



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

Civil Suit 567 of 1999

SOUTHERN CREDIT BANKING CORPORATION LIMITEDPLAINTIFF

VERSUS

KINGSWAY TYRES & AUTO MART LTD.1ST DEFENDANT

NAKUMATT HOLDINGS LIMITED2ND DEFENDANT

COMMISSIONER OF CUSTOMS & EXCISE3RD DEFENDANT

KINGSWAY MOTORS LIMITED4TH DEFENDANT

JUDGEMENT

The Plaintiff agreed to make an advance of Kshs.16,675,000.00 to Shah Motors Limited a customer of the Plaintiff which was secured by the deposit with the Plaintiff of certified copies of shipping documents relating to 29 Kia motor vehicles imported by the 4th Defendant. The documents are in evidence. The loan was duly made and advanced on the 23.7.1996 as appears from the debit entry in the statement of account relating to Shah Motors Limited. Of the vehicles 15 were sold and the proceeds of sale paid to the Plaintiff. Sometime in 1999 the Shaha of Shah Motors Ltd. Left Kenya owing debts to amongst others the Plaintiff. It seeks by way of relief from:-

a) The 3rd defendant;

(i) A permanent injunction restraining the 3rd defendant, its servant and/or agents from releasing the suit vehicles listed in paragraph 13 above to the 1st and/or 2nd defendants, their servants and/or agents or any persons whatsoever other than the plaintiffs.

(ii) A mandatory injunction compelling the 3rd defendant its servants and/or agents to release the suit vehicles aforesaid to the plaintiffs.

b) As against the 1st, 2nd and 4th defendants jointly and severally;

(i) A permanent injunction restraining the 1st and 2nd defendants their servants and/or agents from receiving, holding, transferring, charging, selling or in any way whatsoever dealing with the vehicles listed in paragraph 13 above.

(ii) A mandatory injunction compelling the 1st and 2nd defendants to release the suit vehicles aforesaid to the plaintiffs.

(iii) Special damages as set out in paragraph 19 above.

c) Costs and interest of the suit.

d) Any other or further order that this honourable court may deem fit to grant the plaintiff.

The 2nd Defendant agreed to purchase 13 Kia vehicles from the 4th Defendant in July 1996 and inspected the vehicles in the 4th Defendant's Godown. The 2nd Defendant was given certified copies of documents of importation and paid for the cars the agreed price of Kshs.9,970,000.00. the 2nd Defendant then took possession of the vehicles which are still in its godown. The vehicles were not registered in its name because of the dispute, which has arisen in this case.

In 1996 Shah Motors Limited wanting to buy the 29 Kia cars asked the 1st Defendant for a pro forma invoice for the vehicles to enable them to get finance facilities from its bank. Later the 1st Defendant provided Shah Motors Limited with certified copies of the importation documents relating to the vehicles. The vehicles were kept in the 4th Defendant's godown and given to Shah Motors Limited against payment. The 4th Defendant was not aware that Shah Motors Limited had taken a loan for the whole value of the 29 vehicles nor was the same given to the 1st Defendant.

One important piece of evidence which I allowed to be produced were two faxes sent in the name of Kingsway Motors both dated the 18th July, 1996 which are identical in their terms. One is sent from Touring Cars (Kenya) Ltd and the other from Kingsway Motors Show room both appear to be signed by Manish Shah the Executive Chairman of the 1st Defendant.

The text of the fax is as follows:-

:TO WHOM IT MAY CONCERN

This is to confirm that 29 (TWENTY NINE) unites of KIA "PRIDE" passenger cars bearing the following Chassis and Engine Nos. have since been sold to M/S SHAH MOTORS LIMITED, Nairobi and payment received.

No.	Chassis No.	ENGINE NO.
1,	067110	531963
2.	067360	531958
3.	063662	533313
4.	063750	533323
5.	063798	533326
6.	063964	533325
7.	069037	533483
8.	069063	533485
9.	069064	533493

10	069098	533656
11	069099	533497
12	069120	533782
13	069139	533784
14	069166	533640
15	069167	533634
16	069202	533499
17	069235	533490
18	069266	533495
19	069267	533494
20	069300	533633
21	069301	533496
22	069366	533492
23	069369	533489
24	069402	533771
25	069433	533766
26	069434	533638
27	069468	533765
28	069469	533767
29	069334	533491

All the relevant documents for the above have also been handed over to M/s Shah Motors. “

In his evidence Mr. Manish Shah denied that the signature on the faxes was his. He did not know who signed it. That Touring Cars (Kenya) Limited was a company near to the Shah Motors Limited and the fax was sent at 11.19 a.m. whereas the fax from Kingsway Motors Show room was sent at 9.45 a.m. He also denied that the invoice of the 19.7.98 also faxed to the Plaintiff was genuine. In his view it was not possible to say that payment had been received on the 18th July 1996 and the next day send an invoice for the same amount. At the request of the court he produced the original shipping documents which were in the 4th Defendant's possession.

There is a difference if one vehicle between the 14 vehicles which the 1st Defendant alleges were not bought by Shah Motors Limited and the 13 vehicles sold to the 2nd Defendant. This vehicle was the subject matter of proceedings in HCCC No.31 of 1998 in which the Plaintiff herein obtained judgement against the 4th Defendant herein in an action for conversion based on the fact that the 4th Defendant had sold this vehicle to Athi Mining Company Limited whilst it was secured to the Plaintiff.

Having heard the evidence, I find that the Plaintiff agreed to make the loan on the strength of the representations by Shah Motors Limited that it had purchased 29 vehicles from the 4th Defendant and the depositing with them of certified copies of the import documents in respect of the vehicles. They were further persuaded that the vehicles belonged to Shah Motors Limited by virtue of the two faxes referred to above as well as the invoice of the 19.7.96.

On the other hand I accept the evidence of Mr. Manesh Shah for the 4th Defendant that the arrangement with Shah Motors Limited was that it had right to purchase up to 29 of the vehicles imported on the basis that title would be transferred to Shah Motors Limited as and when payment was made at any particular time, when the original documents of imports would be made available so that the vehicle could be registered in the name of Shah Motors Limited or as it directed.

I further accept the evidence of Mr. Manesh Shah that the two faxes and invoices referred to above did not emanate from the 4th Defendant. Firstly there were two faxes one purporting to have been sent by a third party which was identical to that purporting to be sent by the 4th Defendant. The contents of these faxes was untrue as it stated the 29 vehicles listed had been sold to Shah Motors Limited and payment had been made.

I find that the arrangement was as stated by Mr. Manesh Shah that the vehicle being bought would be given to Shah Motors Limited with the original documents relating to the vehicle when payment was received. As the vehicles the subject matter of this suit had not been paid for by Shah Motors Limited the title in the vehicles had not passed to Shah Motors Limited and as such it had no property in those vehicles to charge or pledge to the Plaintiff.

This is a case where it is necessary to determine which of two innocent parties should suffer. In the case of **Lick Barrow v Mason & others [1775 – 1802] ALL ER** Ashhust CJ stated:-

“We may lit it down as a broad general principle that whenever one of the two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.”

In this case the 2nd Defendant was an innocent purchaser of the vehicles and had no reason to believe that the 4th Defendant had a right to sell the same. By the same token the Plaintiff was, as I find, duped into lending money to Shah Motors Limited on the basis of a pack of lies told by them to the Plaintiff. It was not true as I find that Shah Motors Limited had paid for 14 of the said vehicles and further it was Shah Motors Limited who fabricated the two faxes and one invoice referred to above. It may have been that someone employed by the 4th Defendant was implicated in those false documents but that is not sufficient to pin liability on the 4th Defendant. In that respect there is no evidence whatsoever that the 4th Defendant was involved.

Having found as I have, I dismiss the Plaintiff's claim with costs to the Defendants.

The Amended Defence and counterclaim contains a counterclaim by the 2nd Defendant in respect of loss which it claims it has suffered as a result of the Plaintiff obtaining a restraining order stopping the 2nd Defendant from registering the title to the vehicles in its name. Apart from saying the 2nd Defendant was paying storage charges no evidence was adduced to prove these charges or how much they were. In the result the 2nd Defendant has failed to prove its counterclaim, which is dismissed with costs.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE