



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 13 OF 2019

TRISHUL CHOHAN T/A AUTO EXTREME.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KISUMU.....1ST DEFENDANT

THE CHIEF OFFICER - FINANCE..... 2ND DEFENDANT

JUDGMENT

The Plaintiff's suit is premised upon a contract Number **CGK/TRA/FIN/01-04/2018-2019**, which is dated 18th January 2019.

1. Pursuant to the terms of the said contract, the Plaintiff allegedly delivered and transferred to the Defendant a motor vehicle, being a Toyota Landcruiser **VXR**, Engine Number **IVD0450015**; Chasis Number **JTMHVO-1J904263221**.

2. The said vehicle was said to be valued at Kshs 19,546,000/=.

3. Notwithstanding the delivery of the vehicle, the Defendants have allegedly failed to pay for it.

4. The Plaintiff has asked the Court to order for Specific Performance of the contract.

5. The other reliefs sought by the Plaintiff are as follows;

“b. Interest accrued on the delayed advance payment until payment in full.

c. General Damages for breach of contract.

d. Costs of this suit and interest thereon at court rates.

e. Such other or further relief as this Honourable court may deem just to grant.”

6. The Plaintiff was filed on 17th July 2019. Simultaneously with it, the Plaintiff filed an application seeking interim reliefs. In particular, the Plaintiff asked the Court to issue an injunction to restrain the Defendants from putting to use, the Toyota Landcruiser which he had delivered to the said Defendants.

7. After being served, the Defendants entered appearance on 29th July 2019, through Advocate Obondi Victor.

8. When the application first came up before the Court, on 23rd July 2019, the Defendants' advocate asked that the matter be mentioned within 2 weeks. And as the parties indicated that they were holding negotiations, the application was adjourned to 9th September 2019.

9. On 9th September 2019 the Defendants' counsel informed the Court that the County Government was in the process of making their budget; and that they intended to factor the matter into the said budget.

10. The Defendants asked the Court to have the case mentioned in 30 days.
11. The Plaintiff raised no objection; and expressed the hope that parties would be returning to court to record a settlement.
12. On 29th October 2019, the parties agreed to a further adjournment. In the meantime, the Plaintiff was to follow- up on payment.
13. However, it appears that the anticipated payment was never received from the Defendants.
14. On 15th April 2020, the Law Firm of **S. M. ONYANGO AND ASSOCIATES** filed a Memorandum of Appearance on behalf of the Defendants.
15. On 7th May 2020 the Plaintiff filed an application dated 7th May 2020. The said application sought directions to fast-track the application dated 16th July 2019, with a view to having the Landcruiser delivered to the Regional County Commander for preservation.
16. In the alternative, the Plaintiff sought orders to compel the Defendants to pay the purchase price of Kshs 19,546,000/=.
17. On 3rd June 2020 Mr. S. M. Onyango advocate, who was representing the Defendants; and Miss B. Owuor advocate, who was representing the Plaintiff, informed the court that the parties had a consent to record.
18. The consent order recorded by the parties on that date, was in the following terms;

“1. The Plaintiff’s applications dated 16/07/2019 and 07/05/2020 are allowed in the following terms:

a. The Respondent is to remit Kshs 19,546,000/= only to the Plaintiff on or before 12/06/2020.

b. In default of (a) above, the respondent shall surrender motor vehicle Reg. No. 42CG 305A to the Plaintiff/ Applicant.

The said surrender shall be coordinated by the OCS *Kisumu Central Police Station*.

c. Upon surrender of the motor vehicle to the plaintiff, the same shall be transferred back to the plaintiff’s name.

d. Costs of the applications shall *be borne by the respondent*.

e. Leave is granted to the Defendant *to file its Defence within 14 days, in case of default of compliance with this order.*

f. Mention on 15/07/2020 for *Directions on on the main suit.*”

19. Thereafter, on 3rd November 2020, Mr. Maina advocate, who represented the Defendants, told the Court that his clients had made part-payment. He said that his clients intended to finalize payments within 2 months.

20. On 26th January 2021 the parties informed the Court that the Defendant had not finalized payments.

21. Miss Lamwenya advocate, who represented the Defendants on that date, told the Court that the 1st Defendant was still awaiting funds from the National Government. She went on to state as follows;

“But there is an assurance for payment when funds are available.

I request the plaintiff to appreciate my clients’ predicament. But the plaintiff has a right to judgment.”

22. In the light of the Defendants’ concession, the Court proceeded to enter judgment in favour of the Plaintiff.

23. The court record of the proceedings of 26th January 2021 shows the following action as taken by the court;

“Pursuant to the Request for Judgement dated 26/10/2020,

I do hereby grant Judgement as prayed in the Plaint, on account of the Defendants failure to file a Defence within the prescribed time.

(signed)

FRED A. OCHIENG

JUDGE”

Thereafter, the Court directed that Formal Proof would be canvassed on 11th March 2021.

25. When the matter came up on 11th March 2021, the Plaintiff was ready to proceed with Formal Proof. However, Mr. Obiero advocate, who held brief for Mr. Sala advocate, asked for time to enable the Defendants file an application to set aside the Judgment.

26. The Plaintiff’s counsel opposed the application for an adjournment, pointing out that Mr. S. M. Onyango advocate, who had been representing the Defendants, had explicitly admitted that the Defendants were indebted to the Plaintiff.

27. The Plaintiff noted that the Defendants had earlier promised to pay the money claimed by the Plaintiff.

28. In reply, the Defendant’s counsel said that the 1st Defendant had the intention of filing a Defence. Therefore, as each party had the right to defend himself, the Defendants renewed their quest for an opportunity to bring an application to set aside the Judgment.

29. Having given consideration to the submissions made by both sides, the Court rejected the Defendants’ request for an adjournment. The Court’s reason was pegged upon what had transpired in Court on 26th January 2021.

30. Later on the same day (11th March 2021), at 12.06p.m, Miss Owuor, the learned advocate for the Plaintiff informed the Court that she had talked to Mr. Sala, the learned advocate for the Defendants. Mr. Sala had, reportedly, told Miss Owuor that the trial could proceed.

31. PW1, TRISHUL CHOHAN, testified, on oath. He said that he carried on business under the name and style of **AUTO EXTREME**.

32. He had successfully bid for the Tender Numbers **CGKTRA/ FIN/01/2018-2019; CGKTRA/FIN/02/2018-2019;**

CGKTRA/FIN/03/2018-2019; and CGKTRA/FIN/04/2018-2019.

33. He exhibited the Contract Number **CGK/TRA/FIN 01-04/ 2018-2019**, whose value was Kshs 101,906,000/=.

34. Although it was a term of the contract that the 1st Defendant would remit 50% of the contract sum within 21 days of receipt of the Performance Bond, **PW1** testified that the 1st Defendant failed to do so, even though the Plaintiff provided the requisite Performance Bond.

35. PW1 also testified that he delivered and transferred to the 1st Defendant, a Landcruiser whose particulars were specified. The cost of the said Toyota Landcruiser was Kshs 19,546,000/=.

36. In order to finance the purchase of that vehicle the Plaintiff borrowed money from **I & M** Bank Limited.

37. I have to determine whether or not the Plaintiff was entitled to;

a. An order for Specific Performance;

b. Payment for the Toyota Landcruiser;

c. Interest;

d. Costs.

38. I find that there is a contract between the Plaintiff and the 1st Defendant. The said contract was valid and thus enforceable.

39. But the Defendants have submitted that the Court ought not to order for Specific Performance as that would cause severe hardship to them.

40. I appreciate that if the 1st Defendant were compelled to specifically perform the contract, whose value is Kshs 101,906,000/=, that would put a big dent on the budget of the said Defendant.

41. But I am also alive to the fact that it was the said 1st Defendant who floated bids, and thereafter issued tenders to the Plaintiff.

42. The terms of the contract were laid down by the 1st Defendant; and the Plaintiff accepted the same. It would therefore be expected that before the 1st Defendant had put out the bids, it had satisfied itself that it had the requisite financial ability to pay for the resultant contract.

43. In their final submissions, the Defendants have stated as follows;

“The applicants seeks for orders that the motor vehicle be impounded and placed in the custody of the regional County Commander’s yard, pending payment of Kshs 19,546,000.00.

This order, if granted will greatly prejudice the respondent as the motor vehicle is in active use. Further, the condition precedent to the release of the motor vehicle is outrageous. Kshs 19,546,000.00 is not little money, and the respondents do not have this amount of money lying around.”

44. In all honesty, I am at a loss, that the Defendants should perceive the situation in that light! They have received a vehicle, and the same is in active use. However, they have not paid for it. Notwithstanding the failure to pay for the vehicle, they believe that it should not be removed from them.

45. In other words, the Defendants want to have their cake even after eating it!

46. I hold the considered view that it is the Defendants’ position that is outrageous. The 1st Defendant wants to continue using the vehicle, for which the Plaintiff has not been paid.

47. It is a mockery of justice to assert that the loss of a vehicle for which the Defendant has not paid, amounts to double jeopardy.

48. The Defendants do not deserve to enjoy the use of the vehicle until they will have paid for it.

49. By denying the Plaintiff of both the vehicle and the purchase price, amounts to a condemnation of the Plaintiff, in a most callous manner.

50. It is even worse that the Defendants express a sense of entitlement, for a vehicle that they have not paid for; whilst the Plaintiff is having to repay a loan which he used to buy the said vehicle.

51. Nonetheless, I hold the considered view that an order for specific performance may not be appropriate in the circumstances of this case.

52. If the Defendants neither remitted the 50% advance payment amounting to 50 Million, nor the sum of Kshs 19,546,000/= for the Toyota Landcruiser, it may amount to nothing but wishful thinking, to imagine that the Defendants will pay Kshs 101,906,000, if the Plaintiff meets his part of the bargain.

53. Pursuant to **clause 16.5** of the contract, the Plaintiff is entitled to Interest on the sum of Kshs 19,546,000=, at the rate of 0.5% per month. I therefore award the said Interest, with effect from 12th July 2019 when the vehicle was transferred to the 1st Defendant.

54. However, the Interest for which the 1st Defendant will be liable, under **clause 16.5** is capped at the maximum of 3% of the total cost. By my calculations, that aspect of interest amounts to Kshs 3,057,180/=.

55. I find that that aspect of interest is completely inadequate to compensate the Plaintiff. I so hold because the Plaintiff had borrowed a loan, to enable him purchase the Toyota Landcruiser which he then sold to the 1st Defendant.

56. Whilst the Defendants ought not to be held liable for the loan which the Plaintiff had borrowed, I have taken into account the fact that the 1st Defendant failed to remit 50% of the contract sum, as per the contract. It is thus the failure of the 1st Defendant to remit the 50% advance payment, which has exposed the Plaintiff to the cost of the loan he took.

57. But then again, the Plaintiff was not compelled to perform the contract, after the 1st Defendant failed to remit the 50% advance payment.

58. In the final analysis I award interest on the principal sum of Kshs 19,546,000/= at Court rates, with effect from 12th July 2019, until payment in full.

59. For the avoidance of any doubt, the interest at Court rates is in addition to the interest at 0.5% per month.

60. The Plaintiff is also awarded the costs of the suit.

61. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2021

FRED A. OCHIENG

JUDGE