

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

**AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 538 OF 2000**

NORTH END TRADING COMPANY t/a

KENYA REFUSE HANDLERS LIMITED PLAINTIFF

VERSUS

SOLID FREIGHTERS LIMITED 1ST DEFENDANT

JARED ISAAC OMWARE 2ND DEFENDANT

RULING

The plaintiff has instituted this suit against the two defendants for the recovery of Shs.5,062,952.00 together with interest thereon at 36% p.a. from 8.10.1999; a mandatory injunction to compel the defendants to release all documents held by them in respect of some 4 motor vehicles which the defendants were allegedly supposed to clear and register on behalf of the plaintiff; in the alternative to the claim for refund, the plaintiff seeks immediate specific performance of the contract; loss of user at Shs.40,000/= per day from 18.10.1999 and damages for breach of contract together with costs of the suit.

The suit arises from an alleged agreement entered into in January 1998 between the plaintiff and the defendants whereby the defendants were to clear and register on behalf of the plaintiff five motor trucks imported by the plaintiff from abroad in consideration of the plaintiff paying to the defendants the sum of Shs.7,000/= for each truck. The plaintiff avers that it paid the total sum of Shs.35,000/= for the five trucks and a further sum of Shs.4,962,952/= to enable clearance and registration of the trucks. The plaintiff also states that subsequent to those payments and upon further negotiations, the parties mutually agreed that the plaintiff would remit a further sum of Shs.100,000/= in full and final payment of the moneys due by the plaintiff to the defendants on the understanding that the defendants would complete the process of registration of the motor vehicles upon which the defendants would forward to the plaintiff all relevant documents, number plates, payment receipts and other necessary documents. The plaintiff claims that it paid the said sum of Shs.100,000/= vide Bankers Cheque No. 009990 drawn on Middle East Bank which said sum the defendants duly received. But despite having received the cheque, the defendants failed to meet their obligations to complete the transactions thereby necessitating the filing of the suit.

In their defence the defendants state that at all material times it dealt with the Kenya Refuse Handlers Limited and are unaware of North End Trading Company Ltd. They further aver that North End Trading Co. Ltd. is not privy to the transactions the subject matter of the suit and consequently there has been a misjoinder of parties.

Regarding the claim for Shs.4,962,952/=, the defendants deny owing the plaintiff that sum or any part thereof and aver that the 2nd defendant on the instruction of the plaintiffs disbursed cheques to, inter alia, Kenya Ports Authority, Customs and Excise Department. As to the sum of Shs.100,000/=, the defendants claims that the money was paid by the plaintiff to it in part payment of sums owed to the 2nd defendant by the plaintiff and that there is a further sum outstanding. However, despite this latter averment, the 2nd defendant makes no counter-claim which suggests that the claim by the defendants that further sums are still outstanding may not be all that genuine.

All the other claims by the plaintiff against the defendants are denied in the defence.

In view of the various claims and denials made by both the plaintiff and the defendants in their respective pleadings, several issues of fact and law arise for determination. All those will have to be resolved at the trial of the suit. Pending that however, the plaintiff seeks the surrender of all Original receipts, Declarations, Invoices, Refund Certificates, Freight Documents, Import Entry Certificates, Letter of waiver of customs warehouse rent, Road Licences, Registration Plates and/or other documents and items held by them in respect of the subject Motor Trucks to enable registration and use of the trucks. He has done so through an application to that effect filed herein on 20.11.2000 pursuant to Section 3A of the Civil procedure Act. Although the defendants have resisted the application, it is my considered opinion that, in the circumstances of this matter the order sought by the plaintiff ought to be granted in the interests of justice. I say so for the following reasons:-

- (a) The defendants in their defence do not say that they have a lien on the documents the release of which is sought.
- (b) Although in their defence the defendants have stated, in a half-hearted manner in my view, that further sums are due to them under the agreement, they have failed to specify how much those sums are. More significantly however, they have not lodged any counter claims in respect thereof.
- (c) The motor vehicles whose clearance and registration is the subject matter of this case are commercial trucks. The continued delay in having them registered is obviously occasioning grave financial loss and damage to whoever amongst the parties will ultimately be adjudged responsible. Consequently, although I am not quite convinced that either of the parties is acting in an entirely forthright manner, it is in the interest of both that the damages that are likely to be sustained be minimised.

Accordingly, since the defendants have not tendered any evidence to show that they have any interest in either the motor vehicles involved or in the documents, it is fair and just that they surrender them to the plaintiff so that it can proceed to have the motor vehicles registered.

In view of what I have stated above and in exercise of the inherent powers of this court to do justice, I grant the mandatory injunction in the terms sought in the application.

The costs of this application will be in the cause.

Dated at Nairobi this 16th day of January, 2001.

T. MBALUTO

JUDGE