



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2980 OF 1992

HARRISON KINYUA MWANIKI1ST PLAINTIFF

RIFT VALLEY BOTTLERS LIMITED2ND PLAINTIFF

-VERSUS-

THIKA MOTOR DEALERS (K) LIMITED.....DEFENDANT

JUDGMENT

A. DENIAL OF VEHICLE LICENCE WAS OCCASIONED BY FAILURE TO HAVE ERRONEOUS LOG BOOK ENTRIES RECTIFIED:

PLAINTIFF'S PLEADINGS

The plaint in this suit was dated and filed on 3rd June, 1992. The Plaintiffs plead that on or about 25th August, 1983 they had jointly purchased from the defendant a new motor vehicle, model and designation numbers TLD 2.8 ISUZU ELF, a high-sided steel-body lorry, for Kshs.240,000/=, and the same was then registered as number KUT 404 and issued with Log Book No. 160026. It was shown in the said Log Book that the Chassis and Engine numbers of motor vehicle registration number 404 were, respectively, 0235195 and 596775. But on or about 1st August, 1985 when the motor vehicle was inspected by the Police to facilitate licensing for use on Kenyan roads, it was discovered that the said Chassis and Engine numbers entered in the Log Book were not the ones inscribed on the motor vehicle itself. Whereas the Chassis and Engine numbers in the Log Book were respectively, 0235195 and 596775 the corresponding numbers on the motor vehicle were 0232248 and 610638 – and the latter two numbers were revealed after a motor vehicle registry search to belong to a different motor vehicle, bearing registration number KUT 403 – an Isuzu *Matatu* registered in the name of one **Peter Owoko** of Post Office Box No. 86, Busia.

The plaintiffs plead that for the period 25th August, 1983 to 31st July, 1985 when the suit motor vehicle was licensed for use on Kenyan roads, it was used in the transportation of goods-for-hire, and earned an income of Kshs.30,000/= per month.

However, thereafter the suit motor vehicle could not be licensed for use on Kenyan roads, owing to the discrepancy in the Chassis and Engine numbers as recorded in the Log Book, and as they appeared inscribed on the motor vehicle itself.

The 1st plaintiff had brought to the attention of the defendant the said discrepancy between the identification – entries in the Log Book and the actual identification-marks on the motor vehicle; but the

defendant “*failed, ignored and/or neglected to rectify the discrepancy*”. And in consequence, the plaintiffs were deprived of the use of the motor vehicle, and they suffered loss and damage. Such loss and damage took the forms of: loss of income at the rate of Kshs.30,000/= per month with effect from 1st August, 1985; and loss of business growth at the rate of 15% per annum with effect from 1st August, 1985.

The plaintiffs came to Court with prayers for:

- (a) *damages for loss of income at the rate of Kshs.30,000/= per month as from 1st August, 1985 up till the date of payment;*
- (b) *damages for loss of business growth at the rate of 15% per month for the period running from 1st August, 1985 up till the date of payment;*
- (c) *general damages for breach of contract;*
- (d) *costs of this suit;*
- (e) *interest on each of the foregoing items at Court rate;*
- (f) *such further and/or other remedy as the Court may deem appropriate to grant.*

B. MOTOR VEHICLE PURCHASER AFTER OBTAINING LOG BOOK MUST PURSUE RECTIFICATION OF ERRONEOUS ENTRIES WITH REGISTRAR OF MOTOR VEHICLES, NOT WITH THE DEALER: DEFENDANT’S PLEADINGS

In the statement of defence dated 30th July, 1992 and filed on 31st July, 1992 the defendant admits that as an agent of the dealer, General Motors Limited, it had on or about 25th August, 1983 entered into an agreement with the 2nd plaintiff (but not the 1st plaintiff), for the sale of an unregistered TLD Isuzu ELF, high-sided steel-body lorry.

The defendant pleads that in the sale transaction for the said lorry, the defendant’s duty was limited to negotiating the sale and, upon conclusion of the agreement for the sale, the 2nd plaintiff was issued with the necessary papers for the registration of the suit motor vehicle with the Registrar of Motor Vehicles; and thenceforth it fell upon the purchaser and the Registrar of Motor Vehicles to verify the details contained in the registration documents before the vehicle was registered. The defendant pleads that “*at no time did the defendant participate in or was in charge of the registration of the motor vehicle*”. The defendant pleads that it is “*a stranger to the number assigned to the said motor vehicle upon its registration*”, and that “*if there was any mix-up in the particulars of the vehicles it was the duty of the plaintiffs to apply to the Registrar of Motor Vehicles for rectification*”. The defendant pleads that “*it was not the duty of the defendant to attend to any rectification*”, and denies any liability at all based on the revenues which the plaintiffs could have earned, had the licence for their lorry continued to be renewed.

C. IT’S RELEVANT WHETHER LOG BOOK IS OBTAINED DIRECTLY BY PURCHASER, OR ARRANGED BY DEALER: PLAINTIFFS’ REPLY TO DEFENCE

The points of law foreshadowed in the statement of defence led the plaintiffs to file a reply to defence, on 5th August, 1992. This document, apart from its formal denials or admissions, carries two main pleadings:

- (i) *that in the purchase transaction in respect of the suit motor vehicle the plaintiffs dealt with the defendant as a principal dealer and not as an agent of anyone else and “at no time did the defendant ever indicate that it was acting as the agent of General Motors Limited;”*
- (ii) *that “apart from negotiating the sale of the motor vehicle, the defendant also arranged for the*

registration of the motor vehicle with the Registrar of Motor Vehicles and as late as March, 1992 the defendant was willing to have the discrepancy in the registration of the motor vehicle amended.”

D. ISSUES FOR RESOLUTION

The parties through their counsel, on 2nd December, 1992 agreed on issues for resolution by trial. These were filed on 11th December, 1992 and they are, in essence, as follows:

(i) Did the defendant sell the unregistered TLD 2.8 ISUZU ELF high-sided steel-body lorry which was subsequently registered as KUT 404 as the agent of General Motors Limited, or in its own right as a dealer?

(ii) Did the defendant at any time material to this suit, deal with the 1st Plaintiff and/or know of his existence?

(iii) Did the defendant, if at all, complete the necessary papers for the registration of the suit motor vehicle by the Registrar of Motor Vehicles?

(iv) If so, what Chassis and Engine numbers were shown in those papers?

(v) Were the Chassis and Engine numbers in those papers written by the Defendant, its servants or agents?

(vi) Were the Chassis and Engine numbers in the papers presented to the Registrar of Motor Vehicles the same as the Chassis and Engine numbers actually on the motor vehicle?

(vii) Did the Log Book, upon registration of the motor vehicle, show the same Chassis and Engine numbers as the corresponding numbers actually inscribed on the suit motor vehicle?

(viii) If not, were the plaintiffs refused a licence for the use of the motor vehicle on Kenyan roads on account of the discrepancies in the Chassis and Engine numbers as recorded on the Log Book and as actually inscribed on the Motor Vehicle?

(ix) Who, as between the plaintiffs and the defendant, was responsible for the registration of the motor vehicle and the obtaining of the Log Book from the Registrar of Motor Vehicles?

(x) Were the plaintiffs deprived of the use of the suit motor vehicle on Kenyan roads on account of its not being licensed for use, and did they suffer any loss and damage as a direct consequence thereof?

(xi) Is the defendant liable to the plaintiffs in damages, and if so, to what extent?

(xii) Who should bear the costs of this suit?

E. TESTIMONIES

This case was first heard before me on 1st December, 2005, on which occasion learned counsel **Mr. Oduk** appeared for the plaintiff, while learned counsel **Mr. Owino** (holding brief for **Mr. Meenye**) appeared for the defendant.

(a) The Plaintiff's Case: Evidence

P.W.1, **Harrison Kinyua Mwaniki** was sworn and testified that in 1983 he was a distributor of the Coca Cola beverage in Eldoret. He was selling products of the 2nd plaintiff, on the basis of an agreement of 4th

April, 1981 (Plaintiff's Exhibit No. 1). As he needed a motor vehicle for the purpose, P.W.1 purchased a pick-up truck, in respect of which the 2nd plaintiff paid for him a deposit of Kshs.100,000/=; and he was to complete the remainder by instalmental payments made to the defendant herein. On the basis of these arrangements, the motor vehicle, registered as No. KUT 404 was availed to the 1st plaintiff, and he obtained the Log Book for the same. P.W.1 produced a copy of the said Log Book, No. C.160026 (Plaintiff's Exhibit No. 2) showing the Chassis Number as 0235195 and the Engine Number as 596775. These numbers, however, turned out to be different from the corresponding numbers inscribed on the suit vehicle which were: Chassis No. 0232248 and Engine No. 610638.

P.W.1 testified that his motor vehicle could not be licensed, when the discrepancy in the Log Book numbers and the actual vehicle identification marks was noticed by the inspection officer. When P.W.1 reported this hitch to the 2nd Plaintiff, a check was conducted which showed that the identification marks shown on the Log Book for vehicle Number KUT 404 appeared to be wrong ones, as they related instead to a different vehicle, registration number KUT 403 which was registered in the name of a **Mr. Peter Owoko** of P.O. Box 86, Busia. The search (Plaintiff's exhibit No. 4) was conducted in the motor vehicles registry on 8th November, 1991 — as the evidence shows, more than seven years since the suit motor vehicle ceased to be driven on Kenyan roads.

P.W.1 took up the matter with the defendant, who promised to follow up on the matter and to have the mix-up in vehicle-identification numbers rectified. On 18th August, 1986 (Plaintiff's exhibit No. 7). P.W.1 had first written to the defendant complaining about the mix-up in the particulars of identification for the suit vehicle. There was no response and, on 5th June, 1988 he wrote again to the defendant (Plaintiff's exhibit No. 8) in these terms:

"I am surprised to note that nothing has been done to help me carry out my mobile business with the [suit vehicle] which has seen denied road licence for four years because of your negligence in the registration of the vehicle ..."

Thereafter the 1st plaintiff communicated with the defendant through Omukunda & Co. Advocates on 18th November, 1991 (Plaintiff's exhibit No. 9). The letter, in part, reads:

"That you sold to our client a motor vehicle make Isuzu which was registered as No. KUT 404 and you quoted the Chassis No. as 0235195 and Engine No. as 596775.

"Our client later discovered that the Chassis and Engine numbers quoted in the Log Book do not correspond with the numbers on the vehicle itself.

"Our client's numerous letters to you have not been replied to. Our client bought the vehicle for the sole purpose of distribution of soda as an agent of Rift Valley Bottlers."

The same firm of advocates wrote to the defendant yet again, on 15th February, 1992 (Plaintiff's exhibit No. 10) with the same complaint.

Plaintiff's exhibits Numbers 11A, 11B and 11C are letters written to the plaintiffs' advocates by the defendant. In exhibit number 11A, a letter dated 16th March, 1992 from the Managing Director of Thika Motor Dealers Limited, it is stated:

"Further to our letter of 20th March, 1992 [?], in the absence of the details requested, the matter has been taken up with the Registrar of Motor Vehicles.

"We are requested to advise you to return the Log Book and the number plates for amendments."

Exhibit number 11B is a letter by the same Managing Director of the defendant, dated 29th January, 1992 and addressed to M/s. Omukunda & Co. Advocates. It reads in part:

“1. The photocopies of the Log Book are not legible. Please send us fairer copies for investigation urgently.

“2. Respond to number 2 of our letter dated 29th November, 1991.

“3. We have noted contents in the copies of your letters dated 18th August, 1986 and 5th June, 1988. The original letters have never been received by us.

“4. Please let us know who you were dealing with on this matter.

“We can assist in amendment of registration records as long as we satisfy the Registrar of Motor Vehicles. There are formalities to be followed.”

Plaintiff’s exhibit number 11D is yet another letter from the Managing Director of the defendant to M/s Omukunda & Co. Advocates, dated 29th November, 1991; and in his letters he speaks of the 1st plaintiff herein as follows:

“We acknowledge receipt of your letter of 18th November, 1991. “Our comments are as follows:

“1. We have never received any correspondence from your client. Please send us copies of his letters.

“2. Your client has never been our customer, if so please send us copies of our invoices to support that case.”

P.W.1 testified that in their letter of 16th March, 1992 the defendant acknowledged the discrepancy in the vehicle identification in question, and indicated that the defendant was taking up the matter with the Registrar of Motor Vehicles. However, P.W.1 testified, no further action was taken, and the discrepancies in the identification of the suit motor vehicle were not rectified; and consequently the vehicle was not licensed and could not be used in the 1st plaintiff’s business of distributing soda in Bungoma District.

P.W.1 testified that in his soda distribution business he used to make a profit of Kshs.3/= for every crate sold, and in a month he would earn as much as Kshs.36,000/=. He averred that he used to keep records of his soda sales on a daily basis. He produced his record of sales for 1984 (plaintiff’s exhibit No. 13), and indicated how he made his records and reconciled his accounts. He obtained supplies from Coca Cola. His record for 1984 showed that one of the vehicles which he was using was the suit vehicle, registration No. KUK 404. In 1984 the 1st plaintiff had sold 77,700 crates of soda. He also produced a hand-record book for sales-account keeping (plaintiff’s exhibit No. 14). This record book showed his earnings over several months of 1984: April = Kshs.30,730/=; May = Kshs.30,000/=; June = Kshs.29,275/=; July = Kshs.30,360/=; August = Kshs.30,145/=; September = Kshs.30,280/=.

The plaintiff prayed for compensation for loss of income and loss of business growth, as well as damages for breach of contract, and he claimed costs and interests.

P.W.1 said it was not true, as claimed by the Managing Director of the defendant, that the defendant did not know him as the 1st plaintiff: *“The [suit] motor vehicle was registered in the joint names of myself and the 2nd plaintiff”*. And the search conducted at the motor vehicles registry (plaintiff’s exhibit No. 15) showed the previous owner of the suit motor vehicle as the defendant. In the plaintiff’s words: *“I have dealt with [the defendant] and I am not a stranger.”*

On cross-examination, which took place on 17th July, 2006 P.W.1 testified that the suit vehicle was purchased in 1983 and was handed over to him in 1984, by the 2nd plaintiff. The vehicle could not be used; it *“stopped working in 1984”* and the 1st plaintiff *“sold it as scrap”*. He sold it to a scrap motor

company in Eldoret. He testified that the records showed that the suit vehicle was sold by the defendant; and the 2nd plaintiff had suggested that he should sue the defendant. The 2nd plaintiff had given P.W.1 a note directing Thika Motor Dealers Kenya Limited to rectify the registration for the suit vehicle; but P.W.1 averred: *“I don’t know if Rift Valley Bottlers are still parties to these proceedings.”*

The note referred to by P.W.1 is part of a set of records admitted as plaintiff’s exhibit No. 3. It comes from Rift Valley Bottlers Limited (2nd plaintiff) and is addressed to a **Mr. Ngamau** (presumably of Thika Motor Dealers Kenya Limited); it is dated 13th March 1992 and thus reads:

“Please help Mr. Mwaniki as it appears there was [a] mix-up during registration between KUT 403 and KUT 404.”

P.W.1 averred that he had the capacity to bring the instant suit, because the suit motor vehicle was sold to him, and the 2nd plaintiff only came in for the purpose of financing the purchase, and in 1984 the 2nd plaintiff handed the vehicle to him, together with the Log Book, which was in the joint names of the two plaintiffs; and the vehicle was eventually transferred to his name exclusively. By the time he completed payments and title to the vehicle was given to P.W.1, in 1984, the vehicle was *already grounded*. There was delay after it became clear a licence could not be granted for use of the motor vehicle, before suit was filed in 1992.

P.W.1 testified that in 1988 the owner of motor vehicle KUT 403 was compensated by the defendant herein; and when he filed his suit in 1992 he was *hoping the defendant could also compensate him* in respect of KUT 404.

P.W.1 testified that the returns from the suit vehicle could not repay the price instalments; and he had to find other sources of money for the repayments. Several persons had sued him for unmet commercial obligations, and he resorted to the 2nd plaintiff to enable him to approach the defendant herein for a solution to the problem surrounding the suit vehicle; but he did not give any details on such alleged suits.

P.W.1 testified that he had not known the right steps to be taken for the purpose of rectifying vehicle registration errors, and that he had made *no direct contact with the Registrar of Motor Vehicles*. He had seen the 2nd plaintiff as holding the key to a rectification of the registration mix-up, and he visited the 2nd plaintiff on that account repeatedly. He obtained a *note to take to the defendant*, and he visited the 2nd defendant for that purpose, providing the 2nd defendant with relevant documents though *not* the original Log Book and the number plates. Why? P.W.1 averred: *“I wanted compensation”*. He averred further: *“My advocate told them [the defendant] they could also compensate”*. He averred that the 2nd plaintiff were only involved as financiers, but *“only the vendors were involved in registration”*.

It was P.W.1’s evidence that the vehicle registration mix-up which led to this suit *“must have occurred in the office of the Registrar of Motor Vehicles”*, but he averred that *“the vendors should have known the details”*. He testified that it was after *one year* of using the suit motor vehicle, that he discovered that there were vehicle-identification discrepancies on the records.

On re-examination, P.W.1 averred that he had come to know of the discrepancies in the vehicle particulars when the time for renewing the transport licence came up. The vehicle was delivered to him when it had number plates, and he was given the Log Book showing his entitlement to the vehicle.

(b) The Defendant’s Case: Evidence

D.W.1, **George Wambugu Kanuri**, was sworn on 17th July, 2006 and testified that he was the current Managing Director of the defendant company. He had not joined the defendant company in 1983 and at that time one **Mr. Lawrence Ngamau** was the Managing Director.

D.W.1 averred that the defendant is a dealer for General Motors, selling Isuzu vehicles. The defendant is

an agent, and is paid commission on units sold. General Motors delivers vehicles to the defendant on request, and such motor vehicles are “*delivered accompanied with registration documents*”. The purchaser signs Form A, which the defendant takes to the Registrar of Motor Vehicles. The defendant, in this regard, plays a facilitative role.

D.W.1 testified that when he took up employment with the defendant, he saw a file in which a complaint had been recorded about two motor vehicles which the defendant had sold – one being No. KUT 404 and the other KUT 403. These two vehicles had been sold to *one customer*. The agreement for sale was, in each case, between the defendant herein and Rift Valley Bottlers Limited. The anomalies in the registration process, the witness testified, must have occurred in the Registrar’s office. Where such a discrepancy occurs, the defendant would give a form to the purchaser – requesting the Registrar of Motor Vehicles to rectify the record. The witness testified that his predecessor as Managing Director of the defendant had requested the plaintiff’s advocate (16th March, 1992) to forward to him certain items and documents – to enable him to make inquiries that would help with the rectification of the registration record — but the plaintiff’s advocate took no action. D.W.1 testified that the defendant had not been dealing with the 1st plaintiff, but only with the 2nd plaintiff.

On cross-examination by learned counsel **Mr. Oduk**, D.W.1 testified that where there was a mix-up in the registration record for motor vehicles, the Registrar of Motor Vehicles would be the one to blame, and it is to him that the 1st plaintiff should have directed his complaint. He averred that the registration of the suit motor vehicle had been effected by M/s. General Motors; and the defendant as agent was only helping to facilitate the registration process, and that once the defendant had issued forms “C20” and “A”, it was the duty of the Registrar to issue the Log Book. Both form “C20” and Form “A” *would show details of identification of the motor vehicle which is to be registered.*

F.SUBMISSIONS OF COUNSEL

(a) Discrepancies in Vehicle-inscribed Particulars and on Log Book amounted to Misdescription of Goods: The Plaintiff’s Position

(i) Issues of fact

Counsel submitted from the evidence that the defendant had supplied motor vehicle registration number KUT 404 and had effected the registration with the Registrar of Motor Vehicles. The Log Book had shown the 1st plaintiff and the 2nd plaintiff as the joint registered owners.

Learned counsel noted that there was much correspondence between the 1st plaintiff and the defendant, over a period of some 7-8 years; “*and it was not until 1992 that the defendant requested for the logbook and the number plates*”. So many years after the denial of road licence, the suit motor vehicle had by then (1992) long been “*sold as scrap*”. In these circumstances, **Mr. Oduk** submitted, the 1st plaintiff had “*lost on the distributorship agreement*” and on “*the value of the motor vehicle*”. It was urged that the 1st plaintiff had, in the circumstances, experienced “*the loss of bargain and expected profit*” – and this is the reason why he sued.

From the evidence, learned counsel extracted the following points – which in my assessment, *do* reflect the factual position:

- (i) the defendant had sold motor vehicle registration No. KUT 404 to the two plaintiffs jointly;
- (ii) the defendant did carry out the registration process and did obtain by itself the Log Book in favour of the plaintiffs;
- (iii) the defendant delivered the said motor vehicle together with the Log Book to the 2nd plaintiff;
- (iv) the defendant did not disclose to the plaintiffs that it was involved in the vehicle sale-and-

purchase transaction only as an agent of General Motors Limited.

(ii) Issues of Law

Learned counsel submitted that the fact that the defendant had in possession both Form “C20” and Form “A” which had the detailed description of the suit motor vehicle, and the same were forwarded to the Registrar of Motor Vehicles to enable the registration to take place, suggests that the defendant “was guilty of negligent misrepresentation or even innocent misrepresentation” – and this will place liability at the door of the defendant. Counsel cited in this regard as a case in point, *Dobell v. Stevens* (1825) 3 B & C. 623 in which it had been held that a plaintiff who has been affected by deceitful representations, even where he could have raised but did not raise queries timeously, can maintain an action in respect of such misrepresentations. And in *Redgrave v. Hurd* (1881) 20 Ch. D. 1 it had been held that an opportunity to discover the truth which was not used, is not a bar to a relief – even where the misrepresentation was innocent, where there is actual and reasonable reliance on the misrepresentation.

Learned counsel also impugned the failure of the purchased goods to correspond to Log Book entries as a misdescription which amounted to breach of contract. He relied on *Benjamin’s Sale of Goods*, 2nd ed. (London: Sweet & Maxwell, 1981), para. 773:

“The contract of sale may in certain respects be created as entire, so that any slight discrepancy is normally treated as making the article not what was stipulated for. Where an article is not what was stipulated for it can be rejected”.

At paragraph 781 of the same work, the following passage appears:

“It seems ... that a more recent dictum [in Couchman v. Hill [1947] K.B.554, 559] gives a better guide: ‘as a matter of law ... every item in a description which constitutes a substantial ingredient in the “identity” of the thing sold is a condition’. On this basis, statements truly relating to contractual description will rarely be warranties, though ... the possibility remains open. There may, however, clearly be warranties as to quality; and problems of timing or parol evidence may sometimes make it appropriate to regard descriptive statements as collateral warranties”.

Mr. Oduk relied on the foregoing passages to urge that the plaintiffs had sought to purchase goods which would correspond with the description shown in the Log Book; and so “requesting documents in order to rectify the mistake some eight years later does not remedy the breach and is but an admission of the breach itself”.

On the agency question, learned counsel urged that General Motors Limited was not a disclosed principal, and “no clear words of representation were used to enable the plaintiffs to be cautioned”. The principle in the background to this submission is stated in *G.H. Treitel, Law of Contract*, 8th ed. London: Sweet & Maxwell), p. 636:

“The agent is both entitled and liable where the principal is undisclosed; but this rule does not apply where the agent uses words or representation and the principal is only unnamed”.

Counsel urged that the price paid for the suit motor vehicle (Kshs.240,000/=) be refunded, “so as to return the plaintiff to the position [in which he would have been] had the contract been performed.”

Counsel urged that the suit motor vehicle “was customer-sourced and it was known to the defendant the purpose for which it was bought and to what use it was to be [put] ...” Since the suit motor vehicle could not be licensed to be on the road, its purpose could not be fulfilled; and therefore, it was urged, “the defendant must pay ... damages based on the plaintiff’s manual accounting of Kshs.30,000/= per month [as] from January, 1985 to May, 1992 when the suit was filed”. Counsel proposed that the sum of Kshs.40,000/= obtained by the 1st plaintiff when the motor vehicle was sold as scrap, be discounted. The plaintiff was also praying for “loss of business proposals, costs and interests”.

(b) Errors in the Registration Process are the Responsibility of the Motor Vehicles Registrar who is not joined as a Party: The Defendant's Position

(i) Issue concerning parties

Learned counsel **Mr. Mwititi** began by questioning the standing of the 1st plaintiff in the instant suit: whereas the suit was apparently originated by two plaintiffs (**Harrison Kinyua Mwaniki** and Rift Valley Bottlers Limited), only the 1st plaintiff came to Court to testify, and no evidence was received from any representative of the 2nd plaintiff; indeed it was not at all disclosed whether the 2nd plaintiff was still a party to the litigation.

(ii) Issues of Fact

Learned counsel's version of basic facts was stated as follows: the defendant had acted as an appointed *agent* of General Motors Limited, and in that capacity had sold to the 2nd plaintiff motor vehicle registration No. KUT 404 – a *new vehicle*. The 2nd plaintiff, quite independently of the defendant, had entered into a distributorship contract with the 1st plaintiff, a person who was not then known to the defendant. The defendant, acting as agent of General Motors Limited, duly delivered the suit motor vehicle to the 2nd plaintiff. The defendant also submitted the necessary documents for the suit motor vehicle, to the Registrar of Motor Vehicles for registration. Those documents, being Form "A" and Form "C.20", were duly signed by both vendor and purchaser; and after the defendant submitted the same to the Registrar of Motor Vehicles, a valid Log Book was duly issued.

Anomalies were later discovered, in the particulars shown physically on the suit motor vehicle and those recorded in the Log Book. Counsel, on this point, submits that *"there was no evidence that the plaintiffs and especially the 1st plaintiff, personally appeared at the office of the Registrar of Motor Vehicles for the purpose of making a case for the rectification of the records. ... When this anomaly was brought to the attention of the defendant, the then Managing Director [of the defendant], one **Mr. Lawrence Ngamau** ... did inform the Registrar of Motor Vehicles and also advised the 1st plaintiff of the necessary steps ..."*

Counsel urged that the defendant had not been involved in the actual registration exercise, and he knew nothing about the number plates or registration marks assigned to the suit motor vehicle.

(iii) Issues of Law

Learned counsel urged that the defendant could not be held liable for mistakes committed in the office of the Registrar of Motor Vehicles who, in any case, ought to have been joined as a party in the instant suit.

Counsel submitted that the 2nd plaintiff with whom the contractual transaction was executed, *"had the opportunity to inspect the goods"*, and the 2nd plaintiff also executed the relevant documents leading to registration and the issuance of the number plates. The defendant, it was urged, had *"carried out in full its contractual mandate"* and could not *"be held liable for deeds outside its scope"*.

Learned counsel urged that even were liability to be found against the defendant, the 1st plaintiff's claim *"cannot be sustained"*; because there was *"no evidence advanced to show that the mere anomaly in the Log Book and the [vehicle] body led the 1st plaintiff to dispose of the motor vehicle as scrap ..."* counsel disputed the claim that the suit motor vehicle had truly been disposed of at the price of Kshs.40,000/=, as scrap metal: *"The subject motor vehicle was barely a year old when the registration anomaly was detected."*

Counsel urged too that no authentic evidence had been adduced to support the alleged loss of business – and any award such as could be made in this regard, would be speculative.

G. FUTHER ANALYSIS

The evidence adduced, and the contentions of counsel, lead me to a determination of fact and law on the following lines:

1) On or about 25th August, 1983 a contract of sale and purchase was entered into between the 2nd plaintiff and the defendant – for the purchase of an unregistered TLD Isuzu ELF high-sided steel body lorry.

2) By the time of purchase by the 2nd defendant of the suit motor vehicle, on 25th August, 1983 there was *already*, between the 1st plaintiff and the 2nd plaintiff, a distributorship contract, executed on 4th April, 1981 (plaintiff's exhibit No. 1) under which the 1st plaintiff was to distribute the 2nd plaintiff's beverages. The 1st plaintiff was already, as was the case throughout 1984, distributing beverages as *per* contract, as confirmed in plaintiff's exhibit No. 13 wherein the following examples may be extracted:

- (i) 2nd January, 1984 – by vehicle No. KUS 838;
- (ii) 3rd March, 1984 – by Vehicle No. KDZ 844;
- (iii) 5th January 1984 – by vehicle No. KUT 404;
- (iv) 5th January, 1984 – by vehicle No. KLZ 663;
- (v) 5th January, 1984 – by vehicle No. KTU 893;
- (vi) 10th January, 1984 – by vehicle No. KUU 486;
- (vii) 12th January, 1984 – by vehicle No. KSL 313;
- (viii) 13th January, 1984 – by vehicle No. KNA 616;
- (ix) 16th January, 1984 – by vehicle No. KUP 485;
- (x) 18th January, 1984 – by vehicle No. KUT 166;
- (xi) 20th January, 1984 – by vehicle No. KUM 473;
- (xii) 23rd January, 1984 – by vehicle No. KUQ 093;
- (xiii) 25th January, 1984 – by vehicle No. KTJ 434;
- (xiv) 28th January, 1984 – by vehicle No. KRX 372;
- (xv) 30th January, 1984 – by vehicle No. KUM 453;
- (xvi) 1st December 1984 – by vehicle No. KTK 527;
- (xvii) 6th December 1984 – by vehicle No. KUT 404;
- (xviii) 7th December 1984 – by vehicle No. KUT 404;

- (xix) 8th December 1984 – by vehicle No. KUT 404;
- (xx) 10th December 1984 – by vehicle No. KUT 404;
- (xxi) 11th December 1984 – by vehicle No. KUT 404;
- (xxii) 13th December 1984 – by vehicle No. KSE 469;
- (xxiii) 15th December 1984 – by vehicle No. KUM 473;
- (xxiv) 19th December 1984 – by vehicle No. KSD 644;
- (xxv) 19th December 1984 – by vehicle No. KUT 404;
- (xxvi) 20th December 1984 – by vehicle No. KTK 331;
- (xxvii) (xxvii) 22nd December 1984 – by *vehicle No. KUT 404*;
- (xviii) 22nd December 1984 – by vehicle No. KTL 564;
- (xxvix) 30th December 1984 – by vehicle No. KTK 509;

(3) The 1st plaintiff's record does not show the suit motor vehicle, Registration No. KUT 404 being used in the distribution process after 22nd December, 1984; so it is not clear if it was ever used again after that date.

(4) The 1st plaintiff himself gave evidence that the suit motor vehicle was grounded in 1984, was never used again, and was in that year (1984) sold off as scrap metal to a dealer in Eldoret Town, for the sum of Kshs.40,000/=, for the sole reason that it could not be licensed to ply the roads of Kenya thereafter, due to the impugned discrepancies between the identification inscriptions on the body of the suit vehicle and the particulars specified in the Log Book during the process of registration.

(5) The defence seriously doubts that the suit vehicle was indeed sold off as scrap metal for Kshs.40,000/= to an Eldoret scrap-metal dealer, because it was a brand new vehicle sold only the previous year (1983). This misgiving is, I think, well-founded for *at least* the reason, as I hereby recognise by way of judicial notice, that a new lorry for a distributor of bulky goods in a country not so well-served with a transport infrastructure, would have been a precious asset to any transporter such as the 1st defendant testifies that he was.

(6) From the 1st plaintiff's pleadings and from the evidence, the suit motor vehicle had been licensed for road movement for the period 25th August, 1983 to 31st July, 1985 (plaint, para. 7). From this fact it follows that disposing of the new motor vehicle as scrap metal in 1984 would have had little to do with its not being licensed to ply Kenyan roads. It follows that the non-use of the suit motor vehicle after 22nd December, 1984 has no relation to the said discrepancies between the entries in the Log Book and the particulars in the motor vehicle identification inscriptions.

(7) There is no doubt that the defendant, at the time of selling the suit motor vehicle to the 2nd plaintiff, *did* fill in forms "A" and "C 20", *carrying the identification particulars* which were to be used by the Registrar of Motor Vehicles in the process of registration. Since, as I do find and hold, the Registrar of Motor Vehicles would be dealing only with the identification papers and would not be inspecting the physical item, the high probability is that it is the *defendant* who supplied inaccurate entries, leading to the mix-up in the data entered in the Log Book by the Registrar of

Motor Vehicles. I would also hold that the occurrence of such error in the entry of data need not necessarily be evidence of negligence; and in any case such are errors which would be corrected by the *Registrar of Motor Vehicles* once the *defendant* provided to him the correct information. It would have been entirely reasonable, therefore, for the purchaser either by himself or by authorised agent, to return to the defendant with the erroneous *Log Book* and with the *number plates* for the suit vehicle, and request the vendor to bring them to the Registrar of Motor Vehicles for rectification. I hold this to be a more natural and more appropriate course than the purchaser, entirely on his own – and in the circumstances of the instant case – approaching the Registrar of Motor Vehicles *directly*.

(8) From the evidence, I hold that the sale-and-purchase contract had been only between the defendant and the 2nd plaintiff; save that the defendant had come to know that the title to the suit motor vehicle would be in the joint names of the 1st and the 2nd plaintiff. Otherwise the defendant would not have given on their Forms “A” and “C 20” the names of *both* the 1st and the 2nd plaintiffs.

(9) Although the 1st plaintiff, over a period of more than five years, was writing letters to the defendant seeking rectification of the suit vehicle’s registration particulars, the significance of these letters is doubtful; firstly it is not ascertained that the said letters were reaching the defendant; secondly, bare letters of such a kind are not an indication of serious intent to obtain the defendant’s effective action; thirdly, what purpose would any action taken by the defendant serve, if (*as appears from the evidence*) the suit vehicle was long ago (in 1984) sold off as scrap metal to a scrap-metal dealer in Eldoret? Fourthly – and this is unsurprising – the complainant, for unknown reasons, would not deliver to the defendant *both* the *original Log Book* and the number plates for the vehicle. Indeed, even when on 16th March 1992 **Mr. Ngamau**, the defendant’s Managing Director indicated his willingness to help in the rectification of the vehicle-identification mix-up, *such essential items for his use were not supplied* by the 1st plaintiff; but instead the 1st plaintiff (allegedly alongside the 2nd plaintiff), on 3rd June, 1992 filed suit. So what was the suit being filed for, if the defendant was ready to help with the vehicle-particulars mix-up? Quite obviously, because the whereabouts at the time of the suit motor vehicle were undisclosed, and the 1st plaintiff was not genuinely seeking a correction in the registration particulars. Was there any wrong in respect of which the 1st plaintiff was suing? From the facts as they are herein emerging, the 1st plaintiff was seeking liabilities and consequential pay-ups from the defendant the background to which, I think, the defendant could not be expected to understand!

(10) Although there is plenty of evidence that the defendant not only had a hand in the making of the entries in the Log Book for the suit vehicle, and that the defendant – to its credit – held itself out as able and willing to intercede with the Registrar of Motor Vehicles, the defendant had raised queries as to its relationship with the 1st plaintiff. Of the 1st plaintiff, the defendant’s Managing Director had, on 29th November, 1991 written to M/s. Omukunda & Co. Advocates (for the 1st plaintiff) in these terms: “Your client has never been our customer ...”; to which the 1st plaintiff thus responds in his testimony: “The [suit] motor vehicle was registered in the joint names of myself and the 2nd plaintiff”; “I have dealt with the [defendant] and I am not a stranger”.

I have earlier noted that it was indeed the defendant who in both Form “A” and Form “C 20”, to be dispatched to the Registrar of Motor Vehicles, indicated the *name of the 1st plaintiff as co-purchaser*; and therefore I do hold that the defendant *did* know of the existence of the 1st plaintiff in relation to the legal entitlement to the suit motor vehicle which the defendant was selling. I would further hold that this fact would place the 1st plaintiff in the circumstances of this case, in a valid *agency* relationship on behalf of the 2nd plaintiff; and so the 1st plaintiff, if all other matters were done in good faith, could legally come to deal with the defendant in respect of the suit motor vehicle. I therefore do not hold the 1st plaintiff to be a stranger to all dealings relating to the suit motor vehicle.

(11) The 1st plaintiff testified that it was the 2nd plaintiff who had suggested to him that he should sue the defendant. Yet the record shows also the name of the 2nd plaintiff who, however, did not have any evidence adduced on its behalf and was, for all practical purposes, absent before the Court. Considering that the 2nd plaintiff advice-to-sue was given to the 1st plaintiff on or about 13th March 1992 (see plaintiff's exhibit No. 3) when the suit *motor vehicle had ceased to be available some 8-9 years earlier*, I hold the whole suit enterprise to have not been conceived with *bona fides*.

(12) Lack of *bona fides* in this suit is still more evident in that the 1st plaintiff testified in Court that another motor vehicle owner, **Peter Owoko** of Busia whose vehicle number KUT 403 had its registration details mixed up with the identification particulars of the suit motor vehicle, had in 1988 secured a deal for compensation from the defendant herein; so the 1st plaintiff was suing, by his own testimony, not for the judicial redress of wrongs, but for a *negotiating position* with the defendant in the same way as **Peter Owoko** had bargained and secured compensation. Such a design of suit, I do hold, would be an abuse of the process of the Court.

(13) I have already held that it was in law possible for the 1st plaintiff to deal with the defendant on any matters touching on the title documents relating to the suit motor vehicle. In that case, the 1st plaintiff would be coming along *via* his agency linkage to the 2nd plaintiff. It is my finding that the *defendant had not disclosed its own agency role* in relation to General Motors Limited; and so the defendant itself would, in my opinion, be responsible for forwarding the vehicle – identification details to the Registrar of Motor Vehicles. But, as I have noted earlier, the claim in the plaint that the defendant should have secured the rectification of the Log Book details have not been brought in good faith, and any connection between the non-rectification of the Log Book and such commercial losses as the 1st plaintiff may have suffered, has not been proved. It has not been shown how a new motor vehicle barely a year old (the suit vehicle) could be disposed of as scrap metal – and no records of such transaction have been produced. There is no basis for claiming on account of erroneous Log-Book records as late in the day as 1992, when the vehicle allegedly was turned into scrap metal in 1984. The role of the 2nd plaintiff in the suit abides in mystery, just as is the whole claim, which is surreptitiously being linked to business losses – business which had been in progress since 1981, and conducted by means of a *wide range* of motor vehicles.

I hold that the entire suit has been lodged in bad faith, and is an abuse of the process of the Court which in exercise of its unlimited powers as specified in s.3A of the Civil Procedure Act, this Court must dismiss. No valid proof is placed before this Court on the basis of which any finding can be made in favour of the plaintiff, on the *basis* of the plaint of 3rd June, 1992.

Accordingly, I hereby dismiss the 1st plaintiff's suit with costs to the defendant. It is hereby ordered that any application such as there may be, on any aspect of this judgement, shall be heard and disposed of in the Civil Division of the High Court.

Decree accordingly.

DATED and DELIVERED at Nairobi this 29th day of September, 2006.

J. B. OJWANG

JUDGE

Coram : Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff: Mr. Oduk, instructed by M/s. Oduk & Co. Advocates

For the Defendant: Mr. Mwiti, instructed by M/s. Meenye & Kirima Advocates