



**REPUBLIC OF KENYA**

**HIGH COURT, AT NAIROBI MARCH 4, 1993**

**GITHINJI J**

**CIVIL CASE NO 1194 OF 1987**

**UJUMA ..... PLAINTIFF**

**VERSUS**

**KARIM T/A PAMBAZUKA PUBLIC SERVICE.....DEFENDANT**

**JUDGMENT**

The plaint filed by the plaintiff shows that the basis of the plaintiff's claim is the contract dated 23.6.86 by which defendant agreed to refund Shs 144,000 paid under an earlier contract by which defendant had sold motor vehicle Reg KWS 111 Isuzu mini bus at a price of Shs 220,000 to the plaintiff. Plaintiff pleads that defendant refunded only Shs 37,000 leaving a balance of Shs 107,000. He claims that sum together with interest and cost. There is a further claim of general damages. Plaintiff's evidence disclosed that by an agreement dated 20.11.85 (Ex1) defendant agreed to sell motor vehicle Reg No KWJ III to plaintiff at a price of Shs 220,000. Plaintiff paid a deposit of Shs 100,000 and it was agreed that balance of Shs 120,000 would be paid in ten instalments of Shs 12,000 a month effective from 21st of every month. The vehicle was to be confiscated and cash deposit forfeited if plaintiff failed to pay the instalments for two consecutive months lastly it was agreed that the motor vehicle would be transferred to the plaintiff's name after completion of total instalments.

Plaintiff states that he had borrowed the Shs 100,000 from Kenya Finance Corporation (KFC) and that he intended to use the motor vehicle as a *matatu*. Plaintiff states that he paid Shs 12,000 on 23.11.85, Shs 5,600 on 4.2.86; shs 6,500 on 6.3.86; Shs 4000/- on 26.4.86; Shs 7000/- on 29.4.86 and Shs 1000/- on 30.4.86. Plaintiff claims that vehicle started giving him problems and was grounded on 30.4.86. He reported to defendant that he would be unable to pay the instalments and defendant told plaintiff to return the vehicle and that defendant would refund his money. Consequently plaintiff returned the vehicle to the defendant on 23.6.86 an agreement of that date was reached.

That agreement (Ex5) acknowledges the terms of the contract of 20.11.85 and the fact that plaintiff was unable to repay the loan instalments as agreed and that the arrears of instalments were Shs 30,100 as at 1/5/86 which plaintiff was unable to raise. It acknowledges a prior agreement between plaintiff and defendant by which plaintiff was to return the vehicle have it sold by the defendant and after the sale plaintiff would be refunded Shs 100,000 deposit but that the vehicle would not be sold early enough as expected. The agreement then narrates the terms of the agreement of 23.6.86. The relevant terms were that since a buyer would not be found; Mr Suleiman Mahamood who was known to the defendant would be given the vehicle to recover plaintiff's deposit which deposit would be paid in the equal instalments of Shs 10,000 wef 20.7.86 and ending on 20.4.87. The first instalment to be paid with interest of Shs 3000/-.

The agreement stipulated that plaintiff would be collecting money from defendant's office ("In other words Mr Talib repays the cash on behalf of Mr Suleiman").

The agreement is signed by plaintiff and defendant and the three witnesses but Mr Suleiman did not sign it. It is conceded that Suleiman was a clerk in defendant's office.

Defendant pleads that plaintiff paid instalments amounting to shs 29,000 and then failed to pay further instalments resulting in the repossession of the vehicle and forfeiture of shs 100,000 deposit. Regarding the agreement of 23.6.86, defendant pleads that there was no consideration to support that contract; alternatively that the consideration was past and that plaintiff sold the motor vehicle to one Suleiman Mahmood who was to pay plaintiff Shs 100,000 in instalments of Shs 10,080 a month though the defendant did not give evidence. His lawyers stated that defendant did not respond to notices to attend. Defendant's counsel however made lengthy written submissions to the effect that the contract of 20.11.85 was not revoked by the agreement of 23.6.86; that the agreement of 20.11.85 oral evidence to support that agreement is not admissible to vary the terms of contract of 20.11.85; that agreement of 23.6.86 is further inadmissible as it was not stamped; that the agreement of 23.6.86 is unenforceable as it is not supported by consideration and finally that it is probable that the agreement of 23.6.86 related to transmission of money from Suleiman to plaintiff through the defendant.

Plaintiff's counsel in his written submission states that the agreement of 23.6.86 superceded and altered or varied the forfeiture clause in the first agreement and that the surrenders of the vehicle was meant to be to the defendant and not to Suleiman and that Suleiman was only to case it after receiving it from the defendant and to give proceeds to defendant to pay the plaintiff.

From the evidence there is no doubt that plaintiff took possession of the motor vehicle on 20.11.85 and used it as a *matatu* until 30.4.86 when it was grounded. Plaintiff concedes that before he bought it, he was aware that it was being used as a *matatu* and that he was making daily profits of about 200/- from use of the vehicle. He further concedes that he paid the first instalment on 23.12.85 and not on 21.12.85 as agreement provided. More importantly he conceded that he did not pay full instalments either on due dates or at all for months of January 1986, February 1986, March 1986 and April, 1986. His evidence shows that he made some instalments during that period. The result is that as on 1.5.86, plaintiff was in arrears in the sum of Shs 30,000 more than the total of two instalments. It acknowledged in the agreement of 23.6.86 that plaintiff was not able to raise the shs 30,100 when asked to. So, by 30.4.86 when plaintiff grounded the vehicle he had been in breach of the contract of 20.11.85 and defendant was entitled to confiscate the vehicle and forfeit the deposit of Shs 100,000.

But plaintiff asserts that the agreement of 23.6.86 cancelled the first agreement. It does not say so. The agreement of 20.11.85 provided that in case of instalments for 2 consecutive months then vehicle would be confiscated and cash deposit shall be forfeited. As plaintiff was in breach, it means that vehicle would be confiscated and deposited forfeited. It appears from the language of the agreement of 20.11.85 that confiscation of motor vehicle and forfeiture of deposit was consequent upon breach and there was nothing more that defendant was to do to effectuate the confiscation and forfeiture. It seems from the agreement of 23.6.86 that there was a prior agreement (date is not known) by which plaintiff was to return the vehicle for sale and if sold plaintiff would be refunded his deposit of Shs 100,000. If that is so, then by that agreement defendant was surrendering his right to forfeit the deposit but not his right to confiscate the vehicle. This is so because if that agreement went through plaintiff would lose his vehicle but only recover the deposit of Shs 100,000. By the second agreement of 23.6.86, the defendant lose his right of forfeiture of the deposit because he would have to pay it back to plaintiff.

From the evidence plaintiff does not allege that defendant breached the agreement of 20.11.85. Indeed, it appears from the evidence that he found that from the operation of the vehicle he would not be able to repay the instalments to defendant as well as the loan instalments. If he found that the motor vehicle did not fit the purpose for which it was bought and that in that respect defendant was in breach of the agreement of 20.11.85, he would have repudiated the agreement of 20.11.85. He would then recover damages from the defendant reassured by the benefits which could have accrued to him had the vehicle fit for purpose of being used as a *matatu* probably have recovered the deposit, the instalments paid the

expenses incurred on the vehicle and the estimated profits. That is to say that if plaintiff had held defendant guilty of breach of the contract of 20.11.85 he could have claimed damages from defendant far in excess of the deposit of Shs 100,000 which was the subject matter of the agreement of 23.6.86. The result is that as plaintiff was in breach of the contract and vehicle was to be confiscated and deposit forfeited by virtue of such breach, there would be no consideration to support the agreement of 23.6.86 and it would agree that such a contract is unenforceable.

Even if the agreement of 23.6.86 is taken as a waiver by defendant that would only relate to defendant right to repudiate the agreement of 20.11.85 in which case, defendant would not confiscate the vehicle and forfeit the deposit but rather the agreement would continue. I think that such a waiver would not legally impose liability on defendant to refund the deposit contrary to the terms of the agreement of 20.11.85. If the agreement of 23.6.86 is alternatively taken as a mutual termination of the agreement of 20.11.85 then it would be expected that defendant would agree to take the vehicle back directly and refund the deposit. But this not what the agreement of 23.6.86 seems to say. Defendant pleads that by that agreement plaintiff sold the vehicle to one Suleiman Mahmood who was to pay the sum of Shs 100,000 in instalments of Shs 10,000 per month through the defendant. Plaintiff did not file a reply to the defence. Plaintiff while admitting that it was agreed that Suleiman Mahmood would get the vehicle to recover plaintiff's deposit, never the less denies that the agreement means that Suleiman Mahmood was to take over the vehicle from plaintiff and pay plaintiff's money through the defendant in his evidence in re-examination plaintiff stated that he understood the second agreement to mean that Mr Talib (defendant) would collect the money from Suleiman and pay plaintiff.

Paragraph 7 of the defence that motor vehicle was confiscated and deposit forfeited cannot stand together with paragraph 10 of the defence that plaintiff sold the motor vehicle to Suleiman who was to pay Shs 100,000 unless defendant had waived his right to confiscate the motor vehicle. Indeed the agreement of 23.6.86 which is not denied by the defendant presupposes that the vehicle has not been confiscated and that it still belongs to plaintiff. The relevant provision of the agreement reads:

“On 23.6.86 both parties (Mr Talib and Mr H O Emurgat) re-discussed over the issue since the prospective buyer of the vehicle was not forthcoming and agreed on a suggestion by Mr H H Talib that Mr Suleiman Mahmood (whom H H Talib himself knows his background) be given the vehicle so as to recover Mr H O Emurgat's deposit....

The money will be paid to Emurgat by Mr H H Talib and the same will be collected hard cash from Mr H H Talib's office at Kibera on 20th of each month as aforesaid. (in other words Mr Talib repays the later on behalf of Mr Suleiman”

Previously as the same agreement shows in the preceding paragraph, plaintiff and defendant had mutually agreed that plaintiff would surrender his vehicle and the defendant would sell it and refund the plaintiff's deposit but that agreement did not materialize as a buyer was not found. The true construction of the agreement of 23.6.86 in the context of the whole agreement is that plaintiff instead of surrendering the vehicle to defendant was surrendering it to Suleiman Mahmood to use it and recover plaintiff's deposit which should be paid by monthly instalments; payments of such instalments being guaranteed by the defendant. As the agreement did not provide for the return of the motor vehicle which after the recovery of the plaintiff's deposit the only sensible construction of the agreement is that plaintiff sold the vehicle to Suleiman for a consideration equal to deposit he had paid to defendant – that is for a consideration of Shs 100,000. As defendant was to pay the instalments to plaintiff instead of Suleiman directly paying instalments to the plaintiff, the defendant liability under the guarantee was primary and not secondary. I therefore find that contrary to averments in para 3 of the plaint, there was no agreement that defendant refunds the deposit paid under the sale agreement to plaintiff. Rather the agreement was that Suleiman Mahmood to whom plaintiff sold the motor vehicle was to pay the purchase price of Shs 100,000 by monthly instalments such monthly repayments being guaranteed by the defendant. The guarantee is an independent contract from the original agreement of 20.11.85. There would therefore be no liability against the defendant on the basis of pleadings.

I have considered whether or not defendant should be held on the basis of the guarantee though liability

of defendant under the guarantee has not been pleaded. But I realise that no issue was framed regarding whether or not the agreement was a guarantee or whether or not defendant was liable under the guarantee. Consequently, defendant has been given an opportunity to raise any defences regarding enforceability of the guarantee such as presence or otherwise of consideration. So the whole case regarding the agreement being construed as a guarantee and the liability of defendant under such a guarantee has not been placed before the Court. It would be unjust therefore for this Court to make a decision on the liability of the defendant under the guarantee without the whole case and the available defence having been placed before the Court for a decision.

The result is that I dismiss the plaintiffs suit with costs.

Had the plaintiff's suit succeeded I would have held defendant liable to refund only the Shs 100,000 with interest at court rates and costs. This is because the agreement of 23.6.86 concerns the refund of the deposit and not all monies paid under the agreement. That fact is conceded by plaintiff in his evidence in cross examination. I could not have held defendant liable to pay general damages with regard to the interest charged on the loan obtained by plaintiff from KFC. This is so because plaintiff suit is not founded on the breach of the agreement of 20.11.85 but on the one dated 23.6.86. Further more, it is my view that such damages would not be recovered as they were not within the contemplation of the parties.

Dated and delivered at Nairobi this 4<sup>th</sup> day of March, 1993

**E.M. GITHINJI**

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**JUDGE**