REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 151 OF 1993

BACCHUS GROCERS LTD ……..……..PLAINTIFF

VERSUS

CRATER AUTOMOBILE (NRB) LTD …...…..DEFENDANT

RULING

The dispute between the parties herein relates to a contract for sale by the defendant to the plaintiff of a new Mitsubishi Fusso lorry.

It is the plaintiff's case that on the 20th February, 1993 the defendant offered to sell to him the vehicle whose details are well described by way of a vehicle order 075, and that he accepted that offer. Then, in pursuance thereto, on the 24th February, 1993 the plaintiff undeniably paid to the defendant Shs 600,000/= as a deposit. Furthermore, the plaintiff paid another sum of Shs 85,000/= to cover the cost of fitting the lorry with the body. There is no dispute that this particular lorry was taken to Bunns and Blanes Limited Nairobi who fitted it with the body. These payments clearly constitute part performance of the contract by the plaintiff.

It is common ground that the balance of the purchase of price to the tune of Shs 3,915,000/= was to be paid within 7 days from the 20th of February, 1993. To date the money has not been paid to the defendant. The plaintiff contends that this term should have been abided by had the plaintiff only signed the loan application form from the plaintiff's financier - the Premier Savings & Finance Limited of Mombasa, which, he asserts, were forwarded to the defendant on the 24th February 1993.

In paragraph 7 of the affidavit sworn by the defendant's manager in reply to the present chamber summons seeking an interim injunction to restrain the defendant from selling this particular vehicle to anyone else pending the determination of the suit, the defendant acknowledged having received the Premier Saving & Finance Application forms and annexed the said forms to his affidavit as M A AVI. But why did he not sign them?

In paragraph 8 of the same affidavit the defendant's manager, so far as material, deponed as follows:-

> "8 .... the plaintiff has completely misunderstood the whole issue in that there are clearly 2 distinct and separate offers namely the cash offer payable within 7 days and the offer made within the proforma invoice ....."

I find it pertinent and indeed of crucial importance to the dispute between the parties to observe that the defendant did not at any right stage draw the plaintiff's attention to the practical significance which he

now attaches to the distinction between the 2 offers. Instead, he not only retained those forms in his custody but chose to keep quiet about the matter. He never alerted the plaintiff of the mistaken belief or delusion under which the latter was labouring in his bid to perform the contract. This is the sort of silence which amounts to an acquiescence.

The questions which must be posed here is why the defendants did not consider it right to disabuse the plaintiff of what they clearly saw "misunderstanding of their 2 separate offers" and why they waited until the time for performing the contract had run out before seeking to take advantage of that "misunderstanding?"

Another question which would need to be simulteneously grappled with the ones above is why the defendant had deemed it necessary to issue the plaintiff with a proforma invoice dated 20th February, 1993 (on the same date of the agreement) if the transaction between them was on a purely and exclusively cash basis? It can be inferred with a measure of accuracy that right from the inception the defendant had intended to trick the plaintiff. Would it therefore be just to allow him take advantage of the circumstances which it had deliberately created to mislead the plaintiff?

From the defendant's own unequivocal statements in its affidavit and the documents exhibited no knowledge of the alleged mistake can be impated to the plaintiff. And so he cannot be blamed for failing to perform the contract within the agreed seven days. If there was a mistake on his part in failing to distinguish the cash deal from a proforma invoice deal his was a bona fide one, and thus excusable.

It is clear that if the defendant had signed the forms from Premier Finance and Savings Company the defendant would have paid for the lorry at the agreed price. Now, inflation has caused the price of the same lorry to soar considerably, and so, he would have to pay much more for it. It can also be validly argued here that if the defendant had promptly communicated to the plaintiff that the sale would have to be entirely on cash basis, the plaintiff would have made other arrangements, and would have secured the same lorry - even from another dealer at the price for which the item was being quoted at that time. By the same token it can be said that he would not only have benefited from the use of the lorry but he would also have had the worth of the Shs 685,000/= which he paid to the defendant in relation to the instant contract. It can not be gainsaid that he has now suffered loss of the value of that sum of money.

Thus, owing to the nefarious conduct of the plaintiff as highlighted above, which I deprecate, coupled with the various aspects of the unquantifiable loss and inconvenience which the plaintiff has suffered and bearing in mind the guidelines in *Giella v Casman Brown Ltd* [1973] EA 358. I would be constrained to grant the injunction sought by this application. But as it is clear that the pleaded defence in the light of the chronology of material events set out in the defendant's own affidavit as adumberated above, this is a case where the defendant is grossly guilty of abusing the process of Court, the defence is one which is absolutely vexatious and must be struck out under the Civil Procedure Rules order VI rule 6.

Accordingly judgment is given to the plaintiff as prayed in a, b, c, d and f of the plaint. I also give the costs of this application to the plaintiff.

Costs of the application to be in the cause.

Dated and Delivered at Mombasa this 5th day of April, 1993

I.C.C WAMBILYANGAH

…….

JUDGE