



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: C. MEOLI, J)

CIVIL CASE NO. 4 OF 2014

PJ CRAFT LIMITED.....PLAINTIFF

-VERSUS-

BASETRACK EQUIPMENTS LIMITED.....1ST DEFENDANT

CAROLINE WAMBUI NJORA.....2ND DEFENDANT

J U D G M E N T

1. The Defendants are dealers in construction equipment. The subject matter of this suit is used equipment imported by the Defendants and sold to the Plaintiff in June 2014 vide receipt number 114 and delivery note number 125 both dated 20th June, 2014. The Equipment is therein described as a Double Drum Roller 800mm, green in colour, and model **15V 004692015612**. The purchase price sum of Shs 1,250,000/=, paid by 3 postdated cheques number **001365**, 01364, **01357** for the sums of Shs 500,000/=, Shs 300,000/= and Shs 325,000/= respectively.

2. Earlier in March 2014 the Plaintiff had also purchased from the Defendants two pedestrian rollers vide receipt number 101 and delivery note number 005 dated 14th March, 2014 at a cost of Shs 500,000/=.

3. On 27th October, 2014, the Plaintiff approached the court under Certificate of Urgency seeking to restrain the Defendants from repossessing the equipment filed contemporaneously with the motion for injunction was a plant asserting *inter alia* that it was a term of the sale agreement that the Defendants would provide registration “books” in respect of the equipment before presenting the payment cheques; that despite the Defendants’ noncompliance, the Plaintiff had allowed encashment of the sum Shs 325,000/= and a further Shs 10,000/= the latter being for facilitating the transfer; that the Defendants persisted in non-compliance rendering it impossible for the Plaintiff to use the equipment in his business; and eventually on 24th October, 2014 the Defendants attempted to repossess the equipment by force.

4. The Plaintiff prayed for a permanent injunction to restrain the Defendants from *inter alia* interfering with the Plaintiff’s business and possessions of the equipment an order that the Defendants provide registration documents for all the rollers purchased from the Defendants, and in the alternative a refund of the sum of Shs 835,000/- to the Plaintiff, loss of user calculated at 27,000/= daily from 10th July, 2014 and a further sum of Shs 1,500/= per day payable from 10th July until the date of the collection of the rollers by the Defendants.

5. With leave of court the Defendants filed an amended Defence on 22nd December, 2015. Thereon the Defendants admitted the sale of pedestrian and double drum rollers to the Plaintiff on the clear understanding that the said equipment were not registrable as they had no chassis number. That a sum of Shs 790,000/= is outstanding in respect of the double drum roller model **15V 00469201512** sold to the Plaintiff as two postdated cheques were returned unpaid. The Defendants deny that provisions registration books for rollers are a condition of the sale, and over that at the completion of sale, the Plaintiff was entitled to the bill of lading. The Defendants assert further that the Plaintiff is in breach of the agreement through failure to settle outstanding payments while retaining possessions of the equipment. They deny the particulars of loss by the Plaintiff.

6. Further the Defendants counterclaimed for the sum of Shs 800,000/= being outstanding purchase price and Shs 4,400/= being bank charges incurred in respect of returned cheques for the sum of Shs 800,000/=.

7. In reply to Amended Defence the Plaintiff denied the averments in the amended defence and counterclaim.

8. Prior to the hearing, the parties framed three issues for determination:

1. Whether or not the twin-drum roller machine code number **8430690000** model number **15V-00469201512**, manufactured in 1998, supplied by the Defendant to the Plaintiff is registrable by National Transport Safety Authority (NTSA).

2. Whether or not the Plaintiff having refused to release the same on demand by the Defendant ought to pay the balance of the purchase price or be allowed to return the roller to the Defendant.

3. Who pays costs.

9. At the trial **Joseph Muguro Ndungu (PW1)** a director of the Plaintiff gave evidence and the Plaintiff called **Dancun David Odekeyo** of National Transport Safety Authority (NTSA) as a witness. The sum total of the Plaintiff's evidence is as follows. That between March and June 2014 the Plaintiff purchased two pedestrian rollers at a cost of Shs 500,000 and one double drum roller at a cost of Shs 1,125,000/= from the Defendants. That he paid by three postdated cheques for the double drum roller, and the equipment supplied on condition that the cheques would not be encashed until the Defendants supplied registration documents. He asserted the despite not having received the ownership documents he agreed that the cheque number 1357 dated 10th July, 2014 be paid as the Defendants had financial difficulties. He also paid a further sum of Shs 10,000/= by MPESA.

10. Nonetheless the Defendants attempted to repossess the goods on 26th October, 2014 prompting this court action. The court ordered that he deposits a sum of Shs 800,000/=. That the Plaintiff cannot use the equipment as he needs to insure it, which is not possible without ownership documents. He stated that the National Transport Safety Authority (NTSA) had confirmed that the double drum roller is registrable and that, as he is unable to use the same, the Defendants ought to take it away and refund his part payment.

11. For his part, **PW2** who claimed to work in the licensing department of National Transport Safety Authority (NTSA) testified he received the bill of lading [**D. Exhibit 1**] from the Defendants, that he did not receive **P. Exhibit 3** - the delivery note in respect of the double drum roller for purposes of answering the query on registrability. He asserted nonetheless that a double drum roller has a chassis and is registrable. He pointed to the letter produced by **PW2** as Exhibit 4, authored by National Transport Safety Authority (NTSA). To the effect that double drum rollers are registered while pedestrian rollers are not.

12. **Caroline Wambui Njoroge**, the 2nd Defendant testified that she was an agent of the 1st Defendant, **Basetrack Equipment Ltd**, involved in the importation and sale of agricultural and construction equipment. That the Plaintiff was a repeat customer in the material period. He bought the double drum roller and gave postdated cheques. That he requested the Defendants to hold presentation of the first

cheque when it fell due, later instructing them to encash the cheque for Shs 325,000/=. When the Defendants pressed for payment, a meeting was held between the 3 parties. The Defendants asked the Plaintiff to release the equipment to them while the former sought more time to pay.

13. Subsequently the Plaintiff refused to pick the Defendants' calls. Two postdated cheques were dishonoured and the Plaintiff became elusive eventually sending a letter from his lawyer. **DW1** said that the Plaintiff did not raise the issue of registrability of the double drum roller in his period and that the Plaintiff had been issued with a copy of the Bill of lading, produced in court as **Exhibit 1** alongside the delivery note and receipt [**D. Exhibit 2 and 3**]. **DW1** said the Plaintiff had never demanded any further registration documents or sought help in registration. **DW1** expressed unwillingness to take back the double drum roller as she could not certify its condition. She testified that only double drum rollers over 3 tonnes were registrable and that the one in contentions was below 3 tonnes. She relied on the National Transport Safety Authority (NTSA) letter of 2nd October, 2015 which stated that the double drum roller in the bill of lading was not capable of registration as it had no chassis number. She asserted that the double drum rollers were properly cleared and no authority had demanded registration.

14. The gist of the Plaintiff's submissions is that the Defendants are in breach of the agreement. Reiterating their evidence that double drum roller is registrable. The Plaintiff argued that the Defendants failed to obtain registration documents hence frustrating the transfer of the goods to the Plaintiff. The Plaintiff placed reliance on Section 19 and 20 of the Sale of Goods Act. Thus the Plaintiff ought not to be forced to pay the balance of the purchase price, and having acted in good faith should be awarded the costs of the suit.

15. The decision of **Ngaah J** in **Dickson Maina Kibira -Vs- David Ngari Mukonya [2015] eKLR** is attached to the submissions though not referred to in the body of the submissions.

16. For their part, the Defendants their submissions was that the bill of lading, to be issued upon the postdated cheques being paid was adequate and registration of the equipment was "neither here nor there". That the Plaintiff had by his conduct accepted the equipment by taking possession and by issuing cheques.

17. Citing the case of **Dickson Maina**, the Defendants highlight the absence of a written contract and argue that Section 20 (d) and 36 of the Sale of Goods Act applies in this case. That the Plaintiff having taken possession ought to keep the equipment and pay the balance of the purchase price. Citing the Plaintiff's part performance of the agreement, the Defendants argue that it is not entitled to damages and costs.

18. The basis fact of this case are not in dispute. The Plaintiff purchased several equipment from the Defendants in the material period. Although the plant included equipment bought in March, 2014, it turned out during the trial that the dispute herein only relates to the double drum roller purchased separately and delivered to the Plaintiff in June 2014. The parties had framed issues for determination by the court, but I note that the submissions appeared in some instances to either reframe the issues or go beyond the stated issues. The issues for determination are those framed by consent of the parties prior to the hearing and have already been stated. Inevitably this case turns primarily on the first issue, whether the double drum roller in this case was registrable.

19. The contract between the parties was not reduced into writing beyond the receipt and delivery note admitted by both parties. Section 107 of the Evidence Act provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

20. In this case, while it cannot be disputed that the property in the equipment could only pass upon the

payment of the post-dated cheques listed in the receipt, the latest one, by 10th July 2014, nothing in the receipt or delivery note suggests what the Plaintiff has made a plank of his case. Namely the condition that the cheques could only be paid upon the occurrence of an event - provision of registration documents for the equipment. Considering that the first cheque was payable by 25th June, 2014, a mere five days sickness the contract, such condition appears unlikely. It was not clear in the Plaintiff's evidence whether the condition was for the issuance of ownership documents in his name or whatever documents of ownership the Defendant had in their possession.

21. Moreover, **PW1** did admit under cross-examination that the first two cheques were dishonoured by his bank. By the date of the maturity of the third cheque on 10th July, 2014, it must have been clear, if **PW2** is believed, that the ownership documents had not been handed over. Yet in his own admission, **PW1** allowed the encashment of the said cheque, the only one of the 3 post-dated cheques to go through. His explanation is intriguing: that the defendants were in financial difficulty. This conduct is not consistent with existence of a condition for the delivery of ownership documents, or a further action by the Defendants. Plaintiff also rushed to court when the Defendants attempted to repossess the goods.

22. **PW1** admitted in his evidence that despite the alleged failure on the part of the Defendants to provide the documents, he did not offer to release the goods to the Defendants.

23. As to the question whether indeed the double drum roller in this case required registration by the National Transport Safety Authority (NTSA), the evidence of **PW2** was confounding. Claiming that the Defendants had forwarded to them only **D. Exhibit 1** - the bill of lading, he asserted that the same did not include a double drum roller, such as reflected in the Plaintiff's receipt and deliver note. He clearly stated that he did not receive the said letter exhibits with the query to the National Transport Safety Authority (NTSA).

24. Nonetheless he went on to claim that the letter **P. Exhibit 4** was the answer by his boss and that the green double drum roller in Plaintiff's photographs marked Exhibit 1 required registration. The letter **P. Exhibit 4** refers to a letter of 26th June, 2014 by the Plaintiff's Advocate not produced at the hearing. The brief response reads:-

“RE: REGISTRATION OF DOUBLE ROLLERS AND PEDESTRIAN ROLLERS

Your letter dated 26th June, 2015 in regard to the above refers. This is to inform you that Double Rollers are registered like other motor vehicle but pedestrian rollers are not.

(signed)

EDWARD KISINGU

MANAGER, REGISTRATION AND LOG BOOKS.”

25. This letter makes no reference to **D. Exhibit 1**, which in any event, according to **PW2** referred to twin drum rollers which he claims are different from double drum rollers. During cross-examination **PW2** admitted that though the National Transport Safety Authority (NTSA) had the bill of lading **D. Exhibit 1** in its possession, they did not check their system. He proceeded to claim that double drum rollers is done upon payment of duty.

26. Evidently **PW2** did not pay attention to the particulars of the items, particularly the twin drum rollers in the bill of lading which he claims accompanied query to National Transport Safety Authority (NTSA)

confronted with **D. Exhibit 2**, another letter from National Transport Safety Authority (NTSA) specifically referring to the twin drum roller machine code 8430690000, **PW2** admitted it emanated from National Transport Safety Authority (NTSA). The content of the letter directly contradict the assertions made by **PW2**, stating that a twin drum roller having no chassis is not registrable.

27. At that point, in cross-examination **PW2** asserted that at twin drum roller differs from a double drum roller as the former is pushed manually while the latter has a chassis and is motorized. Yet according to **PW1** the pedestrian roller is the manual roller.

28. Pausing here, the distinction introduced by **PW2** during cross-examination would mean that we are now dealing with three types of rollers: twin drum rollers, double drum rollers and pedestrian rollers. The National Transport Safety Authority (NTSA) letter produced as **P. Exhibit 2** by the Defendant is specific to the equipment in question twin drum rollers referring to its tariff code. Based on common sense, it is difficult to accept that a twin drum roller differs from a double drum roller as **PW2** purported to assert. Instead of buying clarity in the matter the National Transport Safety Authority (NTSA) has obfuscated this question.

29. It is possible that the real question that the parties avoided in this case was that of payment of duty for the goods. The best authority to clarify this issue ought to have been the Kenya Revenue Authority. The issue does not seem to have been raised during the sale agreement. A letter to National Transport Safety Authority (NTSA) filed into the court by the Plaintiff's advocate on 16th February, 2017 laments the confusion created by the two attached letters from National Transport Safety Authority (NTSA) dated 27th July, 2015 (**P. Exhibit 4**) and 2nd October, 2015 (**D. Exhibit 2**).

30. The Plaintiff advocates states *inter alia*:

“The question before the court is whether Double drum roller is registrable in this country or not. We have received two confusing letters from you.....

In order to clear this doubt kindly let us know the correct position as this matter is coming up for hearing on 22nd February, 2017.”

At the end of the trial, there was no more clarity than there was at the time of the letter above.

31. Reviewing the evidence at hand, the court finds that the Plaintiff has failed to prove that the double drum roller was registrable. The related question whether the registration or provision of registration documents was a key condition of the agreement of sale must fall by wayside. Contrary to the Defendants' submissions the facts of this case do not bring it within the provisions of Section 20 (b) of the Sale of Goods Acts which states:

“Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer-

(a);

(b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;

(c);

(d);

(e);

32. There is no plausible direct or indirect evidence that the Defendants were under a duty to do

something to the goods for the purpose of putting them into a deliverable state. On the contrary, there is undisputed evidence that the Plaintiff accepted the delivery of the double drum roller and proceeded to pay three cheques, one of them which was honoured while two of them were dishonoured.

33. He admittedly never attempted to return the goods to the Defendants but resisted their bid to repossess, eventually coming to court and paying a further sum of Shs 800,000/= as ordered by the court. The issue of registrability of the equipment is in my view a red herring raised by the Plaintiff to deflect demands for payment of the full purchase price. It does seem that the Defendants had not released the bill of lading to him as the cheques were dishonoured.

34. It is absurd for the Plaintiff while continuing to hold on to the equipment to have expected the Defendants to hand over the bill of lading or whatever other ownership documents he claims without performing his part of the agreement, that is making full payment. This case in my view falls within the provisions of Section 36 of the Sale of Goods Acts which provides:

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

35. In light of the findings above, it is clear that the Plaintiff is liable to pay the balance of the purchase price, Shs 800,000/= to the Defendants and upon that event receive the bill of lading as evidence of ownership. The Plaintiff will also meet the cost of the suit.

36. In the result, this court dismisses the Plaintiff’s suit with costs and allows the prayers a), b), c) and d) therein. The court further directs that the sum of Shs 800,000/= deposited into court by the Plaintiff is to be released to the Defendants. Upon receipt of the monies, the Defendants are to forthwith release the relevant bill of lading, being a copy of the **D. Exhibit 1** to the Plaintiff.

Dated and signed at Kiambu this 27th day of **February, 2019.**

C. MEOLI

JUDGE

Delivered and signed at Naivasha this 14th day of **March, 2019.**

R. MWONGO

JUDGE

In the presence of:-

1. Awuor for the Plaintiff
2. Mburu holding brief for Kisila for the Defendants

Court Assistant - Quinter Ogutu