



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 239 of 2008

DIDIER MAILLARD.....PLAINTIFF

VERSUS

MOTOR LINK LIMITED..... DEFENDANT

RULING

The Plaintiff filed this suit on 6th May, 2008, simultaneously with a Chamber Summons application. The brief facts of the case are that the Plaintiff and Defendant entered into a Sale Agreement, for the sale of a motor vehicle by Defendant to the Plaintiff. The vehicle belonged to one Hassan. The Agreement was dated August 22nd 2006. As agreed under the Sale Agreement, the Plaintiff purchased a motor vehicle from the Defendant, paid the full purchase price and got delivery of the suit vehicle. The Defendant was, under the contract, obligated to hand over the log book and other documents to the Plaintiff upon receiving them from the relevant authority. The Agreement is annexure SK2 in the Defendant's replying affidavit. The Defendant did not handover the documents leading the Plaintiff to file this suit. The application dated 6th May, 2008 sought a mandatory injunction for delivery of the log book and other relevant documents and in alternative, for the Sale Agreement to be rescinded and an order to the effect that the Plaintiff is entitled to the full purchase price. Those prayers are the same ones sought under the plaint except the plaint seeks in addition an order of Restitution and Costs.

The application dated 6th May, 2008 was heard by Hon. Khaminwa, J. By the time of hearing, the Defendant had handed over the log book and all relevant documents to the Plaintiff. Hon. Khaminwa J. was urged by the Plaintiff to order the Defendant to pay costs for the application which she did.

The Plaintiff has now filed a fresh application, a Notice of Motion dated 23rd October 2008, in which he seeks judgment as prayed for in the plaint and seeks costs of the suit. The application is brought under sections 63 (e) and 3A of the Civil Procedure Act and Order XXIV rule 6 of the Civil Procedure Rules.

Order XXIV rule 6 of the Civil Procedure Rules provides:

***“6. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.*”**

(2) The court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”

The grounds for the application is that the suit has been wholly adjusted and/or compromised by the Defendant's compliance with the Plaintiff's demands to deliver all relevant transfer documents to him and that there is nothing left for determination by the court.

The application is resisted. The Defendant filed a Replying Affidavit in which it annexed a copy of the Sale Agreement. The Defendant avers that it was a term of the Agreement that the Defendant would hand over the log book and all relevant documents upon receipt from the relevant authority. The affidavit also annexes a letter to the registered owner, Mr. Hassan, in which the Defendant demands delivery of the documents. The letter is dated 20th February, 2008. The affidavit annexes a demand notice for taxes dated 23rd April, 2008 which it is averred was given to the Defendant by Mr. Hassan. In the letter the Kenya Revenue Authority was demanding payment of taxes together with penalties over the same motor vehicle. The Defendant avers that acting in good faith, it paid the taxes, a total of Kshs. 42,043/-, in order to obtain the relevant documents.

I have considered the application and submissions by both counsels. The Plaintiff contends that even though the suit has wholly been adjusted, it should get judgment as sought in the plaint and an order for costs of the suit. The Defendant on the other hand contends that the Plaintiff rushed to file suit, that the suit was unnecessary as under the Agreement, the Defendant was to hand over the documents upon receipt from Kenya Revenue Authority. The Defendant contends it did as obligated under the Agreement. The Defendant also contends that prayers in the plaint and instant application were same and so application ought not to be allowed.

It is quite clear even from submissions by both counsels before court that no judgment can be entered in this case, whether under the application or under the plaint; the suit having been wholly adjusted. The only issue pending in the matter is the issue of costs of the suit.

The Defendant argues that no costs should be ordered since the suit was unnecessary. At the same time, the Defendant urges the court to leave the issue of costs to be determined after a full hearing. The Plaintiff argues it filed suit when no documents were forthcoming and that therefore it is entitled to costs.

Under the Agreement, the Defendant was to hand over documents to the Plaintiff upon receipt from KRA. It is clear that the Plaintiff was aware the vehicle was unregistered. It is also clear that the Defendant went to sleep for two years before demanding to know from Mr. Hassan, the owner of the suit vehicle, why documents were taking rather long to deliver. A lapse of two years before meeting its part of the bargain was inordinate. I am abundantly aware that the Agreement between the parties provided that the Defendant was to hand over the documents upon receipt from KRA. From letters annexed herein, it is clear that as late as April 2008 the documents had not been issued. The Plaintiff filed suit because the Defendant had taken inordinately two long to hand over the documents despite continuous demands. Those were the averments in the Plaintiff's supporting affidavit to application dated 6th may, 2008 at paragraphs 9, 10, 11, 12 and 13. The Defendant did not controvert these averments. It is abundantly clear that the Defendant was content with the status quo even when it was clear to it that a long time had lapsed before it met its obligation under the Agreement.

Given the circumstances of the matter, it will be a waste of time for the court to order that the issue of costs be heard at a trial as suggested by the Defendant.

The issue of costs is in the discretion of the court. I have considered that the Defendant had not complied with its part of the bargain under the contract, at the time the suit was filed. The Defendant complied long after suit was filed and before its notice of motion application dated 29th July 2008 was conversed. The Defendant's application seeks to have the suit struck down for being scandalous, frivolous and vexatious and for being an abuse of the court process under order VI rule 13 of the Civil Procedure Rules. It was never conversed. In any event I believe that the Defendant filed this application in order to steal a match against the Plaintiff.

In opposition to the current application, the Defendant has not demonstrated it acted diligently to obtain the relevant documents within a reasonable time. Even though the Defendant's obligation was to hand over the documents upon receipt, I find that the Agreement cannot be interpreted to mean the Defendant would take eternity to obtain the documents. I think that the Plaintiff deserves his costs for bringing this suit.

I do rule that the Defendant should pay the costs of this suit to the Plaintiff to be agreed or taxed.

Dated at Nairobi this 29th day of May, 2009.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Wangila for Applicant

Mr. Onindo for Respondent

LESIT, J.

JUDGE

Order: The Defendant has a right to appeal against this ruling.

LESIT, J.

JUDGE