



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 625 OF 2015

CHRIS NDOLO MUTUKU T/A MASII FARM FEEDS.....PLAINTIFF

VERSUS

ASSOCIATED MOTORS LIMITED.....1ST DEFENDANT

ASSOCIATED AUTO CENTRE LIMITED.....2ND DEFENDANT

JUDGMENT

PLEADINGS

The Plaintiff instituted this case against the Defendants vide a Plaintiff dated 10th December 2015, a claim for an order of injunction restraining the Defendants from continuing with breach of the contract of sale of **Motor Vehicle KBV 575Z Ashok Leyland Truck** and for general damages thus far occasioned by the breach of the aforesaid contract by the Defendants.

That, by the contract of sale entered into between the parties herein or about August 2013, the Plaintiff purchased from the Defendants Motor vehicle registration number KBV 575Z Ashok Leyland truck at a cost of Kenya Shillings three million five hundred and thirteen thousand, seven hundred and fifty. The Plaintiff paid full purchase price to the Defendants, and took possession of the said truck.

That it was an implied term of the contract that the Defendants would provide the Plaintiff with all the requisite legal documentation, including but not limited to the logbook to the said truck.

The Plaintiff stated that he was buying the said truck for use in his business as a distributor of farm feeds for Unga Farm Care (E. A) Limited, a fact which was, or ought to have been, within the Defendants' knowledge.

The Plaintiff averred that in breach of the said contract, the Defendant refused and/or neglected to release the said logbook, thereby rendering use of the truck impossible, as a consequence of which the Plaintiff has suffered loss and damage.

Specifically, the Plaintiff averred that the Defendants' breach aforesaid directly led to the closure of the Plaintiff's business which he had set up at a cost of Kenya Shillings ten million.

AMENDED PLAINT

The Plaintiff filed Amended Plaintiff on 17th February 2017, filed on 20th January 2016 and averred that in breach of the said contract, the Defendant refused and or neglected to release the said logbook, thereby rendering use of the truck impossible, as a consequence of which the Plaintiff suffered loss and damage. Specifically, the Plaintiff averred that the Defendants' breach aforesaid caused the Plaintiff to incur extra costs in hiring alternative transportation and directly led to the closure of the Plaintiff's business which he had set up at a cost of Kenya Shillings Ten million. In addition to forfeiting a sum of Kenya Shillings Two Million which he had issued to Unga Farmcare (E.A) Limited as a bank guarantee for his due performance of his obligations as a distributor. Further, the Plaintiff avers that from the time of the closure of the said business to time that the Defendants surrendered the logbook aforesaid in court, he suffered loss of user of his motor vehicle.

The Plaintiff's claim against the Defendants was for an order of injunction and for special, general, exemplary and punitive damages thus far occasioned by breach of the aforesaid contract by the Defendants.

The Plaintiff outlined particulars of willful neglect and/or breach of Contract and particulars of special damages claimed at Ksh 12,433,507.80/-.

1ST DEFENDANT'S STATEMENT OF DEFENCE

In response the 1st Defendant deposed that it was wrongly joined to these proceedings since the contract/transaction for the sale/purchase of subject motor vehicle was entered into between the and the 2nd Defendant and not the 1st Defendant. The 1st Defendant was only contracted by the 2nd Defendant as an agent, to procure the vehicle.

1st Defendant in its Statement of Defence stated that not being the seller of the vehicle or the contracting party, it could not have been vested with the duty of supplying the logbook to the Plaintiff.

In any event, the said logbook having been handed over to the Plaintiff in Court on 14th January 2015 before the Hon. Amin J. the Plaintiff's grievances have been overtaken by event.

AMENDED DEFENCE BY 1ST DEFENDANT

On 9th March 2017, the 1st Defendant amended its Defense that 1st Defendant only introduced the Plaintiff to 2nd Defendant.

The 1st Defendant deposed that although it thereafter in some instances dealt with the Plaintiff, it never participated in the sale/purchase transaction. Even the Purchase price received by the 1st defendant was so received on behalf of the 2nd Defendant to whom the same was subsequently forwarded.

2ND DEFENDANTS STATEMENT OF DEFENCE

The 2nd Defendant through its statement of defense, dated 7th March 2017, filed on 10th March 2017, denied the contents of paragraph 4 of the further amended Plaintiff in so far that there is a continued breach of contract of sale of motor vehicle registration KBV 575Z, Ashok Leyland truck as the sale was completed and the Plaintiff given possession of the said motor vehicle in August 2013.

The 2nd Defendant admitted the contents of paragraph 5 of the further Amended Plaintiff and averred that after the sale of the said motor vehicle, the Plaintiff took possession and was in full use, custody, care and control of the said motor vehicle and the same was released to the Plaintiff and was in good condition.

The 2nd Defendant admitted the contents of paragraph 6 of the further amended Plaintiff in so far as the Plaintiff was to be provided with the requisite legal documentation for purposes of registering the motor vehicle in his name including the sale agreement and executed transfer forms but averred that the responsibility to obtain a logbook was not vested on it but on the Kenya Revenue Authority charged with duty of processing logbooks and dispatching the same directly to the registered owner of the motor vehicle by way of registered post.

In any event, the 2nd Defendant averred that the original copy of the logbook was obtained by the 1st Defendant on 13th January 2016 and the same was produced in Court on 14th January 2016 before the Hon. Lady Justice Amin and handed over to the Plaintiff.

The 2nd Defendant further averred that delay in obtaining the logbook was not wilful neither was it occasioned by the 2nd Defendant as the Kenya Revenue Authority is charged with the mandate of processing and dispatching logbooks. The Defendants were only assisting the Plaintiff to obtain the same from KRA and as such could not be held liable for the delay in obtaining the logbook.

HEARING

PLAINTIFF'S CASE

On 5th May 2017, **PW1** testified before L.Onguto J as follows;

He is an advocate of the High Court and on 29th January 2013 he was appointed by Unga Farm Care (E.A.) Ltd (referred to as **UFCEA**) Distributor in Machakos & Makueni Area by virtue of letter of 29th July 2013 annexed to the List of Plaintiff's documents. He produced copy of Certificate of Registration; carrying business in the name and style of Masii Farm Feeds marked **CNM1**. He went to the 1st Defendant premises in August 2013, he met Mr Ajay & Mr Rahim, negotiated purchase of a truck. They agreed on a truck at the cost of Ksh 3,513,750/- full purchase price. He was issued with a Proforma Invoice dated 28th June 2013 in the name of Associated Auto Centre Limited - 2nd Defendant. The Plaintiff was to pay Ksh 3,513,750/- and 3 weeks later after payment, a Leyland truck would be delivered. The Proforma Invoice is annexed as **CNM2**. Mr Rahim collected a cheque for deposit of Ksh 900,000/- on 11th June 2013 as evidenced by Cheque Deposit Slip annexed to Plaintiff's bundle of documents. On 8th August 2013, the Plaintiff paid through Equatorial Commercial Bank RTGS Funds transfer of Ksh 2,624,750/- to the 1st Defendant. He collected the truck on 26th September 2013 and thereafter it was impounded by Kenya Police for being unroadworthy. After it was taken for Motor Vehicle Inspection it was found to have a speedometer that was not working. The Certificate of Examination was annexed as **CNM4**.

The Plaintiff contacted the 1st Defendant and explained his predicament to Jai who promised to look into the matter. Later, he gave him a smaller Nakumatt truck to use. After 1 week he was called to collect his truck which had a certificate of compliance and he used the truck.

The motor vehicle was due for inspection in 2014, the Plaintiff waited for the logbook to be released to him by Rahim as he had spoken to

him about it.

On 8th July 2014, Rahim sent him an email with a copy of the logbook as was sent to him by one Jonathan from the 2nd Defendant. The Plaintiff took the motor vehicle for inspection and the copy of logbook was rejected. The Plaintiff informed Jai and Rahim and kept asking for the original logbook until September 2014, when the Plaintiff was informed his driver was arrested and the truck was impounded. The Plaintiff paid fine of Ksh 40,000/- for driving unlicensed and unroad worthy vehicle. He kept asking for the truck's logbook and Rahim told him that he would look into the matter. He later learnt from Rahim that the issue of the logbook involved the 2nd Defendant.

The Plaintiff went to Unga Farm Care Ltd and explained his predicament as he did not want to lose the distributorship. The Plaintiff hired trucks from Unga Farm Care Ltd to transport the products to 2 depots Tala & Masii which he transported products 3 times to each depot per week. The Plaintiff produced the Unga Farm Care Ltd rates as **Exh -7** and Trading Terms & Incentives **Exh 8**. He explained that he collected feeds from Dakar Road Nairobi to Tala Township.

The expenses incurred from loss of use of Plaintiff's truck are itemized in the Affidavit on Costs incurred in hiring alternative Transport & Attendant Consequences filed by the Plaintiff on 23rd December 2015 on Court 's Order/Leave granted to file Affidavit by Hon. LJ F. Amin.

The Plaintiff was recalled for cross examination in this Court 5th February 2019 based on the examination in Chief on record and typed proceedings also on record.

1st DEFENDANT'S CASE

On 27th July 2019, the Court heard evidence by **DW1** Rahim Mombani who relied on his Witness Statement of 11th July 2017 and he stated as follows;

He recalled the Plaintiff approached his Company 1st Defendant for purchase of a motor vehicle but since his Company was not an authorized dealer, he introduced him to the 2nd defendant an authorized dealer who sold him the Ashok Leyland truck as per Invoice produced by the Plaintiff.

As per the 1st Defendant's List of Documents filed on 18th July 2016 that was by and in the name of Associated Auto Centre Limited- 2nd Defendant included;

- a) Proforma Invoice of 28th June 2013 for purchase of motor vehicle
- b) Receipt dated 11th July 2013 issued to the Plaintiff for Ksh 900,000/=
- c) The Motor Vehicle Inspection Report of 24th July 2013 of Pre-Registered Make Ashok Leyland;
- d) Kenya Revenue Authority (**KRA**) Application for Registration of Motor Vehicle
- e) Import Packing List of Ashok Leyland Limited
- f) Import Declaration Certificate Ashok Leyland Limited
- g) Banking Slip for payment of Customs Excise Tax

Clearly, the documents show that the 2nd Defendant was the seller. Although, the 1st Defendant dealt with the Plaintiff it never participated in actual sale/purchase of vehicle transaction. The purchase price was received by 1st Defendant on behalf of the 2nd Defendant.

With regard to the motor vehicle's logbook, a copy was initially sent to the 1st Defendant on 8th July 2014 and later surrendered the original logbook on 13th January 2016 and it was handed over in Court on 14th January 2016.

The 1st Defendant deposed that KRA a statutory body was responsible for issuing logbooks. The Plaintiff should have pursued the same himself from KRA. The Plaintiff's losses did not arise directly from the simple failure to obtain the logbook. The 1st Defendant contested the fact that the calculations and documents produced support the Plaintiff's claim for loss for purposes of compensation.

The 1st Defendant's 2nd witness DW2 Dorothy Dolo relied on her statement of 10th February 2010 and reiterated the contents of issues raised by DW1. Save for DW2 handing over the original copy of the logbook to the Court, the rest of the issues raised are hearsay, she was not attendant to conversations between the Plaintiff and DW1.

2ND DEFENDANT'S CASE

Nasir Sayani DW4 testified and relied on his statement filed on 25th July 2019 and stated as follows;

In August 2013, 2nd Defendant sold the Plaintiff Ashok Leyland truck Reg. KBV 575Z for Ksh 3,513,750/-. Upon payment of purchase price, the motor vehicle was released to the Plaintiff in good condition and he was in full use, custody care and control of the motor vehicle todate.

The 2nd Defendant was not privy to the Plaintiff's distributor contract with Unga Farm Care (E.A.) Ltd.

As per standard procedures [at the time] the requisite documents were forwarded to KRA and it was their mandate to process and dispatch logbooks to owners by registered post. The delay to avail the logbook was by KRA and not the 2nd Defendant as it had no authority to process and dispatch logbooks.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that in July/August 2013, he entered into a contract with 1st and 2nd Defendants of sale and purchase whereby the Plaintiff paid to the Defendants the total purchase price of Ksh 3,513,750.00 for motor vehicle registration number KBV 575Z, Ashok Leyland truck. The Plaintiff produced the Proforma Invoice from the Defendants as **PExbt -3**. Likewise, he produced the evidence of the full payment, marked **PExbt-4** even though the full payment of the purchase price for the truck has never been disputed by either of the Defendants.

It was the Plaintiff's submission that the documents present by the Defendants to the Kenya Revenue Authority for registration of the Plaintiff's truck contain glaring anomalies in the chassis and engine numbers, and it needs no belaboring that the said numbers do not relate to KBV 575Z. The inescapable conclusion is that the Bills of Lading presented by the Defendants are either forgeries or were doctored to defraud KRA of duties and taxes. This would probably explain the delay in releasing the logbook to the Defendants, and certainly, this was not something they would readily admit.

The Plaintiff submitted that at no time did the Plaintiff deal with the 2nd Defendant, and all the emails and are between the Plaintiff and the 1st Defendant, and it is only when the issue of the logbook became heated that the 1st Defendant started copying their mails to the 2nd Defendant. Indeed, it was at this stage that the Plaintiff actually learnt of the existence of the 2nd Defendant as distinct from the 1st Defendant.

The Plaintiff relied on the case of **Stephen Kilonzo vs Hellen Wangari & Another [2012]eKLR**, where Justice Mutava had this to say;

“Section 35 (1) of the Evidence Act provides that any statement made by a person in a document and tending to establish a fact shall, on production of the original document, be admissible as evidence of that fact if two conditions are met, namely, if the maker has personal knowledge of the matters dealt with by the statement, and secondly, if the maker of the statement is called as a witness in the proceedings. The only proviso to these conditions is where the maker is dead, or cannot be found or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

The Documents produced by the Defendants were made by a person who did not testify in court, even though they do not in any way negate the obligations of the seller to the purchaser. They are irrelevant to this claim. Even then, at no time did the Defendants witnesses adduce evidence that they were the makers of these documents or somewhat involved in their making and presentation to the KRA.

The Plaintiff submitted that it is a mandatory requirement under the Traffic Act that all trucks operating on Kenyan roads must be inspected and cleared/licensed by the Government, annually. Further, in the absence of the logbook to the truck, it was not possible to have it licensed and authorized to be on Kenyan roads. This is more so because **Section 17(1) (b) of Traffic Act** makes mandatory requirement for verification of the correctness of the particulars in the registration book, in this case the logbook.

“17. Conditions for issue of License

(1) A licensing officer shall issue a license only if he is satisfied-

(a) That the vehicle is duly registered; and

(b) That the particulars in the registration [log] book are correct.

(c) That the vehicle is insured against 3rd Party risks in accordance with provisions of the Insurance (Motor Vehicles 3rd Party Risks) Act (Cap 405) and

(d)

(2) Before issuing a license in respect of any motor vehicle or trailer of a class prescribed for the purposes of this subsection, a Licensing officer shall require the applicant to produce an Inspection report showing that the vehicle or trailer has been examined by an Inspector during the months immediately preceding the commencement of the license; and that the vehicle or trailer complies with the provisions of this Act and of any rules made thereunder.”

The Plaintiff submitted the following as the special damages incurred in hiring alternative transport;

Transport costs from UFCEA Depot at Dakar Raod, Nairobi, to the two stores were in accordance with the official Transporter Rates of UFCEA which were produced as exhibit **PExbt-8**. The tabulation is as follows;

a) Tala township - Ksh 1,170.01 per ton x 12.5 tons = **Ksh 14,625.125**

b) Masii Market – Ksh 1,524.58 per ton x 12-5 tons= **Ksh 19,057.25**

At three trips per week for each store, the cost was as follows;

a) Tala Township Ksh 14,625.125x 3 =Ksh 43,875.375

b) Masii Market Ksh 19,057.25 x 3 = Ksh 57,171.75

Subtotal **Ksh 101,047.12**

Add cost of distribution from the two stores to the designated markets heretofore stated at a conservative estimate of Ksh 10,000.00 per day x 6 days = **60,000.00 per week**.

Therefore, from July 2014 when the truck was grounded for want of inspection to February 2015 when the Plaintiff closed down the distributorship, the cost was as follows;

a) Ksh 101,047.12x4 weeks =Ksh 404,188.48 x8 months =3,233,507.80

b) Ksh 60,000.00x 4weeks =Ksh 240,000.00x 8 months =1,920,000.00

Subtotal **Kshs.5,153,507.80**

Despite closing down the business in March 2015, the truck could still have generated income from hire in the sum of Ksh 20,000.00 per day. So the total loss of user up to 14th January 2016 when the 1st Defendant delivered the logbook to the court, the earnings would have been as follows;

Ksh 20,000.00 x6 days =Ksh120,000.00 per week x 4 weeks= Ksh 480,000.00 per month x 11 months = **Ksh 5,280,000.00**.

The Plaintiff also testified and adduced evidence that he forfeited the Ksh 2,000,000.00 Bank guarantee upon failing to perform as a distributor, and this loss ought to be visited upon the Defendants. The debt for the forfeited money is clearly shown in the bank statement produced by the Plaintiff as an exhibit.

The summary of the foregoing special works out as follows;

a) Transportation costs (July 2014 – February 2015) Ksh 5,153,507.80

b) Loss of user (March 2015 – January 2016) Ksh 5,280,000.00

c) Bank Guarantee Ksh 2,000,000.0

Total **Ksh 12,433,507.80**

Setting up a distributor ship is a multi-million investment. The truck is but just one of the costly prerequisites, and this the court is urged to take judicial notice. Based on this, the breach by the Defendants must have caused the Plaintiff's business considerable loss and damage, which eventually led to its closure and loss of the investment. The Plaintiff testified that he started the business at a cost of Ksh 10,000,000.00 and this is easy to ascertain from:

a) The purchase of the truck Ksh 3,513,000.00

b) Initial stock for the two stores Ksh 6,000,000.00

c) Start-up rents, utilities, construction of

wooden pallets Ksh 500,000.00

Subtotal **Ksh 10,013,000.00**

The Plaintiff is entitled to an award of this amount as general damages.

The Plaintiff further proposes Ksh 10,000,000.00 as exemplary and punitive damages for the willful, malicious and arrogant breach of

contract.

1ST DEFENDANT'S SUBMISSIONS

The 1st Defendant submitted that the contract for sale of the vehicle was entered into solely between the Plaintiff and the 2nd Defendant as evidenced by documents produced by 1st Defendant in its list of documents filed in court on 18th July 2016. (as outlined Above)

On whether 1st Defendant was agent of 2nd Defendant or had introduced Plaintiff to 2nd Defendant it was submitted as follows;

Assuming that the 1st Defendant was the 2nd Defendant's agent, the 1st Defendant relied on the case of City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR; the Court of Appeal stated as follows;

"30. The main contention between the parties herein revolves around the existence of a contract. In this regard, the learned authors of Cheshire, Fitfoot and Formstons, the Law of Contract 14th Edn at pages 34 and 35 state:

"the first task of the Plaintiff is to prove the presence of a definite offer made....proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeror to accept that offer."

'33. In this regard Halsbury's Laws of England, 4th Edn 9(1) para. 748 states;

"the general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement....."

The 1st Defendant relied on the case of Agricultural Finance Corporation vs Lengetia, 1982 - 88 1 KAR 772 which states;

"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party; even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

On who was to produce the logbook it was submitted as follows;

The 1st Defendant submitted that not being the seller of the truck, the 1st Defendant could not in any way assume the obligation to obtaining and supplying the logbook. The photocopy of the logbook was emailed by 2nd Defendant to 1st Defendant on 8th July 2014. Since the Plaintiff had been registered as owner by that date, why did the Plaintiff not go to KRA offices and collect the original logbook? It is a matter of judicial Notice that at the material time issuance of logbooks was the sole duty of KRA now NTSA.

The 1st Defendant submitted that it did not understand in the absence of any contractual term, the Plaintiff expected the Seller to also process the logbook. Did the Plaintiff pay any fees for such additional service?

On whether the Plaintiff is entitled to damages sought in the Plaintiff it was submitted as follows;

Abson Motors Ltd vs Dominic B. Onyango Konditi 2018 eKLR; C.A. stated the following;

"34. we are guided by the case of Hadley vs Baxendale (1954) Exch 341 which stated that the test for reasonable damages is that of remoteness:-

1. The damages must therefore flow naturally from the breach of contract.

2. The damages, although difficult to predict in the ordinary case, were reasonably foreseeable because the unusual circumstances were communicated to the defendant.

We find there was no nexus between the appellant and the accident and the resultant towing and repair charges.

The learned trial Judge therefore erred in awarding damages for towing and repair charges as the damages was too remote."

Mbugu David vs Margaret Ndinda Wamwenga [2016]eKLR observed;

"In case of David Bagine vs Martin Bandi CA No. 283 of 1996, the Court of Appeal pronounced itself in the following passage:

“it is trite law that the plaintiff must understand that if they bring actions for damages, it is for them to prove damages. It is not enough to note down the particulars and to speak, throw them at the head of the court saying this is what I have lost. I ask you to give me these damages. They have to prove it.”

It is true the respondent pleaded specific claim of Ksh 75,00/- as value of loss of the damaged Motorcycle. Besides particularizing the value, she had a duty to give an assessor’s report on pre-accident value and value of salvage for the court to come up with actual loss suffered. The evidence in this respect fell short of the threshold to prove material damage.....”

The 2nd Defendant did not file submissions despite the right granted on 13th November 2019, mention before DR Commercial Division on 27th January 2020 while Court was on annual leave and 27th February 2020, when all parties were granted opportunity to file submissions in Court or through DR before the judgment date.

DETERMINATION

1) Was there a contract between the Parties?

The Plaintiff in cross examination stated that there was no written agreement/contract between parties but a contract was based on oral communication and culmination of Pro forma Invoice, emails, receipts and invoices from the 2nd Defendant through the 1st Defendant. From these documents it was agreed that the Plaintiff would purchase a truck for Ksh 3,513,750 from the Defendants. This is because PW1’s testimony revealed that in August 2013 he approached the 1st Defendant and enquired and negotiated the sale of a truck and agreed on type of truck and purchase price.

The 1st Defendant submitted that it was not privy to the Contract of sale of the truck and it is wrongly enjoined to the proceedings but here are the salient facts;

a) The 1st Defendant’s Defence he pleaded that he was an agent of the 2nd Defendant, then in the Amended Defence pleaded that it introduced the Plaintiff to the 2nd Defendant. Assuming the amended defence pleading is true, then after introduction from the 1st meeting where the Plaintiff met one Ajay and Rahim at the 1st Defendant’s premises, then the Plaintiff would have continued communication directly with the 2nd Defendant and/or visited the 2nd Defendant’s premises instead.

b) That is not so, all emails and correspondence annexed to Plaintiff’s bundle are from 1st Defendant including Plaintiff’s letter of 1st December 2015 addressed to both Defendants to produce/ provide the logbook.

c) The Pro Forma Invoice dated 28th June 2013 was issued by 1st Defendant at their premises to the Plaintiff. The Pro Forma Invoice is on letterhead of the 2nd Defendant, Associated Auto Centre Limited. However, the Proforma Invoice has names and contacts;

Rahim Mombani (+254 732712157)

Akbar Ladhani (+ 254 733 488 140)

Therefore, the inference is that there is a relationship between 1st & 2nd Defendant as **Mr. Rahim** is from the 1st Defendant Company.

d) The Plaintiff testified Mr Rahim came and collected payment from him of Ksh 900,000/- which he paid by cheque.

e) The Plaintiff paid the balance of Ksh 2,624,300/- by RTGS drawn in favor of 1st Defendant.

f) After the Plaintiff collected the truck and was later impounded, he contacted one Jai from 1st Defendant and he was given a small truck to use branded Nakumatt. After 1 week he was given back the truck with certificate of compliance by 1st Defendant.

g) The events leading to demand of and delivery of the logbook in Court involved the 1st Defendant.

h) The delivery of the logbook was by the 1st Defendant on directions of Hon LJ F.Amin.

From the above activities outlined and in the absence of a written agreement spelling out the terms and conditions by each party, in the transaction even though the documents depict the 2nd Defendant as seller, the 1st Defendant was involved in the said transaction from the beginning to the end when the matter was filed in Court. There is no agency relationship established between the Defendants and in the absence of written contract they are both liable to the Plaintiff if at all.

2) Was/Is there a breach of the Contract of Sale?

It is the Plaintiff’s testimony that pursuant to purchase from the Defendants of Ashok Leyland truck Reg **KBV 575Z**, in August 2013, The Plaintiff took possession of the truck from August 2013 from the 1st Defendant.

The Plaintiff adduced evidence that upon taking delivery of the truck without the logbook to the truck, Rahim and Jay promised to avail the

logbook in 2 weeks. This never happened until 2 ½ years later, that the 1st Defendant's Human Resources Manager M/S Dorothy Dolo DW2 produced the logbook in Court pursuant to an order of the Court.

The 1st Defendant submitted that it was not privy to the contract of sale of the truck. The documents outlined above, Pro forma Invoice, Receipt, Vehicle Inspection, Application for Registration and Importation documents are all in 2nd Defendant's name. Therefore, 1st Defendant could not breach a contract it was not party to.

Secondly, assuming it was an agent of the 2nd Defendant as per the *Githua case supra*, the 1st Defendant is not liable as there is a disclosed principal 2nd Defendant.

Thirdly, the 1st Defendant submitted that not being the seller of the truck, the 1st Defendant cannot in any way assume the obligation to obtaining and supplying the logbook.

The 2nd Defendant's testimony and Witness statement stated that as per the standard procedure then, the requisite documents were forwarded to Kenya Revenue Authority(KRA) which at the time was charged with the mandate of processing new logbooks and dispatching the same directly to the registered owner by way of registered post. As a result of delay by KRA, the Defendants came in to assist the Plaintiff obtain the log book.

The Court has considered each party's views on the matter regarding registration of motor vehicles and provision of log books. As a matter of law, in a sale of a motor vehicle; the Buyer pays the full purchase price in return the Seller delivers the motor vehicle and registration documents to the buyer or the logbook then or at a later date agreed on by parties. So that; the buyer has possession of the motor vehicle and title/ownership document –logbook of the motor vehicle to complete the sale. In the absence of either the motor vehicle or the ownership document the sale is incomplete. Therefore, although the Plaintiff on payment of full purchase price, the truck was delivered in August 2013, the contract of sale of motor vehicle was not complete until 15th January 2016, when the original logbook was presented in Court as ordered by the Court.

Sections 15,16 & more specifically 17 (1) (a) (b)& (c) of the Traffic Act mandates that every vehicle shall be registered and the registration book contain correct particulars so as to have the motor vehicle inspected, licensed and insured.

The Plaintiff was in possession of the truck, Ashok Leyland Reg KBV575Z from August 2013 but in September, 2014, it was impounded for being un roadworthy and unlicensed. The Plaintiff's driver was fined Ksh 40,000/= as evidenced by copy of Court Fines Receipt dated 26th September 2014 marked **CNM-5** annexed to Plaintiff's application filed on 14th December 2015.

The Plaintiff vide letter dated 1st December 2015 sought from both Defendants the original logbook of the said motor vehicle to no avail.

In July 2014, the annual license from Inspectorate of Motor Vehicles expired and upon taking the truck to Machakos for inspection he was asked to present the original logbook. He duly informed the Defendants and from Plaintiff's bundle of documents; email of 8th July 2014 from Mr. Rahim 1st Defendant forwarding a copy of the logbook of motor vehicle that was received from one Jonathan. When the Plaintiff presented the copy of the logbook at the Inspectorate it was rejected and he was to avail the original logbook. After the truck was impounded he grounded the truck.

The totality of these events disclose breach of the contract of sale of the truck as the original logbook was not availed to the Plaintiff. Consequently, although the Plaintiff had physical possession of the truck, he could not have it on the road as it was not inspected and issued with compliance certificate, it was not licensed and it was not insured in compliance with **Section 17 Traffic Act**. This was a huge loss as to put the truck on road without the inspection certificate, road license and insurance would be to put an unroadworthy vehicle and risk to other road users and in case of an accident the Plaintiff would incur expenses personally. The truck was grounded.

With regard to the Defendants claim that at the time it was the legal responsibility of Kenya Revenue Authority to register the truck and provide the logbook, this Court has the following observations to make;

- a) The 1st time this claim was/is made by Defendants is at the time of filing their Defences;
- b) The emails, correspondence, invoices, receipts and any other communication between the parties at no time/point is it shown that the Defendants informed the Plaintiff to pursue the Logbook from KRA.
- c) In fact, as at 8th July 2014, the Defendants sent the Plaintiff a scanned copy of the Logbook in the Plaintiff's name and the registration date was /is 1st August 2013. Since the Defendants accessed the scanned logbook from the original logbook, they did not inform the Plaintiff to pursue the original logbook from KRA as it was ready or better still avail the original logbook.

The 2nd Defendant who lodged the registration Application at KRA did not have the Purchaser sign the Form but used his business name "Masii Feeds" to fill in the form and did not inform the Plaintiff that he had lodged the Registration Documents so as to enable him follow up the release of the Logbook.

- a. During re-examination of the Plaintiff by his Counsel it was revealed that the Chassis and Engine Numbers on the Packing List /Certificate of Origin are; **Engine number CXIH240406543, Chassis Number MBIAIJJC4CRWG1504** and the Chassis and Engine Numbers in the Log book were/are different; **Engine number COHZ 121040, Chassis number MBIANJJA6CRDH 1903.**

b. If as insinuated, that the Plaintiff failed to obtain the Logbook and the Defendants were under no obligation to produce/provide it, the Court proceedings/record of 14th January 2016 confirm that the 1st Defendant's advocate presented the original logbook. Mr. Wananda informed Court that the logbook was sent to them by Mr. Muganda from the client Jonathan Manwaram. When they enquired where the original logbook was sought from, it was said to be from KRA. The Defendants when ordered by the Court to produce the original logbook, they did not inform the Court that it was the Plaintiff's responsibility to pursue the logbook from KRA and it was not their lookout instead they produced the logbook in Court.

The Defendant's claim that it was the Plaintiff to pursue the logbook was not relied to the Plaintiff and he remained without the logbook and the truck was grounded thereby adversely affecting the Plaintiff's distributorship business. The defendants breached the contract of sale of the truck. They failed to avail the logbook for 2 ½ years until the Court intervened and ordered production of the original logbook in Court.

3. Did the Plaintiff incur/suffer loss from breach of contract for sale of the truck?

The Plaintiff outlined loss incurred due to the breach of contract; the production of the logbook for 2½ years in the Affidavit on Costs Incurred in Hiring Alternative transport & Attendant Consequences filed on 23rd December 2015 and outlined above.

In General Principles of Commercial Law by Kibaya Kimaana Laibuta at Pg 100-101 commentary on damages;

"The Aggrieved party may sue for financial compensation for breach of contract and the redress may take the form of either special or general damages or both. But general damages are not usually awarded for a breach of contract because damages arising from such breach are usually quantifiable and are not at large....."

In actions for damages it is not enough for the Plaintiffs to write down particulars of special damages. They must specifically prove the damages sought. In other words, special damages must not only be specifically claimed but also strictly proved....."

The object of damages is always to compensate the Plaintiff; not to punish the Defendant. Though difficult to quantify in certain cases, it is normally assumed that each contracting party's interest in the bargain is purely commercial and therefore the loss resulting from the breach of contract in issue is measurable in purely economic terms; but this does not mean that in every case the breach of contract the Plaintiff can obtain equivalent of specific performance."

a) On Payment/Compensation of Guarantee of Ksh 2,000,000/-

Applying the legal principles on damages and case-law cited by parties; the Plaintiff claimed the distributorship awarded to him vide letter dated 29th July 2013 by Unga Farm Care (EA) Ltd; as a result of the truck he purchased from the Defendants which was grounded for lack of the logbook, the Plaintiff was forced to give up the Distributorship. The Plaintiff forfeited Ksh 2,000,000/- to UFCEA in due performance of the Guarantee which was called up. The Plaintiff annexed the KCB Guarantee Application Form of 19th June 2013 by Customer- Masii Farm Feeds and Beneficiary Unga Farm Care (E.A.) Ltd for Ksh 2.5million attached to Plaintiff's Supplementary Bundle of Documents filed on 17th February 2017. The plaintiff's bank Statement attached to its application of 14th December 2015 and marked **CNM6**, confirmed entry of 3rd February 2015, Unga Farm lodged demand Claim of Ksh 2,000,000/- which was debited from the Plaintiff's business Account on the same date.

This was/is a loss arising out of the Defendant's breach of contract which resulted in withdrawal of the distributorship and the guarantee was called up and paid by the Plaintiff. The claim of Guarantee is specifically pleaded, and strictly proved. It is quantifiable and hence payable to the Plaintiff to restore the Plaintiff if the contract was enforced and not breached.

b) Transportation costs at UFCEA rates from July 2014 to February 2015 calculated at Ksh 5,153,507.80 cts as tabulated in paragpgh 6,7,8 & 9 of the Affidavit on Costs.

The plaintiff reiterated that the Court granted him leave to file Affidavit of Costs. The Defendants failed to file any reply or contest to the claim and hence remains uncontroverted.

The Plaintiff relied on the UFCEA rates annexed and marked as **CNM1A** to calculate the transport costs from 2014 -2015 when the truck was grounded.

The 1st Defendant objected to the claim for special damages as follows;

The claim was overtaken by events as the original logbook was presented in Court and given to the Plaintiff on 14th January 2016 before Hon LJ F. Amin.

The period between the purchase of the truck and delivery of the logbook is 2 ½ years which would not justify an award of damages.

The compensation sought by the Plaintiff loss of business, loss of use and hire of alternative truck are indirect and consequential losses and have no nexus to the contract of sale.

There is no evidence that at the time of sale the seller was privy of the circumstances/purposes the truck was to be used in; distribution of farm feeds for Unga Farm Care. Therefore, these losses were not naturally foreseeable from the contract. In any event, the 1st Defendant

submitted that sufficient documents were not produced to support alleged losses and the calculations are highly speculative. The 1st Defendant claimed the Plaintiff did not mitigate the loss.

The Court finds that by virtue of the principle that special damages must be pleaded and specifically proved and also that he who alleges must prove (in this case on a balance of probabilities) in line with **Sections 107-109 Evidence Act**;

- a) There are no documents; Delivery Notes, Stock/Product Register(s), Vehicle Pass/Ledger to show/prove actual trips taken by the truck (before it was impounded) to the Depots and/or to Retailers to demonstrate the number of trips, the tonnage or stock of goods delivered and transportation cost.
- b) There are no Invoices from Unga Farm Care (E.A.) Ltd to the Plaintiff on hiring their trucks to transport Farm Produce to the Distribution Area. There are no receipts depicting payment by the Plaintiff for hire of the trucks. Although the Plaintiff alluded that the hiring cost was combined with cost of goods it was important to establish specific cost of hiring the Trucks.
- c) The loss of User of the Truck bought from Defendants for 11 months from March 2015- January 2016 is a direct consequence of the breach of contract by the Defendants. Since the logbook was not availed, the truck had already been impounded and even after release and payment of fine, the truck remained, uninspected, unlicensed and uninsured and hence grounded going to waste and adversely impacting on Plaintiff's distributorship. The plaintiff submitted that the truck would have earned KSh 20,000/- each day for 6 days which would amount to Ksh 120,000 per week and for 4 weeks in a month total to Ksh 480,000/- add 11 months would come to Ksh 5,280,000/- Again, no documentary proof was provided to confirm this fact of number of trips on hire of the lorry and payment of Ksh 20,000/- daily for 6 days, and so it was not verified. Secondly, it was not clarified whether, Ksh 20,000/- was gross before deducting expenses; fuel, wear and tear (service of the truck and purchase of spare parts and/or salary of driver and turnboy/loader). The lost income from loss of user as tabulated is not specifically proved.

This Court considers the fact of loss of user of the truck as direct loss from lack of roadworthy truck on the road due to lack of logbook and deprived the Plaintiff of business and revenue as the truck was grounded. In the absence of proof of amounts claimed, this Court considers nominal damages as follows;

Assuming the lorry was in use /hire 5 days a week for 1 month, 20 days would fetch the Plaintiff Ksh 100,000/- profit net of expenses. For 11 months it would amount to Ksh 1.1 million.

The 1st Defendant was aware of the Plaintiff's intended business as the Plaintiff testified that the 1st Defendant did branding of the truck and he was to release it to Unga Farm Care (E.A.) Ltd.

d) The Plaintiff blamed the collapse of the said distributorship business on unaffordable cost of hired transport and by extension failure to provide the logbook. In closing the business, the plaintiff lost in excess of Ksh 10,000,000/-. The amount was tabulated in Plaintiff's submissions as;

- i. Purchase of truck – Ksh 3,513,000/=
- ii. initial stock for 2 stores- Ksh 6,000,000/-
- iii. startup rents, utilities, construction of wooden pallets Ksh 500,000/-

Total – Ksh 10,013,000/-

This Court relies on the case of ***Hadley vs Baxendale (1954) Exch 341 supra***; In ***Principles of Commercial Law by Kibaya Imaana Laibuta page 102***, on damages;

“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, from such breach of contract 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.”

That provides for the test for recoverable damages; the damage must flow naturally from the breach of contract; it was reasonably foreseeable because unusual circumstances were communicated to the Defendants. The loss must be a natural consequence of the breach of contract and must have been foreseeable.

In this case, the loss of distributorship and investment of the startup enterprise may have been lost but it has not been proved that it arose directly and solely from the lack of logbook of the truck. The inordinate delay to release the logbook by the Defendants directly caused loss of user of the truck as it could not be placed on the road; it was unroadworthy. Without the original logbook, it was not inspected licensed or insured as required under the Traffic Act. That loss has been considered, in the absence of cogent proof the Court awarded nominal damages.

With regard to the purchase of the truck, the Plaintiff has been in possession of the same and to mitigate loss may sell it to recoup investment or have it hired out for other business.

With regard to initial stock there was no documentary or tangible evidence to prove the quantity of stock and its value of Ksh 6,000,000/-The Construction of the depots, the facilities may be rented out for other business purposes to mitigate loss.

Finally, these amounts were not substantiated in Court pleadings but in submissions and have not been strictly proved.

e) The Plaintiff sought general damages of Ksh 10,000,000/- exemplary and punitive damages of Ksh 10,000,000/-

As has been alluded to earlier, general damages are not usually awarded for a breach of contract because damages arising from such breach are usually quantifiable and are not at large. The Plaintiff has not established the basis for the award of general damages whereas special damages have been considered arising from the same contract.

With regard to exemplary and punitive damages, the Plaintiff posits that because of the brazen, reckless and arrogant breach of the contract; the defendants were at all times seized of the Plaintiff's logbook and despite pleas for its surrender they failed to produce it until the Court's intervention in January 2016 that he received the logbook after 1 ½ years. The plaintiff also consider loss of future earnings abruptly cut short by the omissions of the Defendants.

The Defendants alluded in their pleadings and submissions that the duty to provide the logbook was not contracted, at the time it was a statutory body KRA that issued logbooks to purchasers by registered post. Be that as it may, this Court found no evidence that the defendants informed the Plaintiff of lodging registration documents with KRA and/or that he was to pursue the release of the original logbook directly. Secondly, if that was the process, to obtain the logbook from KRA, it is unexplained how and where the Defendants obtained a scanned copy of the logbook in the Plaintiff's name as early as 8th July 2014 but could not provide the original logbook or any explanation to the Plaintiff whose truck was grounded.

The Defendant cited the case of *Bank of Baroda (Ky) Ltd vs Timwood Products Ltd Civil Appeal 132 of 2001* where it was held;

Punitive or exemplary damages would be granted where;

a) Where there is oppressive, arbitrary or unconstitutional action by servants of the Government;

b) Where the Defendant's action was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff...

In the present circumstances, the Defendants did not benefit in any way from delay of delivery of the original logbook but the delay seems to have been due to undisclosed circumstances. Secondly, the defendants mitigated their misconduct/ omission /breach of contract by presenting the original logbook as per Court order on 14th January 2016. For these reasons the Court will not grant the said damages.

DISPOSITION

1. Judgment is entered on liability/breach of contract of sale in favour of the Plaintiff against the defendants jointly and severally.

2. Judgment is entered on quantum in favor of the Plaintiff against the Defendants jointly and severally as follows;

a. Transportation costs as Unga Farm Care rates from July 2014- February 2015 Ksh 5,153,507.80 not granted as special damages must be pleaded and strictly proved and although pleaded in Amended Plaint were not strictly proved.

b. Loss of User of the truck for 11 months from March ,2015 – January 2016 is a natural and direct consequence of breach of contract by the Defendants not providing the original logbook for 1½ years from sale of truck. However, the amount of Ksh 5,280,000/- was not strictly proved. This Court grants nominal damages of Ksh 100,000/- each month loss of profit for 11 months; total Ksh 1,100,000/-.

c. The Guarantee amount forfeited to Unga Farm Care of Ksh 2,000,000/-was/is pleaded and strictly proved by Application of Guarantee and Bank Statement and is therefore granted.

d. General, exemplary and punitive damages not proved not granted.

e. Judgment is entered for Ksh 3,100,000/- with interest and costs of the suit.

DELIVERED SIGNED DATED IN OPEN COURT ON 16TH SEPTEMBER 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. ADUNDA FOR THE PLAINTIFF

MS MUHONJA FOR THE DEFENDANTS

COURT ASSISTANT- TUPET