



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NO. 208 OF 2011**

**FARAH AWAD GULLET.....PLAINTIFF**

**VERSUS**

**CMC MOTORS GROUP LIMITED.....DEFENDANT**

**JUDGMENT**

FARAH AWAD GULLET (the plaintiff) seeks an order compelling the defendant to forthwith and unconditionally release the registration number plate and log book of the suit property herein (Tractor make New Holland Engine No.[Particulars withheld] Chassis No.[Particulars withheld]), together with the attendant transfer Document(s), to him. The plaintiff also wants to be compensated for loss of Profit or user at the rate of Kshs.30 000/= per day from 29th December, 2009 until compliance and interest thereon at courts rate.

**The Plaintiffs case**

The Plaintiffs case is that on or about 28th December, 2009, he approached the defendant (CMC Motors Group Ltd) with a view of purchasing a tractor whereupon they negotiated and entered into a sale agreement.

Upon execution of the sale agreement, the plaintiff paid to the defendant the agreed consideration being Kshs. 800,000/= and was issued with a receipt. To prove these facts P.W.1 , Ali Farah, (the plaintiff's son)who testified on behalf of the plaintiff (pursuant to a power of attorney donated to him, PEX 1) produced a copy of the cheque the plaintiff drew in favour of the defendant (PEX 2) and the receipt issued in respect thereof (PEX 3).

It is the plaintiffs case that barely a day after they executed the agreement, the defendant delivered the tractor to him and promised to surrender the registration number plate and Log Book without unreasonable delay. According to P.W. 1 , the defendant agreed to register the tractor and surrender to the plaintiff the registration details and number plate within one month.

After the lapse of one month, P.W. 1, went to the defendant's premises and saw one of its officers, (Paul Nganya), to find out about the log book and registration. The said officer informed him that the defendant needed more time to finish the registration. Thereafter, P.W.1 followed up those documents on three more occasions and by phone calls to no avail.

After his efforts to get the registration documents failed to bear any fruits, his father instructed an advocate to demand the release of the documents from the defendant. The plaintiffs advocate wrote a demand letter to the defendant (PEX 5).

Contending that the plaintiffs intention was to use the tractor for personal purposes (farming) and commercially by hiring it out, P.W.1 argued that owing to non-registration of the tractor the plaintiff was unable to use it for its intended purposes. Further that had the tractor been used for its intended purposes, the plaintiff would have been making at least Kshs. 30,000/= per day.

P.W.1 maintained that the defendant was to blame for the losses the plaintiff incurred due to none use of the tractor and urged the court to grant the plaintiff all the prayers sought in the plaint. However, on cross examination by Mr. Ombati for the defendant, P.W.1 admitted that the plaintiff neither demanded refund of the purchase price nor returned the tractor. He also admitted that he had nothing to prove that, the plaintiff indeed lost Kshs.30,000/= per day owing to the defendant's alleged breach of contract. Nevertheless, he asserted that the the plaintiff could not use the tractor even on the farm because it was not to be confined to the farm.

In its defence, the defendant called its credit controller, Nakuru branch, Kennedy Sumba Shiundu (D.W. 1), who admitted that the plaintiff bought a used tractor from the defendant and that at the time of sale, the tractor did not have a registration number. He pointed out that according to the plaintiffs delivery instructions (PEX 1), the tractor was to be delivered as soon as possible (ASAP).

D.W. 1 denied having been aware of a promise by the defendant to deliver the logbook and registration plate within a month but admitted that the defendant was under an obligation to register the tractor and hand over the registration documents to the plaintiff. He explained that in fulfilment of those obligations, the defendant applied for the registration of the tractor and has since made efforts to get the tractor registered to no avail.

As for the plaintiffs claim for loss of user, he argued that it would be unfair to condemn the defendant to pay that claim as it could only do so with the help of a third party, Kenya Revenue Authority. Further, that the claim is not supported by any documentary evidence. He contended that nothing could have stopped the plaintiff from using the tractor in the shamba. However, he admitted that the plaintiffs claim for release of a log book is justified and urged the court to give the defendant 2-3 months to get the tractor registered.

On behalf of the plaintiff, it is submitted that at the time of entering into the sale agreement the defendant gave the impression and/or representation that he was seized with the mandate to sell, transfer and confer title to the plaintiff and that in breach of its contractual obligations, the defendant failed to procure and issue the plaintiff with the registration number plate and logbook within the covenanted timelines and at all.

Although the defendant contends that it tried to procure the documents but got frustrated by a third party, Kenya Revenue Authority, the plaintiff argues that the defendant never presented any application for registration to the Registrar of Motor vehicle, in the prescribed form together with the prescribed fee, as required under Section 6(2) of the Traffic Act, Chapter 403 Laws of Kenya; that the defendant's witness did not produce any document to attest any attempt to secure the essential documents from the relevant authority and that, in any event, the defendant's witness admitted that the burden of obtaining the registration number plate and log book lay on the defendant's shoulders. Further that the law imposes an obligation on the defendant to avail the registration documents within 14 days.

As the obligation to avail the essential documents lay with the defendant and since the defendant had not discharged that obligation, it is submitted that the defendant breached and/or violated the terms of the contract both express and implied. In this regard reference was made to **section 14** of the **Sale of Goods Act** and **Sections 6 and 9** of **the Traffic Act; National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & another Civil Appeal no.95 of 1999 (unreported) and Dr. Joel Muthuri v. Julius Gichuru Guantei. Civil application no. 72 of 1996 (unreported).**

Regarding the loss allegedly suffered by the plaintiff, it is submitted that the plaintiff had purchased the tractor for private and commercial use; that to facilitate use of the tractor, the tractor needed to be duly registered and assigned a number plate. In support of the foregoing contention, the plaintiff cited **sections**

**4 and 12 of the Traffic Act** which prohibits use of motor vehicles on the road if not duly registered.

Since the tractor was not registered, it is argued that it was and it is not possible for the plaintiff to use it for its intended purpose. Consequently, the plaintiff has suffered loss and continues to suffer loss and damage.

The loss and damage suffered by the plaintiff is said to be in the nature of the amounts of money he paid to hire tractors to plough his land and loss in terms of monetary income he would have derived from hiring the tractor to other farmers (customers). Based on the plaintiff's testimony that the tractor could have ploughed 10 acres of land at Kshs 3000/= per acre, it is submitted that the plaintiff lost, on average, Kshs.30,000/= per day from the date of delivery of the tractor to date and that the loss continues to accrue at the same rate.

Although the plaintiff's claim is in the nature of special damages, and as such requires strict proof, it is contended that in leasing or hiring out a tractor, no receipts are normally issued. That practice, is said to have made it not possible for the plaintiff to produce any documentary evidence to show the loss of income he suffered. Contending that the evidence adduced suffices to prove the plaintiff's claim on a balance of probabilities, it is submitted that the plaintiff is entitled to Kshs.43,260,000/= as at 13<sup>th</sup> December, 2013 and that the sum continues to accrue at the rate of Kshs.30,000/= daily.

In support of the plaintiff's case, reference is made to **Virani T/A Kisumu Beach Resort v. Phoenix of East Africa assurance Co. Ltd** (2004) 2 KLR 269-280 and **Moses Jomo Olengeben v. Samson Masea & another C.A NO.29 of 2004** (unreported) where it was underscored that proof of special damages depends on the circumstances generating the loss in question.

On behalf of the defendant, it is submitted that there is no evidence capable of supporting the plaintiff's contention that the parties agreed that the defendant should deliver the registration number plates and logbook within one (1) month from the date of purchase; that the evidence on record supports the defendant's defence and contention that the tractor that was sold was used and unregistered. Further that the defendant's evidence supports the defendant's contention that at the time of entering into the sale agreement, the defendant informed the plaintiff that the tractor was unregistered and that the defendant was not holding the logbook and number plates. The plaintiff is said to have purchased the tractor as used and unregistered and taken delivery of the same as such.

The defendant argues that the plaintiff having purchased the tractor as used and unregistered and taken possession of the same as such is estopped from raising issues concerning its unregistered status.

Blaming the failure to avail the registration documents on a third party, i.e. Kenya Revenue Authority, the defendant explains that it promptly applied to the Registrar of Motor vehicles for the registration of the tractor and issuance of the registration documents with intent to transmit them to the plaintiff. However, the third Party failed to register the tractor and to issue the requisite registration documents within a reasonable time and at all.

In view of the foregoing, it is submitted that the defendant is not guilty of any act or omissions concerning the registration of the tractor and issuance and delivery of the logbook and number plates.

On whether the plaintiff suffered loss, it is submitted that there was no legal basis for the plaintiff's failure to use the tractor to plough and work on his land; that section 9(1) of the Traffic Act only prohibits use of a motor vehicle on a road and not in a farm. Further that the plaintiff's claim for Kshs.30,000/= per day is a claim for special damages and as such needed to be specifically pleaded and proved by production of evidence such as agreements for hire of tractors, invoices issued by the owners of the tractors hired and/or receipts to confirm payment of hire charges of Kshs. 30,000/= per day. The plaintiff is faulted for having failed to produce any evidence to prove that he would have hired out the tractor to third parties and earned Kshs. 30,000/= per day.

To prove the alleged loss, it is submitted that, the plaintiff needed to produce expert reports by an

Agricultural Economist on acreage that the suit tractor could plough, the cost of ploughing each acre, the gross earnings and the net earnings per day and/or evidence of earnings by persons with similar models of tractors; that in the circumstances of this case, the plaintiff did not tender any evidence to demonstrate that he hired other tractors to plough his land or that he could have hired out the tractor to third parties all year round.

It is pointed out that the plaintiffs witness admitted that it would not have been possible to hire out the tractor through out the year because ploughing and use of tractors is seasonal. The court is urged to take judicial notice of that fact.

In view of the foregoing, it is submitted that the plaintiff has not proved the special damages he seeks to recover. Further that the plaintiff failed to take any reasonable steps to mitigate the loss he allegedly sustained. The defendant contends that the plaintiff should have returned the suit tractor to the defendant and asked for a refund of the purchase price or a replacement of the tractor. His conduct of waiting indefinitely and lodging huge claims for recovery of damages allegedly suffered for breach of the contract described as not being the conduct of a prudent man or a person who was indeed needed not make use of the tractor.

As for the plaintiffs prayer for interest on the alleged special damages, it is submitted that awarding that claim would be unjust and inequitable because account will not have been taken of the period for the delivery of the logbook and that it will amount to awarding interest for loss and damage that is still continuing.

In support of the defendant's submission, reference was made to the following authorities:- **Ouma v. Nairobi City Council (1976-80) 1 KLR 375 at 385, Shabani v. City Council of Nairobi (1985) KLR 516 at 517; Kiptoo v. Attorney General (2010) 1 E.A 200 at 201; Nairobi Civil Appeal No.283 of 1996-David Bagine v. Martin Bundi; Ryce Motors Limited & Another v. Muroki (1995-98) E.A 363; NBC Holding Corporation v. Mrecha (2000) 1 E.A 174 and Hahn v. Singh (1985) KLR 716 at 717.**

From the pleadings herein and the submissions by the respective parties, the issues for determination are:-

1. Whether the defendant is in breach of its contractual obligations to the plaintiff? If yes,
2. Whether the plaintiff has proved his claim for loss of user?
3. What order(s) should the court make?

As concerns the first issue, the plaintiff asserts that the defendant breached its contractual obligations to him by failing to avail the essential registration number plate and log book within the agreed time and at all. He contends that by entering into the sale agreement herein, the defendant gave the impression or representation that it was seized of the mandate to sell, transfer and confer title over and in respect of the suit property.

The plaintiff blames the defendant for having failed to take any steps or put any diligent efforts to ensure the registration of the suit property as required by law. The defendant having admitted that it was duty bound to register the suit property and avail the registration documents to the plaintiff. It is argued that, by failing to register the motor vehicle and avail the registration documents within the agreed time or within a reasonable time, the defendant breached and/or violated both the express and the implied terms of the contract. In this regard reference is made to Section 14 of the Sale of Goods Act, Chapter 31 of the Laws of Kenya.

The defendant denies being guilty of material non disclosure of information or having promised to avail the registration documents in one month as alleged. The contention is that the plaintiff knew that the tractor he was buying was unregistered and took it as such. Whilst acknowledging its duty to register the tractor, the defendant blames the Registrar of Motor Vehicles for the delay in registration of the suit

property.

There being no written agreement detailing the contractual obligations of the parties, beyond the agreed purchase price and delivery of the tractor, to appreciate the obligations of the parties thereto one has to be guided by the general provisions of the Sale of Goods Act, in particular Section 14 thereof which provides as follows:-

**"Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:**

**Provided that nothing in this section shall affect the law relating to Corporations."**

Section 12 thereof provides as follows:-

**"12(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of essence of a contract of sale**

**(2) whether any other stipulation as to time is of essence of the contract or not depends on the terms of the contract." (emphasis supplied).**

In the instant case, the plaintiff agreed to take possession of the suit tractor before it was registered. While entering into the agreement, he knew that the tractor was unregistered. That fact is acknowledged in his testimony and proved by the evidence he adduced in court.

There being no documentary evidence of that fact this court takes note of the provisions of Section 107 of the Evidence Act which places the burden of prove of existence of facts on basis of which he desires the court to give judgment in his favour. I also take note of Section 3(4) thereof which provides:-

**"A fact is not proved when it is neither proved nor disproved."**

Related to the issue of breach of contract is the plaintiff's contention that the defendant breached implied conditions and warranties in the contract of sale. In this regard, the plaintiff contends that the defendant gave the impression and/or representation that it was seized of the mandate to sell, transfer and indeed confer title over the suit property. According to the plaintiff, to meet its contractual obligations, the defendant must have had the capacity to transfer the tractor and all the attendant rights which include issuance of the Registration Number plate and the attendant Log Book as such documents underline ownership of the suit tractor.

I have read and considered the foregoing contention and the evidence adduced in this case, I am unable to agree with the plaintiff that the defendant breached any of the conditions and/or warranties implied in a contract of sale, under section 14 of the Sale of Goods Act. The Said Section provides as follows:-

**"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:-**

- a) an implied condition on the part of the seller that in the case of sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;**
- b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;**
- c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."**

Although the plaintiff contends that the defendant breached the foregoing conditions and warranties which are implied in all contracts of sale of goods, unless the parties have expressed a contrary intention, he has not led any evidence capable of proving that the defendant had no right to sell the tractor or that he has been prevented from having quiet possession of the tractor. The plaintiff has also not proved that the suit property was not free of any encumbrance in favour of any third party.

Be that as it may, upon review of the evidence adduced in this case, I find as a fact that the defendant had agreed to facilitate the registration of the tractor within a reasonable time. Under Section 56 of the Sale of Goods Act, the issue as regards what is reasonable time is a question of fact.

In determining whether the Defendant fulfilled its contractual obligation to register the tractor in reasonable time, I take note of the fact that the property required to be registered before it could be lawfully used on the Kenyan roads. I refer to Section 4 as read with Section 12 of the Traffic Act, Chapter 403, Laws of Kenya.

Under Section 4 of the Traffic Act, a tractor is classified as a motor vehicle. Section 12, on the other hand, prohibits use on the road of a motor vehicle or trailer registered under the Act or driven under the authority of a general dealer's licence unless there is fixed thereto in the prescribed manner the prescribed number of identification plates of the prescribed design and colour on which is inscribed the identification mark of the vehicle or of the general dealer's license.

Concerning the defendant's argument that the law does not prohibit the use of an unlicensed motor vehicle on the farm, I agree with the plaintiffs submissions that the tractor could not be restricted to the farm. To perform the intended purpose, especially the intended hiring out, it must of necessity be driven on the road. Such use of the suit property is prohibited by Section 9 of the Traffic Act.

Having found that it could not have been the intention of the parties that the tractor was to be confined to the farm and that it would be unlawful to drive the tractor on the road without the requisite registration particulars, to give business sense to the contract entered between the parties herein, I infer that both parties agreed that the tractor would be registered within a reasonable time.

As pointed out above, the question as to what reasonable time is a question of fact to be determined based on the circumstances of each particular case.

In the circumstances of this case, although there is no evidence that the parties had agreed that the registration documents be availed within one month of delivery of the tractor, I find the unexplained delay in registration of the suit property, of nearly two years, is unduly unreasonable.

Although the defendant claims to have put efforts to register the suit property, no evidence of such effort was produced. For instance, the defendant did not produce any evidence of payment for the registration of the suit property or evidence of any follow up of the alleged application for registration. If blame is being shifted to KRA, then I would expect the defendant to have sought to enjoin it as a 3rd party so as to pass on liability in any event.

In view of the foregoing, my answer to question (1) above is in the affirmative.

As for question 2; counsel for the defendant has submitted that the claim for Kshs.30,000/= per day with effect from 29th December, 2009 is a claim for special damages and, as such, it needed to be specifically pleaded and proved.

Contending that the plaintiff did not lead any evidence to prove that he hired other tractors to plough his land at a cost of Kshs. 30,000/= a day or to prove that he would have earned Kshs. 30,000/= per day by hiring out the tractor, the defendant argues that all what the plaintiff has done is to write down the particulars of special damages and thrown them at the head of the court saying:-

***"I have suffered loss of user and/or profits at the rate of Kshs.30,000/= per day, I ask you to***

***award me the sum."***

The defendant has also blamed the plaintiff for failing to mitigate his losses. In this regard, the defendant argues that the plaintiff had a duty to take all reasonable steps to mitigate the losses he has allegedly sustained. In the circumstances of this case, the defendant argues that the plaintiff should have returned the suit property to the defendant and claimed for refund or replacement of the tractor.

In support of the foregoing arguments, the defendant cited many cases including but not limited to **David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996 (1997)eKLR** where the Court of Appeal observed:-

**"It has been held time and again by this Court that Special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Shabhani v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Ali Shabhani v. City Council of Nairobi (1982-88) 1 KAR at page 684:**

**"...Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. In Bonharm Carter vs. Hyde Park Hotel Limited (1948) 64 TLR 177 thus:**

**"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so 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." ..... We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can..."**

Although the plaintiff did not produce any documentary evidence to prove his claim for loss of user, in his written submissions it is contended that his oral evidence that a tractor can plough 10 acres at the rate of Kshs. 3000/= per acre sufficed to prove his claim for loss of user on a balance of probabilities. In defence of the plaintiffs failure to produce any documentary evidence to prove that he incurred the loss complained of, it is submitted that ordinarily no such documents are produced; and that, in any event, the plaintiff evidence of loss was not challenged or controverted. Reliance was made on **Virani t/a Kisumu Reach Resort V. Phoenix of East Africa Assurance Company Ltd (2004) 2 KLR 269** and **Civil Appeal No. 29 of 2004 Moses Jomo Olengeben v. Samson Masea & Another** (unreported) where the Court of Appeal held:-

**"...What amounts to strict proof depends on the circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done."**

In the circumstances of this case, there is no doubt that the plaintiff was prevented from making full use of the suit property, if at all not any use of it. The sole issue for determination is whether the evidence he produced sufficed to prove the pleaded damages.

In determining this question, I begin by taking judicial notice that the business for which the tractor was acquired was seasonal one. I also take judicial notice that it was impossible for the tractor to have been used on daily basis either because of the seasonal nature of the business or because of mechanical break down. So for the plaintiff to prove that he incurred the pleaded loss, it was imperative for him to produce receipts for the actual loss he suffered by hiring tractors to plough his shamba and/or a statement of income generated from use of tractors by persons in such a business. Such a statement, in my view, may assist the court to determine what loss the plaintiff sustained, albeit as an estimate thereof. In my view, such was the standard of proof contemplated by the Court of Appeal in **Virani case supra**. The plaintiff having failed to lead such evidence, his claim for loss user cannot be said to have been strictly proved as by law required.

As concerns the plaintiff's failure to mitigate his losses, I agree with the defendant's submissions that the plaintiff owed himself a duty to mitigate his losses. In this regard see **Kiptoo v. Attorney General (2010)1 EA 201** where the Court of Appeal held:-

**"The principle of law guiding mitigation of losses is that it is the duty of the plaintiff to take all reasonable steps to mitigate his loss he has sustained consequent upon the wrongful act in respect of which he sues and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately the plaintiff realizes that an interest of his has been injured by breach of contract or a tort...."**

Having failed to mitigate his loss by either returning the useless tractor and claiming a refund, the plaintiff cannot be heard to say that he is entitled to Kshs.43,260,000/= for loss of user.

Since the plaintiff has failed to prove his claim for loss of user, it will be superfluous to consider his claim for interest as it is embedded in that claim.

Regarding the order(s) that this court should make, it is noteworthy that the defendant admitted it was and it is obliged to avail the documents sought to the plaintiff and urged the court to give it 2 to 3 months to avail the documents.

Since the defendant acknowledges that it has a duty to provide the plaintiff with the documents sought, the only question which arises is whether the defendant should be given the time requested in order to register and supply the document.

In determining that question, I take note that the plaintiff has for a long period of time been denied the full use and enjoyment of the suit property. The secondly, the defendant should not have waited to be sued in order to fulfil its admitted contractual obligations to the plaintiff. Besides there is no explanation as to why the defendant requires 2 or 3 months to do what it should have done long time ago, even without any compelling orders.

The upshot of the foregoing is that the defendant's plea for 2-3 months to register the motor vehicle and avail the registration documents to the plaintiff fails. Consequently, the defendant is ordered to forthwith and immediately the number plate, logbook and attendant documents as prayed.

Each party bears its own costs.

**Delivered and dated this 24th day of September 2014 at Nakuru**

**H. A OMONDI**

**JUDGE**