

HIRE PURCHASE: TOWARDS BETTER CONSUMER PROTECTION

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DEDICATION

For my parents, Pauline and Patrick K.
Waweru for their efforts to bring me this far.

To my sisters and brother, I wish them the
best in their academic pursuits, but above all to
strive for moral excellence.

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The mistakes are however, my responsibility.

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ABBREVIATIONS

- | | |
|-------------|--------------------------|
| 1. A.C | Appeal cases |
| 2. All E.R | All England Reports |
| 3. Ch.d | Chancery Division |
| 4. EALR | East African Law Reports |
| 5. K.L.R. | Kenya Law Reports |
| 6. W.L.R. | World Law Reports |
| 7. E.A.L.J. | East African Law Journal |

TABLE OF CASES

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TOPIC: HIRE-PURCHASE TOWARDS BETTER CONSUMER PROTECTION
SYNOPSIS

The subject of this study is fairly explicit. My contention is that the consumer/hirer of hire-purchase goods is not adequately protected. Many scholars have written on this subject and I dare say, this is evidence enough of the perplexing nature of hire-purchase contracts. I attribute the exploitation of the consumer by the dealer to the short-sightedness of the Legislature when it enacted the Act, Hire-purchase Act, Cap 507 laws of Kenya. I propose it is upon the same body to ammend the said Act, due consideration to be given to economic changes and related development so that the intention and motive underlying the birth of the Hire-purchase Act be realised to all persons who partake in the transaction.

I have three chapters in which I have discussed the topics as follows:-

Chapter 1

In the first part of this Chapter we have the nature of the hire-purchase explained. The layman's idea in contrast to the legal meaning is explained and the distinction between hire purchase agreement and other agreements which closely resemble it. The essentials of a hire-purchase agreement are also briefly outlined.

The second part has the development of hire-purchase trade in England. I found it imperative to do so for Britain imposed upon Kenya her law of hire purchase, being her mother country in the

colonial period. The problems found in Britain pertaining to hire purchase trade were not much different from the ones found in Kenya, despite the different economic background. Most important is the fact that the Kenyan legislature considered the British Acts in the formulation of the Kenyan hire purchase Act, and thus this background is necessary to understanding hire purchase law in Kenya.

Chapter II

In this-Chapter the development of the hire purchase law in Kenya is discussed. The colonial state then is explored as a reason which hindered hire-purchase trade, however even in this state there was development of hire purchase trade as independence neared. The abuses in the trade are also stated and this is what necessitated legislation to govern the trade. The hot debate in Parliament features prominently in this Chapter as well and this explains the mistakes the legislature made even then and they make the Act not to be expedient to the consumer whom it was aimed to protect.

In the later part of the Chapter the provision of the Act which relate to consumer protection are laid down. This is an effort to show how the legislature thought they are protecting the consumer. The provisions are not critically analysed here.

Chapter III

Chapter three, which is also the last one, has the shortcomings of the provisions given in detail. How they can be revised to protect the consumer better is discussed alongside. The conclusion shows how hire purchase is important for our country's

economy: it is a system greatly needed. The legislature should act to this end and have a hire purchase to suit the needs of our country in its development.

CHAPTER ONE

1.1 The Nature of a Hire Purchase Agreement

The layman's perception of what a hire purchase agreement is, is not the legal meaning of the term. To the layman there is no difference between hire purchase agreements and other closely related transactions like instalment buying or credit sale. This misconception can even be heard from the advertisement over the media, it emphasizes that hire purchase business is chiefly a way of getting that which you cannot afford to buy in cash then or at once. The buyer is given the advantage of keeping and using the item as he pays. One scholar, Wild brings out this very vividly, as he writes.

"The ordinary buying public looks upon hire purchase as a means of obtaining at once that which it could not otherwise afford. The shopkeeper regards it as a means of selling goods for which he would not otherwise have customers: and of course behind the shopkeeper is the manufacturer. Then the financial looks to hire purchase dealing as a ground for profitable investment".¹

So to the ordinary public hire purchase is a method of supplying, disposing and acquiring goods on credit.

The legal meaning is certainly very different. It describes hire purchase as a particular kind of agreement with certain well-defined characteristics as seen in the case of HELBY Vs MATHEWS² which we are going to discuss later. The briefest legal definition is given by Professor Atiyah

"... a contract of hire purchase is a bailment of the goods coupled with an option to purchase them, which may or may not be exercised"³.

Basically, what this means is that there is an agreement under which an owner lets out goods of any description 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 sum.⁴

The common law understanding of the hire purchase transactions as stated above does not differ much from the one given in the Kenya Hire Purchase Act which states:-

"hire-purchase agreement means an agreement for the bailment of goods under which the property in the goods will or may pass to the bailee: and where by virtue of two or more agreements none of which by itself constitute a hire purchase agreement,

there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purpose of this Act as a single agreement made at the time when the last of those agreements was made"⁵.

Two factors emerge dominant in these definitions of hire-purchase: the element of bailment and the one of option to purchase. There is bailment for the hirer takes the goods in his possession and in fact uses them though the title in those goods is still with the owner or seller of the goods. So the hirer is holding the goods for another and this is in essence bailment.

The element of the option to purchase is the distinguishing factor which makes hire-purchase different from closely related transactions which it can easily be confused with.

When the owner of the goods grants the option to purchase, he makes an irrevocable offer to sell the goods to the hirer if the conditions laid down in the agreement are fulfilled. But the hirer is not obliged to take the goods, he may exercise the option and hence accept the offer put across by the owner and purchase the goods. He can also elect to terminate the hiring and return the goods. In this instance, the hirer ceases to pay future instalments but can pay for

depreciation, loss or profit as may be provided by terms of the agreement.

The option to purchase can be understood better in how it distinguishes hire-purchase from other contracts of sale, for instance simple hire. In the latter there is no element of permanent ownership and upon expiry of the hiring period, goods return to the owner for the hirer has no option to purchase.

A sale on credit terms is also easily confused for a hire-purchase agreement. But the sale on credit terms has no option about purchasing the goods, and it is definitely a sale, there is no question of not purchasing purchasing the goods in question.

Despite bailment being a central feature in a hire-purchase agreement, the two differ for a hirer in hire-purchase, in addition to having the goods as a bailee, he has the option to purchase the goods and make them his even in title whereas a bailee has no such choice.

The leading case in establishing the nature of hire-purchase agreement is the case of HELBY Vs MATTHEWS⁶ aforementioned.

Briefly, one Mr. Brewster agreed to hire a piano from the appellant Helby, under an agreement which gave him (Brewster), an option to purchase the piano upon payment of the requisite number of instalments stipulated for in the agreement. During the continuance of the agreement, Brewster pledged the piano with a third party, the respondent, ^{by} Matthews as a security for an advance. In an action the appellant

against the respondent for conversion of the piano. The latter contended that Brewster had "agreed to buy" the piano and could pass a good title under section 9 of the Factors Act, 1889.

Though the court of appeal had upheld this contention by stating that in a contract of the seller to sell and a purchaser if he does not change his mind to purchase, such an agreement when it goes to the end, ends in a purchase, the House of Lords did reverse the decision.

One reason for this reversion was, there was no contract by seller to sell, but merely an offer to do so. Lord Herschell said:-

"where a person has, for valuable consideration bound himself to sell to another on certain terms if the other person chooses to avail himself of the binding offer, he may in popular language be said to have agreed to sell though an agreement to sell in this sense, which in truth is merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case".⁷

In the same judgement Lord Watson added:-

"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.... 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".⁸

These words mean there was no contract by the hirer to buy, so Mr. Brewster had no title to the goods to pass to the respondent for he had not yet exercised the option given to him.

The option to purchase may be drafted in two ways. ^{main} Firstly, where upon due performance of all the terms of the agreement the hirer may be entitled to purchase the goods upon payment of an additional and usually nominal sum. The second way is where upon due performance of all the terms of the agreement the property in the goods or title rests automatically upon the hirer. In this case the agreement must provide for the hirer to terminate (if he wishes to do so) the agreement before the final instalment.

Much as I have emphasized on the importance of these two elements, hire purchase is not simply a bailment on hire with an option to purchase super-added. Well, these are the essentials but the specific laws of hire purchase agreement take into account the modern methods of hire purchase finance, the social background of the transaction and the fact that the bailment for hire will probably end

in a purchase.

I find it useful to briefly look at the essentials of a hire purchase agreement for a better understanding of the nature of the same.

The original position in common law is that there are no formal requirements for a hire purchase agreement, and an oral agreement is valid and binding as in the case of RE FOWLER EXPARTE BROOKS⁹.

However, the agreement must be in writing if it is to be governed by the Kenyan Act. It should be delivered for registration to the registrar within thirty days after its execution.¹⁰

The issue of capacity is governed by the ordinary rules of contract. A minor can enter into such an agreement but it will not be enforced against him. This depends on whether the agreement ^{is} for necessities or not. In the case of MERCANTILE UNION GUARANTEE CORPORATION LTD Vs. BALL¹¹

A minor who was carrying on business as a transport contractor was sued for arrears due under a hire purchase agreement relating to the supply of a lorry to him for the purposes of his business. The court of appeal held that the agreement was not for necessities and was thus unenforceable against the minor. In fact even if the goods were necessities for the agreement would still be unenforceable unless it was for the minor's benefit. So a minor is not exactly welcome in hire purchase trade as a person with capacity.

The subject matter of the agreement must be

established. Due to the bailment factor in hire purchase it only applies to goods as defined in Sale of goods Act,¹² i.e. all chattels personal other than things in action or money. Thus certain interests like land or intangible interests like debt, Specific rights are excluded from this agreement.

The terms of a hire purchase agreement must be stated with certainty and precision so as to enable the courts to ascertain the intention of the parties. SCAMMEL (G) & NEPHEW LTD Vs OUSTON.¹³

In this case, there was in a contract of sale a stipulation to the effect that the balance of the purchase price was to be paid on hire purchase terms for a period of two years. Court held the agreement to be unenforceable for no precise meaning could be attributed to it. It was vague as to when and what amount is to be paid.

However, in the Kenyan scenario certain contracts cannot be held void for uncertainty. The court applies the principle of reasonableness, though certain formalities must be in writing.

1.2 THE HISTORICAL DEVELOPMENT OF HIRE PURCHASE LAW

Britain imposed upon Kenya her law of hire purchase. It is thus imperative to look at the development of her hire purchase law as a background to our study of the Kenyan law. The English law of hire purchase has its origin in the nineteenth century during the heyday of competitive capitalism. Goode gives a

'formal' account of this and says:-

"Hire purchase trading in England first started in 1846 if we may believe Mr Henry Moore, the Bishops gate piano maker who deemed to have invented the system and to have introduced it that year: Thereafter this new method of obtaining goods on credit rapidly gained favour with the advent of the sewing machine, produced by Singer Manufacturing Company, which let out machine to its customers under a hiring agreement containing an option to purchase, the sums paid by way of hire-rent being allowed against the purchase price in the event of the option being exercised"...¹⁴

He goes ^{on} to explain how this idea developed in the Wagon Industries and even spread to furniture and other commodities even unlikely items as false teeth.

In essence what was happening was that with capitalism as a mode of production there were always surplus goods. There was mass production and distribution of commodities resulting from innovations and inventions. These inventions were just the things the working class persons needed and could not afford to buy in cash at once. Such commodities included cookers, refrigerators, radios, television, cars and so on, and there were always new inventions

whetting the appetite of the consumer.

As Goode continues to explore this development, he writes that at first it was the dealer who extended credit and thus the hire purchase agreement would be conducted direct between dealers and consumers. This worked well as long as the number of transactions the dealer is concerned with was relatively small. However, this form of business gained popularity and the dealer found out unless he is endowed with a liberal amount of working capital his resources became seriously depleted due to having large quantities of stock out on credit, with a lapse of considerable time before he could expect the payment in full. It was for this reason of financial backing that the finance company came into the scene.

A trade well-organised like this was likely to expand by leaps and bounds and infact this is exactly what happened. This expansion brought in its wake abuse which were beyond the purview of general contract law. Two attempts to have hire purchase legislation in relation to protecting the hirer had failed in 1912: so as it were, there was no legislation on this trade.

The most notorious of the abuse is 'the snatch back principle'. Unscrupulous hire purchase dealers deliberately encouraged consumers to enter into hire purchase agreements beyond their means with the ^{aim} of allowing them to fall

into arrears towards the end of the hire period. Most instalments would have been paid then and the dealer goes and exercises his power of repossession and thus obtain enormous profits from the goods they supplied without ultimately parting with them. If a hirer showed reluctance the dealer resorted to intimidation and violence.

Exemption clause excluding the dealer from liability were usually put across in the agreement. For instance, all conditions and warranties on the part of the owner as to the fitness of the goods supplied would be excluded and the unfortunate hirer would be landed with a completely defective item. If he attempted to return the item he would be exorbitantly charged for depreciation in conformity with the minimum payment clause. In ~~the~~ case of KARSALES (HARROW) LTD Vs WALLIS.¹⁵

A hirer, had actually seen the car he was buying on hire purchase terms but on the D-Day the car could not even move!

The hirer was also charged exorbitant interest as the dealer had no obligation to inform the hirer how much the price of the goods would be had he paid for them in cash.

The phenomena of linked-on agreements was also common. In this respect a hirer who had completed most of his payments would be persuaded to enter into a fresh agreement covering the goods comprised in the original agreement for which payment had nearly been completed.

In an early case of CRAMER Vs GILES¹⁶ the rule laid down is that the courts would not interfere to

protect a hirer in default. So that even if he had defaulted in the last payment only, having paid punctually all the previous instalments the owner was entitled to repossess the goods. Immediately default took place. Actually hirers under hire purchase were denied relief which courts gave readily to defaulting mortgagors in foreclosure proceeding or tenants in proceedings by landlord for recovery of possession for non payment of rent.

Sales methods were equally onerous. An intending hirer would be invited to sign a blank hire purchase form and the dealer would later insert more onerous terms. In other cases house-wives would be approached whilst their husbands were absent and asked to append her signature, or that of her husband on the assurance it was of no consequence then later find herself bound.

In the 1920s a cry for legislation on hire purchase was loud and clear-

Between 1927 and 1930 no less than three bills affecting hire purchase were tabled, though none of these bills passed through the second reading. It was not until 1938 that the English legislature was goaded into action in this direction and the hire purchase Bill introduced and skilfully piloted through Parliament by Miss Ellen Wilkinson reached the statute book.

HIRE PURCHASE ACT 1938

This Act generally gave a price ceiling. For instance, £50 where agreement related to a motor-

vehicle or a railway wagon, £500 if it related to livestock and £100 in any other case.¹⁷ The Act also imposed various formal requirements in regard to making of a hire purchase or credit sale agreement.¹⁸ It also prescribed the information to be given to intending hirers.¹⁹

The hirer was given a right to terminate the agreement by notice in writing any time before the final payment fell due, limiting his liability after termination to a sum which would bring his payments and accrued arrears up to one-half of the hire purchase price.²⁰

The Act also implied conditions in hirer's favour in regard to title, fitness, merchantable quality etc which could not be excluded save in certain circumstances.²¹ The owner was also prohibited from enforcing a right to repossess the goods, except by an action through the court if one-third of the hire purchase price had been paid, except in the instances whereby it is the hirer who terminates the agreement.²²

Section 12, 13, and 14 of the same Act conferred upon the court wide powers as to the orders it could make in such proceeding. Even with this brief analysis of the Act, it can be said it was better than nothing but certainly not good enough.

HIRE PURCHASE ACT 1954

This Act raised the financial limits of the previous enactments so as to cover a larger area than before.²³

In addition it amended the statutory definition of hire purchase price so as to include sums paid or payable by way of deposit whether to the owner or to any other person.

THE ADVERTISEMENTS (HIRE PURCHASE) ACT 1957

With the great expansion in hire purchase trading, advertising of hire purchase facilities increased enormously. A major weakness in advertisements is that they can be excessive, and thus misleading, by giving undue prominence of some part when this is not essentially true. It was thus another move to protect the consumer.

THE REPORT OF THE COMMITTEE ON CONSUMER PROTECTION 1962

The Report is also known as the Molony Committee 1962. The reason for it was because it was becoming apparent that substantial extensions were required to the existing statute law of hire purchase if adequate protection was to be afforded for the consumer. Though the committee final report was disappointing in many respects, it made some notable recommendations.

It suggested the removal of financial limits of the hire purchase Acts for consumer transactions. This would make more transactions fall in the ambit of the Act. It also suggested a seventy-hour period of 'cooling off' if the consumer has signed the agreement not in a retail establishment, he had the right to withdraw from the transaction. Suggestions on tightening up on requirements in regard to advertisements were also put across.

Most important was their suggestion to the amendment of statutory provisions as to implied conditions and warranties so as to bring the law of hire purchase into line with the proposed amended law of sale. These recommendations were put into effect two years later in 1964.

HIRE PURCHASE ACT 1964

This Act as said embodied many of the recommendations of the Molony Committee. It raised the financial ceilings to cover transactions under which the hire purchase price did not exceed £2000, and the distinction in livestock and other goods in this connection were abolished.²⁴ Body corporates were exempted from the Act.²⁵

The formal requirements were also strengthened. The owner had to supply the hirer with the hire purchase documents and also the copy of the completed agreement immediately the hirer signs his part of the document.²⁶

The Act maintained also the limited period in which the buyer or hirer could withdraw from the transaction if it is not signed in the dealers premises.²⁷ Provisions were made for a notice of default, and seven days to pay before the owner exercised his right of repossession.²⁸ There were also amendments in relation to the implied conditions of fitness, merchantable quality and also of sample corresponding to the bulk.²⁹

This Act no doubt improved the law of hire purchase a great deal: but it also left the law in a very untidy state. The parties to the transaction had to familiarise themselves with the amendments, the conditions and alteration made in the new Act. This led to the 1965 hire purchase Act which became the operative statute. The advertisements (Hire Purchase) Act 1957 as amended in 1967 was consolidated to make the Advertisement (Hire Purchase) Act 1967 though this brought no change

in the law.

The protection afforded to the hirer in the 1965 Act covered a wide field and many of the defects of the common law were remedied.

FOOTNOTES FOR CHAPTER ONE

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25. Section 2 Ibid
26. Section 3 Ibid
27. Section 4 Ibid

28. Section 15 Ibid

29. Section 12 Ibid

CHAPTER TWO

2.1 BACKGROUND TO HIRE PURCHASE LEGISLATION IN KENYA

In the first part of this second Chapter we are going to look at the reasons why hire purchase legislation was necessary in the Kenyan economy. Highlighting what the Kenyan economy was like at this period will form a good background to the reasons which made the National Assembly enact the Hire Purchase Act. We are going to end this first part of the second Chapter by looking at the Parliamentary debates on the said Act.

A bird's eye view of the economic background of Kenya reveals the most outstanding fact that Kenya, like many of the other African countries was under a colonial government. The most obvious aspect of colonialism was exploitation despite the various covers given for the presence of the foreign people. Certainly the humanitarian and civilizing role convinces no one. This exploitation ensured that such countries would not be economically independent and had to depend on the big capitalist countries. One scholar, Rodney puts the nature of this exploitation most explicitly. He says:-

"In the period of the notorious scramble for Africa, Europeans made a grab for whatever they thought spelt profit in Africa: and they even consciously acquired many areas, not for immediate exploitation but with an eye for the future".¹

For the Europeans to maintain their influence undisturbed, they formed an alliance with the petty bourgeoisie,

which though a foolish one on the side of the latter party managed to maintain the economy intact to the favour of the imperialists even by the onset of independence.

The effect of this colonial state was to make credit sales of consumer durables virtually non-existent until fairly recently. This can be attributed to the fact that the colonialists invested heavily in agriculture for instance in big plantations where they used unskilled labour of the Africans and paid them very low wages. The poor wages could be used to pay the taxes established by the colonial government and buy basic necessities. In fact the policies the colonial government used were to suppress any development of credit sales amongst the Africans as seen in the 1903 ordinance which stated:-

^N "Contract for the sale ^{of} of credit of Goods to the value ^{of} or at a price more than 100 rupees by any trader or other person not being native of such province.... shall be valid unless it is in writing attested by the collector of the district to which the native belongs."²

The sum of 100 rupees was a very small sum of money and the formality one had to go through made it extremely difficult for the Africans to get anything worth more than the 100 rupees even through some form of credit. Also, most of the goods sold by hire purchase were not of such small sums of money. In 1906 and 1926 the money figure was raised to £10 but this did not help much. The racial rules thus contributed greatly to making credit sales for Africans virtually non-existent.

By independence, Kenya's economic structure was merely an extension of British bourgeoisie economy. This did not allow for ordinary Africans to buy the goods in the luxury sector, for example cars, refrigerators or even farm machinery. It is only the petty bourgeoisie who had this advantage.

In Kenya the trickle of hire purchase business started by the 1950s and it went on steadily increasing. In fact the first hire purchase case, DUDER Vs. BAILEE³ was reported in 1952. By 1955 a considerable volume of business could be said to have been done.

However, the swelling of hire purchase credit was in 1959 with the ^{arrival} on the scene of Lombank, the British Merchant Bank which amounted very large amounts in this sector. Statistics reveal that in 1959, Credit Finance Corporation had hire purchase credits outstanding of £760,000⁴ which is certainly a startling figure.

Lombank was not a success. It recorded large losses and within two years the Company closed down all its office in East Africa. The credit outstanding rose steadily over the years. For instance in 1964, the major finance company had £1,933,000 outstanding in hire purchase credit and it grew at a steady rate of 24%. Dillion estimated the total outstanding of hire purchase debt in June 1971 to be approximately £8-9 million.⁵ Other institutions of hire purchase grew and faced the same problem.

However, it was obvious that hire purchase trade was practised. This was mainly due to the population increase, which affected the demand and use of consumer durables especially motor vehicles.

The educational factor was also very significant. Education was available for many people and after school most of them would get jobs. However, the salaried wage earners could not manage to buy some of the necessary durables without hire purchase due to inflation. Surani, in his thesis says it was inflation over post war years i.e. second world war which made people be influenced into buying and paying later and this made many turn to hire purchase.⁶

As the trade grew, it brought abuses within it as had happened in England. There was a variance in the abuses due to the difference in scope of the trade in both countries which can be explained from the different backgrounds of the trade in the two countries. All the same the misuse of the trade necessitated legislation in Kenya, in more or less a similar way like England.

What exactly necessitated hire purchase legislation in Kenya was the fact that such persons who entered hire purchase agreements were unsophisticated in these legal matters or the small technicalities pertaining to the transaction.

As explained in the first Chapter, most of the persons in hire purchase trade would enter into transactions as a way of getting that which they could not buy in cash. This made it possible for the less scrupulous traders to insert in their agreements provisions which operated harshly and unfairly against hirers.⁷

So in Kenya there are two distinct types of legislation directly concerned with hire purchase trading. On one hand is protective trading which is legislation designed to protect those doing business e.g. traders and customers upon hire, and on the other hand there is control legislation which is legislation by statutory instrument issued by Central Bank designed to limit the amount of business being done for the purpose of protecting not the individual but the economy as a whole.

Consultation between government and Finance companies in regard to new and self-contained legislation to cover hire purchase had gone on intermittently from 1951. But it was only until 1968 when the late J.M. Kariuki, a Member of Parliament introduced a private members Bill to cover hire purchase.

Before the hire purchase Act was passed the prevailing law in this area was the English common law. It was imported in Kenya through the Indian Law of Contract Act which was in operation upto 1.1.1961. Gould J. said as much in the case of CREDIT FINANCE CORPORATION Vs SINGH.⁸

He said:-

"It is necessary to bear in mind that none of the English statutes on the subject of hire purchase which was enacted in England in 1938 is in force in Kenya. The law to be applied is the law of contract under the Indian law of contract Act and common law".

The honourable Kariuki in his introduction of the Bill summarized the aim of the intended Act in the following words:

"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, but it is also extended to the honest company to defend itself against the dishonest hirers".⁹

From the point of view of the legislature hire purchase was essential to uplift the standard of living. The consumer durables as well as agricultural machinery could only be obtained through hire purchase. It was in fact a mode of trade we could not do without as seen from Mr. Mati's contribution to the debate. He said,

"Mr Speaker Sir, our present kind of life is such that we cannot do without hire purchase system. Most of the members here, perhaps unknown to most of the public outside live on nothing else but hire purchase. The hire purchase system is therefore indispensable, for raising the living standard of the people and because we know our people want to live at a higher standard we must have a provision to protect them against exploiters. This is what the Bill tries to do".¹⁰

The legislature was also aware of the ills of the trade. It is a sad fact that almost all of them thought the only of the system was the repossession of the good by the dealer in default of payment. There were certainly other exploitative factors of the system. It can be said this single track of thought among the members of Parliament when directing themselves to the ills of the trade made the effect of the Act not to be far-reaching. It is clear from Honourable Masinde Muliro's contribution that the ills the Parliament had in mind was the snatch back method. He said

'Sir, I find the present arrangement of hire purchase a much of a swindle than a proper arrangement for hire purchase business. You find today that someone has been paying money on hire purchase for 11 out of 12 instalments and then the owner of the goods come and take possession. Then he goes to sell those goods and then every cent is kept by the owner. This is a swindle'.¹¹

This ignorance made the final Act to be a very mild one. No doubt a few of the members were aware of the inherrent injustices from debates either in Britain or in Tanzania and they failed miserably to relate these to the local situation.

In fact, the original draft J.M. Kariuki had in mind could have been ^{far-reaching} if implemented as it was. However, the finance companies fearing the future of their interests used the Attorney-General's office to ensure their interests were championed. There had even been earlier drafts to which finance companies had objected on the ground that they favoured the hirer too much. So the Bill had to be amended before being introduced to the National Assembly. J.M. Kariuki ^{compromised} most of the sections which seemed unpalatable to the finance companies.

The Bill was actually discussed by the Law Society, the Chamber of Commerce and the Motor Trade. So a lot of compromises had to be met before the Bill was tabled in Parliament. Ultimately Mr. Biggs of Credit Finance Corporation and Mr. R.G. Ridley of National Industrial Credit (East African Limited) with the late J.M. Kariuki rewrote the Bill.

The latter introduced the Bill in the House as a poor man's charter, a title largely disputed. He said

"The bill, Mr. Speaker Sir as I see it is a poor man's charter"¹².

When this is taken to mean that the poor man will acquire that which existed only in his imagination, it is certainly a wrong view. It was a blessing to the bourgeoisie will acquire the durables they could not have afforded to buy for cash at one go. The Honourable Shikuku opposed the label of the Bill with a vehemence as he said,

"..... although it is said that it is a poor man's charter, I am of the opinion that it is not quite a poor man's charter because it is for the middle class people like myself, yourself and any other higher people interested. Poor people do not even buy bicycles; Sir, I am their President and I know they do not go in for cars on hire purchase. So it should be called the middle and high class charter. It is not for the benefit of these poor people. However, it is welcome by that class and by other higher classes and I hope the government will make sure it works".¹³

This is a realistic view of the Act especially in a capitalist Government like ours. However, it can be optimistically said that development was hoped to take place and most people would use the hire purchase method as they would join the salaried wage earners.

Even the proposer of the Bill J.M. Kariuki did say the Bill will be helpful to

"Most of our people taking goods: on hire purchase who are bus-owners."¹⁴

Certainly bus-owners cannot be said to be poor people. Mr. Mati also supported this by showing it is for the purchase of consumer durables which include cars, TV's, refrigerators and so on and these are also items not for the poor.

After all the debate surrounding the Bill, the members of Parliament finally came up with the following suggestions-

- (a) owing to the fear that should the Bill be passed and it meets with opposition from finance companies the government should use the contribution to the National Social Security Fund to establish a finance company which would finance hirers.
- (b) the hire purchase agreement should be made clearer and the implication explained to prospective hirers due to the high rate of illiteracy.
- (c) the rates of interest charged by finance companies should be fixed by the Act.
- (d) the restriction on repossession should become effective after half the hire purchase price has been paid.

Some members suggested the bill did not give adequate control machinery to guarantee compliance. They suggested there be a committee operating at a district level to evaluate the goods sold on hire purchase, and to fix the prices the owners charged.

The Bill in its final draft was for the interest of the international bourgeoisie. It was also to an extent a measure to protect the ruling African petty bourgeoisie as Mutunga says in his article:

"There is no doubt the Act was a measure to protect the ruling African petty

bourgeoisie from extortion, sharp practices and what is in their opinion exploitation by both international, capital and the local non-African capital."¹⁵

Finally the Act was passed in June but had to wait until 2nd November, 1970 when it became operative through legal notice 181 of 1970. The dealers and finance companies no doubt wanted ample time to readjust to business under the Act.

Let us in the second part of the Chapter see the particular provisions contained in the Act in their aim to protect the hirer.

2.2 THE KENYA HIRE PURCHASE ACT (CAP 507)

The Act has been termed by Hodgkin as a disappointing piece of legislation.¹⁶ I choose not to analyse this now but briefly lay out the provisions the legislature set out to protect the consumer. To begin with, the Act has most of the sections relating to consumer protection either directly or indirectly, owing to the fact that it was supposed to be a legislation to protect the hirer or consumer and also an honest trader. It turned out the hire purchase agreement is laid out by the trader so the provision to protect the trader are fewer.

Section 1 and 2 of the Act introduce the Act and the various terminologies therein.

Section 3 echoes the preamble which terms hire purchase Act as an Act of Parliament having provisions

for regulating certain hire purchase agreements.

Certain hire purchase agreements are those entered into after the commencement of the Act under which the hire purchase does not exceed the sum of eighty thousand shillings other than a hire purchase agreement where the hirer is a body corporate.¹⁷ It was to make the hirer not commit himself to a sum he may regret even when paying in instalments. This can be understood better for at that time most of the goods which could be termed as consumer durables fell under this price, given the fact that buses were costing at the price which was the limit.

Sections 4 and 5 call for the establishment of a registry where all hire purchase transactions would be recorded. It should be registered within thirty days, otherwise the agreement cannot be enforced against the hirer nor can any action be taken against any guarantor of the agreement. The owner cannot thus recover such goods from the hirer. The registry is accessible to the public and the registrar can give a certified copy of any entry. This is a useful practice for it ensures smooth running especially when the amount of work is still fairly small. The penalties for failure to register are strongly in favour of the hirer. Section 5(2) demands the agreement to be in the English language. I will discuss this later for it does not favour the hirer.

Section 6 relates to the information the agreement must contain. It is mandatory that the cash price be clearly indicated. This helps the hirer to make a comparison of how much the privilege of hire purchase is to cost him. The price of each instalment, the period of repayment and a description of the goods must be shown. The rights of the hirer must be displayed in a prominent form and a copy of this agreement should be delivered to the hirer, by the owner within twenty one days of the date of the agreement. The effect of non-compliance is to make the agreement unenforceable against the hirer and guarantor. This is certainly a provision for the benefit of the hirer.

provides that inclusion of certain

Section 7 provisions in the agreement makes it void. These include those that allow the owner or his agent to retake possession of the goods or to prevent the hirer from terminating the agreement as in section 12, or add extra liabilities should he terminate and finally any attempts to relieve the owner from liability from the default of his agents. This is a stronghold for the hirer and especially so if the provisions are not coupled with exceptions.

Section 8 deals with conditions and warranties implied in the agreement. There is a condition that the owner will sell the goods at the time the property is to pass, a warranty for the hirer to enjoy quiet possession of the goods, and that the goods will be free from any charge or encumbrance, and lastly a condition that the goods are of merchantable quality unless they are second hand and the agreement says so.

This was meant to safeguard the hirer so that he gets goods which are fit for the purpose he wanted them for. It can be another of the hirer's stronghold if not for the exceptions which follow.

Sections 9, 10 and 11 are concerned with the change of address and removal of the goods both within and outside Kenya. The hirer is required to inform the owner or the seller of the goods, if it is stipulated in the agreement of any changes in location of his residence, business premises or the position of the goods, otherwise he can be fined accordingly. Much as this is protection for the owner, I dare say since all the hirer needs to do is to inform the owner of such changes it is not exactly unfair to him. It may even be for his own security that these hire purchase goods be restricted in their movement.

Section 12 allows the hirer to terminate the agreement. It allows him to exercise the option to purchase. This is the essence of hire purchase transactions, and it is a hirer's right. To pay for depreciation is not unfair for the hirer should also make the goods to be in a reasonable state for the owner.

A hirer can also choose to complete the agreements as Section 14 says. If owner reposses the goods, the hirer can exercise the option within 28 days. This is a fair deal for the hirer if not for the Section being silent as to reduction of price owing in recognition of the advantages of the owner of such accelerated payment, i.e. paying in one lump sum. However, the section gives the hirer time to save the goods if he has fallen behind in his payments.

Section 15 is another stronghold for the hirer. It allows that if two-thirds of the hire purchase price has been paid then any right to repossess the goods can only be exercised through court action. If the owner contravenes this, the hiring terminates and hirer can recover all monies paid out by him. To the National Assembly this was the most important section for it protected the hirer from the common law rule of 'snatch back'.

The relationship between the parties once the owner has instigated an action to recover possession is governed by sections 16 and 17. The National Assembly thought what they put across is a status quo position where neither party is disadvantaged, but as we shall see later this was not the case.

Section 24 states that if goods become subject to a second hire purchase agreement and two-thirds of the original agreement price had been paid then the rules set in sections 15 and 16 shall effect in relation to the second agreement as from its commencement. This is to ensure smooth running in successive agreements between the same parties.

Section 25 states if the owner legally retakes the goods otherwise than by suit he is under duty to sell them for the best possible price and he should account to the hirer the proceeds of sale. The intention here is to make hirer receive the money not rightfully to be given to the owner, for the owner after getting his due shall have undergone no loss.

Section 26 protects the hirer by making his refusal to give up possession when the owner's rights are restricted by the Act as not being conversion.

Section 27 allows the hirer on payment of Kshs 10/- to seek in writing all relevant information from the owner concerning such matters as how much has been paid, how much is owing and when the instalments are due. Failure to reply by the owner within thirty days exposes him to a fine of up to five hundred shillings. This allows the hirer to be clear about everything he should know about the agreement.

Section 28 covers situations where there may be two or more hire purchase agreements between the parties. The hirer may ask the owner to appropriate what he has paid towards two or more agreements to satisfy just one of them. This is a useful practice and would help the hirer to become the owner of at least one object rather than lose everything.

Section 29 prohibits the owner in the event of hirer's breach from enforcing any kind of accelerated payment unless more than one-tenth of the hire purchase price is due in one instalments or more than one-twentieth, in two instalments. There should also be no provisions for damages, for future penalty or accelerated payments unless the hirer is given notice in writing and allowed fourteen days to carry out the obligation. So the hirer here has time to organise himself in order to avoid the results of what might merely be inadvertance in regard to some small detail on his part.

Section 31 allows a hirer's trustee to settle the rights and duties of hirer in instance of bankruptcy, though such a trustee can disclaim. It is still some form of protection for the hirer if the trustee is willing.

Section 34 protects the hirer from any false information given. The producer of the false information can be fined a sum not exceeding five thousand shillings.

The National Assembly did try to give the hirer the protection they thought he needed. I dare say at the time the Act was debated, it cannot be said to be a bad Act though it became disappointing with the lapse of time.

It would suffice to say the Act was thought and intended to be helpful. What it proved to be later due to the shortsightedness of the legislature is yet another matter which we shall look into in the next Chapter.

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2. 1903 Ordinance No 1 Article 3
3. (1952) 25 KLR 28
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14. MR. J.M. KARIUKI M.P. NATIONAL ASSEMBLY OFFICIAL
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17. Section 3 Hire Purchase Act

CHAPTER THREE

THE SHORTCOMINGS OF THE PROVISIONS IN THE ACT:

HOW CAN THEY BE REVISED

The Kenyan hire purchase Act has never found approval in any of the writers who have critically looked at it. Hodgkin calls it disappointing piece of legislation. He says it is disappointing in two respects. Firstly, the legislature made little effort to suit the Act to the local conditions and secondly the comparative study undertaken is now out of date, the result being that the Kenyan Act provides less consumer protection than the English hire purchase Act of 1965 and the latter is, itself by no means a satisfactory enactment.¹

^{MUTUNGI}
~~Mutunga~~ says the Act gives half-hearted protection to the petty bourgeoisie the ultimate consumers of the commodities, the subject matter of the hire purchase transaction.² From the two writers it is clear the Act is criticised on the basis of being confused and hence failing to protect the class it was aimed to protect and thus making the consumer in a hire purchase transaction remain in the chains of the dealer.

The Act presents itself as a compromise measure between the hirer, and the owner whose sole aim is to maximise profits. Therefore the hirer is still exploited by the owner as the end result. This makes the Act not fulfil its aim.

Going by the provisions in the Act, some of the loopholes are fairly obvious. Section 3 sets a top financial limit to transactions that will fall within its protective scope of 80,000 Kenya shillings. Any transaction involving a purchase over Ksh 80,000 is not under the ambit of the Act. The legislature may have rationalised that anyone who can afford goods in excess of that figure should be capable of negotiations without statutory protection. Certainly this is a fallacy even if we consider incorporated bodies exclusion.

According to Hodgin, he argues that the fixed figure becomes outdated by inflation, devaluation, revaluation etc and unfortunately the legislature does not move at the same speed to correct the then unrealistic figure. Thus many transactions fall outside the scope of the Act. Infact the prices of commodities increase and the buses which were then costing the said amount of Kshs 80,000 now cost a figure far above this, even most agricultural machinery costs more.

The main reform here would be to remove the financial ceiling in the face of our nation's expansion and development as changes are the order of the day. If the ceiling has to be there for reasons the legislature should explain then the same body should revise the figures frequently as situations demand.

Section 5 (2) which states that for a hire purchase agreement to be acceptable for registration, it should be in the English language cannot pass uncriticised. One would wonder why it should be in

English in a country like ours where illiteracy is still a major problem. Most of our people are still not yet educated to the level of understanding English.

The Act should thus provide for the agreement to be in simple Kiswahili which most people understand. For those who may not understand Kiswahili, the agreement should be orally read to the hirer and he should acknowledge that he has understood what he is getting into.

Section 6 lays down the information the agreement must contain and other requirements the owner must meet in relation to the agreement. The Section should be expanded and state how the information is presented to the hirer.

The information should be very clearly indicated in **big** handwriting and in a prominent place.

The Board of Trade in relation to the 1965 English Act suggested that a prominent warning should be given to the hirer that his signature will bind him and the goods are not his until all the payments are made so he should not sell them. Such a message written down clearly in block letters on a large box can be called a prominent display of the hirer's rights and this can help the hirer to sign only when he wants to be bound.

Despite the apparent protection seen in Section 8 it has at close scrutiny colossal loopholes.

In the first place is the exclusion clause in Section 8(1) which provides that although some conditions and warranties are implied, there is a provision to the effect that if the owner had reasonable grounds for not knowing of a defect in the goods then no condition should apply. The legislature assumes there is equal bargaining power between the two parties and certainly this is not the case.

doctrine of freedom of contract should not be operative in this scenario at all. Hodgin wonders

"Why? Someone must lose! Why should it be the innocent hirer? We are not concerned with the guilt but with the balancing of economic interests. The man whose livelihood is to have the expert or technical know-how in fact benefits from not having it".³

The remedial step here would be to give a death blow to the exclusion clause in Section 8(1).

The Section also excludes second-hand goods from not being given protection of merchantable quality. This means a lot of machinery sold a short while after use is not covered by this important Section in the Act. The seller is thereby protected while such a hirer can have his business come to a halt after buying a defective machine. Sellers are known to sell defective machines fully knowing they are as was seen in the case of KARSALES (HARROW) LTD Vs WALLIS.⁴

Though Section 8(3) appears to bar exclusion clauses when read together with the mentioned provisions and exceptions it does little to provide the type of protection the hirer requires. Bitonye accurately remarks,

" these provisions take away with the left hand what the Act purports to give the hirer with the right hand".⁵

Section 12(1) though it allows the hirer a right to terminate the agreement by giving a written notice to the

owner, he will have to pay up to 50% of the hire purchase or less should the agreement so state. (This is a most unlikely event). This Section makes it extremely difficult for the hirer to terminate the contract. It ensures that those who insist on premature termination of the contract suffer punitive rather than remedial consequences.

It is agreed that the owner should be entitled to a fair sum to cover possible depreciation not met by the payments so far received. Lord Denning explains the difficulty therein in the case of BRIDGE Vs CAMPBELL DISCOUNT CO LTD⁶. He said

"When hire purchase transactions were first validated by this house in 1895 in Helby Vs Matthews, the contract of hire had most of the features of an ordinary hiring. In particular, the hirer was at liberty to terminate the hiring at any time without paying any penalty. He would return the goods and not be liable to make any further payments beyond the monthly sum then due. There was no clog on his right to terminate and this was one of the reasons why the house saw nothing wrong with the transaction Lord MacNaughten in characteristic fashion pointed out what a benefit this was to the hirer.

'..... If a coveted treasure is becoming

a burden and an encumbrance, it is something to know that the transaction may be closed at once without further liability and without payment of any forfeit".

He continued

"Since that time, however, the finance houses have imposed a serious clog on the hirer's right to terminate the hiring. They have introduced into their printed forms a "minimum payment" clause such as never appeared in Helby Vs Matthews. What possible justification have the finance houses for inserting this "minimum payment clause"? They call it "agreed compensation for depreciation". But it is no such thing. It is not 'agreed' nor is it 'compensation for depreciation'. There is not the slightest evidence that the appellant ever agreed to it (sic) and I do not suppose for a moment that he did. He simply signed the printed form and for depreciation, everyone knows that a car depreciates more and more as it gets older but this sum gets less and less. The truth is that this minimum payment is not so much compensation for depreciation but rather compensation for loss of future instalments which the respondents expected to receive but which they had no right to receive. It is a penal sum which they

exact because the hiring is terminated before two-thirds is paid. In cases when the hiring is terminated as it was here: within a few weeks. It is beyond doubt oppressive and unjust"⁷.

Mutunga also comments on how this minimum payment clauses make the hirer's celebrated right of terminating the agreement expensive. He says

"The Act does not seek to abolish these payments but just modifies the common law position where the percentage of hire purchase price agreed upon as minimum payment was not fixed".⁸

So a hirer continues on an agreement which is to his detriment and the owner reaps unjustified profits. The situation is aggravated for the section does not demand of the owner to account for and pay to the hirer any excess monies got from the sale of the returned commodity.

The remedial action here is to adjust the payment for depreciation. The minimum payment clauses should be abolished and depreciation, should be assessed in each case by an impartial body like the courts. The owner should also in instances of sale of a commodity returned give an account of the sale and give to the hirer any excess monies.

Section 13 allows the hirer if he so wished to pay in one lumpsum. The criticism in this section is its silence on if the owner should reduce the price in such circumstances as the hirer will not pay in instalments. There certainly should be a price reduction since the hirer then pays in cash

The finance companies should not reap the benefit of the interest. The Act should include this part in the Section as it is only fair.

In fact courts in England allowed such a discount to be made as seen in the case of YEOMAN CREDIT LTD Vs MCLEAN. Master Jacob said in this relation,

"It may not be out of place to mention that there is a common almost customary practice among owners, particularly finance companies who let goods on hire purchase, 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 desires to pay the outstanding balance in one lumpsum rather than spread over the remaining period of the agreement".⁹

The Act should deal with this and not leave it for the courts to decide.

Section 15 allows that after two-thirds of the price has been tendered the owner cannot recover the goods save by an action of the court. This Section was thought by the entire legislature as the all important Section in the Act. But this price is too high. The price should be lowered to one-third since usually the hirer starts the transaction hoping to go right up to the end. Thus when he fails leniency should be extended to him by lowering this price. In fact a payment of one-third is also a show of good faith.

Sections 16 and 17 concecutively govern the relationship between the parties once the owner has instigated an action to recover possession. Contrary to Section 15, Section 16(3) allows the owner to remove the goods if two or more instalments are owing; this is not termed as repossession but as an act protecting the owner's interest. This makes an owner have power to repossess the goods under the guise of an act protedting his interest even though the court can act against him.

To avoid unnecessary intervention by the courts this Section should be removed as it only serves the purpose of threatening the hirer.

Section 25 can be a most helpful Section to the hirer, as it demands of the owner to pay excess monies got out of a resale of a commodity he repossesses from the hirer. But the Section is limited to a situation or situations where the goods are obtained by suit. The phrase should be removed and the Section to include **even** situations whereby the goods are obtained through other ways as long as there is an excess. It should cover even instances where hirer terminates the contract.

From the foregoing it is evident why scholars have termed the Act as a disappointing piece of legislation. The pecuniary interests of owners of goods have been enhanced tenfold by the Act at the expense of the consumer's pecuniary interest.

Much as the sections can be ammended as suggested there needs additional provisions to cover areas which

will crop up in the future. For instance, advertising is an area where the Act should cover. Advertising should be controlled so as not to misguide the hirer in entering contracts under influence of false or overly decorated information. Since the Minister has power to make such rules he should do so.

Other areas ignored by the Act should be included in the same manner e.g. there should be a provision to give hirer a right of cancellation if the document is signed at a place other than appropriate trade premises. This is because even today door to door salesmen operate and someone may get into such a transaction without exactly understanding it then find himself in trouble later.

In the face of our developing country it is most helpful to have a committee to review the needs of the parties and especially protect the weaker party, in this case who is the consumer.

CONCLUSION

Hire purchase trade is an important system in our country. It is a much needed system in our developing country.- the farmers need it for purchasing agricultural machinery so as to have better produce, the traders also need it and even the majority of persons who are wage earners. It is thus imperative that the system be given total support for the good of many.

The future of hire purchase can only be ascertained by creating fairness in the trade and thus encourage many consumers to join in and for sure there would be a higher standard of living. It would serve no purpose even to the dealers if the system is used by very few people due to the difficulties within it. The dealer should realise the importance of the consumer in this trade and how when the latter is secure it is for dealers' own good, his business flourishes. It is also good for our economy.

I am not overlooking the fact that Kenya is an under-developed capitalist country, reason being she had been in the past integrated into the international capitalist economic system. This makes her to be a victim of a large scale exploitation. In the hire purchase business two roles are emphasized: investment, and then sale of manufactured goods. As such exploitation occurs in endeavours to maintain these two roles e.g. The doctrine of freedom of contract is operative in a trade where it is certainly out of place at least as far as the ordinary consumer is concerned.

However, even under these circumstances the legislature has the right to make rules and laws. It should thus do its

role. It may not be easy to overhaul the Act overnight since other policy considerations have to be made, but it is upon them to put across the suggested reforms into the statute and keep revising the Act. Hire purchase is very important in our country's economy and we cannot afford to do without it. The more consumers it has, the better, and it is only through better protection that more consumers can be encouraged to use it.

FOOTNOTES

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