REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 668 OF 1999.

PETER MWORIA.....PLAINTIFF

VERSUS

CALTEX OIL(KENYA) LTD.....DEFENDANT

J U D G M E N T

The Plaintiff in his suit saw an advertisement in the Daily Nation of the 4th October 1996 inviting tenders for a number of v vehicles being sold on an "as is where-is basis".

He tendered for a number of the items and eventually his offers in the sum of Shs.1,180,000 for two prime movers i.e. vehicles registration number KAD 404V for Shs.580,000 and KAD 401V for 600,00 was accepted by the Defendant. See letter of 14 March 1997 sent by the Defendant to the Plaintiff.

On the 8th April, 1997 the Plaintiff wrote to the defendant and paid Shs.1,180,000/- to the Defendant see receipt No. 55410 of 8.4.97 issued by the Defendant. In that letter the Plaintiff asked for a period of one month to repair the vehicles and make them mobile. It had also been agreed orally that the Plaintiff could leave the vehicle where they were at the Defendant's premises for an indefinite period or so the Plaintiff says.

On the 4th November 1998 the Defendant put a Notice in the Daily Nation under the provisions of the Disposal of Uncollected Goods Act calling upon the Plaintiff to collect the vehicles. The Plaintiff saw the Notice and went to the heard office of the defendant on the 5 November 1998 and was given a note by D.W. 1 to go to see the fleet Manager and collect the vehicles. D.W. 1 also required the Plaintiff to pay Shs.246,205,95/- being for expenses incurred by the Defendant, details of which are set out in a statement from the Defendant dated the 4 December, 1998.

The Plaintiff went to the place where the vehicles were lying and according to him he found that the vehicles had been cannibalized. As a result he did not take the vehicles away. The Plaintiff stated that a Mr. Musembi told him that the reason why parts were missing was that they had been removed to repair the Defendant's moving vehicles but that they were waiting for spare parts to come to repair the Plaintiff's vehicles.

The Plaintiff says he returned to the Defendants' head office and saw D.W. 1 and asked for his money back. D.W. 1 denied that the Plaintiff came to see him with such a request.

On the 9th November 1998 the Plaintiff wrote to the Defendant as follows:-

Dear Mr. Kiarie,

SALE OF VEHICLES NOS. KAD 401V AND KAD 404V

I wish to plead to Caltex Oil (K) to waive penalties being charged to me by the Fleet Depot Manager. This tabulation of the charges were copied to you on December 4th, 1998.

I feel I would not pay for the advertisement in the newspapers because the noti ce would have been communicated by registered letter since you have my current postal address.

Please consider the fact that the vehicles purchased were in such a poor state that even towing is very difficult. The costs to be incurred to enable towin g are high and they were not anticipated.

I can accept to pay Shs.90/ - per prime mover (the normal charge at petrol stations for a complete lorry is Shs.100/ -.) from the date of the advertisement to the date of towing the vehicles from your depot. T his office should not prejudice my position as I have never taken possession of the vehicles. I raise this issue because I have been denied access to the vehicles to view their present state even on production of original documents for identification of purchases.

Please assist me to be able to remove the vehicles at an early date.

Yours faithfully,

Peter Mworia."

It is clear from this letter that the Plaintiffs concern was with regard to the charges being levied against him. The letter also is an admission by the Plaintiff that the vehicles were on such a poor state when he bought them that even towing would have been very difficult. I reject the suggestion made by the Plaintiff that this referred to the state of the vehicles when he saw them on the 4th November, 1997. If the vehicles had been cannibalized as he alleged then one would have expected the fact to be mentioned in this letter.

The first mention of cannibalization of the vehicle occurs in the Plaintiff's letter to the defendant written on the 8 January, 1999. This in my view was an afterthought by the Plaintiff who rued his bargain and decided he wanted his money back.

The Plaintiff called P.W. 2 to support his story that he had been told by Mr. Musembi that the parts had been taken off his vehicles for use in repairing the Defendant's other vehicles.

P.W. 2 stated in his evidence that the visit to the Defendant by the Plaintiff and himself was on the 4th November 1997 which was infact the day on which the Notice appeared in the paper. Whereas D.W. 1 and the Plaintiff said the visit was on the 5th November 1997 which I accept, I reject P.W.2's evidence as it appears that his evidence was tailored to suit the evidence of the Plaintiff and is not credible.

D.W. 12 who is the Manager in charge of distribution logistics and an engineer said in his evidence that the vehicles sold to the Plaintiff which he had seen, were not in working order when first sold and that the Defendant had over 30 millions worth of spares and as a matter of policy would not have used second hand parts in its vehicles to repair them. He also said that no one called Musembi worked for the defendant although the fleet manager at the depot at the relevant time was a Mr. Alex Mbithi. He was not available as he had been asked to resign.

I accept D.W. 1's evidence as truthful and find that the vehicles were not cannibalized as alleged by the Plaintiff but were in the same state of repair on the 4th November 1998 as when he bought them in April, 1997. This is confirmed by the evidence of P.W. 3 a motor vehicle assessor who gave two written reports both dated the 12 November, 1998 made as a result of his visit to the place where the vehicles lay in the Defendant's depot on the same day as the report.

The reports in respect of both vehicles show what will be required to put the vehicles into a working condition.

In cross-examination P.W. 3 states that KAD 401 was worth 600,000/- at the time of his inspection and KAD 404V was worth 300,000/- in the condition in which they were. He also said that they would have been worth a bit under the value he gave them in April, 1997 as they had been lying in the open and some deterioration would have taken place. It seems therefore that the sum the Plaintiff paid i.e. Shs.1,180,000 was approximately the correct value of the vehicles in the state they were in on the 5th November, 1998.

In the result, I dismiss the Plaintiff's claim for the special damages claimed for the repair of the vehicles as set out in paragraph 6 of the Plaint as well as the claim for a refund of the purchase price. I order that the Defendant permits the Plaintiff to remove the vehicles within 30 days from the date of this judgment failing which the Defendant is at liberty to pursue its rights under the Disposal of Uncollected Goods Act. I find that Notice was properly given.

There was no agreement at the time of the purchase of the vehicles in respect of storage charges and the Defendant should have pursued its remedies sooner rather than waiting for nearly eighteen months. It should also have sent a letter to the Plaintiff asking him to remove his vehicles. In the result, I disallow the Defendant's counterclaim save that in the event that the Plaintiff does not remove his vehicles within the time given the Defendant will be at liberty to recover its cost for the Notice of Shs.79,205,95 from the proceeds of sale of this vehicles when sold.

I award the costs of the suit to the defendant and make no order for costs on the counterclaim.

Dated and delivered at Nairobi this 22nd day of February, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.