



Shreeji Enterprises (K) Limited v Rooprat t/a Motorways Constructions (Civil Case 781 of 2003) [2023] KEHC 3082 (KLR) (Commercial and Tax) (14 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 781 OF 2003**

A MABEYA, J

APRIL 14, 2023

BETWEEN

SHREEJI ENTERPRISES (K) LIMITED PLAINTIFF

AND

DS ROOPRAT T/A MOTORWAYS CONSTRUCTIONS DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company incorporated in Kenya and the defendant is a male adult of sound mind residing and working for gain in Nairobi.
2. Vide a plaint dated 5/12/2003, the plaintiff claimed that it offered to sell 3 motor vehicle trucks registration numbers KAH 500J, KAH 510J and KAJ 520Q through Bruce Trucks (E.A) Limited (hereinafter “the selling agent”) at a sale price of Kshs.2,500,000/- each.
3. That it sold the said vehicles by auction through the selling agent and the defendant agreed to buy the same at an agreed total price of Kshs.7,500,000/=. That the defendant inspected the trucks and entered into a sale agreement upon being satisfied with the truck’s condition and paid a deposit of Kshs.1,000,000/=.
4. The plaintiff’s case was that the defendant issued it with a cheque for the balance of the purchase price of Kshs.6,500,000/- after which the plaintiff released the said vehicles to the defendant. However, that the cheques remained unpaid as the defendant stated that the vehicles were defective, unroadworthy and of no useful value.
5. That defendant therefore failed to pay the balance of the purchase price despite numerous demands. In the premises, the plaintiff prayed for judgment against the defendant for the said sum of Kshs.6,500,000/- together with interest and costs of the suit.



6. The defendant opposed the plaint vide a defence and counterclaim dated 19/1/2004 which was later amended on 4/2/2004. In it, the defendant denied owing the plaintiff the claimed sum or any sum at all. He contended that the defendant's representative N.S Roopra went to the premises of the selling agent to view the said vehicles. He met one Mr. Kitau who showed him two trucks and assured him that they were in good shape. That on this basis, the defendant paid a deposit of Kshs.1,000,000/- and agreed that the balance would be paid upon collection of the said vehicles.
7. That the plaintiff's representative also assured the defendant that the said vehicles were suitable and fit to traverse fully laden between Nairobi and North Eastern Province. That on the basis of the said assurance, the defendant paid the balance of the agreed purchase price of Kshs.6,500,000/- by cheque and took possession of the trucks on 7/11/2003.
8. The defendant contended that the plaintiff's and its agent's representations that the vehicles were in good shape was false and fraudulent which led him to repudiate the contract. That on 9th and 10th November 2003, the defendant loaded two of the vehicles to proceed on their first trip to Moyale but were found to be unroadworthy while the third one broke down in the defendant's yard before proceeding on its first trip.
9. That the defendant attempted to return the vehicles to the plaintiff but it refused to accept delivery thereof and they remained in storage with the defendant who claims storage fee of Kshs.1,000/- per day per vehicle from the plaintiff.
10. That the defendant stopped the payment of the cheque for the said Kshs.6,500,000/- as he had repudiated the agreement for sale.
11. In its counterclaim, the defendant claimed from the plaintiff a total sum of Kshs.549,000/- plus general damages and storage charges. He also claimed the refund of the deposit of Kshs.1,000,000/- paid to the plaintiff plus interest.
12. The plaintiff filed a reply to defence and defence to counterclaim dated 20/1/2004. It reiterated that the said vehicles were sold as second-hand units and in the condition that they were in. That no representation was made by or on its behalf of the plaintiff to the defendant as to their suitability for any specific purpose. That the defendant was afforded the opportunity to inspect the same before agreeing to purchase and pay for them. It denied the defendant's counterclaim in total.
13. At the trial, the plaintiff called its Executive Director Dhaval Soni as its sole witness. He swore a witness statement dated 15/9/2017 which he adopted. He testified that the defendant inspected the trucks many times at the premises of Bruce Trucks (E.A) before entering into the agreement and taking possession thereof. That he voluntarily entered into the agreement and performed part of his duty only to change his mind midway while the plaintiff fully performed its part of the contract.
14. In cross examination, he stated that the vehicles were sold through a public auction but in the auction advertisement, one of the vehicles, KAJ 510Q was not listed. That the auction was held on 4/10/2003 but the deposit of Kshs.1 million was received on 16/10/2003, 12 days later.
15. That the plaintiff gave a commission to Bruce Trucks (E.A) to conduct the auction. That the trucks were inspected well by the defendant's mechanics by checking underneath, doing a test drive and opening the cabin. That the vehicles were sold as second hands and the defendant knew that fact. That there were inspection certificates which show the road worthiness of the vehicles.
16. The defendant called 2 witnesses. DW1 was Narinda Singropra. He relied on his two statements dated 27/3/2019 and 20/9/2019, respectively. He testified that upon obtaining possession of the trucks,



- some of them did not have brakes but this was later fixed. That the clutch of one of the trucks failed and was returned.
17. That upon discovering the problems that the trucks had, he informed the plaintiff that the defendant wished to cancel the purchase of the trucks and gave bank instructions to stop the cheque payment. That the defendant attempted to return the remaining two trucks but the plaintiff and its agent refused to accept them. He denied that the vehicles were sold in an auction.
 18. DW2 was John Waljee. He recorded this statement dated 27/3/2019 and adopted the same in Court. He testified that he took DW1 to Bruce Trucks to view the lorries and that they were assured that the trucks were good to be used to transport materials to North Eastern province. Further, that the trucks were sold to DW1 by private treaty.
 19. In cross examination, he stated that DW1 did not confirm the condition of the trucks before moving them.
 20. The court has considered the entire record including the parties' submissions.
 21. The first issue for determination is whether ownership and title passed to the defendant.
 22. It is undeniable that the parties entered into a verbal sale agreement in or about October, 2003. By that agreement, the plaintiff agreed to sell and the defendant agreed to buy the subject vehicles. The sale was through the selling agent at a total price of Kshs.7.5 million.
 23. Pursuant thereto, the defendant paid a deposit of Kshs. 1 million and took possession of the said vehicles. He subsequently stopped payment of the cheque he had issued for the balance of the purchase price. He stopped the payment of the balance on the basis that the vehicles were defective and of no use to him.
 24. Had ownership and title passed to the defendant at the time of rescission of the contract?
 25. Section 20 (a) of the *Sale of Goods Act* provides: -

“Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.”
 26. In *Joel Muthuri v Julius Gichuru Guantai* [1996] eKLR, the Court of Appeal held: -

“A log book is only evidence of title but property in a vehicle passes to the buyer at the time when the contract is made. See section 20 (a) of the *Sale of Goods Act*.”
 27. In this case, the record indicates that the contract was made on or about 16/10/2003 and shortly after a deposit of Kshs.1,000,000/- was made by the defendant to the plaintiff. I find that at this point, ownership passed to the defendant despite the fact that the balance of the purchase price had not yet been paid and that a transfer of ownership was yet to be effected.
 28. The second issue for determination is whether there was a breach of contract and whether the defendant could rescind the contract.
 29. In cross examination, DW1 confirmed that he and his mechanic had the opportunity to examine the vehicles three times. Thereafter, the defendant paid a deposit of Kshs.1,000,000/- to reserve the vehicles and on 7/11/2003 issued the plaintiff with a cheque for the balance of Kshs.6,500,000/-.



30. The vehicles were being sold as second-hand units. The defendant had the opportunity to inspect them before entering into the subject contract. Having found that title had already passed to the defendant on or about 16/10/2023, the defendant's instructions to stop payment of the cheque was in breach of the contract with the plaintiff.
31. It may be true that the plaintiff assured the defendant that the trucks were in good shape and suitable to carry out the duties which the defendant was purchasing them for. However, the defendant had adequate opportunity to scrutinise the vehicles even with his mechanic before entering into the agreement and partially performing the contract by paying the deposit.
32. As already held, the vehicles were second hand units sold on the basis of as is and it was upon a buyer to thoroughly check on such a vehicle before entering into a contract to purchase the same.
33. I find that by failing to pay the balance, the defendant was in breach of the contract and could not rescind the contract.
34. The upshot is that the plaintiff's claim is meritorious and judgment is entered for the plaintiff for Kshs.6,500,000/- together with interest thereon at Court rate from the date of the suit until payment in full. The plaintiff will also have the costs of the suit.
35. It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

A. MABEYA, FCIArb

JUDGE

