REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 916 OF 2009

ATIENO OUKO ONYONYI .....PLAINTIFF

VERSUS

ALFA MOTORS LIMITED.....DEFENDANT

R U L I N G

The Applicant in the Chamber Summons dated 20th May 2010, is the Defendant in this suit. He has brought the application under **Order V1 Rule 13 (1) (a) (b) (c)** and **(d)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, praying that the Plaintiff/Respondents plaint dated 16th December, 2009 be struck out on the ground that the same is frivolous, vexations and an abuse of the process of the court. He prays also that the Respondent be ordered to pay the costs of both the application and the suit.

The application is supported by an affidavit sworn by HARBINDER SINGH BHOGAL, a director of the Defendant. Opposing the application, the Plaintiff/Respondent filed a Replying Affidavit of 36 paragraphs sworn by herself on 5th June, 2010.

The suit sought to be dismissed arises out of a contract of sale under which the Applicant sold to the Respondent a Swaraj Mazda T3500 minibus, which the Respondent alleges to have been unsuitable for the purposes for which it was bought, owing to certain mechanical defects, which, according to the Respondent the Applicant knew or ought to have known to have existed at the time of the contract and by virtue of which the motor vehicle became a liability to the respondent, causing her to incur, *inter alia*, expenses and economic losses. She holds the Applicant liable in damages for fraudulent misrepresentation and breach of contract.

The Applicant's main ground for seeking a dismissal of the Plaintiff/Respondent's suit is that, whereas the contract for sale is not denied, it is apparent, from the facts as set out in the Plaint that the Respondents claim arises purely from a temporary ban imposed by the Government against the importation of Swaraj motor vehicles as pleaded in paragraph 24 of the Plaint, which ban the Applicant contends was put in effect without any basis and was unwarranted, given that the same was lifted on 8th April, 2010. The applicants' position is that the Respondent had no cause to complain either prior to or after the lifting of the ban and the suit is, therefore, an afterthought.

In her Replying Affidavit, the Respondent states that the Defendant's application is an attempt to have a summary trial and to mischievously scuttle the hearing of the suit on merit, which suit had been set down for hearing and a date fixed by consent, for the 23rd December 2010, now past. She depones that her claim for want of merchantable quality of the motor vehicle in question is supported by sound evidence, including, but not limited to, mechanical and quality inspection and report of the Kenya Bureau of Standards which is annexed to the Replying Affidavit as annexture A002. Also the records of repairs and report of ministerial task force which found the subject motor vehicle and other similar ones unroadworthy.

The Respondent appears to have fallen into the Applicant's trap of arguing the merits of the suit in the body of the Replying Affidavit by introducing evidence which would ordinarily be for production at a trial, including the reference to suits filed by other dissatisfied customers, which, not being before this court and are obviously irrelevant for the present purposes. Importantly, however, the Respondent has deponed in the Replying Affidavit that a statement of issues has been drawn up, agreed upon by the parties and duly filed, which in itself implies that the Applicant does acknowledge that the Plaint does raise triable issues. The Respondent depones further that she has filed her list of documents for use at the trial and that the suit is ready for trial on merits.

With leave of the court, the parties herein exchanged and filed written submissions, which together with the authorities cited by each side have been carefully considered. My task, in the application before me is to consider the application and determine whether indeed the Plaint ought to be struck out and the suit dismissed on the ground that the same is:

(i) Scandalous, frivolous or vexatious [Order V1 Rule 13 (1) (b)]

or (ii) it may prejudice, embarrass or delay the fair trial of the action [Order V1 Rule (1) (c)]

or (iii) is otherwise an abuse of the process of the court [Order V1 Rule 13 (1) (d)]

As was stated by the late Madan JA in the celebrated court of Appeal Decision in **D. T. DOBIE & COMPANY (K) LTD –VS- MUCHINA & ANOTHER** [1982] KLR 1, cited herein by the Respondents in their submissions, the power of the court to strike out a pleading should be exercised only after the court has considered all the facts, without, however, embarking on the merits of the case. The court should aim at sustaining rather than terminating a suit, unless it is so weak that it is beyond redemption and incurable by amendment.

It is trite that summary procedure applies only in plain and straight forward cases and that wherever triable issues arise then the suit should proceed to full trial for the calling of evidence. I find that the

Plaint herein raises several triable issues, the main one being fraudulent misrepresentation, upon which the entire claim is founded. Fraud, where alleged cannot be proved otherwise than by evidence at a full trial and the Respondent should be allowed to ventilate her case. It is noted that the lifting of the ban (annexture HJB 3 (a) of applicant's Supporting Affidavit), upon which the applicant relies to refute the Respondent's claim, was conditional upon certain undertakings by the applicant and cannot, in my view be taken as having absolved the applicant of liability as may have arisen prior thereto. Such liability, if any, can only be determined after evidence is taken. I find that the Applicant's written submissions filed herein, together with the authority cited can only gain relevance once evidence has been taken and the trial concluded, as they relate more to the issue whether the Respondent is entitled to the damages claimed, not so much as to whether she has a triable case.

For the above reasons I find that the Plaint is neither scandalous, frivolous nor vexatious, and is unlikely to prejudice, embarrass or delay the trial of the action. Neither is it an abuse of the process of the court. Accordingly the Defendant/Applicant's Chamber Summons is hereby dismissed with costs to the Plaintiff/Respondent.

DATED SIGNED and **DELIVERED** at **NAIROBI** this **9TH** day of **FEBRUARY, 2011**

M. G. MUGO

JUDGE

In the presence of:

Mr. Gathu For the Applicant

Mr. Miyare holding brief for Otieno For the Respondent