



**Man Automotive (SA) Proprietary Ltd v Afrikon Limited (Civil Case 16 of 2020)
[2024] KEHC 5453 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 16 OF 2020
FG MUGAMBI, J
MAY 13, 2024**

BETWEEN

MAN AUTOMOTIVE (SA) PROPRIETARY LTD PLAINTIFF

AND

AFRIKON LIMITED DEFENDANT

JUDGMENT

Background

1. The dispute before the Court is premised on an alleged breach of contract. Through an amended plaint dated 6th July 2022, the plaintiff seeks special damages for breach of contract. Despite service, the defendant neither entered appearance nor filed a defence.
2. The background to the suit is that the parties entered into a contract for the sale and purchase of 30 prime mover trucks. The contract terms were set out in the General Conditions of Sale dated 3rd August 2018. On the order of the defendant, the plaintiff released the consignment of 30 vehicles to Kenya on various dates spanning from 31st January 2016 to 6th March 2017.
3. The defendant was named as the original consignee for 10, while on its request, its agent, 'IVRCL Limited' (IVRCL) was named as the consignee of 20 vehicles.
4. The purchase price for the fleet was payable upon delivery of the vehicles to the defendant. The defendant was also obligated to pay all applicable taxes and duties necessary for the clearance of the vehicles. When the consignment reached Mombasa, the defendant was unable to pay both the purchase price and the import taxes due to the Kenya Revenue Authority (KRA) for their clearance. The vehicles were impounded and KRA in exercise of its powers, gazetted the auction of the vehicles on 18th April 2018.



5. Meanwhile, the plaintiff and the defendant entered into a Memorandum of Undertaking dated 13th April 2018. It was agreed that the plaintiff would pay all the necessary fees and duties to secure the clearance and release of the vehicles by the KRA. It was further agreed that the payment would be regarded as money loaned and advanced to the defendant.
6. The parties also agreed that although the defendant and IVRCL were listed as the original consignees of the vehicles, upon successful clearance and release of the vehicles by the KRA, the plaintiff would be registered as the owner of the vehicles and that the defendant and IVRCL would not have any ownership rights or interest in the vehicles. Pursuant to this agreement, the defendant consented to the plaintiff's right to unilaterally transfer the vehicles and executed the necessary transfer forms, to facilitate the transfers.
7. The plaintiff then went ahead and paid KShs. 133,366,009/= to KRA in outstanding taxes and costs and took possession of the motor vehicles. Afterwards, upon the defendant's request, the parties entered into a subsequent agreement where the plaintiff agreed to sell to the defendant 10 of the 30 motor vehicles at a price of 804,601 Euros. However, once again, the defendant breached the agreement by failing to pay the purchase price and instead obtained financial facilities from various lending entities.
8. The lending entities to whom the defendant fraudulently offered the vehicles as security included Mwananchi Credit Limited, Emu Inya Enterprises Limited, Momentum Credit Limited, My Credit Limited and Platinum Credit Limited. It is the plaintiff's case that the defendant offered the 10 vehicles as security with no disclosure to the plaintiff and in breach of the Memorandum of Undertakings. The defendant also defaulted in its obligation to the lenders, who moved in to seize and repossess the 10 vehicles so as to recover the monies advanced.

The Evidence

9. When the matter came up for hearing on 21st November 2023, there was no appearance by the defendant. The plaintiff called its Senior Legal Advisor, Samkelo Radebe as PW1. He adopted his witness statement dated 15th March 2023, similar to the amended pleadings, as his evidence in chief. He also produced the plaintiff's list and bundle of documents dated 16th January 2020 and the supplementary list and bundle of documents dated 20th November 2023 as exhibits. The further supplementary list of documents dated 11th February 2024 was admitted into the record on 12th February 2024. The plaintiff filed written submissions dated 11th February 2024.

Analysis and Determination

10. I have considered the pleadings, evidence, written submissions and authorities cited by the plaintiff in support of its case. The issue for determination is whether the plaintiff has proven the alleged breach by the defendant and consequently, whether the plaintiff is entitled to the remedies sought.
11. Even though the suit is undefended, the Court bears the duty to establish that the plaintiff has proved its claim to the required standard of proof in a civil case, that is, on a balance of probabilities, as provided under section 107 of the *Evidence Act*.
12. The plaintiff adduced the General Conditions for Sale and Delivery of Commercial Vehicles dated 3rd August 2018 which is the basis of the contractual terms with the defendant. The plaintiff also availed the Offers to Purchase No. Afrikon02 and Africon03 dated 20th December 2018 together with the Local Purchase Order No. AFR/MANSA/2018/001 dated 20th December 2018 with respect to the 10 vehicles for EUR 804,601.76.



13. In order to prove that the vehicles were shipped to Kenya to Africon (10) and IVRCL Limited (20) as the consignees, the plaintiff also produced the following bills of lading:
 - i. EUKBEKY1455865 issued on 31st January 2017 in respect of 10 vehicles;
 - ii. EUKOBKEY1467038 issued on 6th March 2017 in respect of 2 vehicles;
 - iii. EUKOBKEY1460739 issued on 31st January 2017 in respect of 8 vehicles;
 - iv. EUKOBKEY1459323 issued on 6th March 2017 in respect of 8 vehicles; and
 - v. EUKOBKEY1467039 issued on 6th March 2017 in respect of 2 vehicles.
14. The bills of lading indicating IVRCL Limited as the consignee also bore the defendant's name, Africon Limited, and address as the party to be notified. The plaintiff also produced commercial invoices numbers 2188, 2166, 2191 and 2181 for EUR 134,000, EUR 544,800, EUR 276,000 and EUR 84,100 for 20 vehicles. They were all charged to IVRCL Limited and consigned to Africon Limited.
15. The plaintiff also produced the copy of the Kenya Gazette no. 2535 dated 16th March 2018 notifying of the sale of the vehicles by auction unless the vehicles were cleared and removed from KRA's custody. This shows that the defendant did not pay the requisite taxes and import duty upon arrival of the consignment as obligated. In addition, the plaintiff produced the letter dated 9th April 2018 which was received by KRA on 12th April 2018 requesting KRA to forestall the auction as it would pay the taxes due.
16. From the Memorandum of Undertakings dated 13th April 2018, it is deducible that the parties agreed, among others, that the plaintiff would settle the taxes, duties and fees to secure the clearance and release of the vehicles by KRA. The totality of the foregoing is that the plaintiff has provided sufficient proof and I do find that there is ample evidence of breach of contract.
17. Having so established, I now turn to the issue of whether the plaintiff is entitled to the reliefs sought. On this aspect, the legal threshold is that special damages must be specifically pleaded and proved, the rationale being that the purpose for damages for breach of contract is to put the claimant in the position he would have been had the breach not occurred. This is as held in *Consolata Ayango Ouma v South Nyanza Sugar Co. Ltd.*, [2015] eKLR and *Pwani Telecomms Limited Taita Taveta County Government*, [2021] eKLR.
18. With respect to the claim for EUR 804,601 for the 10 vehicles, I find that the plaintiff exhibited the email correspondences, invoices, the offer to purchase dated 30th September 2019, conditions for sale and the purchase orders with respect to the supplemental agreement. The plaintiff also exhibited the copies of the NTSA searches and MPSRA searches showing that the defendant transferred the vehicles to the lenders before payment of the purchase price in breach of the Memorandum of Undertakings.
19. As to the loss of EUR 691,911.38, the plaintiff, in its submissions, contended that the initial purchase price for the 20 vehicles was EUR 2,129,538.5 and that the vehicles were sold to JAP Africa Mobility Solution (Mobikey Truck and Bus) for EUR 1,437,627.12. The plaintiff produced a pro forma invoice dated 5th October 2018 for EUR 2,134,930.27. The plaintiff also produced tax invoices for the 20 vehicles indicative of the purchase price of the vehicles at EUR 106,851 each, EUR 2,137,020 in total.
20. It is clear that the tax invoices produced are reflective of the initial purchase price for the 20 vehicles which was EUR 2,129,538.5 captured in the pro forma invoice. Therefore, in my assessment there is no proof of loss of EUR 691,911.38. In my view, the plaintiff ought to have produced receipts or bank



statements and/ or a contract for sale and purchase of the 20 vehicles to JAP Africa Mobility Solution (Mobikey Truck and Bus) for EUR 1,437,627.12 to establish this claim.

21. With respect to the claim for Kshs. 133,366,009 paid to KRA as applicable taxes, import duties and clearance charges of the vehicles, the plaintiff produced the SWIFT transfer for Kshs. 108,554,457/- paid to KRA on 18th April 2018 and debit advices for payment of Kshs. 7,209,742/- and Kshs. 17,601,810/- to the Commissioner of Customs. I find that there is sufficient proof of this claim.
22. The plaintiff also claims Kshs. 196,084,838/- being the storage and clearance fees paid by the plaintiff to Unifreight Cargo Handling Limited, MAN Energy and Kunhe Nagel. The plaintiff claims a further Kshs. 1,841,927.61/- being transportation fees incurred by the plaintiff and EUR 16,858.31 being servicing and repair fees also incurred by the plaintiff.
23. In support of its claim the plaintiff produced numerous invoices issued to it by the respective service providers. What is however conspicuously missing is any evidence that the invoices were settled. It is common knowledge that invoices do not meet the threshold required to prove a claim for special damages.
24. This Court has previously held (Majanja J), in *Nicholas Angwenyi Siro T/A Riverside Continental Resort v Finlay Kirui & Another*, [2019] eKLR as follows:

“The defendant complained that the plaintiff’s case was not sustainable as it was grounded on invoices. An invoice is a demand for payment and unless there is evidence of payment, an invoice is not evidence of purchase or other loss.

On this issue, the Court of Appeal in *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited V Janevams Limited*, NRB CA Civil Appeal No. 178 of 2005 [2015] eKLR observed that:

“From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”

Disposition

25. Accordingly, judgment is entered for the plaintiff against the defendant for:
 - i. Special damages of: -
 - a. EUR 804,601 being the purchase price of the 10 prime movers sold and delivered to the defendant;
 - b. EUR 691,911.38 being the loss suffered by the plaintiff in relation to the sale of the 20 vehicles at an undervalue to JAP Africa Mobility Solution;
 - c. Kshs. 133,366,009/- being the taxes, import duties and clearance charges for the vehicles paid by the plaintiff to KRA.



- d. Interest on the above figures from the date of filing the suit until payment in full.
- ii. The claim for Kshs. 196,084,838 being the storage and clearance fees paid by the plaintiff to Unifreight Cargo Handling Limited, MAN Energy and Kunhe Nagel is hereby dismissed.
- iii. The claim for Kshs. 1,841,927.61/- for transportation fees incurred by the plaintiff is hereby dismissed.
- iv. The claim for EUR 16,858.31 being servicing and repair fees incurred by the plaintiff is hereby dismissed.
- v. The plaintiff will have the costs of the suit on an undefended basis.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

