



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2725 OF 1994**

**CAPTAIN J.N. WAFUBWA..... PLAINTIFF**

**VERSUS**

**DAVID ANUNDA T/A DAVANU ENTERPRISES..... 1ST DEFENDANT**

**MBWIKA S/O MWAMBU T/A**

**UNITY TYRE EXPRESS..... 2ND DEFENDANT**

**PERMINDER SINGH VIRDI T/A**

**JASWINDER SINGH ENTERPRISES..... 3RD DEFENDANT**

**JUDGMENT**

The Plaintiff's Case:

The Plaintiff herein, Captain J.N. Wafubwa trading as Red Impex Services Limited has sued David Anunda trading as Davanu Enterprises seeking the following reliefs:

- a) Delivery of a motor vehicle registration number KAA 830C bearing a Chassis Number FN-516-A10218 which the Plaintiff claims to have been purchased on his behalf by the Defendant but not delivered despite full payment; or alternatively payment of a sum equivalent to the value of a similar vehicle at the time of judgment or at the time of delivery.**
- b) General damages for loss of business at the rate of Kshs.42,787 per day from August 1993 to the date of release of the vehicle or payment of the value of a similar lorry at the time of judgment.**
- c) Shs.425,000/=.**
- d) Costs of the suit.**
- e) Interest on (a) (b) (c) (d) (e) and (f) till payment in full.**
- f) Such further and/or other relief that the Court would deem fit to grant.**

At the time this suit was filed in 1994 the Defendant was not a party. The Defendants then were The

Attorney General, Mbwika son of Mwambu trading as Unity Tyre Express and Perminder Singh Viridi, trading as Jaswinder Singh Enterprises. The Plaintiff has told the Court that he dropped the claims against the said three Defendants having realized that he had no cause of action against them. He initially amended his Plaintiff to include the Defendant herein as the 1st Defendant, in place of the Attorney General and then re-amended his plaintiff to remove the 2nd Defendant and the 3rd Defendant. As the Defendant herein is now sued singly, he shall be referred simply as “the Defendant” in this judgment. Although the Plaintiff has stated in evidence that he decided to enjoin the Defendant in the suit as a result of his failure to join the Plaintiff either as a co-plaintiff or as a witness, the Court did consider it necessary to examine the evidence before it with a view to determining whether the Defendant is indeed liable to the Plaintiff.

Briefly, the Plaintiffs case against the Defendant as stated in the re-amended Plaintiff is that he engaged the Defendant as an agent in the procurement of a motor vehicle, the subject matter of this suit namely motor vehicle registration Number KAA 830C, Chassis Number FN 516-A10218 in an oral contract. The agreement, according to the Plaintiff was that the Defendant was to purchase and supply the Plaintiff with a Mitsubishi Fuso Truck without an engine and gear box. The Plaintiff says that the Defendant, after tracing and identifying the motor vehicle in question intimated to him that the same would cost Shs.1,275,000/=. The Plaintiff was allegedly to supply (and according to him did supply), as consideration, two motor vehicles registered as KAD 206F and KAD 995G respectively in addition to Kshs.200,000/= and Shs.95,000/= paid separately. The Plaintiff claims Shs.425,000/= from the Defendant as the difference between the purchase price allegedly advised by the Defendant and the actual amount paid by him to the seller of the vehicle, M/s. Unity Tyres. The Plaintiff claims that the Defendant failed to deliver the vehicle and continues to detain the same and that as a result he has incurred an economic or financial loss of Shs.42,787/= per day which he had anticipated to earn from the use of the subject motor vehicle.

#### The Defence:

The Defendant admits that he was engaged by the Plaintiff as an agent to procure the subject motor vehicle but avers that he was only required to purchase a Chassis not a complete vehicle. He admits having bought the Chassis for Shs.850,000 but he denies that he has retained possession of the same. He avers that he gave possession to the Plaintiff’s firm Red Impex Services whereupon the Plaintiff removed certain parts from the vehicles and later on reported the vehicle as having been stolen. He denies receiving motor vehicle numbers KAD 206F, KAD 995G as consideration for the chassis purchased. He also denies having intimated that the same would cost Shs.1,275,000/= as claimed by the Plaintiff. The Defendant therefore denies being indebted to the Plaintiff in the sum of Shs.425,000/= being the difference between the alleged purchase price and the actual sum paid.

#### Plaintiff’s Evidence:

The Plaintiff in his evidence produced several documents in an attempt to prove his case but had a number of them expunged from the record during cross examination. The Court has noted that the Plaintiff has added personal comments on two of the various Exhibits namely Ex W.25 and W27 thus rendering the same inadmissible. It is no surprise that these are the same exhibits the Plaintiff admitted as having no bearing to his case against the Defendants. Exhibit W.28 was also expunged from the record for irrelevance.

Despite the numerous exhibits produced as earlier stated in this judgment, the Plaintiff has not either in his oral evidence or his written submissions made any attempt to connect the said documentation to his allegations against the Defendant. He did not, for instance prove the oral agreement that the Defendant was to purchase for him a vehicle and not a chassis or that the Defendant quoted to him a price of Shs.1,275,000/= for KAA 830C. That the three vehicles said to have been given to the Defendant were so given as consideration is defeated by the evidence adduced by the Defendant and admitted by the Plaintiff that he actually bought the motor vehicle registered as KAD 995G as per the receipt issued to him by the Plaintiff’s firm Red Impex General Services on 22nd November 1993. The Plaintiff did not prove that the payment of cash to one James Mbuti Macharia was received by the said Macharia on behalf of the Defendant. The Plaintiff’s evidence that the Defendant is still in possession of the motor vehicle (or

Chassis) registration number KAA 830C is also not proven. The Plaintiff has also not shown that the Defendant ever had possession of the said vehicle at any one time. On the contrary and as borne out by the Plaintiff's own admission, the said vehicle or the Chassis thereof was undoubtedly the subject matter of a criminal charge against the former 3rd Defendant Jaswinder Singh Viridi wherein the said Jaswinder Singh faced several counts of fraudulent use of the said motor vehicle. The Plaintiff has not shown the Defendant to have parted with the motor vehicle or Chassis to the said Jaswinder Singh. The Plaintiff in his evidence in chief told the Court that the Defendant claimed that the police had taken the vehicle and given it to Mr. Viridi. Yet when the Defendant in his evidence told this Court that the Plaintiff and one of his workers, a Mr. Simiyu, had told the Defendant on separate occasions that they had taken the vehicle to Mr. Viridi for repair, who instead converted it to his own use, the Plaintiff did not counter the same in his cross-examination. That the Plaintiff and the Defendant did meet at Pangani Police Station where the vehicle had been detained is not in dispute. Also that the Plaintiff requested the Defendant to support him in his suit against the former Defendants and the Defendant refusing to do so is also not disputed. The Plaintiff has expressly admitted in evidence that his sole reason for suing the Defendant is that he refused to either testify on his behalf in the suit against the former defendants or to join him as a co-plaintiff. In his own words during cross examination the Plaintiff said, and I quote:

**“The written Statement of Defence filed on 3rd**

**February 1995 shows that the Defendant was not sued**

**with the Attorney General Unity Tyres and Jaswinder Singh.**

**At that time I expected him to join me as a Plaintiff. The reason**

**why I sued him is because he refused to join me in H.C.C.C. No.2725**

**of 1994 as a Plaintiff.”**

Conclusion:

It is quite obvious from the above confession that the Plaintiff himself does not believe in the Defendants' wrong doing. Worse still he has been unable to support his case with the documentation submitted by him in evidence during the trial. This being the case and it being quite evident that the Defendant is not in possession of the motor vehicle in question an order for its immediate delivery cannot be made. Also, the Plaintiff having failed to prove that the Defendant failed to deliver the said motor vehicle to him or that he breached the alleged oral contract between the two, the prayer for payment of a sum equivalent to the cost of a similar vehicle cannot stand. The loss of business, if any, has not been proved to have been caused by the Defendant. I agree with Counsel for the Defendants that the law of evidence requires that he who alleges proves the truth of his allegations. I find that, on the balance of probabilities, the Plaintiff has not proved his case against the Defendant who has on the other hand disproved (despite its not being a requirement on his part) each and every allegation levelled against him by the Plaintiff.

In the circumstances I have no alternative but to find that the suit fails in its entirety and the same must be dismissed. I therefore dismiss the same with costs to the Defendant.

Dated and Delivered at Nairobi this 8th day of June 2005

**M.G. Mugo**

**Judge**

**In the presence of:**

***Wafubwa in Person/ the Plaintiff***

***Buti & Onyambu: For the Defendant***