



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.498 OF 2015**

**SHALOM NYAKIO GATHUMI.....1<sup>ST</sup> PLAINTIFF**

**JEMIMA WANJIKU GATHUMI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAMIS MOTOR WORLD LIMITED.....1<sup>ST</sup> DEFENDANT**

**TERESA NJAMBI WACHIRA.....2<sup>ND</sup> DEFENDANT**

**MARY WAIRIMU GITHIRA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs **SHALOM NYAKIO GATHUMI** and **JEMIMA WANJIKU GATHUMI** through a plaint dated 4<sup>th</sup> September 2014 sued the defendants seeking that judgment be entered against the defendants jointly and severally for:-

- a) **General damages.**
- b) **Special damages as pleaded in paragraph 17.**
- c) **Interests on a and b above.**
- d) **Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.**
- e) **Any other just and equitable relief as this Honourable Court may deem appropriate.**

2. That the defendants upon service entered appearance through the firm of M/s Kago, Muthama & Co. Advocates on 11<sup>th</sup> November 2015 who drew a defence dated 24<sup>th</sup> November 2015 but filed on 8<sup>th</sup> December 2015. The defence counsel proceeded to file a Notice to cease acting dated 24<sup>th</sup> April 2017 and filed on 26<sup>th</sup> April 2017. Subsequently all mentions and hearing notices were to be served upon the Defendants in person. The defendants were purportedly served with a hearing notice for this matter for 27<sup>th</sup> June 2018 on 15<sup>th</sup> May 2018 as per Affidavit of service upon M/s Kago Muthama & Co. Advocates, who had ceased to represent the defendants way back on 24<sup>th</sup> April 2017 after the process server failed to trace the defendants. However having perused the court file I find the plaintiff in attempting to serve the defendants were acting in vain and incomplete ignorance of the late Hon. Justice Onguto's order issued on 20/4/2017 striking the defendant's defence and ordering the case to proceed as un- defended with plaintiff to formally prove their case.

3. At the hearing Mr. Mandela learned Advocate holding brief Miss Mwathi called one witness and closed the plaintiff's case. Submissions were subsequently filed on 16<sup>th</sup> July 2013.

4. At all material times the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the registered Directors of the defendant company, a fact not disputed by the defendant in their already struck out defence dated 24<sup>th</sup> April 2017.

5. The 1<sup>st</sup> defendant company through its Directors the 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered into an oral agreement with the plaintiffs to wit:-

a) The 1<sup>st</sup> defendant was to import, for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, 2 Nissan X-Trail cars with a petrol engine capacity of 2000 cc, automatic transmission the year of manufacture being 2006.

b) The plaintiffs would have a down payment and the balance would be cleared upon the delivery of the motor vehicles.

c) The 1<sup>st</sup> defendant would cater for the cost of the 1<sup>st</sup> plaintiff to hire a car for use awaiting delivery of the Nissan X-Trial.

6. Based on that agreement the 1<sup>st</sup> plaintiff deposited a total of Kshs. 1,079,000 with the defendants while the 2<sup>nd</sup> plaintiff deposited a total of Kshs.200, 000/- with the defendants for the purchase of the agreed motor vehicles. The defendants, however, failed to honour the agreement and undertook to refund the money paid to them by the plaintiffs.

7. The defendants purported to refund the money owing to the plaintiffs and issued cheque No. 000101 dated 8/3/2014 for Kshs. 540,000/- drawn by Mamis Motor World Ltd in favour of the 1<sup>st</sup> plaintiff; cheque No. 00012 dated 22<sup>nd</sup> March 2014 for 539,000/- drawn by Mamis Motor World Limited in favour of the 1<sup>st</sup> plaintiff and cheque No. 00013 dated 15<sup>th</sup> March 2014 for Kshs. 200,000/- drawn by Mamis Motor World in favour of the 2<sup>nd</sup> plaintiff, which various cheques were all issued and forwarded to the plaintiffs through the defendants forwarding letter dated 22<sup>nd</sup> January 2014. The aforesaid cheques were all rejected by the banks upon presentation for lack of funds in the Defendant's Bank account and remained dishonoured.

8. The plaintiffs through several demand notices sought refund of the money paid to the defendants to no avail leading to institution of this suit.

9. The defendants were duly served with summons to enter appearance to which they filed their statement of defence and list of Documents on 8<sup>th</sup> December 2015 but declined to file list of witnesses or witness statements. The matter came for case management severally but defendants despite service with Mention Notices, never appeared in court either in person or through their Advocate on record. Consequently their statement of defence was struck out on 20<sup>th</sup> April 2017 and court directed that the matter do proceed undefended.

10. Having perused the pleadings and having heard the plaintiff and upon considering the plaintiff's counsel/submissions, the issues for consideration can be summed up as follows:-

i) **Whether the plaintiffs have proved there was existence of a binding contract between the plaintiffs and the defendants?**

ii) **Whether the defendants were in breach of the contract?**

iii) **Whether the plaintiffs are entitled to damages for breach of contract?**

**A. Whether the plaintiffs have proved there was existence of a binding contract between the plaintiffs and the defendants?**

11. From the plaintiffs pleadings and oral evidence it is admitted that there was no written contract for sale of the two motor vehicles between the plaintiffs and the defendants. However, there was a contract for sale whereby the Defendants were to import 2 motor vehicles and sell them to the plaintiffs on an agreed consideration. **Section 2 (1) of the Sale of Goods Act Cap (31), Laws of Kenya; define "a Contract for sale as an Agreement to sell as well as a sale."**

12. It is trite law that there is no law that requires an agreement or contract for purchase or sale of any motor vehicle be in writing save for transactions involving land. The court is supposed to consider the conduct of the parties involved, which is enough to determine whether there existed any agreement or contract between the parties. The proposition is well supported by a decision of Justice Alnashir Vishram in **Civil Appeal No. 90 of 2003 Gospel Assembly Church Academy of Music & another Vs. Munene Agotho (2009) eKLR** where the learned Judge stated thus:-

**"A written agreement outlining the transaction of sale (of a motor vehicle in dispute) and purchase is not mandatory. Here, the oral agreement was evidenced by the issue of a receipt. There was no obligation on the Respondent to "Check" if the Appellants were in the business of selling or importing cars. That is quite immaterial. The only issue here is; was there a contract between these two parties. The answer is yes."**

13. The same position was held by Justice J.N. Mulwa in **Civil Case No.51 of 2007, Joseph Chepkwony Vs. Kiptagich Tea Estate Ltd 2017 eKLR** where she stated, *inter-alia*, that:-

**"Coming to the issue whether or not there was a contract between the Plaintiff and the Defendants or any of them.....It is evident and no denying that an oral agreement existed. This is clear from the 1<sup>st</sup> Defendant's admission that the lorry was being used by itself from May 2005 and that the proceeds profits for its use were being paid to the 2<sup>nd</sup> Defendant who purported to be it's owner. That alone is evidence of the existence of an oral agreement for the use of the Plaintiff's lorry for the benefit of the 1<sup>st</sup> Defendant in its tea estate. Documentary evidence need not be the only form of proving a contract between the parties safe for a contract for sale of land."**

14. I have considered the documentary evidence produced by the plaintiffs, which includes text and WhatsApp's correspondence between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant in which the 1<sup>st</sup> defendant offered to import the motor vehicles herein on behalf of the plaintiffs. Further after failing to deliver the motor vehicles as agreed, the defendants offered to refund the money paid to them by signing three cheques to the plaintiffs, which cheques the defendants Bank could not honour for want of funds.

15. Section 120 of the Evidence Act provides:-

**"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

The Defendants by their conduct impressed upon the defendants, they could import vehicles for them and agreed on purchase price, received the money but failed to honour their promise and further purported to refund the money they had taken from the plaintiffs: By their own conduct they confirmed existence of a binding contract between themselves and the plaintiffs. The defendants in my view are then estopped, by their conduct, from denying there was no contract between themselves and the plaintiffs. I am convinced that a contract existed between the plaintiffs and the defendants and nothing else can be far from the truth. I find there was a contract between the parties herein.

**B. Whether the defendants were in breach of the contract?**

16. The plaintiffs paid money which the Defendants received with an agreement to import and deliver 2 Nissan X-Trail in exchange for the balance of the purchase price. The terms of the agreement between the parties were in line with the provisions of the **Sale of Goods Act section 29** which provides:-

**"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."**

16. **Section 28 of the Sale of Goods Act** further sets out the obligations of a buyer and seller in any agreement on contract for sale to the effect:-

**"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."**

17. In view of the above section the duty of the seller is to deliver the goods; and the buyer to accept and pay for the goods in accordance with the terms of the contract of sale. The term "**Delivery**" is defined expressly under **section 2 (1) of the Sale of Goods Act**, as the "**voluntary transfer of possession from one person to another.**"

18. It is my finding that the seller negated on his duty to deliver the motor vehicles and by such failure the defendants breached their obligations of the seller by failing to deliver possession of the motor vehicles thus the (2) X-Trail motor vehicles to the plaintiffs. The defendants even when they purported to issue cheques in lieu of delivery of the motor vehicles and gave bad cheques, they did not make good the breach. The letters forwarding cheques dated 22<sup>nd</sup> January 2014 stated:-

**"This is a refund of the amounts deposited to our account on various dates for the purchase of a motor vehicle but due to unavoidable circumstances we have decided to cancel the oral agreement we had and give you back your deposit."**

The defendants admit that they never delivered the two motor vehicles as agreed. There is undoubted defendants admission on their failure to fulfil the terms of the agreement and by extension breach of the terms of the oral agreement entered into between the plaintiffs and the defendants. I find without hesitation nothing more than defendants; failure to deliver the goods (*motor vehicles*) to the plaintiffs could be termed as amounting to a breach of contract and which was worsened by issuance of bad cheques and failure to make them good. I find the defendants are in breach of the oral contract between them and the plaintiffs

**C. Whether the plaintiffs are entitled to damages for breach of contract?**

19. The defendants acted unlawfully in failing to deliver the two motor vehicles as agreed and further in issuing bad cheques. The law doesn't and should not be seen to support the unlawful acts or an illegality. The aggrieved party should be compensated for any unlawful act done on him or her and one way of doing so is to order a refund of the paid sum. Further the buyer is entitled to general damages for non-delivery of goods. This is well provided for under **section 51 (1) and (2) of the Sale of Goods Act** which provides:-

**"(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.**

**(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract."**

20. The above section is unwavering on the issue that the defendants liability for damages for non-delivery of goods and consequently for the breach of the contract. In the case of **Gedion Mutiso Mutua Vs. Mega Wealth International Limited (2012) eKLR** Hon. Justice G.V. Odunga faced with a similar suit for breach of contract stated thus:

**"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 from 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 contact 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. It may however exceptionally include compensation for physical discomfort or inconvenience or loss of time....."**The plaintiff was clearly exposed to all annoyance, inconveniences and even expense including expense relating to this litigation to ensure restoration of this telephone lines. No doubt what the defendant did amounted to a breach of contract. A breach of contract of this nature must of necessity be injurious to a person in his trade or professional calling. Consequently damages must be assessed bearing that in mind."

21. In the instant case, the defendants failed to deliver the motor vehicles as promised; deliberately proceeded to waste the plaintiffs valuable time in a wild goose chase exposing the plaintiffs to financial suffering and quagmire; further embarrassed and humiliated the plaintiffs by issuing them with bouncing cheques and frustrating their personal plans. The damages and loss visited upon the plaintiffs as a result of the defendants deliberate actions of breach of the contract cannot with all due respect be emphasized. The loss justifies an award for refund of the money paid to the defendants and general damages for breach of the contract. The breach of this nature must have been injurious to the plaintiffs in their trade or professional calling; consequently general damages must be assessed bearing in mind and considering the period the plaintiffs have been without making use of their money since the defendants got the money. The 1<sup>st</sup> plaintiff anger she was forced to borrow 15,000 Dollars with accrued interest of 10% per annual to finance purchase of motor vehicle due to defendants breach of the contract which loan the 1<sup>st</sup> plaintiff avers is a great strain on her finances. Taking all into the account the plaintiffs should each be refunded their money in addition being awarded general damages. The plaintiff have proved that they are entitled to be refunded the amount they paid to the defendants. I further find the plaintiffs are entitled to be awarded general damages.

22. The plaintiffs have through their unchallenged evidence proved that they entered into an agreement with the defendants, paid Kshs. 1,079,000/- and Kshs. 200,000/- respectively to the defendants, who after breach of the contract purportedly attempted to refund the money through three cheques Nos. 001101 dated 8/3/2014 for Kshs. 540,000/-; No. 00010102 dated 22/3/2014 for Kshs.539,000/- in respect of 1<sup>st</sup> plaintiff's refund of Kshs. 1,079,000 through a forwarded letter dated 22/01/2014 and a letter 22/1/2014 and forwarding cheque No. 000103 dated 15/3/2014 for Kshs. 200,000/- due to the 2<sup>nd</sup> plaintiff. I am satisfied the special damages in respect of the aforesaid amount has been pleaded and proved and the plaintiffs are entitled to the said amounts. The claim for Kshs. 185,000/- being cost of car hire at Kshs. 2,500/- per day for 74 days though pleaded, it has not been proved. No evidence has been adduced in respect of the same. Similarly no evidence on bank loan and its relation to this matter. No evidence of any car having been purchased. I therefore find that the two limbs of the claim cannot be granted.

23. In this matter I cannot conclude the case without pointing out that the defendants filed their defence but refused and neglected to attend court despite being served severally which failure led to their statement of defence being struck of the record for their failure to comply with the laid down Civil Procedure Rules. As it now stands the plaintiffs' pleadings filed in court and their evidence as adduced before this court stand unchallenged and uncontroverted. I am satisfied the defendants have no interest in defending the matter by virtue of their failure to comply with the provisions of the Civil Procedure Rules and I find their purported defence was intended to delay this suit from hearing and determination. The defendants conduct makes the court to draw an inference that their failure to adduce evidence is because they have no cogent defence against the plaintiffs' case thus leading to the hearing the plaintiff's case unchallenged. I find that there is nothing to put doubt into the mind of court as regards the plaintiff's evidence.

24. In view of the above the plaintiffs case is meritorious. I accordingly enter judgment in favour of the plaintiffs as follows:-

- a) **Kshs. 1,079,000 special damages payable to the 1<sup>st</sup> plaintiff.**
- b) **Kshs. 185,000/- being cost of car hire for 74 days at a rate of Kshs. 2,500/- per day not proved and is declined.**
- c) **Prayer (c) for Bank interest for a facility taken by 1<sup>st</sup> plaintiff to buy another car at interest of 10% per annum of 15,000 USD rejected.**
- d) **Kshs. 200,000/- special damages to the 2<sup>nd</sup> plaintiff.**
- e) **Geneal damages for Kshs. 200,000/- to 1<sup>st</sup> plaintiff for breach of contract.**
- f) **General damages of Kshs. 40,000/- to the 2<sup>nd</sup> plaintiff for breach of contract.**
- g) **Cost of the suit to the plaintiffs at higher scale.**
- h) **Interest at court rate on (a), (d), (e), (f) and (g) from the date of filing the suit till payment in full.**

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of July, 2018.

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**J .A. MAKAU**

**JUDGE**