



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CIVIL SUIT NO 74 OF 2016

KENJAB MORORS LIMITED.....PLAINTIFF

-VERSUS-

ZEKI WANJALA T/A ZEKI MOTORS.....DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiff filed this suit against the defendant seeking **kshs.36,120,000** plus **interest** and **costs** of this suit. The claim arises from agreements entered into between the plaintiff and defendant in which the defendant being motor vehicle dealer purchased vehicles from the plaintiff to sell to its customers.
2. The plaintiff stated that it was agreed that the plaintiff would repossess the respective vehicle in the event a buyer defaults in making monthly instalments and the plaintiff has defaulted in paying for more than 30 vehicles as listed in paragraph 10 of the plaint.
3. The plaintiff contends that it has occasionally instructed auctioneers to repossess the vehicles for sale and in some occasions they found customers on the ground who had purchased the vehicles and paid the price in full to the defendant; the plaintiff stated that their efforts to recover unpaid amounts have been frustrated by court orders obtained by the defendant on the ground that the vehicles have been sold to his customers who have paid purchase price in full.
4. The plaintiff stated that despite several demands, the defendant has failed to pay balances to the tune of kshs.36,120,000.
5. The defendant filed defence on 29th August 2016. He admitted that within a period of 3 years he entered into numerous motor vehicle agreements with the plaintiff in which it sold more than 30 vehicles. The defendant however stated that once the vehicles were sold to 3rd parties, they could not be repossessed and that he was to harmonize accounts with the plaintiff and mutually agree on how payments were to be made.
6. The defendant avers that he has paid 98% of the amount realised from sale of the vehicles and plaintiff out to fleece the defendant unlawfully and at the time of filing defence the defendant had no active case in court over the vehicles. He denied owing the plaintiff kshs.36,120,000; and from his record only kshs.650,000 is owed to the plaintiff, which he will be ready to pay when the accounts are reconciled.
7. In the counterclaim the defendant urged the court to order the plaintiff to reconcile accounts with defendants, that the plaintiff be barred from demanding payments from 3rd parties and to release log book for the following vehicles
 - a. KAC 647 W
 - b. KBY 743N
 - c. KBV 099Z
 - d. KCE 245W
 - e. KCF 416

f. KBQ 841Q

8. Release the following vehicles and their logbooks

a. KCA350D TOYOTA ALPHARD

b. KCA 003X TOYOTA WISH

c. KCB 026Q MAZDA BONGO

9. That court declared that kshs.14,310,000 in respect to the 14 vehicles listed in paragraph 6 of the agreement is wrongly claimed and be summarily disallowed and release of logbooks in respect to vehicles listed in paragraph 26 of the counterclaim.

10. Defendant sought permanent injunction to bar the plaintiff from repossessing 3rd parties' vehicles and release logbooks of vehicles already sold as shown in paragraph (f) of the counterclaim.

11. The interested party filed his claim on 21st June 2018. He stated that on 30th December he entered into an agreement with the defendant to purchase motor vehicle registration number KBJ 630 R at a cost of kshs.2,400,000. He said he fully paid but has not been issued with a logbook for the said vehicle to date. He prayed for an order of specific performance compelling the release of the logbook for motor vehicle registration number KBJ 630 R and an order for prohibitory injunction to restrain the plaintiff and defendant from seizing or selling the said vehicle and its logbook. He also prayed for costs of this suit.

12. Plaintiff filed a reply to defence and defence to counterclaim dated 21st September 2016 and filed on 28th September 2016. Plaintiff denies paragraph 23 of the counterclaim and aver that the said vehicles have not been paid for and puts the defendant to strict proof to the contrary; further that the independent agreements between them were binding and were not vitiated by the alleged sales to third parties. The plaintiff further invited the court to admissions therein and prayed that the court compels the defendant to pay up the balance he owes the plaintiff to the tune of kshs.36,120,000; that the defendant has refused and/or neglected to honour the agreements and has issued cheques which were dishonoured on insufficient funds. Plaintiff urged court to disregard the defendant's allegations in the counterclaim and dismiss with costs and plaintiff's claim be allowed as prayed in the plaint.

PLAINTIFF'S EVIDENCE

13. The plaintiff availed one witness **Ellen Kagiri** who is its manager as a witness. She adopted her witness statement recorded on 26th June 2016. She produced a bundle of documents which contain motor vehicle agreements and pleadings for a case filed in Eldoret Court plus unpaid cheques and summary of claim in the supplementary list of documents filed on 16th July 2018.

14. In her witness statement, she restated contents of the plaint. She listed 20 vehicles also listed in paragraph 10 of the plaint where balance amounting to kshs.21,810,000 had not been paid and logbooks held by the plaintiff. She further confirmed 3 vehicles KCA 647W, KBY 743N and KBV 099Z had been paid for but logbooks have not been collected. She also listed 15 vehicles where a balance of kshs.14,310,000 had not been paid but logbooks had been released.

15. PW1 testified that when the plaintiff sought to repossess the vehicles the defendant filed a claim in Eldoret Court, Eldoret CMCC No.191 of 2016 which was dismissed for want of pecuniary jurisdiction. She further stated that the defendant advised his customers to file frivolous suits against the plaintiff to bar plaintiff from repossessing the 15 units in Eldoret with each having temporary injunctive orders.

16. She further stated that she is aware that the defendant received the purchase price in full from his customers and is only declining to pay necessitating this suit. She added that the plaintiff has been subjected to unfair business practice by the defendant thus plaintiff is financially prejudiced.

17. In cross-examination by **Mr Andambi** for the defendant, PW1 said she is not one of the directors of the plaintiff but she is authorised to sign documents on behalf of the plaintiff's company. She said her authorization is part of the documents she produced. She stated that the agreement was on vehicle basis not pool. She said the agreement stated that they would release the logbooks upon full payment.

18. On cross examination by **Mr.Ogari** for interested party, she said that she was aware of motor vehicle registration number KBJ 630R. She said it is currently in the possession of interested party and that they would hand over the logbook to 3rd party if defendant gives instructions.

19. On re-examination, she said she got instructions from plaintiff's directors to testify in this suit. She said she is in charge of the department and conversant with the vehicles.

DEFENDANT'S EVIDENCE

20. Defence availed one witness, the defendant herein. He adopted his witness statement dated 29th August 2016 and produced bundle of documents 1 to 43. He testified that the relationship between him and the plaintiff is that he would take vehicle from the plaintiff and sell. He said payments were by instalments by deposit of cash in plaintiff's account. He said he would deposit money and plaintiff would decide how many vehicles he would allocate to him. He said an agreement would be done for each vehicle and when he deposited money, the plaintiff would allocate to the vehicles. He said the plaintiff would release logbooks upon full payment. He prayed that his counterclaim be

allowed and he be paid costs for this suit.

21. In his statement, he paid a deposit while purchasing vehicles from the plaintiff and would pay the balance after selling the vehicle. He said at the time of recording statement he had paid kshs.21,160,000 as per bank slips listed 1 to 31 and to the best of his knowledge he owed only kshs.650,000. He stated that the plaintiff has exaggerated the figures as they are different from the agreement between them. He listed 5 vehicles as follows: -

- a. KBU 353 U agreement kshs.1,200,00, tabulated kshs.1,300,000
- b. KBV 157 Z Agreement kshs.700,000 tabulated kshs.850,000
- c. KBU 222H Agreement kshs.4,500,000 tabulated kshs.4,800,000
- d. KBJ 630 R Agreement kshs.2,000,000 tabulated kshs.2,500,000
- e. KBU 222 H Agreement kshs.4,500,000 tabulated kshs.4,300,000

22. He further stated that some of the agreements attached to the plaint relate to transactions between **Kenjap and Smarttkar Limited** and not him; he cited vehicle registration number KBU 353U and KBJ 630R attached to defence.

23. The defendant stated that the plaintiff has been spoiling his name and business, harassing third parties who he sold the vehicles to by repossessing them.

24. In respect to the interested party, he confirmed that he sold a vehicle to him and that he paid which to him, which he paid to the plaintiff. He however said he has not been given logbook for the vehicle. He said the plaintiff repossessed 3 vehicles.

25. On cross-examination by counsel from the plaintiff, he said they agreed that he pays and the plaintiff allocate money to prison. He denied owing kshs.36,120,000. He said he paid the whole amount and only 3 vehicles were repossessed; that plaintiff threatened to attach the other vehicles but his clients filed suits.

26. On cross examination by counsel for interested party he said the interested party paid the whole amount for motor vehicle registration number KBJ 630R. He said he informed plaintiff's director but he refused to release the logbook. He said the agreement was between him and the interested party and that he fully paid.

27. DW2 **Nicholas Rono** testified that he has worked with the defendant since 2010. He adopted his witness statement dated 29th August 2016. He stated that the defendant purchased several vehicles for the plaintiff and he once witnessed the defendant paying kshs.5 million to the plaintiff in the plaintiff's office in Nakuru. He said the said amount was received by PW1 **Ellen Kagiri**. He further stated that kshs.175,000 was paid by petty cash voucher on 13th January 2016 which was received by the plaintiff's director **Veandnayagam Arumairajarishi**. He stated that he has on several occasion witnessed repossession of vehicles by plaintiff from 3rd parties.

PLAINTIFF'S SUBMISSIONS

28. The plaintiff submitted that entered into numerous motor vehicle agreements with the defendant for a period of three years and it was a term of the agreement that the plaintiff would have a right to repossess the vehicles in the event of default in payment of instalments; and they further agreed that logbooks would be handed over to the plaintiff upon payment of last instalment.

29. The plaintiff submitted that the defendant has since defaulted, neglected or refused to pay the instalments; that the plaintiff instructed auctioneers to repossess the vehicles but found that they have since been transferred to 3rd parties; that the defendant has mischievously and with malice intent gone to Court to obtain to restrain the plaintiff from repossessing the vehicles on the ground that they have been sold to his customers who have paid purchase price in full; that the claim balance due is kshs.36,120,000.

30. Plaintiff summarised evidence captured above and submitted that it was agreed that the defendant would pay deposit and the balance would be paid on scaled instalments and the plaintiff performed its part of the obligation by supplying vehicles but the defendant failed to service the instalments; that the defendant admits in his defence still owing money. Plaintiff submitted that parties are bound by their terms of contracts unless they show there is a vitiating factor which the defendant has not proved.

31. Plaintiff cited the case of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999(2001) KLR 112 (2002) EA 503** Where the court held as follows:-

“A court of law cannot rewrite contracts between parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

32. The plaintiff further submitted that the plaintiff has clearly shown how it arrived at kshs.36,120,000 owing from the defendant to the plaintiff by producing all agreements for sale of motor vehicles and tabulation of figures on how much had been paid and amount owing. That the defendant has not demonstrated how he came up with the figure of kshs.650,000; that this are fictitious figures meant to defeat the plaintiff's claim; that the bank slips and acknowledgment note do not show which vehicles they refer to. Plaintiff submitted some of the payments defendant alleges to have paid relate to other vehicles.

33. Plaintiff submitted that mere denial is not sufficient defence and the defendant should be ordered to pay kshs.36,120,000 owing to the plaintiff. Counsel cited the case of **Jane Njeri Gitau V KPLC Ltd [2006]e KLR** where the court quoted the case of **Prem Lata Vs Peter Muas Mbiyu [1965] EA 592** where the court stated as follow:-

“In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

34. The plaintiff submitted that the defendant’s claim cannot stand as it would amount to unjustly enriching the defendant at the expense of the plaintiff; that the defendant has breached the terms of the agreement and should not be allowed to benefit from equity since he has come to Court with unclean hands; that the defendant has not met the threshold of being granted injunction; that the prayer to meet and reconcile accounts has been overtaken by events. That the defendant has not met the threshold as in the case of **Giella vs Cassman Brown [1973]EA 360**.

35. On claim by interested party, the plaintiff submitted that it cannot stand against the plaintiff as there is no contractual agreement between the plaintiff and the interested party; that plaintiff is not privy in the agreement between defendant and interested party. Plaintiff cited the case of **Savings and Loan (K) Limited Vs Kenyene Karangaita Gakombe & another [2015] eKLR** where the court held as follows: -

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

36. Plaintiff submitted that the sale agreement of motor vehicle dated 30th December 2015 is not valid as the defendant had no capacity to sell the vehicle to the interested party having not paid the last instalment; that the defendant was a hirer but not the owner of the vehicle and he should have consulted the plaintiff before transferring the vehicle to the interested party; and the interested party did not also conduct due diligence before purchasing the vehicle. Plaintiff prayed that judgment be entered for the plaintiff against the defendant as prayed in the plaint.

DEFENDANT’S SUBMISSIONS

37. The defendant submitted that the plaintiff is a limited liability company owned by directors but none of the directors recorded a statement and **Ellen Kagiri** who came to Court to testify admitted that she is just an employee. Further the plaintiff did not file resolution or authority under the company seal, authorising the said **Ellen Kagiri** to appear in Court on behalf of the company. That the statement was filed in the year 2016 and is therefore subject to provisions of the **Companies Act 2015 section 39, 40 and 41 of the Act**; and even during the hearing she did not provide authorization by the company.

38. The defendant submitted that the transactions between the plaintiff and defendant were sometimes so casual as some deposits would be made without stating which vehicles they were depositing money against; the defendant faulted the plaintiff for exaggerating figures and showed exaggerated figures vide **exhibit 42**.

39. Defence counsel submitted that the defendant has tried to account for all the transactions of the vehicles he dealt with the plaintiff. That the plaintiff admitted holding logbooks for vehicles registration numbers KCA 647W, KBY 743N and KBV 0992 which been fully paid and submitted that they should be ordered to release the logbooks.

40. Defendant further submitted that he has established that kshs.14,310,000 where logbooks have been released had been duly paid as per parties’ agreement and kshs.21,260,000 paid to plaintiff’s account as per receipt and bank slips provided; that kshs.35,570,000 is proven payment by the defendant to the plaintiff; that the figure owing is kshs.550,000 and the figure 650,000 admitted in the defence is an arithmetic error.

41. Defendant prayed for prayers in the counterclaim be allowed save for (a) which has been overtaken by events.

42. Defendant further prayed that the plaintiff be ordered to release logbook for motor vehicle registration number KBJ 630R to the interested party who has fully paid. Further that the cheques in the plaintiff’s supplementary list are not dated and there is no evidence that they were not banked neither do they show which vehicles they are meant to cover.

ANALYSIS AND DETERMINATION

43. There is no doubt that a relationship existed between the plaintiff and the defendant where, the defendant was allocated vehicles upon payment of deposited by plaintiff and the defendant was to pay the balance by instalments and logbooks of the vehicle would be released upon payment of last instalment. In respect to the vehicles released to the defendant, the plaintiff alleges that apart from three vehicles, the other vehicle totalling 35 have not been fully paid; that the three have been fully paid though logbooks are with the plaintiff. Of the 35 the defendant alleges that logbooks for 15 have been released despite the fact that no full payment has been made and the plaintiff is holding logbooks of 20 which have not been fully paid.

44. From evidence adduced, it is not also disputed that the plaintiff is holding three logbooks for vehicles already fully paid and that the interested party’s vehicle has been fully paid. I consider the following to be in issue:

(i) **Whether PW1 was authorised to record witness statement and represent the plaintiff in court.**

45. The defendant's argument is that contrary to **Section 39 of Company's Act**, PW1 who adduced evidence on behalf of the plaintiff never demonstrate that she had authorization from the plaintiff to record statement and adduce evidence on its behalf in Court. However, PW1 in cross examination testified that she is authorised to sign documents on behalf of the plaintiff's company and her authorization is part of the documents filed. I have perused documents filed and I have not seen the authorization as alleged by PW1. **Section 40 of the Companies Act** provide as follows: -

“40. Executive of deeds or other documents by attorney;

1) A company may, in writing, authorise person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.

2) A deed or other document executed by a person authorized under subsection (1) has effect as if executed by the company.”

46. **Hewett, J in Assia Pharmaceuticals Vs. Nairobi Veterinary Centre Ltd[2000] eKLR** cited the commentary in **4th Halsbury Vol 7 paragraph 767** which reads as follows:-

“control of company's litigation. As regards litigation by an incorporated company, but, in the absence of any contract to the contrary in the Articles of Association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action should be commenced or allowed to proceed. The secretary of a company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

47. On perusing the record, I have not seen the authority as alleged by PW1 who is the manager of the plaintiff. However, going by the **Assia Pharmaceutical Case (supra)**, an action commenced without authority is capable of being ratified. It would therefore not be in the interests of justice to dismiss this suit on the ground that that PW1 did not file the authority together with the verifying affidavit. I also note that the issue was not raised before the hearing commenced. PW1 stated that she is the manager of the plaintiff. She stated that she was conversant with the transactions as she was involved in them. That was not challenged by the defendant. My understanding is that the provision for authority from board of a company is to address the mischief of companies being dragged to Court with litigation which may not have been sanctioned by the board managing the affairs of the company.

48. From the evidence adduced herein there is no doubt that PW1 was in Court to represent the interest of the company. With respect to her witness statement, my view is that an employee of a company who is conversant with the issues before Court cannot be barred from testifying unless the company raises objection to his/her appearing on behalf of the company.

49. Further in **Microsoft Corporation Vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, Ringera, J** stated as follows: -

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

50. The defendant has not demonstrated any prejudice that it may have suffered by failure to attach authority to plaintiff's documents. No explanation has also been given as to why the issue was not raised at early stage of trial of this suit. I agree with the above decision to the effect that legal technicalities or procedures which does not prejudice the other party should not come in the way to substantive justice. I therefore see no merit in the defendant's argument on that ground

(ii) Whether the plaintiff has proved its claim against the defendant.

51. It is no disputed that the defendant would be required to pay deposit for vehicles to the plaintiff upon which the vehicles would be released to him and he would pay instalments for the vehicles. The logbook would be released to him after payment in full. It is therefore evident that he would pay and clear instalments for a specific vehicle before it is released. This is confirmed by the defendant's evidence that instalments in respect of the interested party's vehicle have been fully paid. It was therefore upon the defendant to demonstrate full payment of instalments in respect to each vehicle released to him. I do not agree with his allegation of pool payment; how would one know if payments for a vehicle has been cleared if money paid goes to a pool. Payments by the defendant's customers were for specific vehicles they purchased by them from the defendant and it followed that he would have been required to use such payments to pay the instalments for the specific vehicles with the defendant. From the foregoing, I find that the defendant has failed to demonstrate that upon receiving payments from his customers he paid the plaintiff instalments for the vehicles as agreed.

(iii) Whether defendant has proved his counterclaim.

52. In the defence the defendant admitted owing kshs.650,000 and prayed for release of logbooks. However, in the evidence adduced, the defendant said the amount owing is kshs.550,000 and kshs.650,000 was an error.

53. However as observed above, he has failed to demonstrate that payments of the vehicles were cleared. He alleged that the transactions were done in a casual way and money would be deposited in a pool. If this was to be taken as the true position, how then would he have known which vehicle had all instalments fully paid. Defendant stated that 3 vehicles have been fully paid but logbooks have not been released. Defendant also says the interested party has fully paid for his vehicle. It begs a question “how would he have known this if money was paid in a pool or in a casual manner? The obvious answer is; he knows how much is owing from each vehicle.

54. The pleadings and evidence adduced creates an impression that, the defendants defence is intended to create confusion to make it unclear how much is owing to the plaintiff and may be benefit in the process.

(iv) Whether the interested party has a claim against the plaintiff.

55. Evidence has been adduced to the effect that the 3rd party has cleared paying for the vehicle but has not been given logbook. It is not disputed that the interested party did an agreement with the defendant. The plaintiff was not a party to it as per evidence adduced. There was no tripartite agreement. Therefore, if the interested party has any claim, should be against the defendant as the plaintiff was not privy to in the contract between him and the plaintiff. From the foregoing therefore there is no claim by the interested party against the plaintiff.

(v) Whether the plaintiff was entitled to repossess the vehicles.

56. The defendant having failed to demonstrate that he paid balances owing for the 35 vehicles the plaintiff was entitled to repossess the vehicles as per the agreement between them to recover the balance.

57. From the foregoing I find that the plaintiff has proved its case on a balance of probabilities.

58. FINAL ORDERS

- 1. Judgment is entered for the plaintiff against the defendant for kshs.36,120,000.**
- 2. Defendant’s counterclaim is hereby dismissed.**
- 3. Interest on 1 above at Court’s rate from the time of filing this suit.**
- 4. Costs of this suit to the plaintiff.**

Judgment dated, signed and delivered via email at Nakuru this 14th day of May, 2020

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RACHEL NGETICH

JUDGE

TO:

Ikua Mwangi Advocates Counsel for Plaintiff

Andambi Advocates Counsel for Defendant

Ogetto Otachi Advocates Counsel for interested party