REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 376 OF 2011

SUNRAYS RENT-A-CAR-SAFARIS.....PLAINTIFF

VERSUS

CONTRA TOURS LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff took out summons against the Defendant on 1 September 2011 claiming the amount of Kshs. 7,050, 128/= as the unpaid balance of car-rental charges. In support of its claim and cause of action, the Plaintiff contended that it had entered into a motor vehicle rental agreement with the Defendant whereby the Plaintiff hired out to the Defendant various motor vehicles at an agreed daily rate inclusive of VAT, collision damage and theft protection but exclusive of excess(insurance) liability and fuel.

2. The Plaintiff further alleged that the agreement on various vehicles took effect on diverse dates between 1 April 2011 and 7 April 2011 (both inclusive) and as of 31 August 2011, the net amount due to the Plaintiff was Kshs. 13,217,808/= less the amount paid by the Defendant of Kshs. 6,167,000/=.

3. Simultaneously with the claim summons, the Plaintiff also took out a chamber summons seeking to attach the Defendants bank account as well as the Defendants motor vehicle registration number KBP 527Q pending determination of the suit.

4. In support of its claim the Plaintiff filed a bundle of documents containing copies of the motor vehicle rental agreement, the Plaintiffs bank statements and a demand letter. The Plaintiff further attached the invoices to assist particularize the claim for Kshs. 7,050,128/=.

5. The Plaintiffs chamber summons was initially heard under urgency and ex parte. Ex parte orders were granted attaching both the Defendant's bank account No. 0102076374700 domiciled at Standard Chartered Bank of Kenya Kenyatta Avenue Branch Nairobi and motor vehicle registration number KBP 527Q. Subsequently, the Plaintiff also caused, through another ex parte application made under urgency, the attachment of motor vehicle registration No. KBP 927Q.

6. The Defendant defended the claim and filed a plea. Initially, the Defendant only filed a statement of defence on 21 September 2011. And, almost immediately the Defendant on 22 September 2011 filed an application, by which application the Defendant sought to vacate the court's orders which had attached the Defendant's bank account as well as the Defendant's motor vehicles. The Defendant's application of 22 September 2011, despite objections by the Plaintiff, was heard and determined on its merits. The application was disallowed on 19 December 2011.

7. In the meantime, the Defendant had on 3 November 2011, with the court's leave and permission, filed an amended statement of defence and counterclaim.

8. The Defendant whilst not denying the motor vehicle rental agreement admitted that the only amount due to the Plaintiff was Kshs. 1,183,861.70 which the Defendant volunteered to deposit in court.

9. The Defendant in its defence denied owing the Plaintiff the sum of Kshs. 7,050,128/=. Instead, the Defendant calculated the amount due to the Plaintiff from the motor vehicle rental agreement at Kshs. 10,236,000/= but from which the Defendant urged a set-off of Kshs. 6,168,000/= admittedly paid, Kshs. 1,535,400/= as an agreed commission, Kshs. 860,138.30 as withholding tax payable to the Kenya Revenue authority ("KRA") and Kshs. 275,000/= as replacement expenses for a motor vehicle wrongly seized by the Plaintiff from the Defendant's client.

10. The Defendant also counterclaimed against the Plaintiff the sum of Kshs. 2,884,138.30 as agreed commission and also damage occasioned by the Plaintiff's illegal withdrawal of a motor vehicle from the Defendant's client as well as loss of revenue in respect of a motor vehicle which had been involved in an accident. The Defendant further claimed damages occasioned by alleged wrongful orders issued by the court which led to the freezing of the Defendant's bank account and also the attachment of motor vehicles registration numbers KBP 527Q and KBP 927Q.

11. Fast forward to 2015, after the hearing of the interlocutory motions, the parties prepared for trial. Case management conferences were called in 2015 and 2016. Directions were given for compliance with the pre-trial procedures. Ultimately only the Defendant complied with the Plaintiff being placed under a notice, to show cause why the Plaintiff's claim could not be struck out for want of compliance. As at the time of trial, the Notice to Show cause had not been dispensed with or addressed by the Plaintiff.

12. The Plaintiff did not attend the evidentiary hearing and the trial of the claim and counter claim proceeded in the absence of the Plaintiff, its representatives or its counsel.

13. The Defendant called three witnesses. All of them had filed witness statements.

14. DW1 was Boniface Kaguo Mwangi. He is the Managing Director of the Defendant Company. He relied on his two witness statements filed on 29 September 2011 and 3 November 2011. He also relied on and produced the Bundle of Documents filed on 31 March 2016, which included not just the motor vehicle rental agreement but also the invoices dispatched by the Defendant to the Plaintiff and bank statements.

15. DW1 testified for the Plaintiff that the Plaintiff's relationship with the Defendant started in early 2011 after the Defendant won a tender to supply the Truth Justice and Reconciliation Commission (TJRC), an ad hoc independent commission, with motor vehicles for a period of six months. The Defendant did not own enough motor vehicles so it outsourced from other parties, including the Plaintiff. With the Plaintiff, the agreement was that the Plaintiff would avail four-wheel drive motor vehicles and in return the Defendant would pay Kshs. 12,000/= per motor vehicle per day. The agreement was reduced into writing.

16. DW1 described the modus operandi for executing the motor vehicle rental agreement. The Plaintiff would avail the motor vehicles to the Defendant who would in turn surrender the same to the TJRC. The Plaintiff would then invoice the Defendant who would settle the invoices once it had also counter invoiced the TJRC and had been paid.

17. DW1 confirmed that the Defendant received invoices from the Plaintiff. The Defendant according to DW1 did not settle the invoices in full as they were erroneous and not reflective of some amounts claimed by the Defendant.

18. DW1 testified that he further personally reconciled the invoices and found that the Plaintiff's dues aggregated Kshs. 10,236,000/=. It was DW1's testimony that from the aggregate amount the Defendant was entitled to deduct 15% as commission, as well as Kshs. 860,138.30 as withholding tax. The commission, according to DW1 amounted to Kshs. 1,535,400/=. DW1 also further testified that an amount of Kshs. 275,000/= was also to be deducted from the amount due to the Plaintiff. This amount of Kshs. 275,000/= according to DW1 was for replacement expenses paid by the Defendant for hiring (a) motor vehicle(s) after the Plaintiff switched off or withdrew other motor vehicles. In the end, DW1 testified that the Defendant only owed the Plaintiff the sum of Kshs. 1,397,461/70 which it (the Defendant) had actually offered to pay the plaintiff but the Plaintiff had refused to collect.

19. The alternative was that the Defendant was now claiming these amounts by way of counterclaim if it could not off-set.

20. Further and by way of counterclaim, DW1 testified that there was wrongful attachment when the court ordered that motor vehicle registration No. KBP 927Q be attached. In his testimony, DW1 stated that motor vehicle no. KBP 527Q did not concern the Defendant at all. For the wrongful attachment, DW1 testified that the Defendant did not have any user of the motor vehicle yet it was paying the bank an amount of Kshs. 105,000/= monthly. This, testified DW1, had run for a period of 4 years. The Defendant, according to DW1, was claiming the value of the motor vehicle (KBP 927Q) as "*it was less than three months old when*" the Plaintiff attached and took it away.

21. The final limb of DW1's testimony was on the frozen bank account.

22. The account no. 0102076374700 domiciled at the Kenyatta Avenue Branch of Standard Chartered Bank of Kenya Ltd was frozen by the court on 8 September 2011. The freezing order made in the form of an attachment was to subsist until the final hearing of the suit.

23. DW1's testimony on the frozen account was that it was an overdraft account which fetched interest. According to DW1, at the time the order was made freezing the account there was a debit balance of Kshs. 4,193,089/=. DW1 however had no idea what the status of the account could be as at the time of trial. DW1 further testified that the Defendant's operations were grounded as the Defendant could not operate the bank account and for such wrongful attachment the Defendant was seeking damages.

24. The Defendant's second witness was the owner of motor vehicle registration number KBN 793K. He was Mr. Dickson Nyaga.

25. Mr. Nyaga testified that he had leased his motor vehicle to the Defendant and not the Plaintiff and thus any claim by the Plaintiff based on the motor vehicle was erroneous and unjustified. There was availed in evidence an agreement between the Defendant and DW2 to support DW2's testimony. The agreement is dated 20 June 2011. According to Mr. Nyaga, an amount of Kshs. 170,000/= is still due and outstanding from the Plaintiff as a cheque he had been given in payment was dishonored.

26. DW3 was Fred Muriithi Kiremia, an employee of the Defendant. His testimony related to the seizure and attachment of motor vehicle registration no. KBP 927Q on 14 October 2011, and no more. It was a confirmation that the Plaintiff had seized the motor vehicle in question on 14 October 2011.

27. The Plaintiff's claim was for the balance of unpaid rental charges for motor vehicles supplied and availed to the Defendant by way of hire or rental pursuant to a written agreement. No evidence was however presented in support of the Plaintiff's claim, following the Plaintiff's no show at trial.

28. Ordinarily, the Plaintiff's claim should stand dismissed. However, Order 12 Rule 3 of the Civil Procedure Rules provides the guiding stitch where on the day of trial only a defendant shows up.

29. Order 12 Rule 3 of the Civil Procedure Rules stipulates as follows:

> **1. If on the day fixed for hearing after the suit has been called for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.**
>
> **2. If the Defendant admits any part of the claim, the court shall give judgment against the Defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.**
>
> **3. If the Defendant has counter-claimed, he may prove its counterclaim so far as the burden of proof lies on him".**

30. When the cause was called out on 23 October 2017 only the Defendant was present. The Defendant decided to proceed with its counterclaim. In the cause of the evidentiary hearing the Defendant admitted part of the Plaintiff's claim. This was also in line with the Defendant's pleadings as well as the witness statement wherein the Defendant had admitted partial indebtedness to the Plaintiff but then set up a counterclaim and right of set-off.

31. The admission upon which judgment may be entered and as anticipated by Order 12 Rule 3 of the Civil Procedure Rules must be unequivocal and unambiguous. It need not be at the beginning of the trial, in my view. It may be through the evidence given under oath. It may also be through an adoption of the pleadings where an admission is contained. It is for the court, at the end of the proceedings, to determine whether there is admission by the defendant who is present in court and has led testimony.

32. In the instant case, the Defendant's first witness had filed a witness statement and proof of evidence on 21 September 2011. In the said statement the witness stated as follows:

> **"According to our payment advice the Plaintiff is currently owed only Kshs. 1,397,461/70 which we can pay into this honourable court once the freezing order is lifted"**

33. DW 1 adopted wholly this witness statement as his evidence in chief under oath. DW1 also testified and reconfirmed that the Defendant owed the Plaintiff this amount of Kshs. 1,397,461/70 but denied that the Defendant owed the Plaintiff the amount total amount claimed of Kshs. 7,050,128/=.

34. I find and hold that the admission by the Defendant of part of the Plaintiff's claim was copious. There was admission in the witness statement filed in court. There was admission on oath by the Defendant's first witness during the evidentiary hearing, not once but twice. First, was when the witness testified that his recalculations and reconciliation of the invoices revealed that this amount was due to the Plaintiff. Secondly, was when the witness testified that the witness had urged the Plaintiff to collect the amount to no avail. There was also admission in the Plaint. In all instances the admission was clear, unequivocal and unambiguous.

35. I would thus, pursuant to Order 12 Rule 3 of the Civil Procedure Rules, enter judgment in favour of the Plaintiff who was absent during the trial in the sum of Kshs. 1,397,461/70 but dismiss the rest of the claim which was denied and contested by the Defendant.

36. It leaves the Defendant's counterclaim.

37. The Defendant must prove its counterclaim on a balance of probabilities. The counterclaim ranged from agreed commissions to unpaid taxes as well as special expenses. The counterclaim then delved into alleged illegally issued attachment orders and value of a motor vehicle attached pursuant to orders of the court.

38. DW1 and DW3 were called as witness to support the counterclaim. DW2's evidence was intended to resist the Plaintiff's claim and no more.

39. DW1 testified that the Plaintiff's total gross earning was Kshs. 10,236,000/= pursuant to the agreement to pay Kshs. 12,000/= per motor vehicle per day. The Defendant then claims Kshs. 1,535,400/= as 15% commission off the gross earnings. According to DW1 the parties had agreed on the commission amount. The agreement was allegedly orally made.

40. It is common knowledge that commission is ordinarily some form of remuneration payable for services rendered. To earn a commission one must have carried out that which he had bargained to do. Commissions thus fall in the realm of consideration in the context of contractual relationships.

41. The contractual arrangement between the Plaintiff and the Defendant does not expressly provide for any commission. The Plaintiff was to avail motor vehicles to the Defendant who in turn would pay for the same at a daily rate. I am unable to discern the additional consideration that the Defendant extended to be entitled to any commission. The Defendant sourced the end user of the motor vehicles and for this it was paid. The Defendant did not contend to be a go-between for the Plaintiff and indeed complained that the Plaintiff was interfering with its independent contract with the TJRC.

42. The alleged oral contract between the Plaintiff and the Defendant for payment of a commission was also, in my view and judgment, not proven by the Defendant. The evidence given in this regard was sketchy, to say the least. There was no evidence as to when, where and how the parties agreed and who was involved in the oral negotiations given that the parties are both corporate entities.

43. The conduct of the parties after the execution of the motor vehicle rental agreement is also not consistent with one subjected to commission. The Plaintiff was paid monies by the Defendant and not third parties. Not once did the Defendant deduct its alleged commission. Not once too was there any demand until after the Plaintiff moved to initiate court process. This in-active attitude of the Defendant in the face of demands by the Plaintiff, in my view, left a lot to desired.

44. Finally, the claim for commission is also unclear. The Defendant did not prove whether the 15% commission was on the gross earning or net earning given that the amount earned by the Plaintiff was not only subject to taxes but also other actual expenses like insurance excess.

45. I am not satisfied that the Defendant proved its claim for 15% for commission from the admitted earnings of Kshs. 10,236,000/=.

46. There is also the claim by the Defendant for Kshs. 860,138.30 as withholding tax due to the Kenya Revenue Authority (KRA). I do not possibly see how the Defendant could claim this sum from the Plaintiff. The Defendant was the one to pay the Plaintiff for the motor vehicles hired. It was for the Defendant to pay not vice-versa. If the Defendant was duty bound to pay this amount to KRA it simply should have deducted the amount and remitted the same to the tax authority. There is further no evidence before me that the Defendant remitted this sum to KRA to seek any indemnity from the Plaintiff.

47. I would consequently disallow this claim as I am not satisfied that on a balance of probabilities the Defendant has discharged the evidentiary burden that rested upon the Defendant.

48. The third limb of the Defendant's counterclaim was an amount of Kshs. 275,000/= as an expense incurred in replacing a motor vehicle hired to the Defendant by the Plaintiff but then withdrawn. Again, I am unable to identify the Defendant's loss. The Defendant was in the business of outsourcing motor vehicles and paying for the same. It has not been suggested and there was no testimony that the Defendant had to re-hire another motor vehicle at a higher price than that originally charged by the Plaintiff. Indeed, during the evidentiary hearing DW1 admitted that he had no receipts to prove this rather specific and special expense.

49. I return the verdict that the Defendant did not specifically prove this aspect of the counterclaim.

50. It leaves me with the Defendant's claim that there was wrongful attachment and wrongful freezing of both the Defendant's bank account and the Defendant's motor vehicle registration No. KBP 927Q.

51. According to the Defendant and DW1, the attachments led to loss and damage as the Defendant was unable to meet its obligations to its creditors and also carry out its trade and business. I must first point out that the freezing of the Defendant's bank account was pursuant to a court order issued on 8 September 2011. The seizure and attachment of the Defendant's motor vehicle registration number KBP 927Q was also as a result of a court order issued on 8 September 2011. The frozen account and seizure of motor vehicle were both as a result of genuine and valid court orders. Per se, the attachments were thus not wrongful even though the orders were ex parte.

52. Indeed, the Defendant had on 22 September 2011 sought by way of a formal application to stay the court orders and also set the ex parte orders aside. The Defendant's application was heard on its merits and dismissed by the court on 19 December 2011. It would thus be inappropriate for me to revisit the same issue and determine whether the orders of attachment were wrongful. Besides, both during the evidentiary hearing and counsels closing submissions the Defendant did not attempt to establish that the ex parte orders were unlawful or wrongful. The orders were regularly issued and any challenge ought to have been made, if at all, to the Court of Appeal.

53. The illegality or otherwise of the ex parte orders aside, I note that the Defendant's complaint was an alleged inability to operate the frozen account. Naturally, the frozen account could not be accessed or operated. In my judgment, however, it was not the Defendant's operations being frozen. Nothing restrained the Defendant from operating any other bank account(s).

54. Additionally, by the evidence of DW1 both during the oral hearing and through the documents, the frozen account was already overdrawn. There was no money to be accessed therefrom by the Defendant. The claim by the Defendant that the bank is likely to claim interest if anything is, in my view, merely speculative. In any event the freezing of the account did not also mean that the Defendant could not repay its debts to the bank or collect its payments from third party debtors.

55. The final limb of the Defendant's counter claim is for loss of user for motor vehicle registration No. KBP 927Q as well as for the value of the said motor vehicle.

56. I have already pointed out that this particular motor vehicle was attached and seized by the Plaintiff pursuant to a court order. The court order was to subsist until determination of this suit. There was no order that the Plaintiff disposes of this motor vehicle. I would like to believe that the motor vehicle or what may be the remainder thereof is still in the safe custody of the Plaintiff. An attempt to vacate the court order was resisted and successfully so. The Defendant then never sought an undertaking as to damages. The effect was that the Plaintiff was to continue holding on to the motor vehicle unconditionally and on the basis of a genuine court order until the determination of this suit. The determination is now.

57. I conclude by stating that the Plaintiff's claim is dismissed for want of proof save for the amount of Kshs. 1,397,461/70 admitted by the Defendant and for which I hereby enter judgment together with interest.

58. The Defendant has failed to prove its counterclaim on a balance of probabilities and the entire counterclaim is dismissed.

59. The Plaintiff must now hand back to the Defendant motor vehicle registration No. KBP 927Q and in default the Defendant be at liberty to move the court as may be appropriate.

60. I make no order as to costs.

Dated, signed and delivered at Nairobi this 2nd day of February, 2018.

J.L.ONGUTO

JUDGE