.14

⁴⁰ Kariuki J M Kenya National Assembly, official record, Vol. 2 1968

Mac Neil⁴¹ groups the protections afforded to the hirer under the following purposes:

3.1.1 PROTECTIONS OF THE HIRER

- a) Helping the hirer understand the transaction.
- b) Making the agreement coincide with the reasonable expectations of the hirer.
- c) Restricting the owner's right to repossess the goods and other remedies.
- d) Allowing the hirer to terminate on a reasonable basis.
- e) Miscellaneous protections⁴².

These purposes and their effectuation under the Act are discussed below.

A. HELPING THE HIRER UNDERSTAND THE TRANSACTION

Section 6(1) states that before an agreement is entered into, the owner shall state in writing in the prescribed form the cash price of the goods. This must be done unless the hirer has inspected the goods and at the time tickets or labels were attached stating the cash price or if the hirer selected the goods by reference to a catalogue, pricelist or advertisement which clearly stated the price. Under subsection 2⁴³ the agreement must also contain the hire-purchase price and the cash price of the goods, the amount of each of the instalments and the date or the mode of determining the date upon which each instalment is payable and a description of the goods sufficient to identify them. The agreement should also contain a notice in the prescribed form relating to the rights of the hirer, which is at least as prominent as the rest of the contents of the agreement. The agreement has to be signed by the hirer within twenty-one days of the date of the agreement.

These provisions ensure that the hirer fully understands what he is getting into. By indicating the cash and the hire-purchase prices, he is able to ascertain what he stands to lose by choosing hire purchase. He is also able to learn how much he is to pay in instalments and any other monies and when these are to fall due. An important aspect that should be included but is not is how the information is visually presented to the hirer. This will however be examined in detail in the next chapter.

⁴¹ Mac Neil, IR "Tanzania Hire Purchase Act, 1966" (1966) 2 East African Law Journal 84.

⁴² *Ibid*

⁴³ Section 6(2) (a-d)

Under Section 6(2) the consequence of non-compliance with the above by the owner is that he shall not be entitled to enforce a hire purchase agreement or any contract of guarantee relating to it or any right to recover the goods from the hirer and on security given by the hirer of a guarantor shall be enforceable against them.⁴⁴ The requirement may however be dispensed with if the court is satisfied that non-compliance has not prejudiced the hirer and that it would be just to dispense with the requirement.⁴⁵

Section 5(2) requires that the agreement be in English, English a universal language and the provision ensures that an agreement is not in a language the hirer cannot understand and thus lead to him not understanding the agreement that he has entered into.

B. MAKING THE AGREEMENT COINCIDE WITH THE REASONABLE EXPECTATIONS OF THE HIRER.

All the provisions of the Act are in a sense aimed at making the hire-purchase agreement 'reasonable' and therefore in accordance with what the hirer might reasonably expect to find in it if he read it. One group of provisions however focuses on giving the hirer what he probably thought he was getting. These are the provisions on conditions and warranties.

Section 8 implies certain conditions and warranties into every hire purchase agreement. These are: -

- a) A condition that the owner will have a right to sell the goods at the time when the property is to pass.
- b) Warranty that the hirer shall have and enjoy quite possession.
- c) Warranty that the goods are free from any charge or encumbrance.
- d) A Condition that the goods are of a merchantable quality unless they are second hand and the agreement says so.

⁴⁴ Sec 6(2)

⁴⁵ Sec 6(3)

The implied condition as to title clarifies the law as laid down in Karflex Ltd v Poole⁴⁶ where it was held that an implied condition of title required the owner to have a legal property in the goods at the time of delivery to the hirer because the option might be exercised at any time after delivery. Goddard J said,

I think it is desirable to state that in my opinion where a person is letting out chattels of any description on hire purchase, he does thereby impliedly contract, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time he lets it out”

In Mercantile Union Guarantee Corporation v Wheatley⁴⁷ where the case concerned an agreement made by a finance company on February 7 to let out a lorry on hire purchase terms. On that date the finance company did not own the lorry but subsequently purchased it on February 11. The court held that the condition as to title did not require the owner to have the title at the time of execution of the hire purchase agreement, but it would suffice if he acquired it at any time before delivery.

The proviso to section 8(1) provides that if the hirer has examined the goods the owner shall not be liable for defects which the examination ought to have revealed. It is therefore evident that where the hirer has agreed to take the goods as a result of a previous inspection or examination as to the goods, the owners obligation may be greater than merely to see that the goods match the description in the written agreement. The goods that he offers to the hirer for purposes of hire purchase must be similar to those examined by the hirer. He must deliver goods that match the hirer's expectations. As Denning L J said in Karsales (Harrow) v Wallis⁴⁸

When the hirer has himself previously seen and examined the (item) and made application for hire purchase on the basis of his inspection, there is an obligation on the lender to deliver the (item) in substantially the same condition as when it was seen. It makes no difference that the lender is a finance company which bought the (item) in the interval without seeing it.

⁴⁶ *Supra* n.17 at 263

⁴⁷ (1938) 1 K.B 490

⁴⁸ (1956) 2 All E.R. 866

The effect of a breach of the condition as to title was discussed in Warman v Southern Counties Car Finance Corporation Ltd⁴⁹ where it was held that a hirer was entitled to waive the condition and to sue the owner for breach of warranty for the recovery of all monies paid by him.

The implied warranty as to quiet possession can be said to embrace interference by the owner and persons claiming through him and also interference arising from the acts of third parties.

The implied condition of merchantable quality does not apply to a defect that the owners could not have reasonably been aware at the time the agreement was made with the hirer and if hirer has examined the goods or a sample, to a defect that the examination revealed or ought to have revealed on such examination.

The implied condition of merchantable quality is not limited as it is in the provisions of the Sale of Goods Act⁵⁰ to goods bought by description from a seller who deals in goods of that description.

Section 8(3) makes ineffective any attempt to waive the implied warranty of quiet possession of the goods, implied condition that the owner shall have the right to sell when property passes, implied warranty of freedom from charge or encumbrance when the property is to pass and implied condition of merchantable quality. The *section partly states that*

.... the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the conditions set out..." this is so unless "... he proves that before the agreement was made, the provision was brought to the notice of the hirer and its effect made clear to him.

Section 7 makes void any provisions in the hire purchase agreement whereby:

- a) An owner or his agent is authorised to enter into premises to take possession of goods let under hire purchase.

⁴⁹ (1949) 2 K.B. 576

⁵⁰ Sec 16(b) Sale of Goods Act Cap 31 Laws of Kenya

- b) The right to terminate conferred on the hirer is excluded or restricted or more liability than that imposed by section 12⁵¹ is imposed on the hirer for termination.
- c) A hirer after termination is subject to a liability, which exceeds the liability to which he would have been subject if he had terminated the agreement according to the Act.
- d) A person acting on behalf of an owner is deemed to be an agent of the hirer.
- e) An owner is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the agreement.

C. RESTRICTING THE OWNERS RIGHT TO REPOSSESS THE GOODS AND OTHER REMEDIES.

Under Sections 7 (a) and 7 (b) any provision in a hire-purchase agreement whereby an owner or his agent is authorised to enter into premises to take possession of goods let under hire purchase or under which the right to terminate conferred on the hirer is excluded or restricted or more liability than that imposed by section 12⁵² is imposed on the hirer for termination shall be void. The section partly states

Any provisions in hire purchase agreements whereby-

- a) An owner or any person acting on his behalf is authorised to enter upon any premises for the purpose of taking possession of goods which have been let under a hire purchase agreement or is relieved from liability for such an entry; or
- b) The right conferred on a hirer by section 12 to terminate the hire purchase agreement is excluded or restricted, or any liability beyond that imposed on a hirer by reason of the termination of the termination of the hire purchase agreement by that section.

Under section 13 (3) (b) where the owner has taken possession of the goods, the hirer has a right

Within twenty- eight days after the owner has taken possession of the good and upon tendering or paying to the owner in addition to the net balance due: the reasonable cost incurred by the owner in and incidental to taking

⁵¹ Section 12(1) “... shall be liable (without prejudice to any liability which accrued before the termination) to pay the amount, by which one-half of the hire purchase price exceeds the total of the sums paid and the sums which were due in respect of the hire purchase price immediately before termination or such lesser amount as may be specified in the agreement.

⁵²*Ibid*

possession of the goods, the amount properly expended by the owner on storage, repair maintenance and any other additional interest due under the agreement, complete the agreement and thereby entitled to the goods.

Under section 15 (1) where two-thirds of the hire purchase price has been paid, the owner is prohibited from enforcing any right to recover possession of the goods from the hirer otherwise than by suit. Recovery of possession by the owner in contravention of the above section shall terminate the agreement, releasing the hirer from all liability under the agreement and entitling him to recover from the owner by suit all sums paid by the hirer under the agreement.

Under section 16 some protection is given to the hirer where the owner brings a suit to repossess the goods where two-thirds of the hire-purchase price has been paid. Under section 16 (4) (c) the court may make an order for the specific delivery to the owner of only part of the goods and transfer the owners' title to the remainder of the goods to the hirer.

Under section 16(6) where damages are awarded against the owner the hirer enjoys a procedural advantage since the court can in whole or in part treat the damages as having offset the hire purchase price.

Other sections give the hirer some protection against losing both the goods and money paid under the agreement. For instance where an owner recovers possession otherwise than by suit he is required to sell the goods and is liable to account to the hirer and pay him any excess over the unpaid balance to the hire-purchase price.⁵³

D. ALLOWING THE HIRER TO TERMINATE ON A REASONABLE BASIS

Under section 12 the hirer may terminate the agreement at any time before the final payment falls due by giving written notice of termination and returning the goods to the owner. He shall then be liable to pay the amount necessary to bring his total payments to one-half or 50 percent of the hire-purchase price. He also remains liable

⁵³ Section 25

for any liability, which accrued before termination, and also for any failure to take reasonable care of the goods.

E. MISCELLANEOUS PROTECTIONS

Section 11 allows the hirer to apply to the court for an order approving removal of the hire purchase goods in his possession to some other place within Kenya. Upon issuance of the order the new place is substituted for the place named in the agreement.

Under section 12(1) the hirer may request a copy of the agreement and a statement of the amount he has paid, the amount due and the total amount which will be payable under the agreement.

Section 30 protects the hirer if an owner is adjudged bankrupt or if a company is in liquidation. In such situations the liquidator or trustee is bound by the agreement and they cannot disclaim it. The section however contains a proviso that it does not affect the powers of the court to set aside any disposition of property made by way of undue preference.

Section 7 voids any provision, which tries to transform into the agent of the hirer any person acting on behalf of the owner in the formation or conclusion of the agreement. It further voids any provision relieving the owner from liability for the conduct of a person acting on his behalf in the formation or conclusion of the agreement. This section cuts down the effectiveness of the unfortunate commercial practice in which principals try to avoid the effects of conduct of agents through whom they enter transactions.

3.1.2 PROTECTIONS OF THE OWNER

There are several provisions in the Act that confer rights upon the owner. Section 9 permits the owner to record his postal, residential and business addresses in the agreement. It also imposes a duty on the hirer and allows the imposition under the agreement of a duty on the hirer if he changes his postal, residential or business address or if he removes from the premises the goods, to inform the owner prior to

any such change of address or removal. Such notice however does not have to be given more than ninety-six hours before change or removal.

Under section 10 the agreement may prohibit removal of the goods from Kenya without the written consent of the owner. Breach of the provision is subject to criminal sanctions. This section is however subject to abuse because the owner can treat the violation of the section as a breach of contract which would entitle him to terminate the contract.

Under section 34 the owner's reliance on information given by the hirer in a proposal form or other document completed for the purpose of entering into a hire purchase agreement is protected by a provision making it an offence for a person knowingly to give false information in such a form or document.

Rights of distress of a landlord with respect to the goods the subject matter of a hire purchase shall be eliminated if the owner gives written notice of his ownership of the goods to the landlord where the goods are kept.⁵⁴

3.1.3 MISCELLANEOUS PROTECTIONS OF THIRD PARTIES.

The requirement that all hire purchase agreements be registered offers protection to third parties. First, third parties have the opportunity to find out whether goods in the possession of a person are the subject matter of hire purchase or not. Section 5(5) of the Hire Purchase Act provides that any person may inspect the register of hire purchase agreements during the prescribed hours and may obtain from the registrar a certified copy of the entry in the register. The registration requirement also makes available to government agencies information about hire purchase practices in Kenya. This is necessary so that the government is able to keep clear statistics on hire purchase and exercise control where necessary.

Section 5(2) states that the registrar shall on payment of the prescribed fee register any hire purchase agreement delivered to him unless the agreement is liable to stamp duty and is not duly stamped or is not in the English language. The public revenues

⁵⁴ Section 9(4)

are protected by this section, which by implication prohibits the registration of a hire purchase agreement that is subject to stamp duty and is not duly stamped.

Section 33 gives power to the Minister to obtain all such information as the Minister may require for the proper implementation of the Hire Purchase Act. This ensures that all the parties under the Act and the general public receive the protection that the Act intended to give whether such protection is adequate or not.

3.2 OTHER REGULATORY MECHANISMS.

3.2.1 THE HIRE PURCHASE AGREEMENT

Mutunga, W⁵⁵ states, “The Act does not abandon the fundamental principle of freedom of contract, but simply modifies it”. The principle is still accepted as the basis of all hire purchase contracts. It is the contract that will help identify the intention of the parties to the contract. In Helby v Matthews⁵⁶ Lord MacNaughten stated, “It was the intention of the parties, an intention express on the face of the contract....”

It at times is the practice to insert in hire purchase agreements clauses which contain acknowledgements and declarations by the hirer that he has relied on his own skill and judgement in selecting the goods, that they are in perfect order and condition and fit for the purposes, that no employee or agent of the owner has authority to give any warranty or make any representation as to the goods, that all implied conditions and warranties statutory or otherwise are excluded etc. Such exclusion clauses are inserted into the hire purchase agreement by the owners who are the more powerful party due to their experience, to avoid certain basic liabilities. The theory of freedom of contract, which is premised on the justification that both sides are free to negotiate whatever conditions they like, is what leads to the presence of such exclusion clauses in an agreement. The average hirer however cannot possess equal bargaining power with an experienced owner who is in the hire purchase business.

⁵⁵ Mutunga, W “The Demystification of the Kenya Law of Hire Purchase” (1975) 8 Eastern African Law Review 69 at p 81

⁵⁶ *Supra* n.26 at pg 471

The Hire Purchase agreement is however restricted to the Act. Any provisions in the agreement that are contrary to the provisions of the Act cannot be applied. This is so especially in relation to exemption clauses, which are often included into the agreement and are designed to prevent the hirer being able to make a claim for the owner's breach of the agreement. Wild, D⁵⁷ describes them as a device employed by those who wish to retain the benefit of a contract without the responsibility. It is settled that exempting clauses no matter how widely expressed, only avail the party when he is carrying out his contract in its essential respects and not when he is deviating from it or is guilty of a breach which goes to the root of the contract. This was so held by Lord Denning in **Karsales (Harrow) Ltd v Wallis**⁵⁸ where X decided to take a second hand car on hire-purchase .He signed an exemption clause, which read "no condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein. On the day of delivery the car would not move and many parts had either disappeared or being replaced by even older parts. The court decided that despite the wording of the clause the sellers could not hide behind it.

The minimum payment clause is another clause incorporated into the agreement. This has to be in accordance with the Hire- Purchase Act, Sec 12 (1)⁵⁹. In **Bridge v Campbell Discount Co Ltd**⁶⁰ Lord Denning said of it

What possible justifications have the finance houses for inserting the minimum payment clause ... The truth is that the minimum payment clause is not so much compensation for depreciation but compensation for loss of future instalments...

A hire purchase agreement may sometimes contain a clause which provides that in the event of the hirer falling into arrears, the owner can, by serving a notice, cause all the remaining instalments to fall due immediately upon expiry of the notice unless by then the hirer has paid off all his arrears. A hirer can also pay all the instalments under the hire purchase agreement in a lump sum. This clause is called the accelerated payments clause. This clause therefore allows for the speeding of the original plan

⁵⁷ Wild D, (1960) "The law of Hire Purchase" Butterworth & Co publishers pg 78

⁵⁸ *Supra* n. 48 at 866

⁵⁹ *Supra* at n.51

⁶⁰ (1962) 1 ALL ER 385

under a hire purchase agreement. The clause ensures that the liability to pay the instalments and also the transfer of ownership are brought forward to an earlier time.

3.2.2 THE COMMON LAW

The application of the Hire Purchase Act is limited to transactions whose hire purchase price is below the sum of Kenya shillings three hundred thousand.⁶¹ The section also does not apply where the hirer is a body corporate. What law then applies to the excluded transactions? The agreement between the parties as seen above applies. The common law also applies; according to Mutunga, W⁶² the common law is only modified, confirmed or supplemented by the Act. Where the common law is not modified by statute and where statute does not prohibit application, it is still applied.

The common law also applies where there are no statutory provisions. For instance there is no statutory provision as to delivery in the Hire Purchase Act. In such instances the Common Law will come into operation and where the owner refuses to deliver that is a breach of a condition and the hirer can treat the contract as repudiated and reclaim any money paid together with damages. Where the subject matter of a hire purchase agreement is a second hand motor vehicle, the owner is under obligation to hand over the registration documents. In Bentworth Finance v Lubert⁶³ lord Denning M.R said of the hirer "She was entitled to say 'produce the log book'". Until you do there is no contract. There may, of course be circumstances in which the condition may be waived by taking delivery of the car and using it.

This study will however not dwell on the hire-purchase agreement and the common law. The provisions of the Hire purchase Act looked at above are of utmost importance in this study because it is aimed at analysing the provisions of the Hire Purchase Act and point out flaws in these provisions.

⁶¹ Section 3(1)

⁶² Supra at n.55

⁶³ (1968) 1 Q.B. 680

3.3 CONCLUSION

The regulatory mechanism of Hire Purchase has been looked at and the protections afforded to both the hirer and the owner in this chapter.

It would appear as if the hirer is accorded sufficient protection under the Act, this however is not true and the protection is only half-hearted. This shall be examined later in the next chapter.

CHAPTER FOUR

ADEQUACY OF HIRERS PROTECTION UNDER THE KENYAN HIRE PURCHASE ACT: A COMPARATIVE STUDY

From an examination of the rights and obligations of parties to hire purchase agreements and especially the provisions on the protections afforded to the hirer as undertaken in the last chapter, it would appear on the face of it that the hirer has been accorded adequate or sufficient protection. This however is not true as shall be seen in this chapter. There are areas in which the hirer is not afforded any protection, and where such protection is accorded it is only half-hearted, giving with one hand and taking with the other.

One of the areas in which this protection is lacking is in respect to the scope and application of the Act. The Act does not cover all hire purchase agreements. Section 3(1) of the Kenyan Act provides that “this Act applies to and in respect of all hire purchase agreements ... under which the hire-purchase price does not exceed the sum of three hundred thousand shillings.” This section excludes from the application of the Act all hire purchase transactions whose hire purchase price is more than the sum of three hundred thousand shillings. The statutory sum was eighty thousand shillings at the time the Act was enacted. This sum was increased to reflect the economic changes to three hundred thousand shillings in 1991. There has been no further amendment since then. When the bill was being debated in Parliament, J.M Kariuki said, “Anyone who can afford that sort of money (then eighty thousand shillings) should be able to take care of himself”⁶⁴. This is a very unrealistic justification for the exclusion from the application of the Act of some transactions. The Act should be universally applicable for all hire purchase transactions and should not discriminate between hirers who are well off and those who are not. The Act further does not apply to hirers who are bodies corporate. The owner has a right to choose whom he can enter into

⁶⁴ Kenya National Assembly Official Records vol. 2 col 707 Hon J.M Kariuki-1968

hire purchase agreements with. He can opt to enter agreements with bodies corporate or in relation to a hire purchase price that is above the statutory maximum. There is nothing in the Act to prevent an owner from dealing exclusively with non-Act business thereby leaving a hirer to the protection, if any, offered under the agreement or equity.

Section 5(2) of the Kenyan Act provides that all hire purchase agreements must be written in English. The provision reads: “The registrar shall, on payment of the prescribed fee, register any hire purchase agreement ... unless the agreement ... is not in the English language. Section 5(2) (b) of the Tanzanian Act provides that the agreement is not subject to registration unless it is in Swahili or accompanied by a Swahili translation which the registrar is satisfied is true and accurate. The use of Swahili is widespread both in Tanzania and in Kenya and it is the national language in both these countries. The requirement under the Kenyan Act that the agreement be in English can therefore not be justified. When the Act came into existence very few people in the country knew English. Although the number has now increased, most people are still illiterate when it comes to technical terms in hire purchase forms drafted by experienced persons. The provision on the requirement that the agreement be written in English can therefore be said to be a device and scheme to ensure that most hirers do not fully understand the agreement.

Section 4 of the Indian Hire-purchase Act, 1972⁶⁵ lays down the contents of a hire purchase agreement. Where the requirements specified are not complied with, the hirer may institute a suit for getting the hire-purchase agreement rescinded. The court may, if it is satisfied that the failure to comply with any such requirement on terms it thinks fit or pass an order it thinks fit in the circumstance of the case. Section 4(1) states that “Every hire-purchase agreement shall state:

- a) The hire purchase price of the goods to which the agreement relates;
- b) The cash prices of the goods, that is to say the price at which the goods may be purchased by the hirer for cash;
- c) The date on which the agreement shall be deemed to have commenced;

⁶⁵ Act 26 of 1972 – India (accessed from www.taxmann.com on 9th August 2004)

- d) The number of instalments by which the hire purchase price is to be paid, the amount of each of those instalments, and the date or the mode of determining the date, upon the date or the mode of determining the date upon which it is payable and the person to whom and the place where it is payable and:
- e) The goods to which the agreement relates in a manner sufficient to identify them.

The Kenyan Act does not have such a comprehensive list on the contents of hire-purchase agreements. Section 6(2), which deals with the contents of a hire purchase agreement makes no provision in relation to the date in which the transaction shall be deemed to have commenced. It also does not make the number of instalments by which the hire purchase price is to be paid a requirement. The absence of these two requirements would make it difficult on the hirer to prove that he has discharged all his obligations under the agreement and especially in relation to having paid all the instalments. He cannot prove when the agreement is deemed to have commenced nor can he show the total number of instalments he was to pay. The date on which the agreement is deemed to have commenced determines the date on which the owner and the hirer started having duties, rights and obligations under the agreement. Besides specifying the amounts of each of those instalments, sections 3(2) (c) of the New South Wales Hire purchase Act⁶⁶ provides that the agreement shall specify ... the person to whom and the place at which the payments of those instalments are to be made” This provision like the ones mentioned above ensures that there is no future conflict or uncertainty as regards the payment of hire instalments. These provisions are however not incorporated into the Kenyan Hire-Purchase Act.

Section 6 of the Kenyan Act lays down what information the hire purchase agreement must contain. This is the hire purchase price, the amount of each instalment, the date or mode of determining the time when the amount is due, the various rights of the hirer etc .The important issue here is not merely what information is given, but should be how it is visually presented to the hirer. Section 7(2) of the English Act of 1965 states:

The board of trade may by regulations provide that in any document which, on being signed; constitutes a hire purchase agreement, a credit sale agreement the signature of the hirer or buyer shall be inserted in a space

⁶⁶ Act No. 1960, as amended by act No. 33, 1965

marked in such a manner, and accompanied in the document by such words, as may be specified in the regulations and the regulations may include provisions as to the location of those words in relation to the space in which the signature is inserted, and may prescribe such other requirements (whether as to type, size, colour or disposition of lettering or otherwise) as the board may consider appropriate for securing that the words come to the attention of the hirer or buyer at the time when he is about to sign the document.

This resulted in the Hire Purchase (Documents) (Legibility and Statutory Statements) Regulations, 1965, which demands very high standards of visual presentation as to the binding nature of the hirer's signature, his right of cancellation and requirements as to the style and size of the letters. There are no such provisions in Kenya and although section 35 of the Kenyan Act gives the Minister the power to make rules, no such comprehensive rules have been made.

The board of trade in relation to the 1965 English Act suggested a prominent warning be given to the hirer that his signature will bind him and the goods are not his until all payments are made – such a message written down clearly in block letters in a large box can be called prominent display of the hirer's rights and this will ensure that a hirer only signs the agreement once he intends to be bound.

The English legislature recognised the danger of entering into hire purchase agreements on impulse. This was as a result of the experienced hire purchase salesman using his techniques on unsuspecting housewives successfully. Section 11 of the English Hire-Purchase Act⁶⁷ allows the hirer four days from the day of receiving the second statutory copy of the agreement to change her mind and cancel the agreement. This provision applies where the document is signed at a place other than the appropriate trade premises. The salesman may apply his sales techniques on a person successfully and influence them to enter into the hire purchase agreement, which under any other circumstances they would not have entered into. A housewife may enter into an agreement whose obligation and duties as a hirer she is not able to perform without the help of her husband who is the breadwinner. The intention of this

⁶⁷ The 1965 Hire Purchase Act.

section is therefore to ensure that such agreements do not enter into force until all those who may be affected by the agreement have deliberated upon it. There is no such provision under the Kenyan Act protecting the hirer. A hirer cannot withdraw from an agreement or terminate it without facing some dire consequences as shall be seen below.

Section 12(1) of the Kenyan Act provides that a hirer can terminate the contract at any time before the final payment under the hire purchase agreement falls due by returning the goods to the owner and giving him written notice of termination of the agreement. This provision may on the face of it appear to favour and protect the hirer. The section however further provides that.. “If he does so he shall be liable (without prejudice to any liability which accrued before the terminations) to pay the amount, if any by which one-half of the hire purchase price exceeds the total of the sums paid and the sums which were due in respect of the hire-purchase price immediately before the termination or such lesser amount as may be specified by the agreement.” This provision puts an obligation upon the hirer to bring the total amount paid by him to fifty percent. This clause requiring a certain amount of money to be paid is known as the minimum payment clause.

In **Bridge v Campbell Discount Co Ltd**⁶⁸ Lord Denning said that when hire purchase agreements were first validated in **Helby v Matthews**⁶⁹ they had most of the features of an ordinary hiring. The hirer was at liberty to terminate the hiring at any time and without paying any penalty. He could return the goods and not be liable to make any further payments beyond the monthly sum then due. He went on to say, “Since that time, however, the finance houses have imposed a serious clog on the hirers right to terminate the hiring. They have introduced into their printed forms a “Minimum payment clause ... “ The minimum payment clause is also called agreed compensation for depreciation. Hodgin⁷⁰ says that this amount is not “agreed” nor is it “compensation for depreciation. “There is no slightest evidence that the hirer agreed to it. He simply signs a printed form he is asked to sign. Possible justification for the

⁶⁸ (1962) 1 ALL ER 385 at 398

⁶⁹ *Supra* n.26

⁷⁰ Hodgin, R W “The Kenyan hirepurchase Act 1968 “East Africa Law Journal 201



inclusion of these clauses is that the owner is entitled to a fair sum to cover possible depreciation not met by the payments so far received from the hirer. This is however not satisfactory. It is possible to visualise that one-half of the hire purchase price together with the value of the goods on the open market might well exceed the original price of the goods. The owner would then be better off after such termination and the hirer would have paid a sum that is more than mere compensation for depreciation but which amounts to a penalty payment for terminating the agreement.

The Hire purchase Acts of Tanzania⁷¹ and Kenya have similar provisions requiring a minimum payment of fifty per cent of the hire purchase price. The New South Wales Act⁷² seems to refer the issue to an express provision in the agreement. Section 12 (6) states “where a hire purchase agreement is determined pursuant to this section the owners is entitled to recover from the hirer

- a) The amount (if any) required to be paid in those circumstances under the agreement or
- b) The amount (if any) that the owner should have been entitled to recover if he had taken possession of the goods at the date of termination of the hiring, whichever is the less.

Where a hirer terminates therefore the Act seems to refer to an express provision in the hire purchase agreement specifically directed to the circumstance of an exercise by the hirer of his statutory right to terminate. The English legislature made effort to avoid the fifty per cent becoming a penalty clause.

Section 28(2) of the English Hire Purchase Act states “if in any action the court is satisfied that a sum less than the amount specified ... would be equal to the loss sustained by the owner or seller in consequence of the termination of the agreement by the hirer, the court may make an order for the payment of that sum in lieu of that amount.” If it thinks that such sum more truly reflects the loss suffered by the owner thereby preventing the clause from becoming a penalty clause.

⁷¹ Act 22 of 1966

⁷² Act no 33 of 1965

At common law, the owner imposed the minimum payment upon the hirer and the hirer had to pay it when he terminated the agreement. It did not matter whether or not law provided for the minimum payment clause. It only mattered if it was held that the hirer had breached the agreement. The court would then decide on whether or not the clause was a penalty in law. In Bridge v Campbell Discount Co. Ltd⁷³ Lord Denning said, “The truth is that the minimum payment is not so much in compensation for depreciation but rather compensation for loss of future instalments which the respondents (owners) expected to receive but which they had no right to receive. At the two-thirds mark, the owners have made profits under the agreement and further payments just enlarge their profit margin.

On repossession by the owner, the Kenyan Hire Purchase Act provides that where goods have been let under a hire purchase agreement and two-thirds of the hire purchase price has been paid, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit. Picciotto and Whitford⁷⁴ say that this provision is similar to the one suggested by finance companies for Tanzania. If the hirer is late on two or more instalments, the owner may seize the goods immediately. If two thirds of the hire-purchase price has been paid however, the owner must keep the goods in safe custody at his own expense and immediately apply to the court for an order of repossession. If the owner is in contravention of this provision, the hire purchase agreement if not previously terminated shall terminate and the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner by suit all sums paid by the hirer under the agreement. His guarantor shall also be entitled to recover all sums paid by him under the contract of guarantee or under any security given by him.

The Indian Hire Purchase Act has similar provisions though these differ slightly. Section 20(1) provides that where goods have been let under a hire purchase agreement and the statutory proportion of the hire purchase price has been paid the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit. This statutory proportion is however not uniform like that

⁷³ *Supra* n.68 at 399

⁷⁴ Picciotto S and Whitford WC “The impact of Tanzania Hire Purchase Act, 1966 “(1969) 2 *East Africa Law Review* 23

under the Kenyan Act. It is one-half where the hire purchase price is less than fifteen thousand rupees and three-fourths where the hire purchase price is not less than fifteen thousand rupees. This is only for other goods excluding motor vehicles, which have their own proportions. This ensures that the different classes of hirers are offered adequate protection under the Act. Those who purchase cheaper goods are offered more protection.

The English Act offers more protection to hirers than the Kenyan Act. Where a hirer has met up to one-third of the total hire purchase price the owner shall not enforce his right to recover possession of the goods otherwise than by suit.

The Indian Hire purchase Act has provisions in respect of care to be taken of the goods. Section 14(1) provides that a hirer shall be bound to take as much care of the goods to which the hire purchase agreement relates as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. Section 15 provides for specifications as to the use of the goods. The section states "If the hirer makes any use of the goods to which the hire purchase agreement relates which is not according to the conditions of the agreement, the hirer shall be liable to make compensation to the owner for any damage arising to the goods from or during such use" Section 12(2) of the Kenyan Act imposes an obligation upon the hirer to take reasonable care of the goods. The test of reasonableness is however not expressly stipulated as in the Indian Act. The hirer under the Act can also put the goods into any use because the Act does not provide for any specifications as to use in the agreement. Under the Kenyan Act therefore the hirer can be penalised for failure to carry out an obligation that was not expressly provided for in the agreement.

Under the Kenyan Hire Purchase Act, there is no limit on the rate of hire purchase interest that the owner can derive from the agreement. It is up to the owner to fix any amount as the hire purchase price without any limitations.

Under Sec 26 of the New South Wales Act the rate shall be calculated in accordance with the following formula:

$$R = \frac{100 \times C}{T \times P}^{75}$$

T x P

The section states that the rate shall not exceed seven per centum where the goods are industrial machinery, farm equipment or a motor vehicle all of which are not second hand; nine per centum where the above goods are a motor cycle etc. There are fixed rates that cannot be exceeded by the owner. The Indian Act has similar provisions for determining the statutory charges under section 7. These provisions ensure that the owner does not fix any amount without any limitations.

The term hire purchase is given a broader meaning under the New South Wales Act and the Indian Act than that given under the Kenyan Hire purchase Act. Section 2(5) of the New South Wales Act states that “Where by virtue of two or more agreements non of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods or the property in the goods will or may pass to the bailee, the agreements shall for the purpose of this Act, be treated as a single hire purchase agreement made at the time when the last agreement was made” Section 5 of the Indian Hire Purchase Act has similar provisions. The purpose of these provisions is to extend the definition of hire purchase so as to cover devices such as a simple hiring of goods over which an option to purchase is simultaneously granted by a distinct document and if there is a simple hiring and an option to purchase is conferred on the hirer by an independent document at a later date, the transaction will constitute a hire purchase agreement as from the date of the second document. An illustration of such an instance can be seen from the case of **Kays Leasing Corporation Ltd v Fletcher**⁷⁶. The two agreements in this case were a simple hiring agreement, and an agreement by which at the conclusion of the hiring the owner agreed to sell to the hirer at a specified price goods of the same nature and condition as the hired goods, the owner having an uninhibited discretion to select the goods. He might select the goods hired or some other goods. The majority held that the two

⁷⁵ Where R represents the rate per centum per annum

C represents the amount of terms charges expressed in dollars and fraction of dollars

T represents time between that fixed for the first and last instalment

P represents the difference between the cash price of the goods and the amount of deposit together with other costs incurred.

⁷⁶ (1965) A.L.R 673

agreements were to be treated as “a single hire purchase agreement. These provisions ensure that transactions which the parties meant to be hire purchase agreements but which do not qualify as such⁷⁷ are covered by the provisions of the Act and hence giving the hirer the protection under the Act. The English Act applies also to credit sale agreements. Here, like under the Indian and New South Wales Acts the hirer is afforded protection under the Act whereas such transactions would not be covered by the Kenyan Act.

CONCLUSION

From the foregoing discussion and the comparative study undertaken, it is evident that the Kenyan hire purchase Act does not adequately protect the consumer. The protection that the Act gives to the hirer has in some cases been seen to be half-hearted and not comprehensive.

It can be argued that if the Act was too tough on owners and offered more consumer protection then the owners might withdraw from hire-purchase business. It is however of paramount importance to protect the interests of the hirers because they have a lower bargaining power when entering the agreements. The Act should therefore aim at protecting their interests.

⁷⁷ See the elements and essential of a hire purchase agreement in chapter 1.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

It is evident from the foregoing that a hirer is not afforded adequate protection under the Kenyan Hire Purchase Act. A question might arise however as to why it is important to protect the consumer or hirer when there has been no fraud, misrepresentation or any other scheme by the owner to take advantage of the hirer. An important consumer protection measure in Australia was justified as follows:

In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor* meaning 'let the buyer beware' that principle might have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now trained business executives conduct on an organised basis the marketing of goods and services. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor (the owner). The consumer needs protection by the law⁷⁸.

Consumer protection can therefore largely be justified on the ground of inequality of bargaining power of the parties. As Hodgin puts it, the hirer needs protection from his own commercial inadequacies⁷⁹. He cannot be a match to the skilled and experienced owner or his agent who might insert clauses into the agreement that will favour them. If the two parties were of equal bargaining power, then they should be allowed to hammer out their various rights and obligations and any consumer protection measures would not be justifiable. The vast majority of hirers in their average dealings are however not on an equal bargaining level with the other party. To compensate for the inequalities of bargaining power and technological expertise, the consumer has to be given protection in specific areas and this can only be done through legislation.

⁷⁸ Senator Murphy, then Australian Attorney – General introducing the trade Practices Bill, he quoted John Goldring 'consumer protection and the Trade Practices Act' 1974 – 5 6 FLR 288

⁷⁹ Hodgin RW, 'The Kenyan Hire Purchase Act, 1968. *EALJ* 6 (1970) 209

There are other reasons why the hirer has to be protected. The average hirer is usually a person of low economic capacity compared to the owners and finance houses who are out to maximise profits and take advantage of the fact that the hirers have no better option than hire purchase. Unless the Act offers the hirer adequate protection and hence reducing chances of conflict with the owner, the hirer would have to resort to litigation which is time consuming and slow and most of all is expensive, making it favourable to owners who have the money.

It could be argued that if the Act offered a lot of protection to the hirer then the hire purchase method of purchasing goods would not be unpopular to finance houses and others in the hire purchase business and they would withdraw if the agreement was not favourable to them or they were unlikely to make adequate profits under the agreement. This is however no justification for failure to protect hirers. The hire purchase agreement is laid out by the trader so he should not be looked after as much as the hirer in the Act as it is unlikely that he would insert provisions unfair to him in the agreement.

Hodgin, RW in criticising the Act says that the Act is a disappointing piece of legislation because it has not been suited to local conditions and also because the comparative study that had been undertaken was out of date⁸⁰. Any cry that socio-economic conditions in the country are so far removed from the other countries used for comparative purposes in this study cannot be accepted. Although the hirers might have a higher purchasing power elsewhere, they are all illiterate when it comes to printed agreements and sales techniques used expertly by the owners and their agents. The hirers are also blinded in a sense that they have the sole aim of obtaining the property that they ordinarily could not obtain and they therefore do not take into account things they may consider as trivialities. In this aspect, therefore the hirers are the same everywhere. It is therefore evident that the hirer should be afforded protection and as was seen in the previous chapter, this protection is not adequate under the current Kenyan Hire Purchase Act.

⁸⁰Supra n.70 at pg 198

The ill that pushed the legislature to advocate for the Hire Purchase bill was mainly the repossession of the goods by the dealer in the event of default of payment by the hirer. The legislature failed to look into other areas that needed more attention. Honorable Masinde Muliro⁸¹ said

Sir, I find the present arrangement of hire purchase much of a swindle that a proper arrangement for hire purchase business. You find today that someone has been paying money for hire purchase for eleven out of twelve instalments and then the owner of the goods comes and takes possession of the goods. Then he goes to sell the goods and then every cent is kept by the owner. This is a swindle.

The legislature therefore did not foresee any other ill in the hire purchase agreement when they came up with the Act. This study has shown that more ills exist in the agreements that should have been catered for in the Act. Because of this hindsight the legislature should rectify the current problem by making improvements in the form of amendments to the Act.

Proceeding from the fact that it is of utmost importance to protect the hirer, this study will now look at specific areas and make recommendations.

First it is difficult to find any justification for a financial limit as the one under section 3(1) of the Act. There is no reason to exclude from the protection of the Act some hirers. As was seen above all hirers are illiterate when it comes to the technical terms and schemes used by the experienced owners in the drafting of the agreement and the sales techniques employed. The Act should therefore have no financial limit so as to protect all hirers.

Hodgin RW states that whenever exact figures are chosen, the Act soon becomes outdated by inflation, devaluation, revaluation etc⁸². The legislature unfortunately does not usually act in time to correct these unrealistic figures. This has only been done once since the enactment of the Act. This was in 1991 when the figure was raised to Kenya shillings three hundred thousand. This figure has now again become outdated. Since there is no justification for the inclusion of this ceiling, this section

⁸¹ Kenya National Assembly Official reports June 1962 col 721

⁸² *Supra* n.80

should be repealed and the financial limit therefore removed. Alternatively the legislature could keep updating these figures to keep up with current economic changes in the country.

All hirers should be protected; there is also no justification for the failure to protect in the Act hirers who are bodies corporate. To protect such hirers the Act should be amended to include them in the protection offered in the Act.

The Hire-Purchase Act proceeds on the assumption that all possible parties to a hire purchase transaction know and understand English fully. English is however a foreign language and it is therefore wrong for the legislature to proceed from such a presumption. The requirement that the agreement be in English cannot be justified. Kiswahili is the national language in the country. The majority of Kenyans and especially those in the rural areas are not conversant in English. Even those who are conversant in English are not so well versed when it comes to the technical terms employed in hire purchase agreements. The provision that requires that the agreement should be in English⁸³ should be amended. The agreement should be in any language that the parties understand. Alternatively it could be in Kiswahili, which is the national language and is understood by the majority of Kenyans. It is only then that the Act should require an English translation if the agreement is written in any other language other than English. The agreement should also be read out to the hirer and it should be ascertained that he fully understands the agreement so as to ensure that he knows fully what he is getting himself into.

The Act should also have more clear and detailed requirements for every hire purchase agreement. As was seen in the last chapter, the Act does not make provisions as to the date on which the agreement shall be deemed to have commenced and the number of instalments by which the hire purchase price is to be paid. The absence of these two requirements makes it difficult on the hirer to prove that he has discharged all his obligations under the agreement and especially in relation to having paid all the instalments. He cannot prove when the agreement is deemed to have commenced nor can he show the total number of instalments he was to pay. The documents he might

⁸³ Sec 5(2) Hire Purchase Act

have could only show the number of instalments he has actually already paid. The date on which the agreement is deemed to have commenced determines the date on which the various rights and obligations of the hirer and the owner commenced. Besides making express provisions for the above, the agreement should also specify the person to whom and the place at which the payments of the instalments are to be made so as to ensure certainty under the agreement.

Section 8(1)(d) excludes second hand goods from the protection of merchantable quality. The Act fails to define terms such as second hand goods. Is a motor vehicle whose motor is run to prevent deterioration due to inaction or to demonstrate to potential buyers second hand? Issues such as these are not provided for under the Act and are left to the courts to determine once a dispute arises between the parties. Even goods that have been used for a few days are excluded from the protection under the Act although they are not necessarily 'old'. An owner can also enter into a hire purchase agreement in relation to goods they know very well not to be of merchantable quality as was the case in **Karsales (Harrow) Ltd v Wallis**⁸⁴ where the owner took out a second hand car on hire purchase. The agreement contained an exclusion clause exempting the owner from any condition or warranty as to roadworthiness or as to age. On the day of delivery the car would not move and many parts had either disappeared or been replaced by older parts. It was held here that the owner could not rely on the exclusion clause. Second hand goods should not be excluded from the application of the Act. Crafty owners would make sure that they only dealt with second hand goods that were not covered by the Act.

Section 13 allows the hirer to pay in a lumpsum any remaining instalment charges. The section is silent on whether or not there should be a reduction in the price since buying in cash should ideally be cheaper than purchasing under a hire purchase agreement. The courts have shown an inclination to believe that the requirement that the hire purchase price be paid is unfair. **In Yeoman Credit Ltd v Mclean**⁸⁵, it was said,

...(it is) a practice so often given in evidence before me that I am tempted to take judicial notice of it to allow discount or allowance to a hirer who

⁸⁴ Supra n.48 at 866

⁸⁵ (1962) 1 W.L.R 131 at135

desires to pay the outstanding balance in one lumpsum rather than spread over the remaining period of the agreement

Such a provision should be incorporated into the Act to ensure that hirers are assured of lower prices if they pay in a lumpsum .It should not be left to the courts to decide. There should be a reduction of the price provided for under the Act since the hirer then pays in cash.

Section 12 allows a hirer to terminate the agreement should he so wish. When the hirer exercises this right, the minimum payment clause comes into operation as was seen earlier. This makes it extremely difficult for the hirer to withdraw from the agreement due to the application of the minimum payment clause. It ensures that those who insist on premature termination of the contract suffer punitive rather than remedial consequences. Once the contract is terminated and the goods returned to the owner under this section, the Act does not demand of the owner to account for and pay to the hirer any excess monies got from the sale of the returned goods. The minimum payment clause should be abolished and depreciation should be assessed for each particular case differently as depreciation is not uniform in all goods. There are different circumstances to be considered for the different goods. The owner should also account for the proceeds of sale for goods returned voluntarily by the hirer and not only for those recovered under suit. The excess money should then be given to the hirer. It should also be ensured through the legislative instrument that the minimum payment clause does not become a penalty clause. The Act should provide for a lesser amount than the one specified in the Act if it is evident that such lesser amount would be equal to the loss sustained by the owner or seller in consequence of the termination of the agreement by the hirer. Such a provision would make it open for a court to award a smaller sum if it thinks that such sum more truly reflects the loss suffered by the owner thereby preventing the clause from becoming a penalty clause.

On repossession by the owner, the Act provides that where two-thirds of the hire purchase price has been paid, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit. The hirer here is protected only if he has paid two-thirds of the hire purchase price. As was seen in the last chapter, at the two-thirds mark the owner has already made profits under the agreement and further payments just enlarge their profit margin. Two-thirds of the

total price of hire purchase is too high. The hirer enters into a hire purchase agreement with the aim of completing the hire purchase price and obtaining ownership of the hire purchase goods, it is only circumstances beyond his control that can make him not complete the instalments under the agreement. If this statutory proportion can however not be reduced for whatever reasons. The Act could have provisions like those in the Indian Hire Purchase Act where this proportion is not uniform for all goods. The proportions are different for goods of a particular hire purchase price and are also different for motor vehicles or other specific classes of goods. This ensures that the different classes of hirers are offered adequate protection under the Act. Under the Indian Act, those who purchase cheaper goods are offered more protection.

Under the Act, there is no limit on the rate of interest under a hire purchase agreement. The owner may fix any amount in the hire purchase agreement without any limitation. There is no provision under the Act that tries to regulate the rate of interest that can be derived under the agreement. A hirer therefore takes any amount that is fixed by the owner in the agreement. He has no express right to enquire about the interest rate or to bargain on the hire purchase price. The current Act should be amended so as to protect the hirer from exploitation in this area. The owner and the finance company are always out to maximise their profits and these are derived from the hirers because they are not adequately protected under the Hire Purchase Act.

To ensure also that the owners and finance houses whose sole aim it to maximise profits do not economically exploit the hirers, there should be established state run finance houses whose main aim would be to provide consumer credit and not to maximise profits. This would help in the regulation of the rate of interest under the hire purchase agreement and the hire purchase price would not be arbitrarily high. The government could also fix a rate of interest that would bind all owners and finance houses. This could be done by the minister in charge of hire purchase exercising the power vested in him under section 35(1) to make rules for the better carrying out of the provisions and purposes of the Act.

The Act should contain clear provisions as to description of any part of the consideration to be provided otherwise than in cash. It must also contain information as to who will meet the costs of insurance, freight of the goods, registration fees eg for

vehicles etc. The requirement of such provisions in the agreement will ensure that in case of default or a conflict in future the parties will know clearly their different rights and obligations and it will therefore be easy to ascertain who defaulted.

With regard to the hirers inability to complete payment, there should be incorporated into the Act the right to assign the agreement to another person who will assume all the rights and obligations of the hirer with regard to the agreement. The hirer should also have a right under the protecting him from the arbitrary imposition of liabilities beyond those imposed under the Act. For instance, there can be a provision that the agreement shall not restrict the right of the hirer to determine the agreement etc.

The possibility of hirers signing blank forms and hence giving the owner the chance to fix other figures should also be removed. This may be by inclusion into the Act of a provision requiring the signature or initialling of the hirer where there is any alteration or addition to the hire purchase agreement after conclusion of the agreement and signing by the hirer. Such signature or initialling should be alongside the alteration to signify consent by the hirer.

A provision protecting hirers who enter hire purchase agreements at places other than appropriate trade premises should be incorporated into the Act. A hirer should be able to cancel such a transaction after he has had some time to deliberate upon the issue as is the case in the English Hire Purchase Act where the Act allows the hirer four days from the day of receiving the second statutory copy of the agreement to change her mind and cancel the agreement as seen previously.

Standard forms for use in hire purchase agreements should also be introduced. The minister in charge of hire purchase is given a power under section 35(2)(b) of the Act to make rules regarding such forms. Such forms may have requirements as those under the hire purchase (Documents) (Legibility and statutory statements) Regulations of 1965 in the UK that contain demands and information as to visual presentation relating to the binding nature of the hirers signature, his right of cancellation and requirement as to the type and size of the letters. This would ensure uniformity in all hire purchase agreements and the consumer would be adequately protected in that area.

Standard forms should be used to ensure that there is uniformity and to suit the special requirements of particular traders and the hirers. The contents of such forms should vary with the nature of the goods and the amount of hire purchase price. The Act raises many requirements that should be taken into account in the drafting of a hire purchase agreement. Unless there is a standard form, however, it cannot be guaranteed that all these requirements will be incorporated into the agreement. This is because the trader or owner who makes the agreement and only gives it to the hirer to sign will not be enthusiastic to put provisions that favour the hirer and are therefore potentially detrimental to him and his business. Some of these requirements under the Hire Purchase Act are the conditions and warranties laid down in Section 8, requirements as to termination and completion of the agreement, requirements as to repossession etc.

There should be adequate control of hire purchase advertising. The information that the owner gives must be clear enough for the consumer to understand so that he realises fully what he is about to undertake. The English have done this⁸⁶. The control of such advertising should in fact be incorporated into the hire purchase legislation and not in a separate piece of legislation to ensure that it is conformed to as it would be one of the provisions that would have to be observed.

Misleading advertisements which emphasis the deposit payable and either omit to say what instalments are payable as well, or relegate the instalments payable to small print, should be made illegal under the Act. This is because they mislead the consuming public as to the actual nature of hire purchase in general or of that particular transaction specifically.

There is also a great need for comprehensive consumer protection legislation. Consumers are only offered protection in Kenya through the different pieces of legislation e.g. the Hire Purchase Act, which protection as has been seen is not adequate. In the U.K, the Consumer Credit Act 1974 was passed following the recommendations of the Crowther Committee's report on Consumer Credit of 1971.

⁸⁶ Through the Advertisements (Hire-Purchase) Act 1967

The Act is concerned with providing reasonable protection for those consumers who obtain credit. It brings together all forms of consumer credit agreements and regulates virtually the whole range of consumer credit agreements.

In conclusion the law on Hire purchase should be reviewed to ensure that the interests of the parties and especially those of the hirer are adequately protected under the Act. The honourable J.M Kariuki in his introduction of the Hire Purchase bill said, “The bill is intended primarily as a measure of protection against misuse. That protection is extended to the ordinary man against the dealings of unscrupulous companies...”⁸⁷ This was not fully achieved by the Act and there should be a move to ensure that such protection as was intended is achieved under the Act. The hirer should be accorded protection under the Act, as was the original intention of the legislature.

⁸⁷ National Assembly official Reports – 1968 col 705

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