



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 100 OF 2013

GLOBAL VEHICLES KENYA LIMITED.....PLAINTIFF

-V E R S U S-

LENANA ROAD MOTORS.....DEFENDANT

JUDGMENT

1. The Plaintiff is in the business of importing cars for sale. There has been an association between Plaintiff and Defendant that seems to have started in the year 2011 whereby the Plaintiff hands over vehicles to Defendant, for Defendant to sell and the Log Book would be released to the Defendant once Defendant made payment to Plaintiff of the agreed amount. This trading was represented by agreement entitled “**Agreement For Sale of Motor Vehicle.**” The agreement provided registration number; the agreed price; that the physical possession of the vehicle would be handed over to Defendant once the agreement was signed; that the Log Book was to be surrendered to the Defendant on payment of agreed price; and that if there was no payment of the purchase price Plaintiff had the right to repossess the vehicle. It is important to note that there was no time limit provided for the payment of the purchase price by the Defendant in that agreement.

2. Parties entered into a separate agreement dated 25th August 2013 which is entitled “Debt Collection Agreement.” The recital of one of the Clauses as follows will assist-

“DEBT SETTLEMENT AGREEMENT

AN AGREEMENT OF SALE made this 25th day of Aug. 2013 BETWEEN GLOBAL VEHICLES KENYA LTD (hereafter referred to as the ‘CREDITOR’ which expression shall where the context so admits include their personal representative, Administrator executors and assign) of the one part AND LENANA ROAD MOTORS (herein referred as the ‘DEBTOR’ which expression shall where the context so admits include their personal representatives administrators executors and assigns) of the other part

AND WHEREAS the Creditor acknowledges supplying the Debtor with motor vehicles for sale and remittance of the monies after the sale to the Creditor and the Debtor admits having received the said motor vehicles and sold them to third parties and has not remitted a Kshs. 20,615,000.00 which is hereby demanded”

3. That agreement provided for the amount of Kshs. 20,615,000/- to be paid by instalments starting 20th September 2013 and ending August 2015. The agreement has a default Clause that if any one instalment

was unpaid the entire sum would be due.

4. The Plaintiff filed this claim before even the first such instalment was due and despite that fact there was a prayer in the Plaintiff that the Defendant had defaulted. By its Plaintiff seeks judgment for-

- **Declaration of Defendant's breach of contract.**
- **Kshs. 20,615,000/-**
- **That in default of settlement of the judgment sum the Court do order Plaintiff to repossess of 22 cars whose registration numbers are enumerated in the Plaintiff.**

5. The Defendant denied Plaintiff's claim and averred that although it had fully paid for some of the cars Plaintiff had failed to release their respective Log books. The Defendant did not however Counter-Claim for the release of those Log Books.

6. In short I would describe Plaintiff's case as muddled. The oral evidence and documentary evidence was muddled. There are two issues that will determine this case. Firstly is whether the Plaintiff has proved its claim for the debt of Kshs. 20,615,000/-. Secondly is whether Plaintiff is entitled to the release of the motor vehicles enumerated in the Plaintiff.

7. On the first issue the debt is represented by the agreement, that is Plaintiff Exhibit No. 1, dated 25th August 2013. That agreement which in part is reproduced above is between two entities, the Plaintiff and Defendant. The agreement however was signed by Manuwan Yusuf on behalf of Plaintiff and Moses Wairagu on behalf of Defendant. Moses Wairagu gave evidence on behalf of Defendant and this is what he stated in respect to that agreement-

"The agreement dated 25th August 2013. I signed it in Mombasa with Mr. Yusuf. We agreed that we would have it signed by our co-directors and be sealed by Company seal and we were to agree on the final figure. He confused me he said "sign then it will be signed by your partner (Director) later."

8. The Defendant is a Limited Liability Company. The position in law in respect to a Limited Liability Company is as was stated in the case VALENTINE OPIYO & ANOTHER -Vs- MASLINE ADHIAMBO T/A ELLYAMS ENTERPRISES [2014]eKLR where the Court stated-

"The Court of Appeal in the case of Victor Mabachi & Anor v Nurturn Bates Ltd NRB CA Civil Appeal No. 247 of 2005 [2013]eKLR held that, "[A Company] as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

9. The defence witness was clear that he signed that agreement acknowledging Defendant owed Plaintiff Kshs. 20,615,000/- without the authority of the Board of the Defendant Company since is co-director was unaware of the same. To quote a pertinent case is KENYA COMMERCIAL BANK LIMITED -Vs- STAGE COACH MANAGEMENT [2014]eKLR where the Judge referring to another decision stated-

"In Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No. 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are, by the articles, vested in the Board of Directors,"

10. The Defendant witness signed the acknowledgment of the debt without the authority of the Board of the Defendant Company. It follows he had no authority to give an undertaking on behalf of Defendant Company to repay that debt. On similar grounds Yusuf, who signed on behalf of Plaintiff also failed to place a Company seal next to his signature which in essence showed that he did not have the authority of the Plaintiff's Board of Directors to sign the agreement. It follows that as far as the Plaintiff and Defendant Companies are concerned that agreement has not legal effect. It is unenforceable either on behalf of the Plaintiff's Company or against the Defendant's Company. It essentially seems to be an

agreement between Yusuf and Wairagu and not the Plaintiff and Defendant Companies.

11. In view of the above finding the first issue is in the negative. Plaintiff did not prove on a balance of probability the debt of Kshs. 20,615,000/- was owed by the Defendant Company. That claim fails.

12. The Plaintiff in its Plaint listed 21 motor vehicles in total which it sought an order of the Court for their repossession. The Plaintiff's witness when asked by the Court where the Log Books of those motor vehicles were he responded-

“I don't have any Log Book in this Court.”

13. The Plaintiff essentially relied on five photo copies of Log Books of five vehicles. Plaintiff did not produce original Log Books of the twenty one (21) motor vehicles it seeks to repossess and at worse failed to produce Search of those vehicles to prove they are registered in Plaintiff's name.

14. In my view Plaintiff failed to prove its entitlement to repossess those motor vehicles because of failure to prove ownership. In all probability those vehicles may be registered, owned and possessed by third parties not before Court. If the Court was to order as sought by Plaintiff the release of those vehicles to the Plaintiff without confirmation of their ownership the right of other parties not before Court may be affected without affording such ones the right to be heard. That would be against the rule of natural justice *audi alteram partem*.

15. My finding is that Plaintiff has failed to prove on a balance of probability that it has a right to repossess those twenty one (21) motor vehicles.

16. The Plaintiff having failed to prove the two issues above this case must and does fail. It is dismissed with costs to Defendant.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE