



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 164 OF 2012**

**DOMINIC B. ONYANGO KONDITI.....PLAINTIFF**

**VERSUS**

**ABSON MOTORS LIMITED.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the Defendant seeking the following:-

- a. *An order compelling the Defendant to release to the Plaintiff the logbook for motor vehicle registration number KBF 662 S.*
- b. *Special damages for KShs. 2,584,500/=.*
- c. *Loss of business at the rate of KShs. 68,000/= per week since the 2<sup>nd</sup> week of October, 2011 up to the date of judgment.*
- d. *Watchman's wages at the rate of KShs. 400/= per day from 1<sup>st</sup> January, 2012 up to the date of judgment.*
- e. *General damages*
- f. *Costs*
- g. *Interest on b, c and e above at commercial rates.*

2. The Plaintiff averred that he was induced by an advertisement by the Defendant on the Daily Nation Newspaper of 14<sup>th</sup> March, 2011 for the sale of a lorry which was described as a 7 tonner Foton Lorry/Truck at KShs. 1,983,000/=. He claimed that by an agreement entered into on 24<sup>th</sup> March, 2011, they entered into an agreement where the Plaintiff was to buy a truck registration number KBF 011F at KShs. 2,300,000/=. He stated that he paid a deposit of KShs. 300,000/= on the same day and the balance thereof plus interest was to be settled within three (3) months from the date of the delivery of the truck. The interest was fixed at KShs. 38,750/=. That it was agreed that the Plaintiff deposits the log book of his vehicle registration number KBF 662S as security pending full payment of the purchase price. The logbook was to be released to the Plaintiff then. The Defendant is said to have delivered the truck's chassis to a motor vehicle body building company of the Defendant's choice but at the Plaintiff's costs where he paid KShs. 300,000/=. On 25<sup>th</sup> July, 2011 the Plaintiff transferred KShs. 1,500,000/= to the Defendant's bank account number by Real Time Settlement (RTGS) towards settlement of the purchase price. The truck was handed over to the Plaintiff on 1<sup>st</sup> January, 2011 and it is upon receiving the vehicle inspection report that the Plaintiff noticed the truck was described as a four (4) tonner. On being asked for an explanation, the Defendant stated that it was an error that occurred during the preparation of the report and offered to have the same rectified. The Plaintiff stated that when he received the log book towards the end of October, 2011, the truck had still been described as a four tonner. The Defendant however still maintained that it was a typographical error and took the logbook and

assured the Plaintiff that he will have the same rectified. The Plaintiff laments that when the truck was put to work by loading it with 7 tonne load, the said overturned at Narok shortly after departure as a result of overloading and it was extensively damaged. The Plaintiff claims that he had entered into an agreement with Coca Cola company whereby the truck would distribute drinks to various parts of the country at KShs. 68,000/= per week. That he had taken a comprehensive insurance cover of KShs. 163,000/=, and fixed a car tracker and an alarm at KShs. 30,000/= and KShs. 18,000/= respectively and purchased two new tyres and a battery at KShs. 48,000/= and KShs. 7,500/= respectively. He had also paid a further KShs. 30,000/= towards the settlement of the purchase price. That he spent KShs. 80,000/= being towing charges and KShs. 138,000/= for the repair of the truck.

3. The Plaintiff claims that it is as a result of the Defendants fraud and misrepresentation and breach of contract which have been particularised in the plaint that he suffered damages.
4. The Defendant filed a statement of defence in which he denied the Plaintiff's claim. Particularly, the Defendant denies that the purchase price had been fully paid and that it is the Plaintiff who paid for the body building. It was stated that the Plaintiff has not completed the payment of the purchase price and is in areas of KShs. 508,749/= and that the Defendant paid KShs. 170,000/= for body building. That the Plaintiff was left with a balance of KShs. 500,000/= being the purchase price and interest of KShs. 38,750/=. The Defendant stated that Kehar Body Builders increased the chassis size by around 8 inches at the request and consent of the Plaintiff when fabricating the body making the truck very unstable on the road and affecting the trucks gross weight. The Defendant maintained that the truck as sold to the Plaintiff was a 7 tonner and have been found to be so upon inspection and that the description of it as a 4 tonner was a typographical error. It was contended that the tonnage was never an issue since the Plaintiff in fact KShs. 30,000/= after numerous demands to pay the balance.
5. I have considered the pleadings, evidence on record and the submissions tendered on behalf of the parties herein. The Defendants tendered no evidence in rebuttal to the Plaintiff's case. The effect of such failure was discussed by Makhandia J. in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where he observed as follows:-

***“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”***

In the absence of evidence in rebuttal from the Defendant, it follows that the Plaintiff proved his case against the Defendant on a balance of probabilities.

6. The Plaintiff produced receipts for parking charges for 1<sup>st</sup> January, 2012, 16<sup>th</sup> January, 2012, 1<sup>st</sup> February, 2012, 16<sup>th</sup> February, 2012, 1<sup>st</sup> March, 2012, 16<sup>th</sup> March, 2012, 1<sup>st</sup> April, 2012 and 16<sup>th</sup> April, 2012 for parking for 15, 16, 15, 14, 15, 16 15 and 15 days respectively. The parking charges was KShs. 400/= per day i.e. 6,000/=, 6,400/=, 6,000/=, 5,600, 6,000/=, 6,400/=, 6,000/= and 6,000/= totalling to KShs. 48,400/=. The Plaintiff also produced receipts for KShs. 135,000/= for payment of insurance cover was produced, KShs. 17,400/= for batteries, repair charges being KShs. 138,000/=, towing charges being KShs. 80,000/=, fuel monitoring for KShs. 30,000/=, reverse alarm for KShs. 3,700/=, hired transporters claim form for KShs. 68,987.20, for tyres for KShs. 53,400/=. I have reservations to awarding the amount spent for fuel monitoring garget, reverse alarm, insurance, building body, batteries and tyres for the reason that these are items that whether or not the Plaintiff was sold a good or bad car, he would still have to buy. I find the demand for loss of business viable since the Plaintiff has produced proof that he was contracted to distribute drinks by coca-cola at the rate of KShs. 68,987.20 per week. He is also entitled to a refund of the purchase price of the vehicle and the interest of KShs 38,750/=. On the issue of general damages, I am fortified by the decision in **James Maina Mwangi v Nademi Mohammed [2005] eKLR** where the Plaintiff was awarded KShs. 180,000/= and find that KShs. 300,000/= as general damages suffices in this case.
7. I therefore make orders as follows:-

- a. *The Defendant is hereby ordered to release to the Plaintiff the logbook for motor vehicle registration number KBF 662 S.*
- b. *Special damages for KShs. 2,066,400/= are made out as hereunder:-*
  - i. *Watchman's wages at the rate of KShs. 400/= per day totalling to KShs. 48,400/= as mentioned earlier in the judgment.*
  - ii. *Purchase price KShs. 1,800,000/=*
  - iii. *Recovery and towing charges KShs. 80,000/=*
  - iv. *Repair charges KShs. 138,000/=*
- c. *Loss of business at the rate of KShs. 68,000/= per week since the 2<sup>nd</sup> week of October, 2011 up to the date of this judgment.*
- d. *General damages KShs. 300,000/=*
- e. *Costs*
- f. *Interest on b, c and e above at court.*

**Dated, Signed and Delivered in open court this 25<sup>th</sup> day of September, 2015.**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the Plaintiff**

..... **for the Defendant.**