



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 03 OF 2015

BETWEEN

COUNTRY MOTORS LIMITED.....1ST PLAINTIFF

COUNTRY FARMS LIMITED.....2ND PLAINTIFF

AND

CMC MOTORS GROUP LIMITED.....DEFENDANT

JUDGMENT

Background

1. On or about July, 2013, the 2nd Plaintiff vide LPO No. CML 999/13 purchased 6 prime movers at USD 111,494.25 each from the Defendant being registration numbers:

- a) KBW 099D
- b) KBW 099L
- c) KBW 009L
- d) KBW 900J
- e) KBW 990K
- f) KBW 909K

2. Defendant sent an invoice dated 23.08.13 to the 1st Plaintiff for USD 557,648 to the 2nd Plaintiff which sum the parties agree was paid by Alios Finance Ltd (*financier*) and a receipt thereof was issued on 17th December, 2013.

3. Subsequently, logbooks for the 6 prime movers were issued in the joint names of the financier and the 2nd Plaintiff.

4. By a letter dated 07th August, 2014 to the 2nd Plaintiff, the Defendant demanded payment of Kshs. 18,778,271.00 which was inclusive of VAT which became effective from 01st September, 2013 which sum the 2nd Plaintiff disputed.

5. On 22nd December, 2014, the Defendant issued an order instructing Superview Auctioneers to repossess two tractors and a tracker from the Plaintiffs for non-payment of Kshs. 22,977,244.67.

6. The attempted repossession prompted the Plaintiffs to move the court by a plaint dated 22nd January, 2015 and filed on 27th January, 2015 seeking orders that:

- a) A permanent injunction to restrain the Defendant from repossessing, selling, alienating, auctioning, disposing or in any other way interfering with the Plaintiffs' possession, use, ownership and enjoyment of motor vehicle numbers KBE 690V,**

KBE 679V, KBC 099G, KBA 001G, KBW 099D, KBW 099L, KBW 099L, KBW 009L, KBW 900J, KBW 990K and KBW 909K

b) Damages

c) Costs of the suit and interest

d) Any other relief

7. Simultaneously with the plaint, the Plaintiffs filed an application seeking temporary orders of injunction to restrain the attachment of their vehicles which were granted by a ruling dated 28th October, 2015 pending the hearing and determination of this suit.

8. On 03rd February, 2017, the Plaintiffs amended the plaint substituting the prayer for damages with a prayer for **“a declaration that there are no monies owed by the Plaintiffs to the Defendant in respect of the vehicles KBW 099D, KBW 099L, KBW 099L, KBW 009L, KBW 900J, KBW 990K and KBW 909K and that the process of repossession was tainted, wrongful and unlawful.”**

9. On 05th July, 2018, Defendant amended its defence dated 09th February, 2018 seeking dismissal of Plaintiffs’ claim. It also laid a counterclaim on the ground that the Plaintiffs did not make full payment of the purchase price and that the repossession was lawful.

Plaintiffs’ case

10. **Prithpal Pandhal** a director of the Plaintiffs’ companies reiterated the Plaintiffs’ case as summarized hereinabove. In support thereof, he tendered an invoice dated 23.08.13 issued by the Defendant to the 1st Plaintiff for USD 557,648 and a receipt thereof was issued on 17th December, 2013 to confirm that the sum was paid by a Alios Finance Ltd (**financier**) as **PEXH. 2** and **3** respectively. He also tendered copies of logbooks for the 6 vehicles issued in the joint names of the financier and the 2nd Plaintiff as **PEXH. 4 (a)** to **(f)**.

11. The witness denied that Plaintiffs were indebted to the Defendants and further stated that the 9 cheques issued by 1st Plaintiffs to the Defendant between October 2014 and June 2015 which cheques were returned unpaid for lack of sufficient funds were for the purchase of a tractor which was not delivered.

12. In cross-examination by Mr. Kimanga for the defendant, the witness confirmed that payment was made in December, 2013 long after VAT was introduced in September, 2013.

Defendant’s case

13. **Peter Munge**, Defendant’s Credit Controller restated the Defendant’s case as summarized hereinabove. It is his evidence that the Defendant only received USD 557,648 from Alios Finance Ltd (**financier**) as evidenced by a receipt marked **PEXH. 3** and that the balance of USD 111,317.50 at the rate of 86/- per dollar remains unpaid together with 16% VAT which was introduced on 01st September, 2013.

14. The witness further stated that by a letter dated 07th August, 2014 **PEXH. 5(b)** to the 2nd Plaintiff, the Defendant demanded payment of Kshs. 18,778,271.00 and in a bid to settle the outstanding sum, the 1st Plaintiffs issued 9 cheques to the Defendant between October 2014 and June 2015 which cheques were returned unpaid for lack of sufficient funds. He denied that the cheques were for the purchase of a tractor from them by the Plaintiffs.

Analysis and determination

15. I have considered the evidence on record and submissions filed on behalf of the parties and I have deduced the issues for determination as follows;

i. Whether the Plaintiffs fully paid the purchase price of the 6 prime movers

ii. If not, how much is outstanding

iii. Whether Plaintiffs are liable to pay VAT

iv. Who pays costs

i. Whether the Plaintiffs fully paid the purchase price of the 6 prime Movers

16. Plaintiffs concede that they were liable to pay to the Defendant USD 111,317.50 and the balance of USD 557,648 was to be paid by Alios Finance Ltd (**financier**).

17. The parties are in agreement that the financier paid USD 557,648 to the Defendant and a receipt thereof was issued on 17th December, 2013.

18. The dispute mainly revolves around payment of USD 111,317.50 which the Plaintiffs through their witness maintains was paid and the Defendant denying being paid claiming that 9 cheques issued for part payment of the said sum were returned unpaid and the Plaintiffs claiming that the amounts in the cheques was for payments of tractors.

19. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

1) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

20. Further **Section 109** in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. **Section 110** further provides that:

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

22. Regarding the incidence of burden, **Section 108** provides that: -

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

23. It is therefore apparent that the burden to prove that the payment for the 6 prime movers was paid lies squarely upon the Plaintiffs. I have carefully considered the pleadings all the documentary evidence filed in this matter and there is no evidence to prove when, how and by who the payment of USD 111,317.50 was made.

24. It is worthy to note that after the Defendant's demand letter **PEXH. 5(a)** dated 07th August, 2014 to the 2nd Plaintiff demanding payment of Kshs.18,778,271.00, the 1st Plaintiffs issued 9 cheques between October 2014 and June 2015 which cheques were returned unpaid for lack of sufficient funds.

25. Although the Plaintiffs claim that the cheques were for purchase of tractors, the contention was not proved and was denied by the Defendant. In the absence of evidence by the Plaintiffs that the cheques were for purchase of tractors, the court makes a finding that the only transaction that has been proved as between the Plaintiffs and the Defendant relates to sale of 6 earth movers and that it was for the settlement of the sale price for the same that the said cheques were issued.

26. From the foregoing, I have come to the conclusion that the Plaintiffs have failed to discharge the burden to prove that they USD 111,317.50 was paid to the Defendant.

ii. How much is outstanding

27. The answer to this question flows from the foregoing paragraph. I find that the Plaintiffs are indebted to the Defendant in the sum of USD 111,317.50.

iii. Whether Plaintiffs are liable to pay VAT

28. Section 19 of the commencement of the Value Added Tax Act No. 35 of 2013 (Act) is 2nd September, 2013.

(1) Tax shall be due and payable at the time of supply

29. Section 2 of the Act defines "supply of goods" to mean—

(a) a sale, exchange, or other transfer of the right to dispose of the goods as owner;

30. Section 68 (6) of the **Act** which provides that:

Unless a contrary intention appears, the commencement of this Act shall not—

(a) revive anything not in force or existing at the time at which the commencement take effect

31. The commencement of the **(Act)** is 2nd September, 2013. There is therefore undisputed evidence that VAT was not payable as at the time the transaction herein was commenced and at the time of issue of the invoice dated 23.08.13. It therefore follows that it would not have been expected of the Defendant to issue the Plaintiffs with a tax invoice at the time.

32. Defendant's demand letter to the 2nd Plaintiff dated 17th April, 2014 PEXH. 5 (a) discloses that the latter was notified that 16% VAT was payable on the outstanding sum. I have considered the holding in **Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR** and I am persuaded that that the only way that the Plaintiffs would have escaped payment of VAT was by making full payment of the sale price before the commencement of the Act. Having failed to do so, I find that the Plaintiffs are liable to pay 16% VAT on the outstanding sum of USD 111,317.50.

vi. **Who pays costs**

33. Section 27(1) of Civil Procedure Act Cap 21 Laws of Kenya gives courts unfettered discretion to determine by whom costs are to be paid. It is also trite that costs follow the event and a successful litigant ought to be fairly reimbursed for the costs that he/she has had to incur.

Orders

34. In view of the findings I have made, I make the following orders:

1) The Plaintiffs case has not been proved and it is dismissed

2) Defendant's counter-claim succeeds case and judgment is entered against the Plaintiffs jointly and severally as for:

a. USD 111,317.50 at the current exchange rate

b. 16% VAT on USD 111,317.50

3) Plaintiff are condemned to pay to the Defendant costs of the suit and of the counterclaim.

DELIVERED AND SIGNED IN KISUMU THIS 20th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Okodoi

For Plaintiff - N/A

For Defendant - Ms. Nabiffo