



Auto Gateway Trading Limited v SBT Africa Limited & another (Civil Suit 107 of 2021) [2023] KEHC 21603 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 107 OF 2021
DKN MAGARE, J
JULY 10, 2023**

BETWEEN

AUTO GATEWAY TRADING LIMITED PLAINTIFF

AND

SBT AFRICA LIMITED 1ST DEFENDANT

SBT COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. On May 11, 2012, I dismissed the plaintiff's case and allowed the defendant to proceed on their counter claim. The defendant filed defence on the plaintiff claim on October 7, 2022 in the defence the 1st defendant stated that it is not party to the contract with the plaintiff and the 2nd defendant it stated that it is a separate entity from the 2nd defendant.
2. They averred that the plaintiff contracted the second defendant and ordered consignment as pleaded by the plaintiff. There was various monies for each of the several motor vehicle. The contract title was not remain till payment is was done. And the payment was to be done within 7 days. The purchaser was to forfeit any money paid the balance is not paid.
3. The deposits were made to Tokohama Ekimal Banel prior to loading to the carrier. Diamond shipping company their various bills of landing. The plaintiff did not pay for the involved amount and there was no electronic payment as agreed. The right to resale accrued and the same were sold their different bills of landing.
 - a. HMB-119-0028 (chassis number HA25V-767775), ymb-191-0321(3) (Chassis number HA25V-769250), YMB-191-0321(2) Chassis number MH34S-348629), KMB-191-0075(Chassis number HA35S-171526) and YMB-1910321(5) 9 CASIS NUMBER ha25V-76857) TO M/S Canon Motors Ltd.



- b. UMB-191-0321(4) Chasis number Eha25v-768896) to Ms Susan Chemng'etich Korir
 - c. YMB-191-0321(Chassis number NCP50-0148278), AND ymb-191-0076(Chassis number ZGE20-60131183) To M/s Smattker enterprises the 6th defendant herein
 - d. YNKS182046366 (Chassis number HA25S-944678) to Ms A M Trading company Ltd and;
 - e. HOEGHM64YOM10009 (Chassis number NCP51-0320617) TO MS Ufra Motors
4. Defendant received USD 15,370 from the plaintiff which amount was forfeited. The defendant prayed that the said amount of USD 15,370 was forfeited. The defendant claimed the following;
- a. A declaration that the plaintiff breached the terms of trade and /or contract.
 - b. A declaration that in view of the plaintiff's breach of contract as (a) above, the plaintiff forfeited the sum of USD 15,370 and the same is payable to the 2nd defendant;
 - c. Costs of the suit an interest thereon at commercial rate; and
 - d. Such other order as the Honourable Court deem fit and proper in the circumstance of the case
5. The defendant testified and adopted their statements. The defendant included the following proforma involving;
- a. No. 2020827XXXXXXXXXX
 - b. No. 2020XXXXXXXXXXXXXXXXXX
 - c. No. 20210600XXXXXXXXXX
 - d. No. 20210706001XXXXXXXXXX
 - e. No. 2021072XXXXXXXXXXXXXXXXXX
 - f. No. 20210728002XXXXXXXXXX
 - g. No. 20210806001287-2500
 - h. No. 20210811XXXXXXXXXXXXXXXXXX
 - i. No. 202107280XXXXXXXXXXXXXXXXXX
 - j. No. 20210806XXXXXXXXXXXXXXXXXX
 - k. No. 20210728XXXXXXXXXXXXXXXXXX
6. There were copies of bill of landing and from the judgment sale. The was payment of USD 15,700. It was not shown by the defendant how payment was done. Thought the defendant stated that the payment and monies was for each car, the communication released all cars.

Analysis

- 7. If international trade cannot be done with honesty, there is a risk of killing trade. In this matters the parties had made their own bed and have to lie on it. The defendant urged me that the contracts were not as a unit but each vehicle separately as a unit. Payment was however made into one account on account of all the units.
- 8. The plaintiff could not complete the contract. The defendant therefore changed the vehicles to go to other parties. They are not claiming to retain the money. If this was a single contract, that could have



been the position. However, each vehicle constituted a single contract. This means that the Plaintiff had paid for several vehicles separately and fully. No single vehicle was worthy more than USD 15,570. It means that those vehicles had no claim and as such the act of transferring them was in breach of contract.

9. The court cannot amend or re-write contracts on behalf of the parties. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the court of Appeal stated as doth:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff’s claim.

10. It is my finding that failure to show how he payment for USD 15,570 was done, means that the court is entitled to hold that it was sufficient to pay for a certain number of cars. The same cannot be forfeited. Under the *Consumer Protection Act*, the purchaser is entitled to goods purchased. Given that the rest of the goods were sold, it is my finding that thought the monies for some of the motor vehicle we not paid for, the amount of USD 15,570 was sufficient to apply for several complete units.
11. Thought the suit was dismissed, it is my finding that the plaintiff is entitled to a refund of USD 15,570, failure by defendant to apply the amount the qualifying number of vehicles.

Breach of contract.

12. Both parties breached the contracts. The payments was for each unit. However, from the evidence the payment was made on account. Given that each contract was separate, then those amounts were to be released to the Plaintiff after the vehicles were sold.
13. It could be different if this was one indivisible contract. The plaintiff equally breached the contract by failing to comply with payments as agreed. I therefore find as follows;
- a. The plaintiff breached the contract by failing to pay for the remainder of the vehicles.
 - b. The defendant breached the contract by failing to complete the purchased price for vehicles not paid for.
14. In the case of *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR, the court stated: -

“Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreement of the parties, or not completed. The concept of quantum meruit applies in (but is not limited to) the following situations:-



- a. When a person hires another to do work for him, and the contract is either not completed or is otherwise rendered un-performable, the person performing may sue for the value of the improvements made or the services rendered to the defendant. The law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or on merit.
- b. The measure of value set forth in a contract may be submitted to the court as evidence of the value of the improvements or services, but the court is not required to use the contract's terms when calculating a quantum meruit award. (This is because the values set forth in the contract are rebuttable, meaning the one who ultimately may have to pay the award can contest the value of services set in the contract.)
- c. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a quantum meruit on an implied assumption.

However, if there is a total failure of consideration, the plaintiff has a right to elect to repudiate the contract and may then seek compensation on a quantum meruit basis.

Determination

15. The upshot of the foregoing is that I dismiss the bulk of counterclaim with no order to costs.
 - a. The plaintiff's case had equally been dismissed with no order as to costs for non-attendance.
 - b. I find that the amount paid for USD 15,370 was over and above the value of several units, meaning that the plaintiff had completed payment for several units and it was entitled to possession. However, given that most of the units are sold the plaintiff is entitled to the refund of the full USD 15,370 within 45 days.
 - c. Should refund not be made within 45 days, it shall attract interest at court rates from the date of filing of the counterclaim.
 - d. Each party to bear their costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Odunga for the Defendant

No appearance for parties

