



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 62 OF 2016

JOHN MWAI MATHENGE.....PLAINTIFF/APPLICANT

- V E R S U S -

RMA MOTORS (K) LIMITED....DEFENDANT RESPONDENT

RULING

1) John Mwai Mathenge, the plaintiff herein took out the motion dated 13.7.2016 in which he sought for the following orders:

- 1. THAT this application be certified urgent and be heard ex-parte in the first instance.***
- 2. THAT the court does enter judgement on admission by the defendant/respondent.***
- 3. THAT summary judgement be entered in favour of the plaintiff/applicant for the sum of kes.24,935,112.00/= being a refund of the purchase price together with interest as prayed in the plaint.***
- 4. THAT the defendant/respondent's defence be struck out and judgment be entered accordingly.***
- 5. THAT costs of this application be provided for.***

2) The motion is supported by two affidavits sworn by John Mwai Mathenge. RMA Motors (K) Ltd, the defendant herein filed the replying affidavit of Graeme Lamb to oppose. Learned counsels appearing in this matter recorded a consent order before Mr. Justice Mbogholi on 3.11.2016 to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. The brief background of this dispute is that the defendant, an authorised dealer of Jaguar Land Rover Ltd and the plaintiff entered into an agreement in which the defendant agreed to procure and deliver to the plaintiff a high end custom-built Range Rover Vogue SE motor vehicle on a consideration to be paid by the plaintiff. Pursuant to the aforesaid agreement, the defendant went ahead and procured motor vehicle registration no. KCA 190B and had it delivered to the plaintiff on 22nd August, 2014. The defendant avers that prior to taking possession of the motor vehicle, the plaintiff inspected it and confirmed that the motor vehicle was fitted with additional features according to the plaintiff's specifications. Those extra features included a standard television receiver. The plaintiff continued to use the aforesaid motor vehicle for a year after which he raised issues with the vehicle's television receiver claiming the same was defective and not functioning as represented by the defendant.

4) The defendant has pointed out that the plaintiff formally wrote his complaint to the defendant in mid 2015. The defendant stated that he forwarded the plaintiff's complaint to the manufacturers who then inspected the television receiver and found that it was functional but could not work in Kenya because Kenya had in recent times and after the aforesaid motor vehicle had been ordered and delivered, adopted the more advanced DVD T2 format for transmitting digital signals rather than the D.V.B signal used in most

countries and fitted in all range rover motor vehicles sold globally.

5) It is the submission of the plaintiff that the defendant failed to provide the vehicle agreed on of Kenyan, tropicalised specifications for custom built vehicle complete with a Kenyan market T.V. function. The plaintiff further stated that soon after delivery of the motor vehicle, problems of non-functioning parts and features arose that took several workshop visits to rectify thus denying him the use and enjoyment of the same. It was pointed out that vide various correspondences the defendant admitted failing to deliver the high end custom-built motor vehicle as agreed and has failed to rectify the failure of offer an acceptable solution. It is also the submission of the plaintiff that the defendant's defence discloses no reasonable cause of action, is scandalous, frivolous and vexatious. It was argued that the defendant cannot purport that the digital migration was an act of God. The plaintiff further accused the defendant for misrepresenting to him that it was in a position of supplying a television capable of transmitting under the DVB –T2 signal. This court was urged to find that the defendant has no intent of fulfilling its obligation as per the terms and specifications of the agreement.

6) The defendant is of the submission that its defence raises a reasonable defence to the plaintiff's claim and elicits triable issues. The defendant averred that it performed all its obligations under the contract by routinely servicing the plaintiff's motor vehicle at no charge and that the issue of the non-functioning television was occasioned by Kenya's adoption of the more advanced DVB-T2. The defendant further argued that at the time the parties entered into the agreement until the point of delivery of the aforesaid motor vehicle, it was not clear which form of transmitting digital signal Kenya would adopt. The question which has been posed to this court to provide an answer is whether or not the defendant's defence raises triable issues? Having considered the rival submissions and the material placed before this court, it is clear in my mind that the defence raises various triable issues. First, whether or not Kenya had switched to DVB-T2 at the time the agreement between the parties was being executed. Secondly, whether or not the motor vehicle delivered to the plaintiff was fit for use and in accordance with the specifications ordered by the plaintiff. In my view, the aforesaid issues are weighty and can only be determined via a trial where the evidence can be tested by the rigors of cross-examination. In short, this is not one of those clearest cases where the court can enter summary judgement.

7) The other issue which was left to this court to determine is whether the plaintiff is entitled to entry of judgment on admission. It is the submission of the plaintiff that the defendant admitted in paragraph 8 of its defence that the T.V receiver it had provided the plaintiff is incompatible with the DVB-T2 transmission signal hence it cannot receive television signals and display them on a screen in Kenya. It is also stated that the defendant had written to the plaintiff vide a letter dated 25.1.2016 stating that it was not going to provide a T.V receiver to replace the one it had supplied. For the above reasons the plaintiff urged this court to enter judgment against the defendant on admission. The defendant on the other hand is of the submission that the plaintiff is not entitled to judgment on admission because the alleged admission of liability is not clear and unambiguous. The defendant pointed out that it is factually incorrect to state that it had admitted to deliver the high end custom-built motor vehicle as agreed. I have carefully perused paragraphs 5-8 of the defence and its apparent that the defendant has expressly denied that the vehicle it supplied had non-functional parts. A careful reading of the statement of the defence will reveal that the defendant has clearly stated that it performed all its obligations in accordance with the agreement it entered with the plaintiff.

8) It has already been highlighted that the defendant averred that the power to select the standard for digital migration of television signals in Kenya lay with the government and not within the control of the defendant. With respect, I agree with the defendant's submission that there was no plain and obvious admission of liability.

9) In the end and on the basis of the aforesaid grounds and reasons, the motion dated 13.7.2016 is found to be without merit. The same is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent