REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 400 of 2006

PRAKASH S. SHAH.....PLAINTIFF

-VERSUS-

NIC BANK LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff, Prakash S. Shah commenced the suit in this matter against the Defendant, NIC Bank Limited by way of a Plaint dated 18th July 2006 and filed in court on 25th July 2006.

2. In the Plaint, the Plaintiff averred that on or about 21st January 2000, he entered into a written agreement with the Defendant referenced 40/014556/17 under which the Plaintiff agreed to purchase and the Defendant agreed to sell a Mercedes Benz E230 motor vehicle with registration number KAG 606V for the sum of Kshs. 2,300,000/- only. At the time of the agreement, the motor vehicle was registered in the joint names of the Defendant and one Rosaline NjeriMacharia. It was a fundamental term of the agreement that the Defendant would effect transfer of ownership of the motor vehicle to the Plaintiff. The Plaintiff duly paid the full purchase price and the Defendant delivered possession of the motor vehicle to the Plaintiff on or about 10th February 200. However, the Defendant had since failed to effect transfer of ownership of the motor vehicle to the Plaintiff's name. This failure constrained the Plaintiff to rescind the agreement as he never got legal ownership of the motor vehicle and could not make any use of the vehicle.

3. The Plaintiff's claim against the Defendant is for the principal sum of Kshs. 2,300,000/- together with interest at court rate from the date of payment of the purchase price until the date of filing the suit in this matter which is computed at Kshs. 1,794,000/-. The Plaintiff's aggregate claim is therefore for Kshs. 4,094,000/- together with interest thereon from the date of filing suit until the date of payment in full. The Plaintiff further claims costs of the suit together with interest thereon.

4. The Defendant entered appearance on 9th August 2006 and filed a statement of Defence on 24th August 2006. In the statement of defence, the Defendant states that sale of the motor vehicle was on an "as is where is" basis. It avers that the logbook was held by Kenya Revenue Authority due to non-payment of duty, a fact that was brought to the attention of the Plaintiff as a pre-condition of sale. The Defendant avers further that it is ready and willing to provide good title to the motor vehicle and that any purported rescission of the agreement is null and void as the Plaintiff continues to enjoy full use of the car. Further, the vehicle has since depreciated in value and the sums claimed are not a true reflection of the present value of the vehicle. The Defendant would therefore set off the depreciated value from any sums found due.

5. The parties agreed on issues for determination and filed an agreed statement of issues on 30th October 2007. They also filed and exchanged bundles of documents and witness statements in preparation for the hearing of the suit.

6. At the hearing, each party called one witness. For the Plaintiff, the Plaintiff himself gave evidence while the Defendant called Lillian Sogo, a Legal Officer with the Bank.

7. In his evidence, Mr. Prakash Shah stated that his company Automobile Warehouse Limited was a motor dealer which gave NIC Bank Limited a lot of asset finance business. During a meeting between him and NIC sometime in December 1999, a director of the Plaintiff Mr. Hecle expressed an interest in selling to him a motor vehicle KAG 606V from the bank. The parties exchanged letters on the price and agreed on a price of Kshs. 2.3 Million which the Plaintiff paid in full by liquidating a fixed deposit facility he had with the Bank. The motor vehicle was sold on "as is where is" basis which the Plaintiff understood to mean that the mechanical condition of the car was not guaranteed. At the time of the purchase he was given a copy of the logbook but not the original. The copy showed that the 1st owner of the motor vehicle was a Mr. N.M. Modisi. The next owner was David M. Macharia while the current owner was Rosaline NjeriMacharia and NIC Bank Limited. He was never given the original logbook thereafter in spite of demanding for it severally. He was told the document would follow in due course at the time of collecting the motor vehicle. On 10th February 2000, he was given a transfer form in his name signed by NIC Bank Limited but not the other co-owner. He could not however effect transfer as the original logbook had to be submitted with the transfer to the Registrar of Motor Vehicle. Since then, the original had never been availed. Not even after his numerous visits to the bank and letters of complaint to the Bank on 29th July 2002, 27th August 2003 and 17th September 2003.

8. Mr. Shah testified further that sometime in the year 2004, he went to the Bank and was given a second logbook bearing the name of Mr. Modisi and a rubber stamp from Kenya Revenue Authority blocking transfer of ownership. That logbook was not capable of effecting transfer as customs authority was required for such transfer which authority could only be given after payment of duty for the car. The Bank had never informed him that duty on the car had never been paid. On 8th June 2005, the bank wrote stating that it was in the process of paying duty for the vehicle. A further letter from the Defendant written on 12th June 2006 stated that they were in the process of finalizing their obligation in respect of the logbook issue but the same was still never availed. Due to the lack of logbook, the Plaintiff was unable to make use of the car as he could not obtain a road licence and insurance. He could also not re-sell the motor vehicle. He therefore urged the court to order that the Defendant refunds the purchase price together with interest and aslo costs of the suit.

9. On cross examination by Mr. Mogere for the Defendant, Mr. Shah agreed that part of the purchase price for the vehicle was paid by his company. He stated further that he understood the statement "as is where is" to mean that the vehicle was sold at the place it was located and in the condition it was in. He had not sought any further clarification of the statement from the Defendant. He had also not returned the motor vehicle but had rescinded the agreement. The Defendant had also refused to collect the vehicle.

10. On re-examination, Mr. Shah stated that he could not return the vehicle as it had no insurance cover.

11. For the Defendant, Ms Lillian Sogo testified that motor vehicle KAG 606V had been financed by

the Defendant but had been repossessed by the bank after the customer Ms. Rosaline NjeriMacharia defaulted in repaying the facility. Thereafter, the same was sold to the Plaintiff on "as is where is" terms. The logbook was however held by Kenya Revenue Authority due to non-payment of duty amounting to Kshs. 339,356/-. This sum had since been paid by the Defendant and its agents were pursuing issuance of a duplicate logbook. The vehicle was in possession of the Plaintiff.

12. In cross-examination by counsel for the Plaintiff Mr. Sarvia, Ms. Sogo stated that "as is where is" basis meant that the vehicle was being sold in the condition it was in, including its title and that the purchaser was expected to conduct the necessary due diligence. She admitted that when the motor vehicle was sold the Plaintiff was only given a transfer document and a copy of the logbook. The Bank was however trying to get the vehicle transferred to the Plaintiff using its agents. She could not confirm the averment in paragraph 3 of the defence to the effect that the Plaintiff had, at the time of the agreement for sale of the motor vehicle, full knowledge that the logbook was held by the Kenya Revenue Authority. Shown a letter from the Defendant to the Registrar of the motor vehicle dated 21st January 2000, Ms. Sogo confirmed that at the time of sale of the motor vehicle the logbook was held by the hirer. She could not tell whether the Plaintiff knew the logbook was with Kenya Revenue Authority at the time of sale of the motor vehicle. She agreed that paragraph 4 of the defence was not true in view of this evidence. She further agreed that no transfer could be effected unless the signature of Mrs. Macharia was appended in the transfer form given to the Plaintiff. It was also not possible for the vehicle to be transferred without an original logbook and a signed transfer form. On the two versions of the logbook given to the Plaintiff, she could not tell which was genuine. She agreed further that the Plaintiff could not get insurance but insisted that he could still make use of the vehicle. She confirmed that failure to avail the logbook by the Defendant was a fundamental breach of contract as which could not be waived.

13. Counsel for each party filed written submissions which I have considered in the course of compiling this judgment.

14. I have carefully considered the pleadings and the evidence placed before me. I have also considered the submissions by counsel and can now make my view in this matter.

15. The statement of agreed issues filed by the parties on 30th October fairly captures the issues arising for my determination in this matter. My following analysis will be guided by that statement.

16. The first issueis whether there was a legally binding agreement between the Plaintiff and the Defendant for the sale of motor vehicle registration number KAG 606V. My take on this issue is that Paragraphs 3 and 4 of the Plaint expressly aver that the parties entered into an agreement on or about 21st January 2000 referenced 40/014556/7 through which the Defendant agreed to sell and the Plaintiff agreed to purchase the motor vehicle KAG 606V at the price of Kshs. 2,300,000/-. On the other hand, Paragraph 3 of the Defence explicitly states that the Defendant admits paragraphs 3 and 4 of the Plaint save that the motor vehicle was sold on "as is where is" basis. The paragraph further claims that the Plaintiff was aware of the fact that at the time of sale of the motor vehicle, the logbook was held by Kenya Revenue Authority. In my view, the Defendant having admitted paragraph 3 and 4 of the Plaint effectively acknowledged that there was a legally binding agreement between the partiesfor the sale of the motor vehicle in the terms of the letter of 21stJanuary 2000. Existence of the agreement cannot further be doubted in view of the fact that both parties exhibited the letter of 14th January 2000 containing the terms and condition of sale as evidence and placed reliance upon it. I have perused the letter and can confirm that it constituted the agreement between the parties with regard to sale of the motor vehicle in this suit.

17. As regards the terms and conditions of the said agreement, I find that these were contained in the letter of 14th January 2000 which provided as follows:

"We are pleased to advise that after special consideration, we are willing to accept Kshs. 2,300,000/-. However, we advise that we are prepared to sell to whoever comes first, with a similar or higher offer, within seven days from the date of this letter. Please let us have your payment (by cash or bank draft) within the stipulated period, failure to which we shall move to accept the next highest offer without

further reference to you. Please note that the vehicles/machinery/equipment are sold without guarantee and on "as is where is" basis"

I need not add anything to the terms of sale which are explicitly rendered in the letter as reproduced above.

18. On the issue of whether the vehicle was sold on "as is where is" basis, the letter of 14th January 2012 explicitly answers the same in the affirmative. The evidence adduced by both parties did not also contest this term of sale. However, what was in contention was the import of the phrase, with the Plaintiff taking the view that the phrase meant that the vehicle was sold at the place and in the condition it was. On its part, the Defendant sought to hold the view that over and above the meaning as relates to the condition and place, the phrase "as is where is" also covered the aspect of title to the vehicle. My view is that the phrase "as is where is" is, as ordinarily understood as a term of sale, connotes that the item is sold at the location it is placed and in the condition the purchaser finds it. It does not in any way connote that documents of title to the item under purchase is not guaranteed. Evidently, the above wide interpretation of "as is where is" was employed by the Defendant to engineer a defence that it was not obligated to provide the logbook for the motor vehicle. In my view, not only is this defence a desperate clutch on straws but the same is dangerous as it constitutes plain admission by the Plaintiff that it was selling an item it had no title to. Section 23 of the Sale of Goods Act, cap 31, is explicit that where goods are sold by a person who is not the owner, the buyer does not acquire any better title than the seller. It is therefore contemplated that title to goods is a fundamental attribute of any successful sale. No sale can be successful if no title is held whether or not it is christened sale on "as is where is" basis. The Defendant's interpretation seeking to include title to the motor vehicle in the present matter is therefore devoid of merit.

19. On whether the Plaintiff was made aware of the whereabouts of the logbook to the vehicle, the Defendant's witness admitted that the Defendant sold the motor vehicle in circumstances in which it did not know the whereabouts of the logbook. She could not tell whether it was held by the hirer or had been confiscated by the Kenya Revenue Authority. She further admitted that paragraph 3 of the Defence was not true as far as the statement that the Plaintiff knew where the logbook was at the time of the agreement. If the Defendant itself was not aware of where the logbook was, it would be stretching by anyone's imagination to even infer that the Plaintiff would have known or would have been made aware of where the logbook was. From my analysis of the evidence tendered, I do not want to imagine that the Defendant had agreed to finance a motor vehicle over which duty had not been paid and in respect of which not formal exemption from paying duty had been granted. That would be simply shocking coming from a banker. However, I cannot help but shudder at the farce and circus surrounding the existence of two versions of logbooks and transfer forms in relation to the same motor vehicle and which the Defendant was courageous enough to hand over to the Plaintiff. The Defendant's conduct in this sale exhibits lack of due diligence and circumspection as well as misrepresentation in relation to the fate of the logbook, which is rather appalling. I find it quite inimical to the basic prudential and ethical standards one would associate with a banker of the repute of the Defendant. I dare say no more!

20. On the issues of whether the Defendant had legal capacity to sell the vehicle and transfer ownership of the motor vehicle to the Defendant, it is not contested that the Defendant held a chattels mortgage over the motor vehicle and that there having been default, the Defendant was entitled to enforce the security by selling the motor vehicle. It therefor had capacity to sell. However, the capacity to complete sale of the motor vehicle was substantially impaired by two deficiencies that we have already alluded to above. Firstly, the non-payment of duty for the motor vehicle by the hirer and embossment of non-transferability of the vehicle on the logbook should have dissuaded the Defendant from agreeing to finance the motor vehicle. A prudent banker would, at the minimum, required the hirer to resolve the issue of duty before entering into the hire purchase agreement with the Defendant. Secondly, the failure to know the whereabouts of the logbook ipso facto meant that the Defendant was not in a position to effect a successful transfer of ownership of the motor vehicle. This should again, have informed the Defendant against entering into a sale agreement it knew it could not complete. That from the year 2000 to-date the Defendant has been unable to resolve these two issues and obtain a clean logbook to the motor vehicle makes it obvious that it was not in a position to deliver ownership to the Plaintiff as promised. This

failure, as the Defendant admitted, amounted to breach of a fundamental term of the contract which the Plaintiff can never be said to have waived.

21. The next issue I need to consider is whether the Plaintiff was entitled to rescind the agreement and, if yes, whether such rescission was legally binding. The answer to this issue, in my view, does not require much discourse in the light of the chronology of events relating to the sale in this matter. The sheer fact that the parties entered into a sale agreement for the purchase of a motor vehicle in January 2000 which sale is yet to be concluded twelve years later should send an eerie signal that everything went very wrong with the transaction. For all these years, the Defendant has been unable to procure a logbook for the motor vehicle. As a consequence, the Plaintiff has been unable to make any use of the motor vehicle. He cannot even sell it. Without more, this is a case of clear want of consideration for the price the Plaintiff made for the motor vehicle. To expect that the Plaintiff was going to wait indefinitely for the logbook is inequitable in view of the investment he made in the purchase of the motor vehicle. I therefore find strong justification in the move by the Plaintiff to rescind the contract and claim a refund of the price paid for the motor vehicle. As it were, the Defendant in the evidence tendered on its behalf admitted that failure to provide the logbook was a fundamental breach of contract which breach entitled the Plaintiff to terminate the contract (see. ***Hassan Mbarak vs. North Coast Fishermen's Co-operative Society Limited [1995] eKLR)***.

22. Ultimately, the question of whether the plaintiff is entitled to the reliefs soughtin the Plaint becomes a question of formality in the upshot of the foregoing. The Defendant's witness Ms. Sogo in cross-examination tore up its defence bit by bit leaving no single material defence standing. The suit is essentially admitted and the only defence one can conjure is that the Defendant still needs more time to procure the logbook. That time is itself not determinate. The overriding objective of this court would be trodden upon if the court were to resist grant of the reliefs sought by the Plaintiff.

23. Counsel for the Defendant in their written submissions raise two issues which I feel deserve brief comments. The first the issue raised is whether sale was to the Plaintiff or to his company Automobile Warehouse (Nakuru) Limited. The Defendant argues that the payment for the motor vehicle was made using a cheque made out in the name of the company. There is also correspondence addressed to the company by the Defendant in relation to the sale transaction. In the opinion of counsel, this suit ought to have been brought in the name of the company and not the present Plaintiff in the light of the distinct legal personality espoused in the case of ***Salomom Vs. Salomon [1897]ac 22 (H.L)***. My view on this argument is that the contract of sale in this matter was entered into between the Plaintiff and the Defendant. The letters exchanged by the parties particularly the letter of 11th January 2000 are addressed to the Plaintiff in person, and not as a director of Automobile Warehouse (NKU) Limited. The sheer fact that he used his company's cheque to pay part of the purchase price is neither here nor there. The sale could not have been vitiated by use of a third party cheque to effect payment. It is common knowledge that a party may choose to make payment by any mode including a third party cheque especially if the third party is a company to which it is a director and shareholder.

24. The second issue raised is that the Plaintiff took no action to mitigate his loss since he purchased the motor vehicle. The Plaintiff's admission on cross-examination that he has never returned the motor vehicle is used to support the contention that he is not entitled to the damages claimed. The Plaintiff had a duty to mitigate which duty he did not fulfill. Gallant as this argument sounds, I am not convinced that a return of the motor vehicle would have in any material way mitigated the loss if the parties would have still been waiting for a logbook to be procured by the Defendant. The Defendant does not state whether it would have refunded the purchase price earlier had the motor vehicle been returned. The predicament faced by the Plaintiff of inability to drive the motor vehicle due to inability to procure the documentation and insurance cover mandated by the law for all road users further explains why this argument does not go far. The alternative way suggested of towing the car back to the Defendant's premises is to me one which the Defendant itself should now exercise as it has completely failed to obtain the logbook. Taking back the motor vehicle would indeed be a mitigating step on its part.

25. In the result, I am minded to make the finding that the Plaintiff has, on a balance of probabilities, proved its case against the Defendant and to, accordingly, enter judgment in favour of the Plaintiff against

the Defendant for:

a) Kshs. 4,094,000/-;

b) Interest at court rates on (a) above from the date of filing suit until payment in full;

c) Costs of the suit and interest at court rates from the date of filing suit until payment in full.

26. **I further direct that the Plaintiff do permit the Defendant to unconditionally collect Motor Vehicle Registration Number KAG 606V from its current location at the cost and convenience of the Defendant.**

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2012

J.M. MUTAVA
JUDGE