



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO 114 OF 2002

LONRHO MOTORS EAST AFRICA LIMITED

(IN RECEIVERSHIP).....PLAINTIFF

VERSUS

JOHN NGUMIDEFENDANT

J U D G M E N T

The Plaintiff has brought a claim against the defendant for the recovery of the balance of the purchase price for the motor vehicle **BMW 318 W** and the insurance and licence fee of the same.

P W 1 said that he had worked for the Plaintiff for 5 years and his job entailed running a debtor's ledger and keeping a record of the unpaid balances from those debtors and finally pursuing the payments thereof. The defendant was one such debtor from whom the plaintiff claims kshs 1, 323, 740/- which relates to unpaid balance for motor vehicle registration No. **KAK 318W**. The amount so claimed is broken as, firstly kshs 1, 200, 000 being the unpaid balance of the purchase price of the vehicle; secondly kshs 11, 375/- for road licence for the vehicle; and thirdly kshs 112, 365/- for Insurance of the vehicle. Page 13 of the Plaintiff's documents was a Journal Voucher dated March 2000 reflecting the balance of the purchase price of kshs 1, 200, 000/-. Page 12 was also a Journal Voucher dated June 2001 reflecting the Insurance and page 11 was an invoice dated 4th December 2001 addressed to the defendant for the payment of kshs 11, 375 for road licence.

P W 1 stated that the defendant traded in Motor Vehicle Ford Mondeo Registration No. **KAK 126F** for kshs 1, 200, 000/- and that amount was used to off set the initial invoice. The defendant bought another vehicle from the Plaintiff, a ford explorer **KAL 534B** for kshs 3, 600, 000/-.

There were no dates assigned to the aforesaid transaction but they were all posted in the Journal Voucher in March 2000.

P W 1 stated that on 29th March 2000 the defendant made a payment of kshs 4 million which went towards payment for the aforesaid purchases leaving a credit balance of kshs 400, 000 and this was utilized to partly pay for the **BMW KAK 318W**, which left a balance of the purchase price of kshs 1, 200, 000/- which is the subject of the present suit. P W 1 gave evidence and said that despite demand the defendant did not make further payment and is accordingly indebted to the Plaintiff as claimed.

On being cross-examined PW 1 said that he was not in the Plaintiff's employment when the transactions the subject of this case were undertaken and he confirmed that his testimony was based on the Plaintiff's records. He was unable to confirm when the defendant got possession of the vehicle but added that he at least had possession by the year 2001. P W 1 was unable to explain why the plaintiff was paying insurance when the vehicle was in the defendant's possession but added that the plaintiff paid

because the registration document of the vehicle were in the plaintiff's possession. On being questioned on which capacity the Plaintiff sold the vehicle to the defendant, which was registered in the name of a third party P w 1 kept changing his testimony. He said firstly that the vehicle was sold on behalf of their customer, that is the registered owner; secondly he said that the plaintiff had purchased the vehicle from the registered owner for kshs 2.5 million; thirdly he said that the plaintiff's commission out of the sale of the vehicle is kshs 300, 000/-.

On being cross examined on the defendant's contention that he was often hired to do work for the plaintiff and allowed to off set his fees against his debt with Plaintiff, P W 1 responded "may well be so," then qualified it by saying that the defendant had failed to prove his claim with documents and consequently that is why the plaintiff brought the present action in court. P W 1 responded to the defendant's alleged outstanding invoice of kshs 787, 500/- by saying **"I don't know if it was part payment of the BMW."**

In re-examination P W 1 qualified the aforesaid statement by saying that all transactions of the plaintiff are transacted by being put on record and if indeed the allegation of the defendant was true all the demand letters addressed to the defendant were copied to all top personnel of the Plaintiff who did not raise an issue that the defendant was entitled to offset the debt.

The defendant in evidence in chief stated that all material times until 28th February 2000 he was self employed as an investment banker. While he was self employed the defendant had a relationship with the plaintiff to raise money from various financial and banking institutions. He gave example of various institutions he had arranged financing for the plaintiff and said he assisted the plaintiff to sell its Lonrho house for a consideration of kshs 585 million. For his work the defendant said he charged the plaintiff a fee, which ranged between 0.5% and 1.5%. The defendant said that the transaction the subject of defendants document page 6 for kshs 787, 500/- was relating to the need of Kenya Breweries to have a fleet of plaintiff's vehicle but which they did not necessarily want to own. The defendant was able to arrange for a company, which was willing to lease them to Kenya Breweries, and financing for their purchase of the same was arranged by the defendant. On arranging the structures of how this was to work the defendant, since he was about to enter into employment was requested by the then plaintiff's Managing Director to invoice the Plaintiff. Prior to this the plaintiff did not require the defendant to produce invoices for their transaction was always verbal.

The defendant said that due to previous work he had undertaken for the plaintiff the Plaintiff owed him kshs 1, 850, 000/- and because the Plaintiff did not have cash it was agreed that the defendant be paid in kind by getting a motor vehicle Ford Mondeo Registration No. KAK 126F.

This vehicle broke down and the Plaintiff took it back for the value of kshs 1.2 million and instead of paying, the defendant was given a BMW vehicle registration No. KAK 318W and the balance of the purchase price of this vehicle it was agreed could be off set by the fees the plaintiff owed the defendant. The defendant said that this was done with the knowledge of the then Managing Director Mr. Walmsley, and the then plaintiff's finance manager. The defendant said that he was seeking from this court an order that he be allowed to off set the amount in the invoice, namely kshs 787, 500 and he was willing to pay the plaintiff the balance that would be outstanding thereafter. He also sought an order that the defendant be ordered to pay the duty payable before the vehicle can be transferred into his name and finally he sought an order for damages.

On being cross-examined the defendant said that each transaction he undertook for the plaintiff had its own terms but he denied that those transactions were personal to the then plaintiff's Managing Director.

The Defendant contended that the price agreed for the BMW included duty.

D.W. 2 was Mr. Allan Walmsley who stated in chief that between 1997 and 1999 he was the finance director of Lonrho motors Africa and in January 1999 he was appointed the CEO of Lonrho Motors East Africa Ltd, the Plaintiff. He confirmed that the plaintiff had a working relationship with the defendant whereby the defendant undertook a number of projects, financially related. The Plaintiff contracted the

defendant to work for it about 3 to 4 times in a year. The advantage of dealing with the defendant was that being an individual he was willing to reduce his fees.

D.W. 2 was able to corroborate the defendant's evidence that he did a job for the Plaintiff related to Kenya Breweries which he requested the defendant to raise an invoice which it was agreed would be off set with the purchase price of BMW.

D W 2 was unable to confirm whether the price of the vehicle included duty.

Having listened to the evidence it is clear that both plaintiff and defendant agreed that the defendant purchased the vehicle BMW KAK 318W. The defendant did not controvert the Plaintiff's evidence that the balance of the purchase after credits was kshs 1, 200, 000.

The Defendant has to my mind and on a balance of probability proved that the plaintiff owed him kshs 787, 500 for the invoice dated 28th February 2000.

In regard to the insurance and the road licence I am not satisfied that the payments thereof was anything but gratuitous. The plaintiff's witness was unable to state why the plaintiff paid insurance for a vehicle it had sold to the defendant.

The parties have agreed issues and my findings are as follows: -

- · Of the 1st issue my finding is that the defendant does not owe the plaintiff kshs 1, 323, 740. 20. The defendant owes the Plaintiff kshs 1, 200, 000 less the amount of invoice kshs 787, 500 that leaves kshs 412, 500.
- · Of the 2nd issue I find that the plaintiff has a right to transfer the vehicle KAK 318W. I accept the evidence of the P W 1 that the plaintiff had purchased the vehicle from its registered owner.
- · Of the 3rd issue I find that the defendant was engaged by the plaintiff as a consultant over the period of 1997 to 2000.
- · Of the 4th issue I find that the defendant did raise the invoice for kshs 787, 500 and the plaintiff is liable to pay the same.
- · Of the 5th issue I do not find the plaintiff to be in breach of the sale agreement of vehicle KAK 318W.
- · Of the 6th issue my finding is that the plaintiff is not liable to pay the custom duty or VAT. The defendant obtained the possession of the vehicle between year 2000 and 2001 and had not in that period demanded the payment by the plaintiff of the duty, to my mind that is evidence that there was no agreement on the plaintiff bearing the burden of that duty, even D W 2 was unable to confirm that the agreed price of the vehicle was inclusive of duty.
- · Of the 7th issue the defendant did not adduce evidence to support the prayers of mandatory order or for damages. It goes without saying that on payment of the balance owed to the plaintiff he would be entitled to the original logbook of KAK 318W and any other relevant documents thereof.
- · Of the 8th issue I am of the view that both parties have to some extent succeeded and my finding is that each party should bear its own costs.

The judgment of this court.

(1) That judgment for the Plaintiff against the defendant for kshs 412, 500 with interest at court rate from the date of this judgment until payment in full.

(2) That each party shall bear its own costs.

Dated and delivered this 8th day of December 2004.

MARY KASANGO

AG JUDGE