



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 184 OF 2007

AFRIC PAK INTERNATIONAL LTD APPELLANT

-VERSUS-

JARED ODHIAMBO ODERO RESPONDENT

JUDGMENT

Through **Messrs Oluoch-Awino & Co, advocates**, **Jared Odhiambo Obiero**, now the respondent in this appeal filed a suit in the Senior Principle Magistrate's Court at Migori against **Nadeem Jiqbal Mohammed T/A Afric Pak International Limited**, now the appellant claiming: (i) General damages for wrongful and unlawful possession of motor vehicle registration number KAS 233X, (ii) payment as aforesaid in paragraphs II (a) (b) and (c) above (iii), cost of the suit and interest at court rates. Finally, any other relief that the honourable court could deem just to grant in the circumstances.

What were the circumstances leading to the suit? Apparently by an agreement dated 23rd April, 2004 entered into between the appellant and respondent, the appellant sold to the respondent Nissan Toyota Hiace Motor vehicle without registration number. The agreed purchase price was Kshs. 1,500,000/= and the respondent was to pay a deposit of Kshs 400,000/= and the balance thereof was to be paid by instalments of Kshs. 100,000/=. Motor vehicle registration number was however to be issued on payment of the 1st instalment of Kshs.100,000/= by the respondent. On the other hand, the respondent was to personally meet the cost of fixing the chairs, insurance etc on the motor vehicle. By the same agreement, the respondent was given possession of the motor vehicle as he was to commence business immediately. Despite the deposit of Kshs. 400,000/= and the first instalment of Kshs. 100,000/= paid by the respondent as aforesaid, the appellant flagrantly breached the agreement by willfully and maliciously refusing to issue the respondent with the registration number of the motor vehicle. It was however not until on 20th August, 2006 that the appellant eventually issued the respondent with the said number which however turned out to be fake and the respondent was forced by traffic police officers at Kamagambo to pull off the road the said motor vehicle. Later the appellant again issued him with proper registration number KAS 233X for the motor vehicle and he was able to put back on the road the motor vehicle on or about 24th November, 2004. However on 4th December, 2004 through his agents **Jogedah Agencies**, the appellant attached the said motor vehicle which act was wrongful, unlawful and caused the respondent to suffer damages arising from breach of the agreement aforesaid and subsequent loss of business. Particulars of Breach of the agreement given by the respondent included delay and issuing a fake motor vehicle registration number, preparing a substandard agreement and repossessing the motor vehicle after it had only been in business for 14 days. As for particulars of special damage the respondent demanded a refund of the deposit for the vehicle and the first instalment paid, expenses incurred in fixing passenger seats and storage charges for 7 months that the vehicle stayed without being on the road as well as insurance. The respondent also prayed for general damages.

Through **Messrs Ikua Mwangi & Company advocates** the appellant responded to the respondent claim in terms that it denied the description attributed to it in the plaint and threatened to raise a preliminary objection on the issue, denied the existence of an agreement to the effect that the 1st instalment would be paid upon presentation of number plates but that the balance of Kshs. 900,000/= was to be liquidated in equal monthly instalments of Kshs. 100,000/=. that the respondent breached the agreement by failing to liquidate the instalments on monthly basis as agreed. It further pleaded that the repossession of the motor vehicle was lawful and sanctioned by clause no. 3 of the sale agreement. Otherwise the particulars of breach of agreement and special damages set out in paragraph 11 of the plaint were denied. The respondent willingly entered into the sale agreement dated 23rd April, 2004 and was bound by the

terms thereto which terms did not allow for payment of any of the special damages set out in the plaint. Finally it pleaded that the plaint was incurably defective, grossly inept and a blatant abuse of the court process and was going to seek that the same be struck out at an opportune time.

Subsequent thereto the plaint was amended with regard to the description of the appellant. It now became **Afric Pak International Limited**. The amendment also introduced paragraph 12a of the plaint in which the respondent specifically claimed general damages for wrongful repossession of the motor vehicle and special damages pleaded. Reacting to the amended plaint, the appellant filed an amended statement of defence the effect of which was to do away with paragraph 3 of the initial defence that dealt with the description of the appellant.

On 30th January, 2007, the hearing of the case commenced before **Mr. Ezra O. Owino, P.M.** The respondent in his evidence reiterated what he had pleaded in the plaint that I have reproduced elsewhere in this judgment. Suffice to add that on 3rd December, 2004, the driver told the respondent that the appellant had sent auctioneers to reposes the motor vehicle though he was not in default. He had paid Kshs. 500,000/= in total. He was not given Notice nor told why the motor vehicle was being repossessed. He had fitted the motor vehicle with seats at Kshs. 28,000/=, bought tyres for Kshs. 10,400/=, Kshs. 10,000/= for fuel tank and Kshs. 42,000/= being storage charges for the motor vehicle for 7 months. He tendered in evidence receipts issued to him for those expenses. He testified further that he bought the motor vehicle so as to engage in transport business and he was not able to do so for lack of registration numbers. 3 days after he had put back on the road the motor vehicle it was repossessed. After the re-possession he instructed a lawyer to pursue the matter and paid him fees which he wished to be refunded by the appellant. He received a proclamation for the motor vehicle though from the auctioneers. However he could not tell whether the motor vehicle had been sold.

Cross-examined, he stated that the agreement was not read to him. He maintained though that it was the appellant and not himself who was in breach of the agreement.

With that the respondent closed his case.

For the defence, **Lawrence Ongadi**, an employee of the appellant testified that the respondent purchased a motor vehicle from them at Kshs. 1,300,000/= on hire purchase. He paid a deposit of Kshs. 400,000/= and was thereafter required to pay Kshs. 100,000/= per month commencing one month thereafter and the last instalment was to be on 23rd December, 2004. According to clause 3 of the agreement, the deposit was non-refundable. The respondent did not honour the terms of the agreement by way of monthly payments. He denied that they issued the respondent with fake registration numbers. The respondent took the motor vehicle without number plates. He was to come for the same after 14 days. Instead he came for them in November, 2004. On 2nd December, 2004 they issued a demand for Kshs. 1,230,000/=. After the respondent failed to pay the amount they repossessed the motor vehicle. The repossession was lawful. General damages were not recoverable. As far as they were concerned it was the respondent who breached the agreement.

Cross-examined, he stated that he was the one who sold the motor vehicle to the respondent. The respondent did not reveal to him the purpose for which he was buying the motor vehicle. When he defaulted the motor vehicle was repossessed. Respondent took possession of the motor vehicle after paying Kshs. 400,000/= and never paid Kshs. 100,000/=. The motor vehicle was repossessed and sold by Auctioneers on their behalf. He denied that the transaction was fraudulent nor was the agreement defective. No notice was required for repossession. With that the appellant closed its case.

Both parties thereafter filed and exchanged written submissions. The learned magistrate having evaluated the evidence on record, rival written submissions and the law reached the verdict thus:

“I did not see clean hands in the defendant. Its alleged the issued number plates by telephone as KAS 079L only for the plaintiff to find himself on the wrong side of the law. And that the proper registration was only issued in November, 2004. Clearly the activity of the defendant appear fraudulent. The agreement they executed was fraudulently made is (sic) made in their favour and in void able, the defendant was in breach and could not thereafter purport to enforce the same. My view is that the repossession was unlawfully (sic) ought not to be allowed. And they must refund the money they unlawfully took from a man of Jua Kali (sic) status those being my findings I now enter judgment for the plaintiff for the refund of Kshs. 6,500/= whithy (sic) interest at court rates from 23rd April, 2005 till payment in full. I would also assess general damages at Kshs. 50,000/= with costs and interest of this suit...”.

The appellant felt done in by the judgment and decree aforesaid. Instantly it lodged this appeal setting out 8 grounds of appeal in its memorandum of appeal dated 22nd September, 2007 and filed in court on 24th September, 2007 thus:-

“1. The learned trial magistrate erred both in law and fact in awarding special damages that had not been

pleaded in the pleadings as by law required.

- 2. The learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs. 600,000/= which amount had not been prayed for in the pleadings and in any case which had not been proved.*
- 3. That the learned trial magistrate erred in law and fact in awarding the respondent general damages for breach, which do not lie in law.*
- 4. That the learned trial magistrate erred both in law and fact in ignoring the appellant's pleadings, evidence and submissions.*
- 5. That the learned trial magistrate erred gravely in law and fact in failing to appreciate and make a conclusive finding that the transaction between the parties was solely governed by the terms and conditions stipulated in the sale agreement dated 24th April, 2004.*
- 6. The learned trial magistrate misconstrued the intentions of the parties in the sale agreement dated 24th April, 2004 and thus arrived at erroneous conclusion.*
- 7. The learned trial magistrate gravely erred in law in entering judgment in favour of the respondent who had not proved his case.*
- 8. The learned trial magistrate went on a frolic of his own disregarding the evidence on record and arrived at an erroneous conclusion.....”*

When the appeal came up for hearing before me on 3rd May, 2010, **Mr. Mwangi** and **Mr. Kwanga** appeared for the appellant and respondent respectively. They are both learned counsel. They agreed to ventilate the appeal by way of written submissions. Subsequently they filed and exchanged their respective written submissions which I have carefully read and considered alongside cited authorities.

This is a first appeal to the court and the duty of the court in that sort of situation has long been settled. **Sir clement De Lestang, V.P.** in the then court of appeal for East Africa put that duty thus in the case of **Selle V Associated motor boat Company (1968) E.A. 123 at page 126 letters H-1:-**

“An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in case generally.

I shall in deciding this appeal bear true allegiance to those principles.

The issues for determination before the trial court in my view were, whether there was an agreement, whether the agreement was breached, if so by whom and the consequences ensuing therefrom. It is regrettable that the learned magistrate in his judgment did not isolate the issues for determination as aforesaid. Instead the learned magistrate went on a tirade against the appellant on issues which even the respondent had not raised in his plaint or evidence. He questioned the sincerity of the appellant in surrendering the motor vehicle to the respondent 5 months after the execution of the agreement and payment of a deposit of Kshs. 400,000/=. He also questioned the appellant's failure to issue a receipt for the deposit. The respondent never raised the above issues in his pleadings or even in the evidence. In any event the sale agreement a copy of which was in the possession of the respondent clearly indicated that the deposit paid was kshs. 400,000/=. I do not therefore think that it was necessary for the appellant to issue a receipt for such payment. In any event there is no evidence at all that the respondent asked for the same and he was denied. The learned magistrate also claimed that the appellant charged interest for keeping the money . In his own words *“.....there was totally no justification for the defendant to charge interest for keeping the money without any benefit to the plaintiff, instead it is the plaintiff who should have charged the defendant interest..”* No such evidence is apparent on the record. Neither the appellant nor the respondent raised the issue in their pleadings or evidence. I don't know where the

learned magistrate came by this information. We have been constantly reminded and admonished by the courts above us that judgments and rulings should be crafted on the basis of the evidence on record and law. We are warned not to import into our judgments and rulings evidence or theories that were never canvassed before us. It appears that the learned magistrate had very little regard to this long held tradition. He imported in to his judgment evidence that was not availed before him during the trial and used the same to justify the judgment. In the process he clouded the issues and reached a decision wholly unsupported by the evidence. Indeed even an element of bias against the appellant is self-evident in particular when one carefully reads the judgment from where the learned magistrate purports to evaluate the evidence. He even comes to the conclusion that the appellant's evidence fraudulent without as much as evaluating it on merit nor had the respondent said so in his own testimony. The epitome of bias is manifested in the paragraph of his judgment where he says **"...And they must refund the money they lawfully took from a man of Jua Kali (sic) status...."** The status of the litigants in society was never an issue and can never be an issue in a well crafted judgments, rulings or any judicial proceedings. Still on the judgment, the learned magistrate ended up awarding Kshs 600,000/= without laying any basis for it. Neither in his evidence or pleadings did the respondent specifically ask for that amount. It appears that the learned magistrate picked the figure from the air without any proper basis. If the learned magistrate was ordering a refund of the amount paid by the respondent to the appellant it should have at most been Kshs. 500,000/= and no more. He also awarded Kshs. 50,000/= as general damages without any evidence being led in that regard. So much for the judgment.

It is common ground that the parties entered into a sale agreement of a motor vehicle on 23rd April, 2004. That agreement had specific clauses to which both parties agreed to abide by. The duty of the court is not to make contracts for the litigants. Rather it is to interpret and enforce them no matter how harsh and unconcionable they may turn out to be as long as the court is satisfied that they were freely and voluntarily executed and entered into. Parties to this agreement do not dispute that the agreement was freely and voluntarily executed.

Both parties are also in agreement that the said agreement was subsequently breached. To the appellant, it was the respondent who breached the agreement by failing to pay the agreed monthly instalments of Kshs. 100,000/=. Such failure according to the terms of the agreement entitled the appellant to repossess the motor vehicle which right they exercised. On the other hand, the respondent blames the appellant for the breach on the grounds that it failed to provide the number plates for the vehicle to the respondent in good time or at all and by repossessing the motor vehicle illegally and unlawfully. Between the two, who is right?

I have looked at the sale agreement tendered in evidence just like the learned magistrate did. However it is clear to me that perhaps that agreement should not have been admitted in evidence for want of payment of stamp duty. However since the issue was not taken up during the trial or in this appeal, I will leave it at that. The agreement is clear in terms that the balance outstanding of Kshs. 900,000/= on the purchase price was to be liquidated by instalments of kshs. 100,000/=. However it is silent as to whether it was monthly. Neither does the agreement say that such payment would commence once the registration of the motor vehicle was effected. The respondent admits in his evidence that upon payment of the deposit, he took possession of the motor vehicle . Between 23rd April and 30th November, 2004 when the motor vehicle was repossessed he had only paid one instalment of Kshs. 100,000/=. Surely even if the agreement was silent whether liquidation of the balance of the purchase price was monthly or not, it is not possible probable and or even hard to believe that one would stay with vehicle and or chattel for close to seven months without making any payments towards liquidation of the agreed instalments. As I have already stated, the agreement is silent on any preconditions to be met by the appellant before payments of the instalments by the respondent would commence. I doubt however whether such payments would have commenced at the convenience of the respondent. It does not make business sense at all. In my view therefore it was the respondent who was in breach of the agreements and should not therefore have been allowed to benefit from his own mischief.

Besides, the foregoing, even if the learned magistrate had been right in holding that the appellant breached the agreement, he erred in awarding the damages; special or general. First, and foremost though pleaded in the plaint, the special damages were not specifically pleaded as required by law. In the amended plaint, the particulars of special damages were pleaded ***thus "...deposit for the vehicle as at the time of signing the agreement and the first installment paid at the issuance of the number plates and or registration number, (II) expenses incurred on fixing passenger seats, (III) storage charges for 7 months the vehicle stayed without operating insurance and others to be adduced at the hearing"*** It is trite law that each and every particular of special damages must be pleaded specifically. In the case of **Coast Bus Services Ltd V Sisco E. Murunga Ndanyi C.A No. 192 of 1992 (UR)**, the court of appeal observed ***"...It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council V Nakaye (1972) E.A 446, Ouma V Nairobi City Council 91976) KLR 297 and the latest decision of this court on this point which appears to be Eldama Ravine Distributors Ltd Anor V Samson Kipruto Chebon Civil Appeal Mp. 22 of 1991 (unreported)"*** The court went on to observe this ***"... We would restate the position. Special damages must be pleaded with as much particularity as the circumstances permit, and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particular of special damages were:- "To be supplied at the time of trial".***

In this case, the particulars of special damages were all known to the respondent going by the dates on the receipts

tendered in evidence in support thereof. He therefore ought to have specifically and with particularity pleaded them in the plaint. The respondent cannot feign ignorance. However it is not by coincidence that the respondent pleaded that way. It is routinely done in this part of the world purposely to avoid payment of court fees. How else can one explain that the respondent pleads as he did, yet at the hearing he is able to tender receipts in support of each and every claim. The receipts were issued in the year 2004. Yet this suit was filed in 2005. So that by the time he was filing the suit, he was in possession of all those receipts. Thus nothing stopped him from specifically pleading that loss. It is not lost on me that special damages claimed by the respondent were awarded by the learned magistrate. Counsel for the respondent has submitted on this issue that the respondent impliedly and or expressly specifically pleaded and proved the special damages sought. Nothing can be far from the truth. Special damages can never be implied. Further it was still open to the respondent to rely on those receipts in prove of his claim to special damages by amending the plaint as appropriate before the hearing commenced. He did not take that road. In my view it is only when particulars of special damages are pleaded in the plaint that a claim will be allowed to proceed to strict proof of those specials. That was not the case here.

The learned magistrate also awarded Kshs. 50,000/= as general damages. It is trite law that general damages cannot be awarded for breach of contract. In the case of **Habib Zurich finance (K) Ltd V Lee G. Muthoga & Anor C.A No. 144 of 1991 (UR)**, the court of appeal observed “... *This case has been accepted by this court as authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from breach of contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general ...*” Of course the case being referred to is **Dharamshi V Karson (1974) E.A 4**. Yet this is what the learned magistrate purported to do with the award aforesaid. I think when counsel for the respondent submits that the learned magistrate acted in good faith and applied the correct principles in awarding the respondent general damages for breach, he is doing so with a tongue in the cheek. There can be no good faith in the breach of well known legal principles.

The appellant and respondent willingly entered into a written agreement. It was a term of the agreement that the respondent pays a deposit of Kshs. 400,000/= which amount was not refundable. Yet in making the award of Kshs. 600,000/= to the respondent, the learned magistrate appears to have failed to bear in mind this aspect of the matter. The amount was non-refundable, full stop! Further the respondent was required to pay the balance of the purchase price in equal instalments of Kshs. 100,000/=. The evidence on record point at the respondent not making those payments. It was further part of the agreement that the appellant was at liberty to repossess the motor vehicle in the event of a default. The appellant exercised this right under the agreement and it cannot be blamed or faulted. In the case of **Washington Okeyo V Kenya Breweries Ltd & Anor, C. A No. 322 of 2000**, though it was a case of an injunction, the Court of Appeal made this pertinent observation “... *It is trite law that a contracting party who fails to perform his part of the contract cannot obtain injunction to restrain a breach of covenant by the other party ...*” Transferred to the circumstances obtaining herein, one can say that the respondent came to court asking the court to assist him recover his money when it was clear that he had not kept his side of the bargain. Of course the respondent faint heartedly advanced the argument that he was unaware of the contents of the agreement as it was not read to him. This argument is neither here or there. After all his suit was premised on the very same agreement.

Finally, the respondent has argued that the respondent named was not a party to the suit in the subordinate court and that the record of appeal is incomplete as there is no certified copy of the decree as required by the law. If the respondent was not a party to the suit in the lower court, why did he bother to respond to the appeal. Further why did he not raise the objections at the time when the directions were being issued. Thirdly, it is quite apparent that reference to the respondent as **Jared Odhiambo Odero** instead of **Jared Odhiambo Obiero** is clearly a typographical error which is excusable. Finally, no prejudice will be occasioned to the respondent for such misspelling. As for the decree, there is clearly one drawn by the court and it is in the record of appeal.

In the event then, I allow the appeal, set aside the orders made by the trial magistrate and substitute therefore with an order dismissing the suit with costs. The appellant shall also have the costs of this appeal.

Judgment dated, signed and delivered at Kisii on 16th July 2010.

ASIKE-MAKHANDIA

JUDGE