

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1226 OF 1999**

WHEEL BASE LIMITED PLAINTIFF

VERSUS

KPSITOI FARM COMPANY LTD. DEFENDANT

R U L I N G

The Notice of Motion dated 22nd August 2000 is seeking that judgment be entered in favour of the Plaintiff against the Defendant first on account that the Defence filed raises no triable issues and secondly and in the alternative on grounds that the debt is admitted. I will first consider whether on the pleadings and evidence before me by way of affidavits both by the Applicants/Plaintiffs and by the Respondent/Defendant plus the annexures, I am satisfied that the Defence on record raises no triable issues that can be allowed to proceed to full hearing.

The claim is based on Hire Purchase Agreement No. 2000085 dated 9th December 1994 which is not in dispute. The Defendant, it would appear from its Director's Affidavit that, it admits some indebtedness to the Plaintiff before the repossession and sale of the tractor in question. All it is saying is that the tractor was worth K.shs 2,224,536 but the Plaintiff sold it at an undervalued amount of K.shs 651,200. Thus if I understand, the Defendant properly, he is saying that had the tractor been sold at what he calls proper value, the amount realised would have been enough to offset the amount being claimed from him.

I do agree that even if the tractor was sold at K.shs 2,224,536.00 which the Defendant alleges to be the value, there would have still been a debt owing as the claim is for K.shs 5,675,430/- and thus even if the tractor realised K.shs 2,224,536/- (which I do feel was the highest value one could give it as that was the principal sum advanced for its purchase in 1994 and I assume it was put into use, which would mean that by the time it was being repossessed it had depreciated in value) there would have still remained a part of the claim which has not been explained, yet that element of the value of the tractor is in my humble opinion an issue that can only be probed into properly at a full hearing when both parties will be in a position to prove their allegation with documentary evidence if need be. It means at the end of the day that with that Defence on record the exact amount claimable cannot be ascertained till that aspect is disposed of. It is a triable issue.

On the question of entering judgment on admission, the Plaintiff is relying on the Defendants allegations on counter-claim. I do accept that this is a clearly badly drafted counter-claim. It even ends in not praying for anything and one wonders what its purpose is if it does not pray for anything. Be that as it may, a proper reading of the counter claim or of paragraph 6 of the Defence cannot lead one into accepting that it is an admission. All that the Defendant is stating at paragraph 6 and paragraph 8 of the defence is that if the tractor was sold at the proper value which it asserts is K.shs 2,224,536/- then his account with the Plaintiff would have reflected K.shs 1,573,326/- extra and that would have affected the suit considerably. Nothing in the defence and counter-claim can be taken to be an admission.

Lastly, I do note that the Hire Purchase agreement was between Kenya Motors and the Defendant, but I do humbly feel there could be plausible reasons why the Plaintiff is suing the Defendant.

The application for summary judgment on either ground is not granted. It is dismissed with costs to the Defendant.

Dated at Nairobi this 24th day of May 2001.

ONYANGO OTIENO

JUDGE