



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 66 OF 2009**

**MWANGI NDERITU NGATIA.....PLAINTIFF**

**VERSUS**

**AFRIC PAK INTERNATIONAL LIMITED.....DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

On the 18<sup>th</sup> March 2006, the plaintiff and the defendant entered into a sale agreement for a motor vehicle chassis No. FK 618-510009, the property of the Defendant. The agreed price was Kshs.2,080,000/= and the plaintiff paid a deposit of Kshs.300,000/= at the execution of the agreement.

2. It was a term of the agreement that a further deposit of Kshs.650,000/= and Kshs.50,000/= would be paid by the 30<sup>th</sup> May 2006, and the balance in monthly instalments of Kshs.100,000/=.

It was a further term of the agreement that further payments from the date of the first deposit was subject to the defendant successfully registering the vehicle with Kenya Revenue Authority after which the full balance would be paid upon which all the vehicle documents including transfer and logbook would be handed to the plaintiff.

3. By the 30<sup>th</sup> May 2006, the plaintiff had paid a further Kshs.600,000/=. On the 18<sup>th</sup> March 2006 the defendant handed possession of the vehicle to the plaintiff to enable him customise it for the intended use and a passenger business vehicle (minibus). The plaintiff therefore undertook substantial structural and design modifications including fitting the vehicle with speed governor and seatbelts at a cost of Kshs.1,011,600/=.

However as at 30<sup>th</sup> May 2006 the defendant had not registered the vehicle even upon demand and notices being issued, the defendant failed to register the vehicle, making it not usable for the purpose it was intended.

4. On or about the 20<sup>th</sup> December 2006 six months after the agreed date the the defendant delivered the vehicle particulars and registration number as KAW 246V to the plaintiff who then put it up for passenger transportation business.

5. On or about 15<sup>th</sup> March 2007 the defendant by its agents seized and detained the subject vehicle purportedly for an unpaid balance of Kshs.1,644,000/= and threatened to sell the vehicle despite its undertaking to communicate to the plaintiff regarding payments of the balance which it did not. This action then forced the plaintiff to file this suit.

6. By his **Amended Plaintiff** amended on the 24<sup>th</sup> 2009, the plaintiff claims that by reason of breach of contract by the defendant by its failure to obtain registration of the vehicle within the agreed period, the plaintiff suffered loss particularized as follows:

a) <b>Cost of body fabrication design, decoration and branding</b>	-	<b>Kshs.865,000/=</b>
b) <b>Auto-fittings including speed governor, seatbelts and tyres</b>	-	<b><u>Kshs.146,600/=</u></b>
<b>Total</b>	-	<b><u>Kshs.1,011,600/=</u></b>

7. The plaintiff in his amended plaintiff pleaded that a minibus similar and capacity as the subject vehicle would have earned him an average daily income of Kshs.8,000/= and therefore for 6½ months he would have made a profit of Kshs.1,320,000/= and therefore claims loss of business in the said sum.

8. The plaintiff further states that the repossession of the vehicle was unlawful and fraudulent as the balance of Kshs.1,644,000/= had to be paid on agreed terms resulting from the breach of the contract causing the delay and losses above stated.

It is further stated that no notice was served upon the plaintiff or at all for the payment of the balance of the purchase price.

9. The plaintiff further stated particulars of loss he suffered as a result of the illegal and unlawful seizure and detention of the vehicle in the sum of Kshs.3,440,090/=.

The plaintiff claims the above sum from the defendant with interest from the 15<sup>th</sup> May 2007 when the vehicle was sized and detained, and a further special damage in the sum of Kshs.8,000/= per day from 15<sup>th</sup> May 2007 as loss of business from the date of the seize and detention of the vehicle until date of judgment.

10. In its Amended statement of defence and counterclaim dated the 4<sup>th</sup> April 2009, the defendant denied the plaintiffs claims but stated that on 18<sup>th</sup> March 2006 it entered into the written agreement with the plaintiff for the purchase of the motor vehicle Registered as No. KAW 246V. It stated that the balance of Kshs.650,000/= was payable on or before the 30<sup>th</sup> May 2006 and puts the plaintiff to strict proof to the contrary.

11. It is stated in the defence that as a result of the default, the vehicle was lawfully repossessed in terms of the sale agreement.

The denies the losses stated by the plaintiff and states that it is not liable to compensate him.

It is further stated that the issues raised in the plaint were adjudicated in **Milimani CMCC No. 4479 of 2007** and therefore this case is *Res Judicata* and ought to be dismissed.

In its counter-claim, the defendant claims payment of Kshs.1,280,000/= being the unpaid balance of the purchase price and Kshs.634,000/= being 30% penalty for breach of the contract.

12. The plaintiff testified in support of this statement of claim. He relied on his statement dated the 18<sup>th</sup> June 2012, and document filed.

He produced the Agreement of sale of the vehicle dated the 18<sup>th</sup> March 2006. It was his evidence that he had already paid a sum of Kshs.1,180,000/= which he had to pay in instalments of Kshs.100,000/= on

dates to be agreed between themselves. He produced receipts and documents No. 1, 4, 7, 8 and 10 as appears in his bundle of documents to prove the expenditure in the improvement, re design and auto-fittings all in the sum of Kshs.1,011,600/= including fitting of a speed governor.

13. It was his testimony that despite the above expenditure, and the vehicle being ready to start business by the 30<sup>th</sup> May 2006 after the agreed period he could not start business as the defendant had not obtained registration upto the 20<sup>th</sup> December 2006, more than 6 months after the agreed period for which he claims loss of business at the rate of Kshs.8000/= per day, being the average income for a similar vehicle. In his evidence the plaintiff denied the defendants counterclaim. The defendant did not adduce any evidence.

14. The issues for determination from the evidence are whether the defendant breached the terms of the agreement and if so, whether he suffered loss and damage, and therefore entitled to the reliefs he seeks in the plaint.

A further issue is whether the plaintiff is obligated to pay the sums of money demanded by the defendant in its counter-claim.

15. The defendant in its statement of defence denied liability. It did not however call any witness to give evidence on its behalf. That renders the plaintiff's evidence unchallenged and its counter-claim unsubstantiated.

It is trite that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements. That means that the evidence adduced by the plaintiff against the defendant remains uncontroverted and unchallenged.

See **Stephen Gachau Githanga -vs- AG (2015) e KLR**, and also **Nairobi Milimani HCCC No.1243 of 2001 Trust Bank Ltd -vs- Paramount Bank Ltd & 2 Others**.

16. In the case **Drappery Empire -vs- The A.G. Nbi HCCC No. 2666 of 1996, Rawal J** (as she then was) held that where evidence is not challenged and stands uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases is on the balance of probabilities.

As no evidence was called in support of the defendants counter-claim, it is dismissed with costs to the plaintiff.

17. I have considered the sale agreement the subject motor vehicle. The parties are bound by the terms of their contract unless the same was entered into through coercion, fraud or undue influence. There is no suggestion whatsoever that coercion, fraud or undue influence in regard to the contract.

See **National Bank of Kenya -Ltd -vs- Pipe plastics Sam Kolit (K) Ltd (2001) e KLR**.

18. The terms of the agreement are stated clearly in **Paragraphs 5, 6, and 7** of the Amended plaint. The plaintiffs narration of the events, the payment of the deposits in the sum of Kshs.900,000/= and the improvements to the vehicle to be able to use it for the business of a passenger carrier were well articulated including proof of the costs towards the improvements. Receipts were duly produced in support of the expenditure in expectation that the vehicle would be in business as agreed in the agreement, by the 30<sup>th</sup> May 2006. That did not happen.

19. By the defendant's failure to have the vehicle registered in Kenya for use in the Kenyan Roads by the Kenya Revenue Authority within the stipulated time, the defendant was in breach of the terms of the agreement.

No contrary evidence was adduced to controvert the plaintiff's evidence. The registration was achieved in December 2006. There is no doubt that the defendant breached the contract by failing to deliver within the agreed time frame. I have noted from the agreement that the plaintiff did not pay the 2<sup>nd</sup> instalment of

Kshs.50,000/= on the due date the 30<sup>th</sup> May 2006, a fact he admitted in his evidence. But he had a reason that by that time the documents for the vehicle had not been delivered nor registration of the vehicle achieved and by oral agreement. The parties had agreed to renegotiate and agree on the mode of payment and due dates for the payments of the balance, due to the failure by the defendant to deliver.

20. This piece of evidence was not challenged at all. I shall therefore deem it to be truthful.

In the case **Hassan Zubeidi -vs- Patrick Mwangangi Kibanja & another (2014) e KLR**

The High Court rendered that:

*“----- in contracts of all types time will not be considered to be of essence unless:*

*a) The parties expressly stipulate that conditions as to time must be strictly complied with.*

*b) The nature of the subject matter or surrounding circumstances show time should have been considered of the essence and/or*

*c) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence---”*

21. It is trite that the court can not rewrite a contract between parties, save in circumstances where equity might be prepared to relieve a party from a bad bargain when to escape from such ban bargain.

See **National Bank of Kenya Ltd -v-s Pipe Plastic Ltd (Supra)**. But if the language is plain and unambiguous, the court will be very slow to intervene.

In the present case, the sale agreement gave no timeliness for payments by the plaintiff of the instalments after the 2<sup>nd</sup> one due on the 30<sup>th</sup> May 2006.

22. I have not seen any demand letter addressed to the plaintiff by the defendant demanding the instalment payments nor its intention to repossess the vehicle. I am therefore persuaded that the defendants action in repossessing the vehicle without due notice was in bad faith taking into account that its own default in registering the vehicle on time to enable him start his business to generate income. Equity cannot assist him. He gave no explanation at all for the delay.

It is only after the plaintiff's advocates addressed a demand letter to the defendant on the 4<sup>th</sup> December 2009 (PExt.17) did the defendant avail the number plates for the vehicle., over six months delay.

The nature and circumstances obtaining could not allow the party in default, the defendant to make time of essence on its part to the exclusion of the plaintiff. See **Hassan Zubeidi case (Supra)**.

For those reasons, the repossession of the vehicle by the defendant was unlawful. A party should not be allowed to take advantage of its wrongs or omissions at the expense of another party.

23. The plaintiff tabulated his losses in the plaint in the tune of Kshs.1,011,600/= and Kshs.3,440,090/= including a sum of Kshs.1,320,000/= in respect of loss of earnings from 30<sup>th</sup> May 2006 to 20<sup>th</sup> December 2006 at a daily rate of Kshs.8,000/= per day for 165 days. This sum is pleaded and particularised in the Amended plaint. Loss of earnings or income is a damage that must be proved. The plaintiff produced the vehicles daily worksheet for the period he had use of the same. I have looked at the worksheets for the month of March 2007 just before the vehicle was repossessed. The net income range from Kshs.5,000/= to 10,000/=. A reasonable sum in my view would be Kshs.6,000/= per day.

24. The vehicle was relatively new and therefore not demanding too much expenses towards repairs and spares replacement. After repossession, the plaintiff had no business so had to revert back to employment

as a school vehicle driver, at a much less income. He has claimed that loss for 165 days. It is not practical or a reality that the vehicle would be in business everyday and making an income of the average sum for the whole period. Out of that period, I rationalise that 130 days would be a more reasonable period upon an income of Kshs.6,000/= per day, thus Kshs.780,000/=. That is what I award on the loss of earning. I have adopted 130 days because a party ought to mitigate his losses. Indeed the plaintiff obtained employment and is earning some income. To award him loss of income upto the date of this judgment would be to give him double benefit.

25. I further find that the plaintiff is entailed to refund of the money he paid as deposit for the vehicle in the sum of Kshs.900,000/= and the expenses tabulated in Paragraph 20 of the plaint.

However, as the plaintiff operated the vehicle before the repossession for a period of 6 months the above sums of Kshs.2,691,600/= shall be subjected to a reduction of 25% considering normal wear and tear. This sum will be reduced by 25%. The total therefore comes to Kshs.2,691,600/=.

26. Consequently there shall be judgment entered for the plaintiff against the defendant in the sum of Kshs.2,018,700/= being the said sum shall accrue interest at court rates from the date of this judgment. The defendants counter-claim is dismissed with costs.

27. The plaintiff is awarded 75% costs of the suit.

**Dated, Signed and delivered this 25<sup>th</sup> Day of May 2017.**

**J.N. MULWA**

**JUDGE**