



**Birech v Fuji Motors EA Limited & another (Civil Suit 10 of 2014)
[2024] KEHC 10025 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 10 OF 2014
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

JOHN KIMELI BIRECH PLAINTIFF

AND

FUJI MOTORS EA LIMITED 1ST DEFENDANT

SB HOLDINGS LIMITED 2ND DEFENDANT

JUDGMENT

1. The background facts to this case are fairly straightforward. On or about the 15th April, 2013 the Plaintiff entered in a sale agreement with the 1st Defendant for the purchase of 1 used unit of Scania Tipper Truck, green in colour, a chassis no. 2006843 and engine no. 6247533 at a sum of kshs. 6,700,000. By dint of the agreement the Plaintiff averred that the 1st Defendant and him agreed that the Plaintiff as a purchaser was to pay a deposit of kshs. 4,000,000 and which sum was paid to the vendor leaving a balance of kshs. 2,700,000 payable within 2 months as of the date of the agreement.
2. The Plaintiff further averred that while staking delivery of the motor vehicle, the 1st Defendant had not registered the same hence the vehicle could not be used on the road without valid registration plates and further the chassis number found on the vehicle was improper as it belonged to a different vehicle. The Plaintiff also averred that he was ready to discharge his part of the contract and in furtherance thereof issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013.
3. The Plaintiff averred that the 1st Defendant committed fundamental breaches of the contract by failing to have the vehicle registered timely and by failing to obtain valid registration number; that the 1st Defendant no longer has any valid title capable of transfer or any registration book it may deliver since the vehicle has since been registered in the name of the 2nd Defendant and who is not privy to the sale of contract between the 1st Defendant and the Plaintiff and that the Defendants have proceeded to unlawfully seize the motor vehicle from the Plaintiff in further breach of the contract.



4. The Plaintiff vide a Plaint dated 28th February 2014 and Amended and dated on 27th October 2015, sought the following orders:
 - a. Kshs. 4,000,000 together with interests.
 - b. Kshs. 25,000 daily as of 15th April, 2013 until the date of the judgement or such other date as the Honourable Court may deem fit to grant.
 - c. General damages for unlawful seizure of property.
 - d. Costs and Interests.
5. The Defendants did not file any response to the Amended Plaint nor was there any appearance for the Defendants after the case file was transferred to the High Court. This is despite the Plaintiff publishing notices in the widely read daily newspapers such as the Daily Nation and the Standard newspaper. This matter proceeded for formal proof and hearing.

Plaintiff's Case Summary

6. In support of the Plaintiff's case, evidence was adduced by the Plaintiff John Kimeli Birech (PW1), in line with the witness statement dated 17th January 2014 and Supplementary Witness Statement filed and dated herein on 21st June 2024 and the List and Bundles of Documents filed on the Plaintiff's behalf on 17th January 2014 and further list of Documents dated 20th June 2024, (marked PExh. 1A and 1B, respectively).
7. PW1 testified that on or about the 15th April, 2013 he entered in a sale agreement with the 1st Defendant for the purchase of 1 used unit of Scania Tipper Truck, green in colour, a chassis no. 2006843 and engine no. 6247533 at a sum of kshs. 6,700,000. By dint of the agreement, PW1 testified that the 1st Defendant and him agreed that as a purchaser he was to pay a deposit of kshs. 4,000,000 and which sum was paid to the vendor leaving a balance of kshs. 2,700,000 payable within 2 months as of the date of the agreement. He also testified that the sale of agreement had the following express and/or implied terms: that the 1st Defendant had a right to sell the vehicle in accordance with section 14(a) of the [Sale Of Goods Act](#), cap 31; that the 1st Defendant was to hold the motor vehicle registration book until he completed the payment of all the installments upon which the seller was to sign a transfer in favour of the purchaser; the motor vehicle was sold free from any liability.
8. PW1 also testified that while staking delivery of the motor vehicle, the 1st Defendant had not registered the same hence the vehicle could not be used on the road without valid registration plates and further the chassis number found on the vehicle was improper as it belonged to a different vehicle. PW1 also testified that the 1st Defendant was obligated to effect the registration and resolve the issue of the chassis number in order for the vehicle to be in a deliverable and in a usable state and that he was ready to discharge his part of the contract and in furtherance thereof issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013.
9. Further, PW1 testified that the 1st Defendant committed fundamental breaches of the contract by failing to have the vehicle registered timely and by failing to obtain valid registration number; that the 1st Defendant no longer has any valid title capable of transfer or any registration book it may deliver since the vehicle has since been registered in the name of the 2nd Defendant and who is not privy to the sale of contract between the 1st Defendant and that the Defendants have proceeded to unlawfully seize the motor vehicle from him.



Defendants Case Summary

10. There was no appearance for the Defendants during the formal proof and hearing of this matter before me.

Analysis and determination

11. I have read through the pleadings, the affidavit in support, the parties' submissions and the response thereto. There are 2 issues I find for determination;
 - a. Whether the Defendants were in Fundamental breach of the Sale Agreement dated 15th April 2013.
 - b. Who is Entitled for the Damages

Whether the Defendants were in Fundamental breach of the Sale Agreement dated 15th April 2013.

12. Of relevance to this case are the provisions of Sections 14, 15, 16, 23, 53 and 54 of the [Sale of Goods Act](#). For ease of reference, the Sections provide as follows:
13. Section 14 provides that: In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—
 - (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
 - (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
 - (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.
14. Section 15 provides that:

“Where there is a contract for the sale of goods by description – there is an implied condition that the goods shall correspond with description; and if the sale is by sample as well as description; it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.”
15. Section 16 provides that Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: -
 - a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose: provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
 - b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be



of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regard defects which that examination ought to have revealed;

- c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
 - d) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith.”
16. Section 23 provides for Transfer of Title it states that:
- (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.
 - (2) Nothing in this Act shall affect—
 - (a) the provisions of any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;
 - (b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.
17. In a persuasive authority, the High Court in *Prudential Printers Limited v Carton Manufacturers Limited* [2012] eKLR held that:
- “A reading of Section 16 of the *Sale of Goods Act* shows there is no warranty or condition as to the merchantability of goods; the only time such a warranty will be implied is when the buyer relies on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods.”
18. The motor vehicle sale agreement provided for the following express and/or implied terms that:
- “The 1st Defendant had a right to sell the vehicle in accordance with section 14(a) of the *Sale of Goods Act*, cap 31; The 1st Defendant shall be able to pass title to the Plaintiff; the 1st Defendant was to hold the motor vehicle registration book until the Plaintiff completed the payment of all the installments upon which the seller was to sign a transfer in favour of the purchaser; The motor vehicle was sold free from any liability or lien.”
19. In view of the foregoing clause, the Plaintiff stated that while staking delivery of the motor vehicle, the 1st Defendant had not registered the same hence the vehicle could not be used on the road without valid registration plates and further the chassis number found on the vehicle was improper as it belonged to a different vehicle. The Plaintiff also stated that the 1st Defendant was obligated to effect the registration and resolve the issue of the chassis number in order for the vehicle to be in a deliverable and in a usable state and that he was ready to discharge his part of the contract and in furtherance thereof issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013.
20. From the proceedings and the evidence of the Plaintiff, while staking delivery of the motor vehicle, the 1st Defendant had not registered the same hence the vehicle could not be used on the road without valid registration plates and further the chassis number found on the vehicle was improper as it belonged to a different vehicle. Further, from the evidence the 1st Defendant was obligated to effect the registration and resolve the issue of the chassis number in order for the vehicle to be in a deliverable and in a usable



state and that the Plaintiff was ready to discharge his part of the contract and in furtherance thereof issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013.

21. Section 14 of the *Sale of Goods Act*, Cap 31, Laws of Kenya, provides that:

“ 14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.”

22. No doubt the 1st Defendant breached the foregoing provisions of the law by failing to have the vehicle registered timely and by failing to obtain valid registration number; that he no longer has any valid title capable of transfer or any registration book it may deliver since the vehicle has since been registered in the name of the 2nd Defendant who is not privy to the sale of contract between the 1st Defendant and the Plaintiff and that the Defendants have proceeded to unlawfully seize the motor vehicle from him.

23. The non-disclosure of critical facts by the 1st Defendant in my view amounted to fraudulent misrepresentation as defined by *Black's Law Dictionary* (Eighth edition) as:-

“ A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it”.

24. In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing. The 1st Defendant failed to have the vehicle registered timely and by failing to obtain valid registration number.

25. Be that as it may, the Plaintiff as at the time of the commencement of the claim had deposited a sum of kshs. 4,000,000 and which sum was paid to the vendor leaving a balance of kshs. 2,700,000 payable within 2 months as of the date of the agreement. In furtherance thereof he issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013.

The upshot of the foregoing analysis is that the Defendants were the ones who breached the contract.

Who is Entitled for the Damages?

26. Section 53 of the *Sale of Goods Act* provides for the Remedy for Breach of Warranty. It states:

- (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of the breach of warranty entitled to reject the goods; but he may—
 - (a) set up against the seller the breach of warranty in diminution or extinction of the price; or



- (b) maintain an action against the seller for damages for the breach of warranty.
- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
- (3) In the case of breach of warranty of quality, the loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.
27. It is now trite that the purpose of damages for breach of contract is for the claimant to be put, as far as possible, in the same position he would have been if the breach complained of had not occurred. This principle was enunciated in *Hudley Baxendale* [1854] 9 Exch. 341 thus:
- “where two parties have made a contract which one of them had broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either naturally that it is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.”
28. The same principle was applied in the case of *Gedion Mutiso Mutua v Mega Wealth International Limited* [2012] eKLR, thus:
- “The principal guiding the award of general damages for breach of contract was restated in *Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa* [1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things form such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. the plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract...”
29. With the above principle in mind, I have given due consideration to the evidence and note that there is no contestation that the Plaintiff spent a sum of kshs. 4,000,000 and which sum was paid to the vendor leaving a balance of kshs. 2,700,000 payable within 2 months as of the date of the agreement. In furtherance thereof he issued a cheque of kshs. 2,700,000 to the 1st Defendant on the 16th June 2013. In the premises, I find basis for awarding the Plaintiff additional sum as general damages.
- Consequently, I hereby enter Judgement in favour of the Plaintiff as follows;
- a. Kshs. 4,000,000 together with interests until payment in full.



- b. Kshs. 25,000 daily as of 15th April, 2013 until the date of the judgement.
- c. General damages for unlawful seizure of property.
- d. Costs and Interests to the Plaintiff.

Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE

