



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 186 OF 2011

UNILEVER KENYA LIMITED.....APPELLANT

VERSUS

MOHAMED S. AHMED T/A

WAYANI DISTRIBUTORSRESPONDENT

RULING

1 Unilever Kenya Limited appealed against the judgment of 18th August 2011 in Mombasa Chief Magistrate Court case No. 2265 of 2003.

2. The respondent was in the years 2002 and 2003 the distributor of appellant's products in the Changamwe to Mariakani areas. Appellant initiated a promotion of its products which required its distributors to sell certain quantities of products in order for those distributors to win in that promotion. Respondent in the lower case alleged he won a brand new Nissan 1400 ½ ton. When appellant failed to release that vehicle to him respondent filed the lower court case. The court in that case awarded respondent judgment in his favour and the effect of that judgment was that the respondent was to get a Nissan vehicle and also the lower court awarded him Ksh 1,201,713.8.

3 As a condition to stay of execution of the magistrate's court judgment pending the hearing and determination of this appeal the appellant deposited in a joint interest earning account Ksh 3.8 million which now has accrued interest to the tune of Ksh 5,440,657/= as at September 2014.

4. Appellant being aggrieved of the lower court's judgment appealed herein. By this court's judgment of 6th November 2014 the magistrate's court's judgment was upheld in as far as the award of the Nissan vehicle was concerned but this court set aside the award of Ksh 1,201,713.81. The end result of that judgment was that respondent was entitled to receive from appellant a brand new vehicle Nissan 1400 ½ ton. There are now two applications before this court relating to that judgment.

5. Both parties do not dispute that the production line of Nissan 1400 ½ ton has ceased. That vehicle is no longer in production. The question the two applications address is, what should the appellant give to respondent instead of the Nissan 1400 ½ ton which is no longer being produced.

6 Appellants Notice of Motion dated 17th December 2014 seeks a prayer that this court do order that the judgment be enforced by appellant giving the respondent the available vehicle in the market, that is Nissan NP 200, instead of Nissan 1400 ½ ton which is no longer being manufactured. This is what was deponed in support of appellant's said application:

Following this court's judgment aforesaid, the respondent's/ Plaintiff's advocates are demanding and have insisted on the release of a brand new Nissan 1400 ½ ton (year of manufacture December 2014) or in the alternative be given the entire amount accrued in the mentioned joint bank account.

The appellant/applicant has since established that the said motor vehicle model Nissan 1400 ½ ton is no longer being manufactured which fact the respondent is well aware of and was replaced with another model of Nissan N P 200 whose current market value is Ksh 1,907,510.49.

In the absence of the said motor vehicle model Nissan 1400 ½ ton, it is impossible for the appellant to comply with the order of specific performance.

The respondent/plaintiff has declined the above stated current market value of a similar Nissan vehicle together with costs and has threatened to take out execution proceedings or other further steps in having the no-existent motor vehicle and or the entire amount in the joint bank account released to them.

The respondent/plaintiff aforesaid demands are not only unreasonable but unfair considering that the amount now in the joint bank account of about Ksh 5,440,657.00 is the Ksh 1,201,713.81 which has not been reverted to the appellant together with accrued interest

7 By Notice of Motion dated 10th December 2014 the respondent seek an order that:

Security deposit together with interest thereon at NIC Bank in the joint names of Messrs. Inamdar & Imamdar Advocates and Messrs. Mogaka Omwenga & Mabeya Advocates be ordered released to Messrs. Mogaka Omwenga & Mabeya Advocates in satisfaction of the judgment debtors entitlements.

By his affidavit in support of that application the respondent deponed:

“That the Mega Drive Bonanza Promotion in which I participated and won was from the period October –December, 2002 and hence I ought to have been given my brand new Nissan 1400 ½ tone by January, 2003 which by now is a period of twelve (12) years and could have had the use of the same vehicle in the business that I was engaged in and others hence improving my economic base.

That it is clear from the pleadings in the Record of Appeal the litigation that culminated to the present concluded appeal was purely occasioned by the breach of contract on the part of the appellant when they refused to give or surrender to me the prize of a brand new Nissan 1400 ½ ton that I had won as was expected by January 2003.

That I aver to be aware that even after the subordinate court ruled against the appellant they did not offer to surrender a brand new Nissan 1400 ½ ton to me but instead they appealed which appeal is now concluded with a partial success wherein the monetary award made except the Order was disallowed.

That I aver that the High Court Ruling on record upheld the Order of Specific Performance and costs in the subordinate court stands as per the subordinate court judgment.

That I aver to be aware that an amount of Ksh 3.8 million was pursuant to a consent order deposited in a joint interest earning account as security for performance of the decree and as a condition for a stay of execution and that the money has now earned substantial interest and stands in excess of Ksh 5.3 million while at the same time it continues to earn further interest.

That I aver that the security deposit amount of Ksh 3.8 Million was arrived at upon taking into account the monetary amount awarded in the subordinate court decree in the sum of Ksh 1,201,713.81 and the market value of the motor vehicle.

That it is now fair and just that except for the sum of Ksh 1,201,713.81 that has been disallowed by the court in its ruling which is on record on Appeal, taking into account time lapse of 12 years during which I have suffered loss of use of my brand new Nissan 1400 ½ tonne prize due to the breach of contract on the part of appellant then the whole of the amounts in the fixed deposit at NIC Bank in the joint names of Messrs. Inamdar & Inamdar Advocates and Mogaka Omwenga & Mabeya Advocates that was given as security for the stay and performance of Decree should be released to the firm of Messrs. Mogaka Omwenga & Mabeya Advocates for onward transmission in satisfaction of my entitlement, now that the appellants have failed and/or are unable to supply me with a brand new Nissan 1400 ½ tonne.”

8 Respondent has based his prayer on the ground that the amount deposited in an interest earning account was arrived at after taking into account the lower court’s monetary value of the award made to the respondent which included the Nissan 1400 ½ ton.

ANALYSIS

9 I have considered the parties affidavit evidence and submissions. It is clear that respondent succeeded before the magistrate’s court and before this court on the award of motor vehicle Nissan 1400 ½ ton and not monetary value of it. It is instructive to note that respondent did not cross appeal for the monetary value of that vehicle to be awarded. It is however clear that the stoppage of manufacture of Nissan 1400 ½ ton is an event, which I chose to call supervening event, which makes it impossible for appellant to meet the terms of the judgment. In my humble view since the respondent did not cross appeal for the value for the motor vehicle there is no basis to award him the amount deposited in the interest earning account. It is a car he was awarded by the magistrate’s court, which award was upheld by this court a car, and it is a car he ought to get. The respondent did not submit that Nissan NP 200 is inferior to Nissan 1400 ½ ton. That being so appellant does succeed in its application.

10 In the end the court hereby orders that:

(a) The appellant shall henceforth release to the respondent motor vehicle Nissan NP 200 in satisfaction of order (a) of this court’s judgment of 6th November 2014.

(b) There shall be no order as to costs in respect of Notice of Motions dated 10th December 2014 and 17th December 2014.

Dated and delivered in Mombasa this 2nd day of July 2015

MARY KASANGO

JUDGE

2.7.2015

Coram

Before Justice Mary Kasango

C/Assistant-Kavuku

For Appellant:

For Respondent:

Court

Ruling delivered in their presence /absence in open court.

MARY KASANGO

JUDGE