



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO.223 OF 2011

BRYAN YONGO.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....1ST DEFENDANT

ASHRAF BAYUSUF.....2ND DEFENDANT

SALMA FERNANDES.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by filing a plaint dated 9th June, 2011., seeking for judgment against the Defendants for: -

a) *An order compelling the 2nd and 3rd Defendants to furnish the 1st Defendant with all the import documents to enable registration of the said motor vehicles BMW 520 Diesel Chassis No. WBANC32060CP72932 and BMW Convertible, Chassis No. WBAWN32050JR92285 in favour of the Plaintiff and subsequently compelling the 1st Defendant to register the said motor vehicle in favour of the Plaintiff.*

b) *A mandatory injunction compelling the 1st Defendant to revert the seized motor vehicles, namely BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932 to the possession of the Plaintiff forthwith;*

c) *An injunction restraining the 1st Defendant from releasing the motor vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932 to the 2nd & 3rd Defendants, its proxies, servants, agents, employees, workers, and / or any other person and / or in any way forfeiting or auctioning the same;*

d) *In the alternative to prayers (a), (b) and (c)above, an order compelling the 2nd & 3rd Defendants to restitute the purchase price being; Ksh 4,700,000.00 with interest to the Plaintiff;*

e) *Interest on (d) above at commercial rates;*

f) *Cost of this suit; and*

g) *Any other relief that this Honourable Court deem fit to grant.*

2. The Plaintiff's case is that, on or about October 2010, the 2nd Defendant sold to him three unregistered motor vehicles. The first motor vehicle; BMW 520 Diesel, was sold for a sum of; Kshs. 1,500,000.00. He made payment through the 2nd Defendant's agent; Mr. Nuru Akasha, who in turn delivered the motor vehicle to him and undertook to give him, the import documents, to enable him pay the customs and exercise duty and have motor vehicle registered.

3. On or about the 18th of October 2010, the 2nd Defendant approached him directly and sold him a BMW Convertible, Chassis Number WBAWN32050JR92285, at a price of; Kshs. 2,000,000.00. The 2nd Defendant requested him to draw the cheques in payment, in the 3rd Defendant's name, since they were partners in business. He consequently issued cheques totalling, Kshs 2,000,000.00 as follows:

a) *Cheque number, 00018 - Kshs 900,000.00;*

b) Cheque number, 00019 - Kshs 900,000.00; and

c) Cheque number, 00020 - Kshs 200,000.00.

4. The 2nd and 3rd Defendants undertook to furnish him with import documents for the said motor vehicles. On or about the 4th of November 2010, the 2nd Defendant approached him to purchase another BMW M5 Sports Edition, for a consideration of; Kshs 2,000,000.00. He accepted the offer and issued three (3) cheques totalling to Kshs 2,000,000.00; dated 4th November 2010. It was agreed the 2nd and 3rd Defendant, would not bank the said cheques before furnishing him with import documents for the three motor vehicles.

5. Subsequently, he persistently requested for the said documents from the 2nd and 3rd Defendants to no avail. To the contrary, the 3rd Defendant in breach of the agreement by banking the cheques he countermanded the payment. Thereafter, the 2nd Defendant engaged in acts of extortion and blackmail and made several attempts to use the Flying Squad Police Unit to repossess the said motor vehicles, an action he repulsed.

6. That, the 2nd Defendant went at the Flying squad offices to furnish him with the documents within one week and the Police ruled that the matter was civil in nature. However, the 2nd Defendant requested him to make a payment of; Kshs 1,000,000.00 to enable him obtain the import documents from his clearing agent, which request he acceded to and made the payment to the 3rd Defendant, vide an acknowledgement dated the 16th November 2010.

7. On or about the 26th of November 2010, he made a further payment of; Kshs 500,000.00, leaving a balance of Kshs 1,000,000.00, towards the purchase of the 3rd motor vehicle and which balance was to be paid upon production of the import documents. On or about the 23rd of March 2011, he paid Kshs 200,000.00, which was duly acknowledged on the aforesaid date, leaving a balance of; Kshs 800,000.00, which balance was to be paid upon production of the import documents. However, he was not given the documents.

8. On the morning of the 7th January 2011, the 2nd Defendant raided his residence, situated in Kitisuru, with hired goons numbering fifteen (15) and demanded the balance of; Kshs 1,000,000.00. However, they were repulsed by his security personnel and the police called in. The 2nd Defendant then called in officers and/or agents of the 1st Defendant, who demanded for the import documents.

9. The Plaintiff gave them the background of the transaction but the 1st Defendant's officers or agents insisted that the he pays the 2nd Defendant the balance of the purchase price to enable them leave his residence but he was adamant that, he could not pay the balance without the requisite documentation, considering that his Kshs 4,700,000.00 was at stake.

10. However, the 1st Defendant's agents seized his motor vehicles at the instigation of the 2nd Defendant, ostensibly demanding the import documents of the motor vehicles in a bid to coerce him to pay the balance of the purchase price, without the 2nd and 3rd Defendants giving him the import documents, at the same time, the 1st Defendant expressly stated that, the vehicles were on transit and not for local sale.

11. The 1st Defendant then gave him a notice under sections 235 and 236 of; East African Community Customs Management Act, 2004 and detained the motor vehicles. He avers that, he is extremely exposed due to the fraudulent conduct of the 2nd and 3rd Defendants and belligerence and lack of co-operation from the 1st Defendant to compel the 2nd and 3rd Defendants, to deliver up the import documents, to the 1st Defendant, granted that he is an innocent purchaser for value.

12. The Plaintiff avers that, as a result of lack of import documents, the 1st Defendant is unable to release the motor vehicles to him. He therefore prays that this Honourable court do grant orders compelling, the 2nd & 3rd Defendants, to furnish the 1st Defendant, with the import documents for the motor vehicles to enable registration of the same in his favour.

13. However, the 1st Defendant filed a statement of defence dated 14th November 2011, denying the Plaintiff's claim and averred that, the 1st Defendant received information from an informer, that, they were two unregistered motor vehicles at the Plaintiff's resident in Kitisuru. It inquired from the Plaintiff why the motor vehicles were unregistered and demanded for importation documents, but he failed to produce the same. As a consequent, thereof, the 1st Defendant impounded the two motor vehicles and issued notice of goods deposited in customs warehouse numbers 170375 & 170376 dated 7th January 2011.

14. The 1st Defendant averred that, it is mandated under the East African Community Customs and Management Act, 2004 to demand importation documents from the Plaintiff and not the 2nd Defendant. The two motor vehicles were meant for transit to Kampala -Uganda and according to Customs laws and Regulations, an item on transit can only be used in Kenya with the consent of the Commissioner of Customs and Excise. That, the documents to be delivered to the Plaintiff by the 2nd Defendant, were transit documents and no duty would be payable on them.

15. The 1st Defendant argued that, it was executing its mandate to collect the revenue and its officer Mr. A. N. Gichia was not instigated by the 2nd Defendant to act, neither did he have the intention to fix the Plaintiff. The 1st Defendant denied having breached the Plaintiff's legitimate expectation and/or committed errors of law and averred that the Plaintiff was solely to blame for negligently entering into transactions to purchase motor vehicles on transit.

16. The 1st Defendant denied insisting on the Plaintiff paying the 2nd Defendant the balance of the purchase price. That by 23rd March 2011, the Plaintiff was still making payments despite the fact that motor vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932, had already been impounded.

17. It was further averred that, the Plaintiff and the 2nd Defendant have no locus standi, to sue, as the motor vehicle BMW Chassis No. WBAWN32050JR92285, was imported by one Wael Aweis Bana, P.O. Box 118, Kampala.

18. The 2nd and 3rd Defendants filed a joint defence dated 17th November 2011, and averred that, the Plaintiff filed this suit in bad faith to deny the 2nd Defendant, the balance of the purchase price. That, the allegations that, the payment was made through the 3rd Defendant is malicious and cunning.

19. The 2nd and 3rd Defendants denied the allegations of fraud, misrepresentation, breach of contract, trust, or any impropriety on their part or any other persons as claimed. It was argued, that, it's the Plaintiff who breached the contract of the sale of the three motor vehicles by non-payment of the balance of the purchase price.

20. That; the Plaintiff entered into an arrangement to purchase the 2nd Defendant's three (3) motor vehicles namely: -

a) Chassis number WBANC320604 72932 BMW 5201 Diesel for Kshs 3,000,000.00

b) Chassis number WBAWN 320505V 92285 ENG. 45124151, BMW convertible-silver for Kshs 3,000,000.00

c) Chassis number WBANC 32080CP 72219, BMW grey sport saloon for Kshs 3,000,000.00

21. That, the Plaintiff took possession of the motor vehicles and subsequently, sold or gave out the third motor vehicle to his friend, despite not having paid for it. He also gave a bouncing cheque contrary to the averment that, the cheques were countermanded. That, the Plaintiff purchased the motor vehicles whose authenticity documentation and ownership he was aware.

22. The 2nd Defendant avers that, he sold the three motor vehicles to the Plaintiff on very clear understanding that, the Plaintiff was to get the importation documents upon payment of the purchase price and that explains why he continued making the payment, even after the vehicles were impounded.

23. That, the Plaintiff owes the 2nd Defendant, a sum of Kshs. 5,800,000.00, as the balance of the purchase price and upon which the 2nd Defendant can release the import documents for him to pay the requisite stamp duty as earlier on agreed. Further, the 2nd Defendant is ready and willing to refund the deposit for the three motor vehicles in the sum of; Kshs 3,200,000.00, after ascertaining the depreciation and/or loss in value, after the use of the motor vehicle by the Plaintiff and his friends or agents.

24. Hence the 2nd and 3rd Defendants pray for dismissal of the Plaintiff's claim against them and for judgement to be entered against the Plaintiff in terms of the counter-claim for orders that: -

a) *The 2nd Defendant refunds the Plaintiff the paid deposit in the exchange of motor vehicle BMW 520 Diesel Chassis number WBANC32060CP72932, BMW Chassis number WBAWN 320505JR92285 ENG. 45124151BMW convertible-silver and Chassis number WBANC 32080CP 72219 BMW grey sport saloon less depreciation;*

b) *General damages in (a) above under the Sale of Goods Act; and*

c) *Costs of the suit.*

25. The case proceeded to a full hearing. The Plaintiff's case was supported by his evidence, whereby he relied on a witness statement he recorded dated 9th June 2011, alongside a bundle of documents filed on the same date and a supplementary bundle dated 10th April 2013. He merely reiterated the averments in the plaint.

26. In close examination by the 1st Defendant, he stated that, he was aware that the motor vehicles were unregistered but did not find it necessary to make inquiry from the 1st Defendant. However, he was not aware that, the motor vehicles were on transit, although he had intelligence report that the motor vehicles were not stolen.

27. In further cross-examination by the 2nd & 3rd Defendants, he stated that, the 3rd motor vehicle was not repossessed and it is not a subject of this suit. That, it had Tanzanian number plate. He further stated that, he sued the 3rd Defendant because she is the one who received the money. He maintained that he has made all the payments and only owes the 2nd Defendant Kshs. 800,000.

28. Finally, the Plaintiff stated that, he told the 1st Defendant to assess the duty payable so that he could pay and get the vehicles, but it did not. He denied knowledge of the fact that, it was Aweis Bana who caused the vehicles to be impounded. He maintained that the motor vehicles were sold at Kshs 2,000,000.00 and not for Kshs 3,000,000.00 each.

29. The 1st Defendant's case was supported by the evidence of; Anthony Njoroge Gichia, who testified on 24th July 2019, and relied on the statement he filed dated; 14th November 2011 and documents filed therewith. He literally reiterated the averments in the defence.

30. However, during cross examination, he denied that the 2nd Defendant was a whistle blower, and stated that, the 2nd Defendant merely confirmed he sold the motor vehicle to the Plaintiff. Further, that the 2nd Defendant informed them that the motor vehicles were on transit to Kampala -Uganda.

31. That, the 1st Defendant did not take criminal action or prefer criminal charges, as it did not want to be disrupted by these proceedings herein. Finally, he stated that, the 1st Defendant accidentally auctioned the vehicles, when the case was on going but repossessed them.

32. The 2nd Defendant testified on 11th November 2019, on behalf of himself and the 3rd Defendant. He also relied on the statement, dated 10th February 2012, and filed on 14th February 2012, plus the accompanying documents.

33. In cross examination by the Plaintiff, he stated that, he could not recall when the motor vehicles were sold. That there was no formal agreement executed. The agreement was oral. He also confirmed that, he was to avail the import documents but did not. That, the Motor vehicle were taken due to lack of payment of duty. He also confirmed that, he received a sum of; Kshs 3,200,00.00 from the Plaintiff.

34. The parties filed their final submissions which I have considered alongside the evidence adduced and I find that the following issues have arisen for determination: -

- a) *Whether the 2nd Defendant sold the motor vehicles to the plaintiff;*
- b) *Whether the Plaintiff has fully paid for them; if so, how much;*
- c) *If the answer to (b) above is in the negative, whether there is a good reason for none payment;*
- d) *Has the Plaintiff proved his case and/or should the orders sought be granted;*
- e) *Has the Defendant proved the claim in the counter claim; and*
- f) *Who should bear the costs*

35. It is not in dispute that, the 2nd Defendant sold three motor vehicles, inclusive of the two subject motor vehicles herein to the Plaintiff. The motor vehicles had not been registered locally. It is also not in dispute that, the 1st Defendant issued a notice number 170325 dated 7th January 2011, of goods deposited in customs warehouse and subsequently repossessed the motor vehicles on the ground that, they were goods on transit and incapable of being sold and registered locally without following the law.

36. By a letter dated 10th January 2011, written by Mr. A.N. Gichia on behalf of the 1st Defendant, the Plaintiff was requested to offer an explanation on how he came to possess the motor vehicles and produce documents of importation.

37. Similarly, Mr S. Sainingu, from the investigation and enforcement department, of KRA, by a letter dated 1st march 2011, accused the director cum manager of; Tamani Jua Agency, of diverting the motor vehicles from the designated transit route and attempting to sell them locally and evade payment of taxes on them. He stated that, the diversion amounted to a criminal offence and/or breach of transit conditions, as such the motor vehicles were forfeited under the Regulation 22 of the East Africa Customs Management Regulations.

38. The 2nd Defendant also recorded a statement with the criminal investigation department, in which he states that, the Plaintiff bought, the 1st motor vehicle BMW car, for Kshs 2,000,000.00 and paid by a cheque. He then took the 2nd motor vehicle and paid the same amount by a cheque but the cheque was dishonoured. That he reported the matter to; Flying squad at Nyalı Police Station. However, before investigation were carried out, the Plaintiff paid Kshs 500,000.00 as part of the payment of the Kshs 2,000,000.00.

39. The 2nd Defendant, said that he informed the Plaintiff, that the motor vehicles were on transit. Therefore, he bought them, knowing he was to pay duty. That, after the sale he realised a week later, the BMW motor vehicle had been registered as, KBG 737P and another had been given to a High Court judge.

40. He reiterated that, the motor vehicles were sold at a cost of Kshs 3,000,000.00 per motor vehicle and a total Kshs 9,000,000.00. The Plaintiff has only paid Kshs 3,000,000.00, that is why he is withholding the documents. It is therefore clear that the 2nd Defendant has admitted he sold the motor vehicles to the Plaintiff.

41. However, what is in dispute is how much the motor vehicles were sold for. The Plaintiff alleges he bought the subject motor vehicles at; Kshs 2,000,000 per vehicle. In a letter dated 8th November, 2011, to the 1st Defendant he states that, he bought the three motor vehicles for a total sum of, Kshs 5,500,000.00, that, he has paid Kshs 4,400,000.00 leaving a balance of. Kshs 1,000,000.00

42. The 2nd Defendant on his part states that, the motor vehicles were sold at Kshs 3,000,000.00 each. However, I note from the statement he wrote with the Directorate of Criminal Investigation, he stated that, the Plaintiff bought one motor vehicle and paid by a cheque for a sum of Kshs 2,000,000.00 that was honoured. Apparently, the parties entered into an oral agreement and there is no independent witness called to reconcile the different allegations as to how much the vehicles were sold at.

43. Similarly, there is a dispute as to how much money the Plaintiff has paid the 2nd Defendant. The Plaintiff alleges that, the 1st Vehicle was for Kshs 1, 500,000.00 which he paid by cash to Mr Nuru Akasha. However, Mr Akasha did not testify to support or rebut that evidence. The evidence adduced shows that, the Plaintiff issued three cheques in the sum of; Kshs 2,000,000.00 He avers he countermanded payment. The 2nd Defendant avers they were dishonoured. Whatever, the case they were not paid.

44. Apparently, the Plaintiff paid a further Kshs 500,000.00 to the 3rd Defendant, on 16th November, 2010, in replacement of stopped cheque. That payment is not in dispute. He also paid a sum of Kshs 500,000 and Kshs 200,000 to the 2nd Defendant, on the 26th November 2010 and 23rd March, 2011 respectively.

45. According to the Plaintiff, he paid a total sum of; Kshs 4,700,000 and according to the 2nd Defendant, he was paid Kshs, 3,200,000. As stated above, there is no independent evidence to support the various positions taken by the parties. Yet the Plaintiff claims for the refund of the money paid and the 2nd Defendant seeks for release of the motor vehicles subject to refund of the money paid.

46. Be that as it were, the key issue to determine is the fate of the motor vehicles. To complicate the matter, the motor vehicles were even sold to Mr Hussein Aila Amaro the 4th Defendant herein. He bought the motor vehicles from the 1st Defendant, in a public auction advertised vide Kenya Gazette dated 22nd November 2013, being the highest bidder at Kshs, 620,000.00 and Kshs 845,000. 00. On 12th May 2014, he applied for registration but it was declined as the same were sold against a court order staying any dealings with the vehicles. The vehicles were returned to the Flying Squad police station.

47. It is therefore clear that, the Plaintiff, the 2nd and 4th Defendants are each claiming the legal right to these motor vehicles.

However, it should not be lost to all that, the motor vehicles were on transit to Kampala, Uganda. In that regard, as well submitted by the 1st Defendant, Regulation 104 (4) of the East African Community Customs Management Regulation, 2010 (“EACCMA Regulations”) provides that, goods in transit shall be conveyed by road or route approved by the Commissioner and the transit period in respect of the goods shall not exceed thirty (30) days from the date of entry or any further period as the Commissioner may allow.

48. To enforce the Regulation, section 251(2) of the East African Community Customs Management Act, states that, any regulations made under subsection (1) may provide that, any person contravening any of the provisions thereof, commits an offence and may provide a penalty for the infraction, being a fine not exceeding five thousand dollars.

49. The 1st Defendant correctly submitted that, according to Entry No. 2010MSA243135, dated 31st January, 2010, it indicates the vehicles entered the country on 31st August, 2010. The transit period is thirty (30) days from the date of entry, therefore, the motor vehicles should have exited Kenya, by 1st October, 2010. However, they were still in Kenya, by 7th January, 2011, when they were impounded by the 1st Defendant. A clear contravention of Regulation 104 (4) of the EACCMA Regulations.

50. That the government would have lost revenue of, Kshs. 3, 426 315.00 as, section 2 (1) of the East African Community Customs Management Act, 2004, states that, “uncustomed goods” includes dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs laws.

51. The 1st Defendant further submitted that, Section 210 of the East African Community Customs Management Act, 2004, provides that, in addition to any other circumstances in which goods are liable to forfeiture under this Act, un-customed and any goods subject to Customs control which are moved, altered, or in way interfered with except with the authority of any officer, shall be liable to forfeiture.

52. Further, section 222 of the East African Community Customs Management Act, 2004 provides that, proceedings for an offence under the Act may be commenced, and anything liable to forfeiture under this Act may be seized, within five years of the date of the offence.

53. The question is, what did the 1st Defendant do about the contravention of the law? It submitted that, due to the Honourable Court Order, dated 25th October, 2011, to preserve the motor vehicles, the 1st Defendant was unable to commence proceedings to forfeit the motor vehicles.

54. However, the 1st Defendant is being less than candid in that regard. The order of the Hon Justice E Ogolla stated inter alia that;

a) The 1st Defendant to assess taxes/duty payable and submit report to court within 15 days of date of ruling;

b) The 1st Defendant reserves the two motor vehicles pending the hearing and determination of the suit.

55. In fact, as aforesaid instead of proceeding as ordered by the court, it sold the motor vehicles to the 4th Defendant in total violation of that court order.

56. It is also noteworthy that, the provisions of section 234 (3) and (4), of the East Africa Community Customs Management Act, 2004 states that;

“(3) Where the proper officer requires any document to be produced for any goods which have been imported, exported, transferred, or declared in transit, the proper officer may require the document to be submitted in original and duplicate and the proper officer may retain the original”.

(4) Any person who fails to comply with a requirement of the proper officer under this section commits an offence”.

56. Similarly, the provisions of; section 235 of the same Act states that;

“(1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods —

(a) to produce all books, records and documents relating in any way to the goods; and

(b) to answer any question in relation to the goods; and

(c) to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of trans-shipment of the goods, as the proper officer may deem fit.

(2) Where any owner fails to comply with any requirement made by the proper officer under this section, the proper officer may refuse entry or delivery, or prevent exportation or transfer, of the goods, or may allow the entry, delivery, or exportation or transfer, upon the deposit of such sum, pending the production of the books and documents, as the proper officer may deem fit; and any deposit made shall be forfeited and paid into the Customs revenue if the documents are not produced within three months, or such further time as the proper officer may permit from the date of the deposit.

(3) Where any requirement made by the proper officer under this section relates to goods which have already been delivered, exported, or transferred and the owner fails to comply with the requirement, the proper officer may refuse to allow the owner to take delivery, export or transfer any other goods.

(4) The proper officer may retain any document produced by any owner under the provisions of this section but such owner shall be entitled to a copy of the document certified under the hand of the responsible officer; and the certified copy shall be admissible in evidence in all courts and shall have equal validity with the original.

(5) A person who fails to comply with any requirement made under this section commits an offence.”

57. Finally, under section 236 of the Act, it empowers and gives the Commissioner powers and states: -

“The Commissioner shall have the powers to—

(a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;

(b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

(c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

(d) examine the goods where possible for the goods to be produced”.

58. It is clear from all these provisions that; an offence was committed but the 1st Defendant lay beside it. It was to institute criminal proceedings and there was no order issued to stay institution and or prosecution of any offender. It therefore clear, that none of the parties herein have clean hands.

59. In conclusion I hold that, since the two vehicles that are a subject of this proceedings were destined for Kampala, Uganda and they were illegally and irregularly, diverted possibly, with the intention of evading payment of tax or in mere blatantly violation of the law, this court, being a court of law cannot, sanction, condone and/or aid and abet the offensive, by allowing them to remain in Kenya.

60. The vehicles should be released to the owner for transit to the intended destination, upon production of the documents of importation in proof of importation and ownership. The Plaintiff will be refunded the Kshs 3,200, 000.00 admitted by the 2nd Defendant without interest. The 4th Defendant shall recover the sums paid to the 1st Defendant. Each party shall meet its own costs. The law enforcement agents are at liberty to take any cause of action on any suspect who may commit offence.

61. It is so ordered.

Dated, delivered and signed on this 5th day of May 2020

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Makasira for the Defendant

Mr. Yongo for the plaintiff

Sophy -----Court Assistant