



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL SUIT NO 598 OF 1993**

**BANGA GITHAE**

**SALLY OYERA**

**GEORGE NDATHU**

**R N MUCHIRI .....PLAINTIFFS**

**VERSUS**

**KENYA PORTS AUTHORITY.....DEFENDANT**

**RULING**

In this case, the plaintiffs alleged in their plaint that on or about the 14th April, 1993 they purchased scrap metal from the defendant. In the defence this contention is not explicitly denied. In paragraph 3 of the affidavit in support of the present motion the plaintiffs stated:

“That after the aforesaid purchase of scrap metal we did hire lorries into which some of the scrap metal was loaded ready for transport as the defendant had already issued port passes for the said goods as witness by the annexed disposal scrap, receipts and requisition for port passes marked A, B and C .”

Again, this averment was not at all controverted. However, in paragraph 2 of the defence it was contended that the defendant’s supplies had intended to dispose of the scrap metal in the plaint but the defendant stopped the disposal of the said scrap metal to the plaintiffs because the rate at which the said scrap metal was being disposed of to the plaintiffs was too low.

If the intended sale had been stopped then why were the plaintiffs allowed to pay the purchase price and why were the receipts issued to them? If the sale transaction had not yet been concluded why were the plaintiffs’ requisition for gate passes processed and why was the loading permitted?

I have examined the receipts annexed to the plaintiffs’ affidavit and found them to be authentic and it has not at all been suggested by the defendant that they are not the valid documents emanating from their organisation.

It is thus plain that this transaction has all the requisites of an enforceable contract ie there was the offer and acceptance and consideration. The defendant has not presented sufficient material in its pleading. It is settled law that no valid contract can come into being until one accept without qualification the final

proposal of the other. In a case where the purchase price has been accepted and receipted for and delivery of the goods has notionally been done, it is too late in the day for the seller to seek to resile from the transaction on the ground that the accepted purchase price was too low. That argument is altogether contrary to the legal principles which are applicable to a valid contract. Also, it ought to be observed in this case that the Court can not imply a condition by the defendant that the sale was subject to the review of prices at a later date. After applying all the recognised parameters to the disclosed facts of the case it is clear that the defendant unconditionally accepted the price offered for the goods. And so the price which was fully paid amounted to consideration. Thus it seems to me the irresistible conclusion that there was a consensus *ad idem* for the contract of sale of the goods.

In my opinion the defence is a vexatious one. Accordingly I strike out with costs. But, nevertheless, a mandatory injunction cannot be issued as sought in the instant chamber summons as no such relief is prayed for in the plaint itself. It is obvious that the order XXXIX rule 1, 2 and 3 of the Civil Procedure Rules only apply the property in dispute is in danger of being wasted, damaged or alienated. Where such danger or threat thereof is proved on affidavit evidence then the party who threatens to commit it must be restrained by an injunction. Nothing of the sort has been pleaded in the present case. Each of the prayers in the plaint is of a monetary nature and only seeks compensation for the loss which is alleged to have been suffered.

For these reasons I also dismiss the chamber summons but make no order as to costs.

Dated and delivered at Mombasa this 13<sup>th</sup> day of October, 1993

**I.C.C WAMBILYANGAH**

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**JUDGE**