REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 255 OF 2009

ARROW HI-FI (E.A) LIMITED…….....PLAINTIFF

VERSUS

CITY NOMINEES LIMITED. ..... DEFENDANT

J U D G M E N T

1. By a Plaint dated 3rd April, 2009, the Plaintiff claimed that by a contract entered into between itself and the Defendant in May, 2007, the Defendant placed an order with Premium Automotive Group for the purchase of two (2) Motor Vehicles make Porsche Cayenne V6, Chassis Nos. WPIZZZ9PZ6LA07873 and WPIZZZP26LA09237 through the Plaintiff. That the Defendant paid a total sum of US$136,732 to the said Premium Automotive Group for the said vehicles.

2. The Plaintiff further pleaded that, in December, 2007, the Defendant rejected one of the vehicles Chassis No. WP IZZZ9PZ6LA07873 whereby an alternative vehicle Chassis No. WPIZZZQPZ8LA00379 was given to the Defendant subject to payment of an additional sum of US$5,500. The Bills of Lading were issued in the name of the Defendant and the vehicles were to be consigned to the Defendant at Mombasa on understanding that the Defendant will take the two vehicles belonging to it whilst the 3rd vehicle was to be released to the Plaintiff.

3. The Plaintiff further pleaded that it was agreed between the parties that the shipping documents be handed over to Economic Carriers Company to clear the said three vehicles. That in breach of the said agreement, the Defendant forcibly took possession of the said shipping documents and registered all the vehicles in its own name. The Plaintiff further claimed that the Plaintiff was the owner and entitled to possession of the 3rd vehicle wit, Posche Cayenne V6, Chassis Number WDIZZZ9PZ6LA07873 now registered in the Defendants name as KBB 020F; that the Defendant had continued to be in wrongful possession thereof since 31st January, 2008. That in the premises, the Plaintiff claimed a sum of Kshs. 8,500,000/= and US$ 5,500 together with interest thereon at Court rate from 31st January, 2008 until payment in full.

4. At the trial, AKIF VIRANI (PW1), the Plaintiff's Managing Director testified in support of the Plaintiff's case. He confirmed on oath that the Plaintiff dealt with the importation of Motor Vehicles as an agent of Premium Automotive Groups; that the Plaintiff placed an order for two vehicles from the aforesaid Premium Automotive Group in May, 2007 through the Plaintiff; that it was agreed between the parties that Motor Vehicle Chassis No.NPIZZZ9PZ6LA07873 (hereinafter "07873") though consigned to the Defendant was to be released to the Plaintiff.

5. PWI further testified that: despite knowing that the 3rd Motor Vehicle had been exchanged with Motor Vehicle Chassis No. 07873, the Defendant caused all the vehicles to be registered in its own name and converted Motor Vehicle Chassis No. 07873 to itself. That the Plaintiff contracted to sell Motor Vehicle Chassis No. 07873 to a 3rd party for Kshs. 8.5 million on 31st January, 2008 but due to the conversion thereof by the Defendant, that contract did not materialise.

6. The Defendant filed a defence and counterclaim to the Plaintiff's claim on 14th July, 2009. In the Defence, the Defendant contended that; the Plaintiff's business closed at the time of performance of the contract due to tax disputes with the Kenya Revenue Authority (KRA); That the Plaintiff was therefore, unable to perform its part of the contract; that it had been agreed between the parties that one vehicle was supposed to be collected from the suppliers in Germany in June/July, 2007 for the Defendant's use in Europe; that in breach of the said agreement, the Plaintiff failed to deliver the said Motor Vehicle in Europe as agreed or at all; that thereafter the Defendant established that the Plaintiff had appointed a person at Mombasa for clearance of the vehicles and that there were bills of lading in respect of three (3) vehicles whose clearance had to be effected in all of them.

7. The Defendant further contended that, it discovered that the said vehicles had arrived at Mombasa much earlier than the time of contract; that the Plaintiff had failed to clear them because of its inability to raise the charges required of Kshs. 14,721,904/65 which the Defendant paid to clear the said vehicles and had them registered in its name pending payment of the clearance charges by the Plaintiff. The Defendant concluded that as a result of the Plaintiffs breaches, the Defendant had suffered loss of Kshs. 9,703,898/= and US$12,732 which it counterclaimed against the Plaintiff.

8. At the trial Andrew Smith (DWI) the Managing Director of the Defendant testified in support of the Defendant's case. He produced the Defendant's Exhibits (DEXH 1) and reiterated what the Defendant had pleaded in its Defence. He told the Court that according to the contract entered into between the Plaintiff and the Defendant, the Plaintiff was responsible for the clearing charges for the vehicles whilst the Defendant was responsible for the duties.

9. He told the court that the total demurrage and storage charges for the three (3) vehicles was Kshs. 2,373,539/= which the Defendant paid to clear them. According to him, the Plaintiff was in breach of the contract as a result of which the Defendant had suffered losses amounting to US$12,732 being the VAT claim in Germany and Kshs. 9,703,898/= being the cumulative expenses in clearing the three (3) vehicles at the port of Mombasa. He concluded that the Defendant had retained the 3rd Motor Vehicle Chassis No. 07873 in exercise of its right of lien for payment by the Plaintiff of the expenses incurred by the Defendant in the clearance of the said vehicles.

10. The parties filed separate issues on which the respective Counsels submitted. Upon careful consideration of the pleadings, the evidence tendered and the submissions of Counsel, the following are the issues that fall for determination.

(a) Whether as pleaded, the Plaintiff's case is sustainable?

(b) What were the terms of the contract between the Plaintiff and the Defendant?

(c) Who between the parties breached the contract?

(d) What relief is available for the innocent party?

(e) Whether the Defendant has a lien over the 3rd Motor Vehicle retained by it?

(f) What order as to costs of both the suit and counter-claim?

11. On the first issue, the Defendant contended that since the Plaintiff pleaded its case that it was an agent of a disclosed principal, under the authority of ***Fairlie-vs-Fenton and Another (1870) L.R. Ex 169*** that

no action is maintainable by a broker who names his principal in the contract, the Plaintiff's suit is a non-starter. On its part, the Plaintiff contended that the issue of the Plaintiff's locus standi was neither raised in the pleadings nor in the issues filed by both parties. That the Defendant having admitted the contract in Paragraph 4 of its Defence in accordance with order 2 Rule 11(1) of the Civil Procedure Rules, the Defendant was estopped from raising the issue of the Plaintiff's locus standi. The Plaintiff further contended that since the issue of its locus standi was never in the pleadings, the same did not fall for determination. The Court of Appeal decision in ***Mwai –Vs-KTDC (1983) Eklr 1*** and ***Galaxy Rails Company Ltd-Vs-Falcon Guards Ltd (2000) eKLR*** was relied on. It was finally submitted for the Plaintiff that the submissions on the Plaintiff's locus standi was contrary to Order 2 Rule 6 of the Civil Procedure Rules. That in any event, the suit was perfectly in order under Section 39(1) and (2) of the Sale of Goods Act.

12. Order 2 Rule 6 (1) of the Civil Procedure Rules provides:-

> ***"6 (1) No party may in any pleading make any allegation of fact, or make any new ground of claim, inconsistent with a previous pleading of his in the same suit."***

13. Further, in the case of ***Galaxy Paints Company Ltd-vs-Falcon Guards Ltd*** **(Supra),** the Court of Appeal held that;-

> ***"It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."***

14. From the foregoing, it is clear that a party cannot approbate and reprobate at the same time. The law will not allow a party in the same proceedings to take different positions either in its pleadings or evidence. Secondly, this court cannot purport to determine an issue that is not either raised in the pleadings or agreed to by the parties themselves. This being the position, is the issue of Plaintiff's locus standi determinable by this court?

15. In Paragraphs 3 and 4 of the Plaint, the Plaintiff was categorical that it dealt in the business of importation of Motor vehicles as an agent of Premium Automotive Group and that in May, 2007, the Defendant placed an order with the said Premium Automotive Group through the Plaintiff for two motor vehicles. This was reiterated by PW 1 at Paragraphs 5 and 7 of his witness statement dated 18th September, 2012. In cross-examination, he told the court: -

> "***I received some of the monies as agent to Premium Automotive Group..... The deal was between Premium Automotive and the Defendant. We were only brokers. Premium Automotive is not an entity owned by myself***."

16. In paragraph 5 of the Defence, the Defendant admitted that pleading. My plain and clear understanding of the Plaint and Defence is that the Plaintiff was an agent of a disclosed principal from whom the Defendant made an order for two vehicles.

17. From both the Defence and the issues it filed, the Defendant did not challenge the locus standi of the Plaintiff to bring the suit. The issue was first raised at the submissions. Can it be said that since the Defendant did not raise the Plaintiff's locus standi as an issue expressly in the Defence or in the issues, the same is a non-issue as contended by the Plaintiff? I do not think so. In my opinion, since both parties were agreed in the pleadings from the outset that the Plaintiff was an agent of a disclosed principal, it is a legal issue for the court to determine whether in the circumstances of the case, the Plaintiff can maintain an action.

18. It is not denied by both the Plaintiff and the Defendant that the Plaintiff was an agent of Premium

Automotive Group of U.K and that the Plaintiff had sued as such. To my mind, it is open to a trial court in the circumstances to determine whether the Plaintiff can recover under the circumstances in which the suit has been pleaded. In this regard, I am of the view that the authorities relied on by the Plaintiff are not applicable. In those cases, the pleadings did not disclose or plead a claim of negligence or disclosed agent. In the present case, the parties were agreeable in the principal pleadings themselves that the Plaintiff was an agent of a disclosed principal.

19. Further, I am not in agreement with the Plaintiff's contention that the Defendant was taking inconsistent positions. In its Defence of 14th July, 2009, the Defendant had admitted that the Plaintiff was an agent of a disclosed principal I do not see any inconsistency of that pleading with the submission by the Defendant that, as an agent of a disclosed principal, the Plaintiff lacks locus standi to bring this suit.

20. On the evidence on record and the pleadings, the vehicles the subject matter of the contract belonged to the Premium Automotive Group. The Defendant made payment for the said vehicles to the said Premium Automotive Group and not the Plaintiff. Clearly, as admitted by PW 1 in his testimony, the contract of purchase was as between the Defendant and the said Premium Automotive Group. Clear evidence of this fact is the Plaintiff's exhibit 1 at page 26, a letter dated 27th March, 2009 wherein the said Premium Automotive Group asserts its rights over the extra vehicle that had been released to the Defendant and which is the subject matter of this suit.

21. Counsel for the Plaintiff submitted that the Plaintiff has locus standi by virtue of Section 39 (1) and (2) of the Sale of Goods Act, Cap 31 Laws of Kenya (hereinafter "the Act" in that the Plaintiff was a seller in terms thereof. That Section provides: -

> ***"39(1) The seller of goods is deemed to be an unpaid seller within the meaning of this Act: -***
>
> ***a) .....***
>
> ***b) .....***
>
> ***2) In this part, "Seller" includes any person who is in the position of seller, as for instance, an agent of the seller to whom the Bill of Lading has been endorsed, or....."***

According to the Plaintiff, since the Bills of Lading for the three vehicles had been endorsed in the Plaintiff's name, it had locus standi to bring the instant action.

22. I agree with the Plaintiff to the extent that where an agent of a seller has a bill of lading endorsed to his name and undertakes a sale, he becomes a seller for the purposes of Sections 30 and the following Sections of that Act. However, Section 39 of the Act presupposes a transaction undertaken on the basis of the name of the agent being endorsed on the Bill of Lading. In the present case, the Plaintiff caused the Bills of Lading to be endorsed in the name of the Defendant after the contract of sale had been completed between the defendant and Premium Automotive Group. To my mind, the moment the Plaintiff caused the said change in the Bills of Lading its right to be held as seller under Section 39 of the Act discipated.

23. Accordingly, I am satisfied that according to the pleadings and the evidence tendered, the Plaintiff was an agent of Premium Automotive Group who was a disclosed principal. The issue whether the Plaintiff had *locus standi* to sue in the circumstances was a natural consequence though it was not raised in the issues submitted by the parties. My finding is that, as an agent of disclosed principal, the Plaintiff could not sue on the contract which DW 1 admittedly stated to have been between the Defendant and the said disclosed principal. To that extent the Plaintiff's suit as pleaded fails and is for dismissal.

24. If however, I am wrong on this issue, is the Plaintiff's suit meritorious? To make this determination, I will have to consider the other issues which the court framed earlier on.

25. The first issue is what the terms of the contract were. From the evidence on record, the contract was for the Defendant to purchase through the Plaintiff two (2) motor vehicle Posche Cayenne V6. The total

price for the vehicles was agreed at US$136,732. Although the parties started negotiations in March, 2007 it is not until May, 2007 that a concrete contract for sale and purchase of the vehicles was concluded. It was agreed that one of these vehicles was for delivery at the factory in Germany in June, 2007 and the other vehicle in Nairobi around the same period. Indeed in the email dated 29th April, 2007 (Pexh 1 pg 5) the Defendant gave until August, 2007 for the delivery of the latter vehicle.

26. Despite as aforesaid, it would seem that the vehicle that was to be delivered in Germany was not delivered as agreed. The Defendant's representative visited the factory but was unable to take delivery thereof. From the testimony of DW 1, he visited the factory but the manufacturer did not give him the vehicle but asked him to contact P.W. 1. Not until early 2008 that the two vehicles were delivered. This was over eight (8) months after the agreed date of delivery.

27. The Plaintiff submitted that since the price was paid on 29th May, 2007 and the proper names of the consignee was given by the Defendant on 28th August, 2007, under Section 12 of the Sale of Goods Act, the vehicles were to be delivered within a reasonable time from the date. It was further submitted that, under Section 28 of the Sale of Goods Act, the Defendant was obligated to pay the additional sum of US$5500 for the alternative motor vehicle that was delivered to it.

28. I have scrutinised the correspondence between the parties. In none of the emails appearing at pages 1 to 15 of Pexh 1 and pages 1 to 4 of Dexh 1 were the actual particulars of the two (2) vehicles being purchased by the Defendant identified by way of Chassis numbers. Even the letter of Premium Automotive Group dated 29th May, 2007 acknowledging receipt of the total sum of US$ 136,732 from the Defendant did not give the Chassis numbers for the 2 Posche Cayenne vehicles that were being sold. The very first time the Chassis numbers appear is in the copy Bill of lading dated 28.02.2007 at Page 5 of Dexh 1 and the Bill of lading dated 23.11.2007 at page 16 of Pexh 1.

29. At page 3 of Pexh 1 are two invoices. They are dated 10.04.2007 and are from Premium Automotive Group in the name of the Defendant. They are indicated to be for Motor Vehicle Chassis No. WP 1ZZZ-G9Z6LA07873 and 09237 respectively. The prices given therein are for US$ 62,000 and US$ 78,298/70, respectively. The country of origin is shown to be Hungary. There was no evidence that the two invoices related to the vehicles which were being contracted by the Defendant in May, 2007.The total purchase price under those invoices if US$140,298/70, het the amount negotiated and paid by the Defendant for the two vehicles was US$ 136,732. This is so because, according to both the Plaintiff and the Defendant as well as Premium Automotive Group (in its letter dated 29th May, 2007 at page 9 Pexh 1) one of these vehicles was to be delivered at the factory. The factory was shown to be Leitzpig, Germany and not Hungary as shown in those invoices of 10th April, 2007.

30. I am alive to the email dated 12th April, 2007 by the Plaintiff (page 5 Pexh 1) wherein it informed the Defendant that the Plaintiff was holding two vehicles and it could release one of them to the Defendant. This notwithstanding, it took a whole year for the vehicles to be delivered to the Defendant with the accompanying demurrage charges? The Bills of Lading for the vehicles that were finally released to the Defendant are dated 29th November, 2007 and 23rd January, 2008 as contained in pages 8 and 19 of Dexh 1, respectively.

31. In view of the foregoing, it is the judgment of this court that the Plaintiff did not deliver or perform its part of the contract as agreed. Delivering documentation in December, 2007 or January, 2008 was in my view not within a reasonable time. Apart from the letter by the seller, Premium Automotive Group dated 27th March, 2008 at page 26 Pexh 1, there was no evidence to show that MV Chassis number WP12229PZ8LA00379 was an alternative to the one contracted by the Defendant. This is so because in addition to what is stated in paragraphs 28, 29 and 30 above looking at both the Bills of Lading at Pages 16 Pexh 1 (page 5 Dexh 1) and Page 18 Pexh1 (page 18 Dexh 1) all these vehicles were originally delivered to the Plaintiff in February, 2007. It is only later in November, 2007 that the bills of lading were changed to the names of the Defendant.

32. In any event if motor vehicle Chassis No. WP1222 9PZ8LA00379 was an alternative to that originally

contracted by the Defendant, there is no evidence to show that the value was in excess of US$ 5500 to that of motor vehicle Chassis No. PW 12229P – Z6LA07873. Where is its invoice to prove the price for which it was originally consigned to the Plaintiff? That was not produced at the trial. This court notes that whilst the customs value for the vehicle Chassis No. ending with 07873, that is said to have been rejected by the Defendant, was given as Kshs. 4,926,291/583 (page 23 Dexh 1)the customs value for vehicle Chassis No. ending with 00379 was never given.

33. Accordingly, in my judgment, the Plaintiff was in breach of the contract of sale for delivery of two vehicles one in Germany and another in Mombasa or Nairobi in June, 2007 or thereabouts. The Plaintiff's claim for US$ 5500 is untenable for two reasons. Firstly the value of the **"alternative vehicle**" was not proved to have exceeded the "**originally contracted vehicle**" with US$ 5500. Secondly, since the owner of that vehicle, Premium Automotive Group as expressly stated in the letter dated 27th March, 2008 (page 26 Pexh 1), not specifically assigned its rights to the Plaintiff, the latter could not claim the same.

34. In this regard, the Plaintiff has failed to prove its case on a balance of probability and the same fails.

35. As regards the counterclaim, the Defendant's case was that it suffered loss amounting to Kshs. 9,703,898/= and US$ 12,732 in respect of which it was holding the 3rd vehicle. The Defendant claimed that it was holding the 3rd vehicle as a lien for the costs it had suffered in clearing the same. The lien pleaded and submitted on was that of a worker who has expended time and expense on a chattel.

36. In the case before court, no work can be said to have been expended on the vehicle. However, this court is alive to the fact that the Plaintiff imported the vehicles to this country on a date it failed to disclose to this court. P.W. 1 told the court that he could not recall when the vehicles landed at Mombasa. Of course large sums were paid as storage or demurrage charges. This was in the contemplation of the Plaintiff. The Plaintiff handed over the said vehicle to the Defendant for the latter to clear. Obviously there was no agreement between the two that the Defendant was to incur the costs of clearance and then surrender that vehicle free of charge to the Plaintiff. It will be unconscionable to compel the Defendant to do so. In order for the Defendant to release that vehicle, it had to be paid its expenses. In the circumstances, I am of the view that the Defendant was entitled to hold the said vehicle as a lien for the unpaid expenses incurred in clearing the same.

37. The issue in my view is what was the amount for the lien? In paragraph 13 of the Counter-claim, the Defendant pleaded its loss. The same was testified on by D.W. 1 as follows: -

a) Duty and cost of vehicle – Kshs. 4,080,530/=. The only receipt produced was for Kshs. 3,761,598/= at page 23 Dexh 1.

b) Storage and rent charges Kshs. 2,373,539/=. The documents produced belonging to Rift Valley Logistics Ltd were not acceptable. They were not receipts per se. They did not indicate with particularity that they were in respect of the subject motor vehicle. Other receipts related to more than on entry i.e. for more than one container. The documents from KPA did not specify for which motor vehicle they were being paid for. The release orders set out therein did not show that it was in respect of the subject motor vehicle. In this regard, the only expenses proved in my view were, Kshs.82,406.40, Kshs. 35,728 and Kshs. 12,995/= at pages 28, 30, and 31 of Dexh 1. Since the charges are shown to have been in respect of two containers, the amount must be reduced by half. The sum proved is therefore Kshs. 65,563/20. There was also a sum of US$ 370 by WEC lines at page 35 Dexh 1 which was shown to be cash on delivery of the container. At the exchange rate of Kshs.70.1 quoted by KPA at page 33, the amount stands at Kshs. 27,128/70.The other sum proved was Kshs. 508,300/= at page 41 Dexh 1. The total costs proved therefore for demurrage and storage was Kshs. 600,991/90. And not Ksh.2,373,539/- claimed

c) Refundable tax paid to supplier US$ 12,732/=. At page 1 Pexh 1, the Plaintiff admitted that there was 19% VAT payable on the price of US$ 62600 for the vehicle that was to be delivered in Germany. It was indicated that this sum was refundable. The sum of US$ 74,732 paid to Premium

Automotive Group (Dexh 1 page 9) included this sum. This sum is therefore, recoverable.

d) Delivery of wrong model of vehicles – Kshs. 1.500,000/=. Thi claim was not proved.

e) Amount advanced to the Plaintiff not proved. The sum was as allegedly paid to the wife of DW 1 who is not a party to this suit.

f) Costs of travel to Mombasa was not proved.

g) Costs of bringing an expert from Dubai was not proved.

h) Loss of maintenance services was not proved.

38. Accordingly, the amount of lien in respect of which the motor vehicle Chassis No. ending with 07873 is held is Kshs. 4,362,589/90 and US$ 12,732. On payment of the said sum, the Defendant is to release the said motor vehicle to the owner of the vehicle or whoever shall have been appointed by the seller for that purpose.

39. Accordingly, the Plaintiff's suit is dismissed with costs to the Defendant. The Counter-claim succeeds to the extent that the Defendant shall continue to hold the motor vehicle Chassis No. PW 1ZZZ9PZ6LA07873 until it is paid Kshs. 4,363,589/90 and US$ 12,732. Since the vehicle has been in the possession of the Defendant, I will not award any interest in the said sum. The costs of the Counter-claim are awarded to the Defendant in any event.

It is so decreed

Dated and Delivered at Nairobi this 20th day of February, 2015**.**

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A MABEYA

JUDGE