

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 74 OF 2001

ELEGANT CARS LIMITED APPLICANT

V E R S U S

AKIBA BANK LIMITED RESPONDENT

RULING

BY Notice of Motion dated the 2nd July 2001 supported by affidavit of Rajen Harilal Malde sworn of 29th June 2001 the plaintiff has applied for judgment firstly under order 12 Rule 6 Civil Procedure Code on admission. Secondly under Order 35 Civil Procedure Code rule 1. The said order 12 Rule 6 of the Civil Procedure sub rule 6 provides:-

“Any party may at any stage of a suit, where admissions of facts has been made, either on pleadings or otherwise apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such application make such order or give such judgment as the court may think just.”

In this case the Defendant under paragraph 5 of its defence admits the plaintiffs claim of Kshs. USD 3,000 together with interest. The plaintiff also seeks special damages calculated at Kshs. 464,754.70/- with interest and costs. There is also the claim of USD 3000 being the second payment admittedly received by the Defendant which defendant states that although instructions to determine this transfer was made by plaintiff it was done after the money had already been transferred to its destination.

In total the plaintiff is claiming judgment for the full amount paid USD 6000 amounting to Kenya Shillings 467,300/- plus special damages amounting to Kshs. 464,754.00 which is said to be loss of profits on the sale of some 5 motor vehicles mentioned in the pleadings.

As shown above the defendant has admitted USD 3000 first payment and the plaintiff is entitled to judgment in that sum plus interest. Regarding the other sum of Kshs. 3000 the defendant admits having received instructions from the plaintiff to transfer to the plaintiffs Bank account in Japan. And states that it did carry out instructions of the plaintiff. The transfer was at a fee (a service offered by the defendant to its customers) and there was an agreement for transmission by telegraphic transfer. The plaintiff was sending the money to deposit towards his purchase of 5 motor vehicles for resale in Mombasa.

The defendant denies any knowledge of the details for the transfer of the deposits. Although the defendant alleges that only one payment was not received it is said the balance USD 3000 was transferred and was received as per instructions. The plaintiff has not admitted this receipt but claims the full amount namely USD 6000.

The issue of liquidated damages is also disputed. Defendant simply says the amount was not proved and damage was too remote. The plaintiff was bound to mitigate his loss. I am convinced that there is a part of the plaintiffs claim that is not proved and triable issues exist. I therefore enter judgment for plaintiff in the admitted sum of USD 3000 plus costs and interest.

The balance of the plaintiff claim shall go to trial in the normal manner.

Dated this 11th day of October 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of : -

Mr. Shah for plaintiff

Mr. Fayaz Anjarwalla.

MR. ANJARWALLA

I apply for certified copies of proceedings and judgment. Leave if required is hereby granted to appeal.

J. KHAMINWA

COMMISSIONER OF ASSIZE