

JOURNAL OF
COMPARATIVE LAW

Vol. 4, No. 1
Jan. 2017

THE UGANDA HIRE PURCHASE ACT 2009 VIS-À-VIS THE KENYAN HIRE PURCHASE ACT: A CRITIQUE

By
Abdulkareem Azeez*

Abstract

The Hire Purchase Act of Uganda, 2009 is a commendable effort from the Ugandan law makers which seeks on one hand to respond to the commercial needs of the people by providing a legal framework aimed at creating a regulatory guideline for the concerned parties in a hire purchase transaction and at the same time, cater for the rights, duties and most importantly, the procedure for enforcing such rights or duties when the need arise. The hub of this paper is to examine few clauses in the Ugandan Hire Purchase Act with a view of ascertaining whether those clauses are in tune with the generally acceptable way of legislative drafting while at the same time engage in a comparative analysis between the Ugandan and Kenyan Hire Purchase Act. The essence of this comparison is to bring out few provisions in the Kenyan Act which this researcher considers germane but perhaps via legislative omission; (those provisions) are not included in the Ugandan Act.

Introduction

The term Hire Purchase or rent-to-own as it is known in the United States originated from the United Kingdom which is now unique to former British colonies. Rent-to-own otherwise known as rental purchase is a type of legally documented transaction under which tangible property such as furniture, consumer electronics and home appliances is leased in exchange for a weekly or monthly payment with the option to purchase at some point during the agreement¹. One of the first rent-to-own retail stores established in the United Kingdom was Lotus Radio which began operating as a radio rental business in 1933². According to Okany³, England introduced the first Hire Purchase Act in 1938. He traced the origin of modern hire purchase agreement to the mid-Victorian custom of furnishing trade under which persons who were not sufficiently worthy of open credit were allowed to have possession on condition that if certain arranged payments

* LLB (ABU), BL (Nigeria), LLM (Lagos), Lecturer, Kampala International University, Uganda

¹Lacko James 'Survey of Rent-to-own Customers' April, 2000

² International Directory of Company Histories, 24 ed, St. James Press, 1999

³Okany M.C 'Nigerian Commercial Law' Africana-FEP Publisher Ltd, Onitsha, 1992

were made, the property in the goods becomes vested in them, after the whole of the arranged payments were duly made. Within the United States, the practice of retail based rent-to-own business began to develop in the 1950s and 1960s⁴.

Hire Purchase or rent-to-own is an increasingly important source of medium term financing for business, it is used to finance the purchase of capital goods ranging from plant and equipment to commodities and vehicles⁵. The arrangement is convenience and flexible. It stimulates demand for a wide range of consumer goods and other products and in that way, promotes production and employment; it enables persons in the lower income groups to furnish and equip their homes and acquire many of the conventional necessities of life which they might otherwise have to do without.

Brief Historical Development of Hire Purchase

In the traditional Africa society, the concept of communalism was well entrenched wherein the survival of the people lies primarily in cordial interaction and mutual relationship. Though, the idea of contract in its technical form as it is understood today was alien to the people, the philosophy of contract where goods can either be exchanged for goods or services; or an individual being given the opportunity to have immediate possession and use of a commodity while he pays at an agreed date was well established and was considered as part and parcel of the cherished African custom.

Historically speaking, the codification of commercial law in Europe began at the onset of the Nineteenth Century which was stimulated by the Napoleonic Codification tendency⁶. The incorporation of commercial law into the corpus of the common law in

⁴Rilvin Gary 'From Pawnshop to Pocerity, How the Working Poor Became Big Business' New York p26

⁵ Loveday A. Nwanyanwu 'Hire Purchase Strategy of Physical Capital Investment and Financial Performance of Construction Companies: Illustrating from the Nigerian Stock Exchange' Interdisciplinary Journal of Research in Business, Vol.2, Issue 4, (pp 08-20) 2012

⁶ David Justin Bakibinga 'Commercial Law in a Liberalized Economy: The Case of Uganda' Inaugural Lecture Series, Makerere University, June 2002 @p5

England paved the way for the codification of commercial law. This was further justified by the view that the rules of commercial law had become fairly settled in the precedents and were also settled or clear⁷. This codification played a dual role of assisting the merchants on how to avoid disputes in their day to day commercial relationship and at the same time ensures certainty of rules to be applied in a given commercial transaction.

Uganda, being a onetime colony of Britain, the principles of law including commercial law were inherited from England and continue to apply in Uganda subject to the written laws and local circumstances⁸. These include the written laws as passed by the Legislature, the common law and doctrine of equity, any established and current custom and usage⁹.

Commercial law encompasses all those principles, rules and statutory provisions of whatever kind and from whatever source which bear on the private rights and obligation of parties to commercial transactions whether between themselves or in their relationship with others¹⁰. The scope of commercial law includes basic law of contract; law of agency; sale of goods; banking and negotiable instruments; insurance; bankruptcy; carriage of goods and most importantly hire purchase which is the hub of this paper.

In Uganda, the enabling legislation regulating hire purchase transaction is the Hire Purchase Act, 2009 (herein after referred to as 'The Ugandan Act')¹¹ which came into force on 12th June, 2009. The Act amongst others seeks to provide for the regulation and registration of hire purchase agreements and the licensing of persons carrying on hire purchase business and for related purposes.

⁷ Chalmers M.D 'Codification of Mercantile Law' Law Quarterly Review, Vol.19 @ p11

⁸ David Justin Bakibinga *supra*

⁹ Section 16(2&) of Judicature Act of 1996. See also, Wavah Holdings V General Motors (1991) Supreme Court Judgement of Uganda.

¹⁰ See Goode R. 'Commercial Law in the next Millennium' (Sweet & Maxwell, London 1998) P8-9

¹¹ See The Uganda Gazette No.27 Volume CII dated 12th June, 2009

Meaning of Hire Purchase

Hire and Purchase are two different words merged together. Hire means 'to rent' and purchase means 'to buy'¹² one would then be tempted to ask, why the marriage of the two terms? This question will be answered in due course. Hire Purchase agreement means an agreement under which the hirer has an option to purchase the commodity in accordance with the terms of the agreement and includes an agreement under which possession of goods delivered by the owner thereof to the hirer on condition that the hirer pays the agreed amount in periodical instalments and the property in the goods is to pass to the hirer on the payment of the last instalments and the hirer has a right to terminate the agreement at any time before the property so passes¹³. Hire Purchase agreements are made by persons who desire to have immediate use and enjoyment of goods but do not wish, or are unable to make immediate payment of the price. The owner of the goods then allows the hirer to take immediate possession of the goods on the terms that the price is to be paid by periodic instalments, each of a stipulated amount¹⁴.

The Ugandan Act defines Hire Purchase as an agreement wherein the hirer will upon the payment of an initial deposit have immediate possession and enjoyment of the goods or product whilst giving the owner the power to repossess the hired goods subject of course to default of payment by the hirer. It is a distinct form of transaction where the hirer has the option to purchase and at the same time enjoys the right to terminate the agreement at any time before the final payment¹⁵. The above definitions emphasize three main characteristics of a hire purchase transaction. The first is the element of bailment wherein possession of the goods is handed over to the hirer but the ownership does not change. The second is the element of option in the hirer either to return the goods and put an end to his liability to pay further instalments and the third is to become the owner

¹² Macmillan English Dictionary for Advance Learners (International Student Edition) 2005 @ pg 678&1144

¹³ Section 2(c) of the Hire Purchase Act of India, 1972

¹⁴ Ashiq Hussain 'Law Made Easy' East African Educational Publishers, Kenya. 2010 @ p149

¹⁵ Section 9&10 of Hire Purchase Act of Uganda, 2009

by exercising his option to purchase which is an element of sale¹⁶.

It therefore means that, where the hirer decides to terminate the agreement by returning the goods to the owner, the initial deposit and subsequent instalments paid by him prior to the return of the goods will qualify as rent, thus, the transaction stands terminated. But where the hirer decides to exercise his option to purchase by paying the final instalment, his status from renting the goods (Hire) will change to being a purchaser. By then, the transaction would have moved from hire to purchase, hence, the name 'Hire Purchase'! The effect of this transition in law is that, the hirer prior to his exercise of the option to purchase by paying the last instalment cannot transfer a valid title to a third party¹⁷. The idea of parting with possession but not the title is an in-built safeguard in favor of the owner who parts with his goods without receiving its full price¹⁸.

It is worthy of mentioning that, the option on the part of the hirer to either purchase or terminate the agreement by returning the goods marks the distinction between hire purchase and other transaction¹⁹.

Examination of Some Clauses in the Ugandan Hire Purchase Act

Commencement Date:²⁰ This is a date when or in which the Act is expected to become operative. In other words, commencement date is synonymous with a date of birth. Broadly speaking, there are three methods employed for commencing an Act or bringing an Act into operation. They are: The Act may be silent, in which case, the Act will come into operation on the day in which it is assented; The Act may contain a commencement provision setting out a specified day or time when the Act or part of the Act comes

¹⁶Avtar Singh 'Law of Sale of Goods and Hire Purchase' 6th ED, Eastern Book Company, 2005

¹⁷ See the case of *Helby Vs Mathew* (1895) AC 471

¹⁸ See Macleod 'Sale and Hire Purchase' London Butterworths, 1971. See also, *Cooper Motors Corporation(U) Ltd V. Genesis Transporters Ltd & 2 Ors* (2008) UGCOMM 48

¹⁹ See *Visit Africa Ltd V. Management Committee Shimoni Demonstration School* (2013) UGCOMM 121. See also the position of Indian Supreme Court in *K.L Johar& Co V. Deputy Commercial Tax Officer* (1965) AIR SC 1082

²⁰ Section 1 of the Ugandan Act

into operation or The Act may contain a commencement provision stating that the Act or part of the Act will come into operation on a day to be fixed and announced by the Minister²¹. It is an acceptable legislative style of drafting to either state in clear terms the commencement or operative date; or subject the commencement of an Act to a future event or upon the exercise of discretionary power by the appointing minister. However, it would amount to a careless legislative drafting style, as seen in the Hire Purchase Act of Uganda²² to, on one hand state the commencement date to be 12th June, 2009 and on the other hand state that “This Act shall come into force on a date appointed by the Minister by statutory instrument”. The proper way is to adopt either of these approaches and not the two at the same time.

The Parties:²³ Being a unique form of transaction, the parties to hire purchase agreement are being referred to as the hirer and the owner. Referring to the parties as Creditor and Buyer, Bailee and Owner as seen in the Act²⁴ shows a clear misunderstanding of the concept of hire purchase by the drafters of the Act. There should be consistency in the drafting technique and the idea of referring to the parties as Creditor-Buyer is a misnomer. The point is, hire purchase is a unique type of contract and because of its uniqueness²⁵, parties under this arrangement must be clearly distinguished and identified from all other forms of transactions. Referring to the parties under hire purchase agreement as Creditors and Buyers will erode this uniqueness.

Guarantor:²⁶ A guarantor is someone standing in for the hirer and undertaking a promise to the owner that the hirer will not default in his obligations but where he does, he (as the guarantor) will step in and perform such obligations as agreed under the contract. The whole essence of having a guarantor is for the owner to have double-assurance that he is well covered under the contract and

²¹ Understanding Legislation, South Australian Legislation. Available @ www.legislation.sa.gov.au

²² Section 1 of the Ugandan Act

²³ Section 3

²⁴ *ibid*

²⁵ K.L Johar & Co V. Deputy Commercial Tax Officer Supra

²⁶ Section 4(2)

where the hirer defaults, he can move against the guarantor for his rights. However, the section²⁷ under review posed unnecessary bottle-neck to the successful operation of the hire purchase transaction. Contract is an understanding between the parties to it and the law in the absence of duress or undue influence should allow the parties to reach an agreeable and acceptable terms or conditions without unnecessary legal technicalities. Making a guarantor a mandatory requirement as provided in the Act is absolutely unnecessary because there are instances where the hirer can be given the product on self-recognition. Moreover, the Act ought to have make the above provision optional and not in a mandatory tone as couched by the Act²⁸. The Act should be more flexible for the parties to be able to successfully operate it.

Taking the Goods out of Uganda:²⁹ The clause is to the effect that where the hirer takes out the good out of Uganda without the consent of the owner, the owner has the right to repudiate the transaction. Though, the intention of the Act is to protect the owner by ensuring the hirer cannot move the product subject matter of hire purchase out of the country without the owner's knowledge, but making such requirement a CONDITION is absolutely insensitive and unnecessary. At best, the clause should have been a warranty, a breach of which will entitle the innocent party to damages and not a condition wherein the owner may choose to repudiate the contract. The Act is expected to provide a balanced protection for the interest of the owner as well as the hirer³⁰.

Recovery of Possession:³¹ The Uganda Act provides that the owner cannot engage in forceful repossession of the goods as long as the hirer has paid two-third of the purchase price³². The Act is silent as to whether or not the owner can engage in forceful repossession where the hirer has paid less than two-third, also there is a lacuna in the act as to the available remedy in case the owner

²⁷ Ibid

²⁸ Section 4 (3)

²⁹ Section 8 (e)

³⁰ See Macleod 'Sale and Hire Purchase' Suora @p213

³¹ Section 15

³² Ibid. see also Godfrey Githinji V. Mathew Ouma Oseko (2012) UGCOMMC 107

decides to forcefully repossess. Repossession is a sensitive and delicate issue which should not be left at the mercy of the owner without any procedural guidance from the law makers.

Application for Renewal of Licence:³³This section³⁴ is vague and open to abuse by the hire purchase practitioner, in this case, the owner. Equally, the timeframe within which the licensing authority is expected to accept or reject renewing a licence is not stated. Part of the reasons for codification of the law is to ensure certainty and predictability³⁵. When the law is silent as to when the Owner is to submit his application for renewal and there is no deadline within which such application should be granted or rejected, then the possibility of abuse by the owner and the licensing authority are highly probable. Therefore, there should be a timeframe within which any application for renewal must be submitted and a corresponding timeframe within which the licensing authority must decide whether to renew or not.

Transfer of Interest:³⁶ Section 34 (1) provides “The hirer may only transfer his or her interest in goods under a hire purchase agreement with the consent of the owner” The Act is silent as to when the consent is being sought but unreasonably withheld. The Indian Act is explicit on this where it provides that where the owner unreasonably withholds his consent, assignment can be made without the owner’s consent³⁷. In the same vein, sub section 2 provides “the owner shall transfer his or her interests within reasonable time upon completion of the payment of the hire purchase price by the hirer” what constitute a reasonable time is vague and most importantly the law makers should have provided a clear date particularly when the owner has been given notice of the hirer’s intention to purchase and a specific date fixed for the hirer to complete the payment as stated in section 10 of the Act. Subjecting the transfer of title to the hirer who has completed payment (which I believe should be automatic) to a reasonable time which is

³³ Section 21

³⁴ Ibid

³⁵ Chalmers M.D ‘Codification of Mercantile Law’ Supra

³⁶ Section 34

³⁷ Section 12 of the India Act. See also Belsie Motor Supply Co Ltd V. Cox (1914) 1 KB 244

to be determine by the owner is to say the least not helpful. The property in the goods should automatically pass upon the completion of the instalments.³⁸

Penalty for Taking the Goods out of Uganda:³⁹ This section⁴⁰ provides “A hirer who takes goods obtained by him or her under a hire purchase agreement out of Uganda without the consent of the owner in contravention of section 8 (1) (e) commits an offence and is liable on conviction to a fine not exceeding one hundred currency points or imprisonment not exceeding one year or both” The dilemma with this clause is that it amounts to double punishment for a single offence. Section 8 (1) (e) has given the owner the right to repudiate the contract where the hirer takes out the goods out of Uganda without his consent. Where the owner has repudiated the contract, the effect is that, he is going to recover possession and all the instalments paid by the hirer will be forfeited, which I consider as adequate punishment. Subjecting the hirer to another set of punishment (fine or imprisonment or both) for the same offence is totally unreasonable and amounts to double jeopardy. The combine effect of the above provisions is that, the hirer for taking the goods out of Uganda without the consent of the owner will forfeit the goods and any other instalments paid; will be liable on conviction to a fine not exceeding one hundred currency point (each currency point is twenty thousand shilling); imprisonment not exceeding one year or both! Meanwhile, the Act is silent on where the consent of the owner is sought but unreasonably denied!

Comparison Between the Uganda and Kenya Hire Purchase Act

The Kenyan Hire Purchase Act (hereinafter referred to as Kenyan Act) came into operation on 2nd November, 1970. Since then, the Kenya Act has been amended several times and the recent amendment took place in 2010. The Kenya Act amongst others makes provision for the regulation of certain hire purchase agreements and for the licensing of hire purchase concerns and for purposes

³⁸ See section 8 of the Indian Hire Purchase Act. See also *Jah Bharat Credit & Investment Ltd V CST* (2000) 7 SCC 165

³⁹ Section 35

⁴⁰ *Ibid*

connected therewith. The purpose of this part of the article is to engage in a comparative analysis of the two Acts with a view of bringing out few clauses from the Kenya Act that are not but ought to have been included in the Uganda Act. Why Kenya? Aside from the fact that both countries are within the same East Africa region, Kenya is seen as a commercial giant within the East Africa community and it will be prudent in a bid to overhaul the commercial legal framework in Uganda by making reference to similar law within the same region. Some of the reasons why this researcher feels those clauses should or ought to have been included in the Ugandan Act will be discussed in due course. In conclusion, recommendations on possible amendments to the Uganda Act will be made.

Minimum Threshold: Section 3 (1) of Kenya Act⁴¹ provides “this Act applies to and in respect of all hire purchase agreements entered into after the commencement of this Act under which the hire purchase price does not exceed the sum of Four Million Shillings or such other higher or lower sum as the Minister may, after taking into account market forces from time to time”. The effect of this clause is that, under the Kenya Act, a minimum threshold has been set as to the value of any product before any hire purchase transaction can take place whereas such clause does not exist under the Uganda Act. Setting a threshold which is flexible as seen in the Kenya Act is a way of setting a standard in the commercial industry so that both the prospective hirer and the owner will understand the minimum value of the goods which in law qualifies as hire purchase good. The implication of inserting such clause is to inform the prospective hirer or owner that not all goods qualify as hire purchase good and for a good to be so qualify, it must meet the minimum threshold value as specified by the law. Having such clause in the Act will improve the standard of hire purchase transaction and at the same time set a benchmark on items that qualify in law as hire purchase good.

Taking Goods in Lieu of Rent: Section 9 (4) of Kenya Act⁴² provides “ If the owner of goods under a hire-purchase agreement has given written notice of his

⁴¹ Cap 507, 1970 as amended

⁴² Ibid

ownership thereof to the landlord of the premises where the goods are kept, the landlord shall not have a right of distress over the goods for rent” this implies that the Kenya Act contemplated a scenario where the hirer lives in a rented apartment with the hired goods and he is in default of rent due to his landlord, the landlord may take the hired goods in lieu of his rent which will certainly constitute a barrier to the hire purchase agreement and a big disadvantage to the owner. To protect the interest of the owner, the Kenya Act has put in place a clause which only requires the owner to in writing inform the hirer’s landlord of his interest in the hired good which is being kept in his premises. The logic is that, in case the hirer is in default of rent, the landlord cannot take the hired good in lieu of payment of rent. The Uganda Act does not have such protection for the owner against any landlord who might be tempted albeit unknowingly to take custody and by extension sell the hired goods in lieu of payment of rent. Inserting similar clause in the Ugandan Act will serve as additional protection to owner as the hirer’s landlord taking the hired goods in lieu of rent.

Registration of Hire-Purchase Agreement: The Kenya Act establishes a registry of hire-purchase agreements headed by a registrar and a deputy registrar appointed by the Minister to conduct hire-purchase business⁴³. The registry is charged with the responsibility of registering all hire-purchase agreements entered into in Kenya. Whereas non registration of the agreement is a bar to any right of action in the event of dispute between the parties to the agreement. The essence is to be able to keep tab and monitor all hire purchase transactions in Kenya on one hand and for the parties to be able to access court in case of dispute. There is no such provision under the Uganda Act which makes hire purchase transactions difficult to monitor and coordinate.

Removal of Goods from Premises: Aside from section 8 (1) (e) of the Uganda Act which is to the effect that the hirer shall not take the hired goods out of Uganda without the consent of the owner, the Ugandan Act is silent as to whether the goods can be moved from one region to another region though within the country without the consent of the owner. Whereas, the Kenya Act provides that

⁴³ Section 5

where the hirer for whatever reason is moving from his original address to another place, notice of the new place must be given to the owner at least ninety-six hours before such movement and a violation of this section is punishable with two thousand shillings⁴⁴. It is important to have this clause in the Uganda Act because the owner will be able to monitor the movement of the goods from one region to another.

Passing of Property in the Goods: where Section 34, sub section 2 of the Uganda Act provides that “the owner shall transfer his or her interests within reasonable time upon completion of the payment of the hire purchase price by the hirer” the Kenya Act is to the effect that there shall be an implied condition that the legal ownership of the goods and title thereto shall be automatically be vested on the hirer upon payment of the hire purchase price in full⁴⁵. Unlike the Ugandan act which talks about reasonable time without defining what amounts to reasonable time, the Kenyan Act is proactive and more practical by inserting the above clause that as long as the final instalment is paid, the legal ownership automatically moves from the then owner to the new owner without any delay. Even in India, the position as to the transfer of ownership is akin with what is obtainable in Kenya⁴⁶, so there is the need to confer on the hirer immediate ownership as long as he has completed the payment of all instalments.

The Hire-Purchase (forms and fees) Rules: The Kenya Act has gone an extra mile to provide for the forms in which every hire purchase agreement must comply with⁴⁷. A template of how each of these forms should be drafted is equally provided. Some of these forms include registration out of time; certificate of registration agreement; statement of change of address; notice to the landlord; notice by the hirer to terminate; notice by the hirer to complete; application to be licensed as a hire purchase business and fees paid among others. This is to ensure uniformity in the system and do away with unnecessary

⁴⁴ Section 9(1&2)

⁴⁵ Section 8 (1) e

⁴⁶ Section 8 of India Act, 1972

⁴⁷ 1st Schedule

4/1 technicalities in the drafting. No such clause exists in the Uganda Act.

Conclusion

The above analysis and comparison was an attempt to bring out some of the loopholes noticed in the Uganda Act. The above discussed areas should be critically looked into by the law makers and all stakeholders with a view of amending the Act and at the same time improve the quality of the laws, so that the intention of the law can be realized. The points noted above are not conclusive, but like I said earlier, it was an attempt to point out that all is not well with the Uganda Act and the earlier the law makers started preparing for an amendment the better for everyone in the industry. The law should be able to meet the commercial reality and needs of the people.