



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 42 of 1993

KITUO SERVICES STATION CO. LTD.....PLAINTIFF

VERSUS

MARSHALLS E.A.LTD.....DEFENDANT

JUDGMENT

From the plaintiff's amended plaint and the statement of defence filed by the defendant, the facts of this dispute may be summarized as follows:

In September, 1992 the plaintiff's director approached the defendant, a leading motor vehicle dealer at the time, seeking to purchase a Peugeot 504 salon. The price was indicated as Kshs.709,617.00 out of which the plaintiff paid Kshs.9,617.00 leaving a flat balance of Kshs.700,000.00. The plaintiff obtained finance in the sum of Kshs.639,000.00 from the National Industrial Credit Ltd (NIC) out of which the plaintiff avers Kshs.352,077.00 was paid over to the defendant. Further, the plaintiff took out a comprehensive insurance policy for the motor vehicle.

The dispute erupted in December, 1992 when the plaintiff's director went to collect the vehicle which was at the time registered jointly in its name and that of NIC as KAC 529S. The defendant declined to deliver the vehicle to the plaintiff arguing that the sale price had changed from Kshs.709,617.00 in September, 1992 to Kshs.757,664.00 in December, 1992 – a difference of Kshs.48,047/=.

The plaintiff declined to proceed with the transaction and treated the same as breached hence this suit. The plaintiff seeks three main prayers in the amended plaint, namely:-

- (a) a mandatory injunction to compel the defendant to deliver the vehicle forthwith at the price of Kshs.709,617.00
- (b) a declaration that the withholding of the motor vehicle by the defendant was unlawful and in breach of contract
- (c) general damages for breach of contract.

In defence, the defendant maintains that it is an established practice that the price of a motor vehicle is that ruling at the time of the delivery and that the plaintiff was accordingly notified. That on 26th November, 1992, the defendant issued to the plaintiff a Composite Vehicle Sale Invoice, the basis of a sale contract in respect of motor vehicle sale transaction which the plaintiff refused to accept. It is the defendant's contention that the plaintiff having failed to comply with the conditions precedent, it (the defendant) had the right to hold the motor vehicle in lien

until full payment which as at January, 1993 when this suit was instituted stood at Kshs.954,430.00, Kshs.244,813.00 up from Kshs.709,617.00 which was the ruling price when the plaintiff began the negotiations with the defendant; that there was no written contract of sale.

According to statement of agreed issues, the parties identified the following summarized issues as falling for determination:

1. whether there was a valid contract of sale
2. whether the defendant was bound to sell the motor vehicle to the plaintiff on account of the deposit paid to it
3. whether the plaintiff's failure to execute VSI vitiated the intended sale
4. whether the defendant had any right of lien over the motor vehicle
5. whether the plaintiff is entitled to any of the prayers sought

6. by whom are the costs of the suit payable?

From these issues, the broad single question is whether there was a valid sale of the motor vehicle to the plaintiff.

I may mention before considering these issues that the plaintiff obtained interlocutory orders on 10th March, 1993 restraining the defendant from disposing of the motor vehicle and another compelling the defendant to deliver the motor vehicle to the plaintiff on condition that the plaintiff paid to the defendant the balance of the purchase price and also to execute an undertaking as to damages within 30 days from the date of that order.

The plaintiff defaulted on both conditions and upon application by the defendant, the court set aside the earlier orders. An attempt by the plaintiff to have the setting aside order reviewed was defeated when its application for that was dismissed. That in effect gave the defendant an opportunity to deal with the motor vehicle in question as it pleased.

Hon. Francis John Wanyange Mwangi, the Managing Director of the plaintiff, which was unrepresented at this stage was the only witness for the plaintiff, while Julius Korir, an Administration Manager with the defendant testified on its behalf. The two witnesses basically reiterated the facts summarized in the foregoing paragraphs

I have considered that evidence as well as written submissions by both sides and the two authorities cited by the defendant. This dispute is governed by the provisions of the Sale of Goods Act (Cap 31)(The Act) and the following facts are not in dispute:

1. that there was no form of written contract
2. that the defendant's Sales Representative gave the initial sale price as Kshs.709,617.00
3. that only Kshs. 9,617.00 was received and receipted by the defendant.
4. that the defendant detained the motor vehicle even after registering it in the joint names of the plaintiff and NIC
5. that the defendant was demanding a higher purchase price than that initially intimated
6. that the plaintiff has rejected the new terms

Section 6(1) of the Sale of Goods Act provides that:

“6. (1) A contract for the sale of any good of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.” (Emphasis supplied).

It is therefore not necessary, as contended by the defendant, that in all transactions involving sale of goods there must be a written contract. Part payment with the understanding of further and final payment is sufficient.

The plaintiff paid Kshs.9,617/= as part payment thereby constituting an enforceable contract for the sale of the motor vehicle in question. The main controversy in this matter is on the sale price. The plaintiff contends that he was advised that the price was Kshs.709,617.00 upon which he sought finance and obtained insurance. While conceding that that may have been the position, the defendant argues that in practice the price of a motor vehicle will depend on the ruling price at the time of delivery/purchase (i.e. when the full purchase price is paid).

Section 10 for the Sale of Goods Act provides with regard to ascertainment of the price as follows:

“10. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price; and what is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

The price was fixed at Kshs.709,617/= on the day, in September, 1992 when the plaintiff went to the defendant's car show-room. Indeed if he had kshs.709,617.00 on that day probably he would have driven the motor vehicle away.

When he was ready, having obtained finance some two and a half (2½) months later, he was required to enter into a written contract with the defendant by executing VSI which had detailed terms of the sale, including the ruling price at the date.

It makes reasonable economic sense that in a free market economy for the seller to base his/its price on the value of the day. I am persuaded that the defendant was justified in adjusting the price. Indeed the defendant has averred that as at the time this suit was instituted in January, 1993, the ruling price was Kshs.954,430/= up from Kshs.709,617/= in September, 1992 and Kshs.757,664/= in December, 1992.

In terms of section 19 of the Act property in the motor vehicle had not passed as it was the intention of the parties that the plaintiff would pay the full purchase price before the motor vehicle could be delivered. Section 29 of the Act reads as follows:

“29. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that

is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”
An unpaid seller has a lien on the goods. The defendant lawfully retained the motor vehicle for the price, the plaintiff having paid only KShs.9,617/= Indeed this was the only evidence of payment presented at the hearing.

I turn to the reliefs sought in this matter. In the amended plaint, the plaintiff sought, as indicated earlier, a mandatory injunction to compel the defendant to deliver to him the motor vehicle at the originally agreed price. The plaintiff may have realized that this is untenable as by his own admission he has submitted that motor vehicle is not likely to be available and the type is no longer in production. The plaintiff has instead proposed a refund of the deposit (KShs.9,617/=) at the interest rate of 14.250% from 1992 to 2009 amounting to KShs.94,737/= and a refund of KShs.352,077/= obtained from NIC at 14.250% interest from 1992 to 2009 making KShs.3,447,579.05. Two issues arise from this claim, the most fundamental one being that they were not pleaded or even proved. The defendant cannot be expected at this late stage to challenge the claim. The plaintiff is bound by the amended plaint. Secondly there was no evidence that KShs.352,077/= was indeed disbursed by NIC or paid over to the defendant. The declaration sought is also not available in the light of my finding.

In the result, this suit lacks merit and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 12th day of February, 2010.

W. OUKO
JUDGE