



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 28 OF 2014

BLASOVILLA HOLDINGS KENYA LIMITED.....PLAINTIFF

VERSUS

FOTON EAST AFRICA LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiffs amended plaint dated 14th May 2018 prays for judgement against the defendant for several orders including;

- a. Kshs. 1,500,000 for loss of profit for the supply of ballast and murram.**
- b. Kshs. 2,100,000 for loss of business for the hire period.**
- c. Kshs. 30,000 per day from 24rd of April 2014 till the vehicle is delivered.**
- d. Kshs. 767,000 under several headings.**
- e. Return of titles numbers Kiambogo /Miroreni block 1/3031 (Itherero) and 3031 as well.**

2. The plaintiff prayed for costs of the suit and interest on the above as well.

3. The defendant filled its defence denying the claim and apparently did not attend court during the hearing despite being served. What is before this court is the plaintiff's evidence as well as the written submissions as directed by the court.

4. PW1 Herodian Nyakenyanya Machoka testified on behalf of the plaintiff where he also adopted his witness statement on record dated 6th May 2014. He stated that the plaintiff entered into a contract for the purchase of a tipper track worth Kshs. 8,172,000 as per an agreement dated 23rd December 2014.

5. The plaintiff was to make a deposit of Kshs. 1,270,796 to the defendant and the balance was through a financier. The plaintiff made several amounts which included insurance covers, tracking systems charges, legal fees as well as registration fees all totalling Kshs. 767,000.

6. It was the plaintiffs case that it obtained a financier namely Equatorial commercial bank which had the said vehicle registered in their joint names and the new registration number of the same was KBY 683F.

7. The said bank then had to enter into a buy back agreement with the defendant but upon the plaintiff submitting the contract to the defendant, the latter refused which then frustrated the whole contract as the bank could not release the funds to the defendant who in turn failed to release the track to the plaintiff.

8. It is also imperative to note that the plaintiff apart from paying the deposit amounting to Kshs. 400,000 submitted titles enumerated above to the defendant to form part of the deposits. The said titles according to the plaintiff are yet to be released to it.

9. The sum total therefore of the whole contract is that the defendant contributed in frustrating it by refusing to sign the buyback contract between it and the Equatorial commercial bank. There was no apparent reason as the whole deal had reached an advanced stage according to the plaintiff.

10. The plaintiff testified that it had entered into a contract with one Kamro enterprises limited for the supply of murrum and ballast among other deals. It also produced evidence to that effect. The defendant's failure to deliver the track frustrated the contract and it therefore prays that it be compensated. The plaintiff also prayed for the sum of Kshs. 30,000 per day for the loss of use of the said vehicle. In its submission however the plaintiff prayed that that period be computed for 6 months.

11. After closing its case the court directed that the plaintiff files its submissions which it has done and the court has perused the same with the attached authorities.

12. The substantive issue is whether in the sum total of the evidence on board one can conclude that there was a valid contract between the plaintiff and the defendant. If this was the case did the defendant breached the same as alleged by the plaintiff.? Is the plaintiff entitled to the prayers sought in the plaint.?

13. Although the defendant filed its statement of defence, it did not avail itself to prosecute it. This therefore remains mere pleadings as was well explained by Madan j (as he then was) in **CMC AVIATION LTD V. CRUISAIR LTD (NO1) (1978) KLR 103 (1976-80) 1KLR 835.**

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven.”

14. This court is satisfied that indeed there was a contract between the plaintiff and the defendant for the purchase of the tipper lorry. The plaintiff paid some deposit and ensured that the same was registered between it and the bank which was its financier. The only trouble is that the defendant refused to sign the buyback agreement between it and the bank. As a result, the track could not be delivered to the plaintiff.

15. The question of why the defendant failed to sign the buyback contract was not explained in the absence of evidence by it. It is stated in the defence that there was no privity of contract between the defendant and the bank hence it was not obliged to comply with the buyback element. That remains mere narration and in the absence of oral evidence this court would take the line advanced by the plaintiff.

16. Having stated so this court agrees with the plaintiff that the loss occasioned by the failure of the defendant to meet its end of the stick was enormous. The registration of the track in the joint names with the bank was a clear testimony to this. Had the defendant signed the buyback agreement then the track would have been released to the plaintiff and it would not have incurred any loss.

17. The plaintiff has submitted several headings of payments which it demands from the plaintiff. In its submission though it has abandoned the prayer for signing of the buyback contract as it has been overtaken by events. It has also abandoned the prayer for general damages.

18. The court has perused the same but the prayer for Kshs. 30,000 per day from 23rd April 2014 in my view has not been proven. This was simply inserted there but no evidence was led about it. This court will only grant the plaintiff's wish under the rest of the prayers.

19. In the premises judgement is hereby entered for the plaintiff and against the defendant for;

a. Kshs. 1,500,000 being the loss of profit for the supply of ballast and murrum.

b. Kshs. 2,100,000 for loss of the business for the entire period.

c. Kshs. 767,000 as per prayer 10(d) of the plaint.

d. The immediate return of titles numbers Kiambogo /Miroreni block 1/3031 (Itherero) and Kiambogo /Miroreni block 1/3033 (Itherero)

e. Orders (a), (b) and (c) shall attract interest at courts rates from the date of filing of this suit till payment in full.

f. The plaintiff shall have the costs of this suit.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 18TH DAY OF NOVEMBER, 2021

H K CHEMITEI

JUDGE