REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. HCCOMM/E471 OF 2020

ASSOCIATED CONSTRUCTION COMPANY (K) LIMITED.....PLAINTIFF

-VERSUS-

TATA AFRICA HOLDINGS (KENYA) LIMITED..... RESPONDENT

JUDGMENT

Introduction and Background

1. The Plaintiff, **Associated Construction Company (K) Limited**, is a limited liability company engaged in large-scale construction works, including road, infrastructure, and civil engineering projects across Kenya.

2. The Defendant, **Tata Africa Holdings (Kenya) Limited**, is a company engaged in the business of selling, servicing, and maintaining heavy commercial vehicles, including Tata brand trucks, within Kenya.

3. Between 14th and 17th September 2018, the Plaintiff purchased five (5) brand new Tata Prima Tipper trucks from the Defendant at a total purchase price of **Kenya Shillings Fifty-One Million Five Hundred and Fifty Thousand (Kshs.51,550,000/-)**.

4. The trucks were purchased for use by the Plaintiff in a construction project in Turkana County**,** where the Plaintiff required heavy commercial vehicles capable
   of operating in demanding terrain and conditions.

5. At the time of sale, the trucks were supplied under the Defendant's **warranty policy and vehicle sales terms**, which formed part of the contractual framework governing the transaction. The warranty covered, inter alia, specified components of the vehicles for defined periods, including a warranty on the driveline, subject to stated limitations and exclusions.

6. The warranty terms provided, among other things, that:

   i. The Defendant retained the right to inspect and repair the vehicles in the event of defects;
   ii. Refund or exchange of the vehicles could only be considered if the trucks were returned unused within a stipulated period;
   iii. Liability for economic loss, loss of use, and replacement or courtesy vehicles was excluded.

7. Following delivery, the Plaintiff deployed the trucks in its Turkana construction project. Several months later, the Plaintiff reported mechanical issues affecting some of the trucks, particularly relating to the driveline and differential components.

8. Upon notification of the complaints, the Defendant attended to the trucks under the warranty framework. The Defendant undertook repairs and supplied replacement parts, including differential tubes, with the intention of restoring the trucks to working condition.

9. Despite the repairs undertaken, the Plaintiff maintained that the trucks continued to experience breakdowns and operational difficulties, which allegedly disrupted its construction operations.

10. The Plaintiff contended that the repeated breakdowns were indicative of **manufacturing defects** and that the Defendant failed to adequately remedy the defects within the warranty period. The Plaintiff further asserted that the defects rendered the trucks unfit for their intended purpose.

11. As a result of the alleged unreliability of the trucks, the Plaintiff claimed that it was compelled to **outsource transport services** in order to meet its contractual obligations on the Turkana project, allegedly incurring substantial costs.

12. Efforts at amicable resolution between the parties did not yield a settlement. Consequently, the Plaintiff instituted this suit against the Defendant, and by an amended Plaint dated 22nd March 2022, seeks the following reliefs:

i. Special damages for breach of contract in the sum of **Kshs.51,550,000/-** together with interest thereon at commercial rates prevailing from time to time from the respective due dates, until payment in full.
ii. Special damages amounting to **Kshs. 20,200,800/-** allegedly incurred as loss of user and outsourcing costs.
iii. Costs of the suit together with interest thereon.

13. The Defendant filed a statement of defence denying liability. It maintained that:

i. The trucks did not suffer from manufacturing defects;
ii. All reported issues were addressed in accordance with the warranty terms;
iii. The Plaintiff continued to use the trucks well beyond the period within which any refund or exchange could be contemplated; and

iv. The claims for loss of user and economic loss were expressly excluded under the warranty and were not strictly proved.

Hearing

14. The matter proceeded to full hearing. The Plaintiff called two witnesses, while the Defendant called one witness.

Plaintiff's Case

15. The Plaintiff's first witness, **Nanak Singh Bansal (PW1),** testified as a director and representative of the Plaintiff. He adopted his written witness statement dated 2nd March 2022 as his evidence-in-chief and produced the Plaintiff's bundle of documents.

16. PW1 stated that between 14th and 17th September 2018, the Plaintiff purchased five (5) brand new **Tata Prima Tipper trucks** from the Defendant at a total cost of **Kshs.51,550,000/-**, for deployment in a construction project in Turkana County.

17. He testified that the trucks were sold under the Defendant's warranty policy (produced as PEXH 8), which included a driveline warranty of 24 months or 100,000 kilometers, whichever came earlier.

18. The witness stated that within a few months of delivery, the trucks began experiencing mechanical problems, particularly involving the **differential and driveline systems**, which resulted in repeated breakdowns.

19. According to PW1, the Plaintiff first reported the defects to the Defendant on 10th April 2019 (PEXH 13), within the warranty period, and returned the trucks to the Defendant's workshops for repairs. He

testified that although repairs were undertaken, the same defects persisted, rendering the trucks unreliable.

20. PW1 stated that due to the frequent breakdowns and prolonged repair periods (Since some of the spare parts had to be imported by the defendant from India), the Plaintiff was unable to meet its operational needs using the trucks and was forced to outsource transport services to a third party, **Sublink Global Investment Limited**.

21. He testified that as a result of outsourcing transport services, the Plaintiff incurred costs amounting to **Kshs. 20,200,800/-**, which it claimed as loss of user.

22. PW1 further testified that in his view, the repeated breakdowns were evidence of manufacturing defects**,** and that the Defendant failed to adequately remedy the defects despite several opportunities to do so.

23. He stated that vide a letter dated 19th November 2019 from the Plaintiff's Advocates (done within 14 months of purchase), the Plaintiff eventually demanded either replacement of the trucks or a refund of the purchase price, but the Defendant declined, leading to the filing of the present suit. The witness asserted that this demand was made within the 24-month warranty period for the driveline.

24. In cross-examination, PW1 conceded that after delivery the trucks were deployed in the Plaintiff's construction project; that the Plaintiff did not return the trucks within ten (10) days of purchase; that the repairs complained of were undertaken by the Defendant pursuant to the warranty; and that, throughout the period of complaints, the Plaintiff remained in possession of the trucks.

25. The second witness for the Plaintiff, Mr. **Tend Ngiga Mwaz**, a **Mechanical Engineer (PW2),** testified as an expert witness. He adopted his written expert report and witness statement dated **23rd January 2019** as his evidence-in-chief and stated that he is a Mechanical Engineer (Plant Option) with approximately 28 years of experience in mechanical and automotive engineering.

26. He testified that he was instructed by the Plaintiff to inspect the five trucks after they had experienced repeated mechanical failures. Upon inspection of the trucks, he observed defects in the driveline system, including the differentials, which, in his opinion, were abnormal for new vehicles of that category.

27. He testified that the defects manifested uniformly across the trucks and that, in his assessment, the nature of the failures suggested manufacturing defects rather than normal wear and tear. He opined that repeated repairs were unlikely to permanently resolve the defects and that the appropriate solution would be replacement rather than repair**.**

28. In cross-examination, PW2 conceded that he did not inspect the trucks at the time of delivery; that he did not document the mileage or service history prior to inspection; that he did not interview the Defendant's technicians or review their repair records in detail; and that, his inspection was conducted after the trucks had been in use in the Plaintiff's operations.

The Defendant's Case

29. The Defendant's sole witness, **Benson Musasila Masinde**, a **Service Advisor** employed by the Defendant, testified as DW1 and adopted his witness statement dated **11th January 2021** as his evidence-in-chief.

30. DW1 testified that the Plaintiff reported the first mechanical complaint in **April 2019**, several months after delivery of the trucks. He stated that upon receiving the complaints, the Defendant inspected the trucks and undertook repairs strictly in accordance with the warranty terms.

31. The witness testified that the Defendant supplied replacement parts, including differential tubes, and returned the trucks to service after repairs. According to DW1, the driveline and differential components complained of were covered under warranty and were repaired or replaced as required.

32. DW1 testified that the Plaintiff continued to use the trucks after repairs and that the Defendant was not notified of any irreparable defects that would justify replacement or refund. He further testified that the warranty terms did not provide for refund or replacement after prolonged use of the trucks, and that any refund or exchange was limited to trucks returned unused within the stipulated period.

33. The witness stated that the Defendant did not receive any independent expert report contemporaneously demonstrating that the trucks had manufacturing defects.

34. In cross-examination, DW1 acknowledged that the Defendant carried out multiple repairs on the trucks; that the trucks were used in challenging terrain; and that some replacement parts were sourced from outside Kenya due to availability.

35. DW1 maintained, however, that all repairs were done in good faith under warranty and that the Defendant did not admit liability for any manufacturing defect.

36. At the close of the hearing, both parties filed comprehensive written submissions, which the Court has carefully considered alongside the pleadings, evidence, and applicable law.

Analysis and Determination

37. From the pleadings, the evidence adduced, and the rival submissions, I frame the following as issues for determination:

i. Whether the Plaintiff proved that the trucks had manufacturing defects
ii. Whether the Plaintiff is entitled to a refund of the purchase price.
iii. Whether the Plaintiff is entitled to its claim for loss of user
iv. Who is to bear the costs of the suit?

Whether the Plaintiff proved that the trucks had manufacturing defects

38. It is a well-settled principle in law that a party who asserts a fact bears the obligation to prove it. Section 107 of the Evidence Act (Cap 80 Laws of Kenya), which forms the statutory foundation of the principle, provides in part that:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

39. The above provision captures the legal burden of proof. There is, however, an evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* as follows:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

40. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** the Court held as follows:

"As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

41. In the present case, it is not in dispute that between 14th and 17th September 2018, the Plaintiff purchased five (5) brand new Tata Prima Tipper trucks from the Defendant for **Kshs. 51,550,000/-**, for deployment in a road construction project in Turkana County.

42. It is equally a common ground that the trucks were supplied under a written warranty, and that within months of delivery, the trucks began experiencing repeated failures in the driveline and differential systems, prompting multiple returns to the Defendant's workshop during the warranty period, and that the defendant undertook multiple repairs under warranty, including replacement of major components.

43. The issue that is disputed, however, is whether the repeated failures in the trucks resulted from manufacturing defects (as contended by the Plaintiff) and not defects arising from usage, maintenance, or operational conditions (as argued by the Defendant). The burden in the present case is on the Plaintiff to prove, on a balance of probabilities, that the five trucks were indeed afflicted by manufacturing defects.

44. The Plaintiff relied on the testimony of PW1 and the expert opinion of PW2. PW1 testified that mechanical problems arose months after delivery and that the Defendant undertook repairs under warranty. However, on cross-examination, PW1 conceded that the trucks were deployed in the Plaintiff's construction project, were not returned within ten (10) days of purchase, and that they remained in the Plaintiff's possession throughout the period of complaints.

45. PW2, the Plaintiff's expert witness, testified and told court that he is a qualified
mechanical engineer with over 28 years' experience. He stated that the trucks exhibited cracked differential tubes, causing oil leaks, which he described as "serious manufacturing defects." His opinion was that the uniformity and recurrence of driveline failures across multiple trucks pointed to inherent defects rather than isolated incidents of wear and tear.

46. The Defendant, on the other hand, denied the existence of any manufacturing or latent defects. According to the Defendant's witness (DW1), the trucks operated normally upon delivery, and the complaints arose several months later after the trucks had been deployed in demanding terrain.

47. The Defendant argued that the Plaintiff failed to adduce cogent technical evidence demonstrating that the alleged defects were inherent at the time of manufacture or sale. According to the defendant, the mere fact that repairs were undertaken under warranty did not amount to proof of manufacturing defects or admission of liability.

48. It is a settled principle in law that a manufacturing or latent defect must be shown to be **inherent in the goods at the time of manufacture or sale**, and not merely a fault that arose during use. This principle was affirmed by the Court of Appeal in **CMC Motors Group Ltd v Daniel Kinyua Muthomi [2018] eKLR**, where the Court held that cogent technical evidence is required to establish inherent defects.

49. In the present case, the Plaintiff's technical case rested on PW2's expert report. While the qualification and expertise of the witness as a qualified mechanical engineer were not impeached, it is trite that expert evidence is governed by **section 48 of the Evidence Act**, which provides that expert opinion is admissible but not conclusive or binding on the Court, in the following terms:

> "When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

50. In **Stephen Kinini Wang'ondu v The Ark Ltd [2016] eKLR,** the Court emphasized that expert evidence must be tested against known facts, but where the evidence is unchallenged, it may be

accepted provided it is relevant, based on sound methodology, and tested against the totality of the evidence.

51. Upon careful scrutiny of the expert evidence and bearing in mind the holding in Stephen Kanini Wangondu (*supra*), the Court finds a number of weaknesses in the evidence. First, as correctly pointed out by the Defendant, PW2 did not inspect the trucks at or near the time of delivery. There was no baseline assessment of the condition of the vehicles when they left the Defendant's custody. This omission is material, as a manufacturing defect must ordinarily be shown to have existed at the point of manufacture or sale.

52. Further, it is also clear from the evidence that PW2 did not document the condition of the trucks prior to his inspection, nor did he provide mileage data, maintenance logs, or operational records that would enable the Court to isolate manufacturing defects from defects attributable to wear and tear, usage intensity, terrain, or maintenance practices.

53. Finally, PW2 admitted in cross-examination that he neither engaged with nor interviewed the Defendant's technical personnel, nor did he review the Defendant's repair records in detail. His conclusions were therefore based largely on the Plaintiff's instructions and his own observations, without independent verification, and were therefore inconclusive in that regard.

54. The Defendant, on the other hand, adduced evidence that upon notification of the reported issues, it undertook repairs in accordance with the warranty terms, supplied replacement differential tubes, and returned the trucks to service. Correspondence on record demonstrates that at least two trucks resumed operation after the repairs.

55. The Court accepts the Defendant's submission that, contrary to the Plaintiff's assertions, repeated repairs, without more, do not i*pso facto* amount to proof of a manufacturing defect. Commercial vehicles, particularly those deployed in construction projects in harsh terrain such as Turkana County, as is the case herein, are subject to significant operational stress.

56. The Defendant's uncontroverted evidence was that it honoured the warranty by inspecting and repairing the trucks and supplying replacement parts where necessary. It is settled law that courts do not rewrite contracts for parties. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112**, the Court of Appeal held that parties are bound by the terms of their contract unless vitiating factors are proved. No fraud, misrepresentation, or unconscionability was pleaded or proved.

57. In the premises, the Court is therefore not satisfied that the Plaintiff proved, on a balance of probabilities, that the trucks suffered from manufacturing defects, nor has it been proved that the Defendant breached its warranty under the contracts of sale.

Whether the Plaintiff is entitled to a refund of the purchase price

58. The Plaintiff claims a refund in the sum of **Kshs. 51,550,000/-,** being the purchase price for the five trucks. According to the Plaintiff, the contract had failed in its essential purpose, entitling it to rescission and a refund of the full purchase price due to the persistent defects and unreliability of the trucks.

59. The Plaintiff maintained that the fact that they continued to use the trucks should not be construed as acceptance or affirmation of the contract since the same was driven by commercial necessity. They maintained that contractual limitations on refund should not apply where goods were fundamentally defective.

60. The Defendant, on its part, argued that the Plaintiff accepted the trucks by deploying and using them in its operations for several months, thereby losing the right to reject or rescind the contract. It was further the Defendant's case that the warranty expressly limited refunds or exchanges to vehicles returned unused within a stipulated period, which the Plaintiff failed to comply with.

61. In this case, the Court having found that the Plaintiff failed to prove the existence of any manufacturing defects, and that the Defendant did not breach any of the warranty conditions, I find no legal basis upon which the Court can order a refund of the purchase price.

62. Additionally, the evidence demonstrates that risk and property in the trucks passed to the Plaintiff upon delivery, and that the Plaintiff exercised ownership rights over the vehicles for a considerable period. In fact, available evidence indicates that the vehicles were not returned to the Defendant within the 10-day contractually agreed period, and that the vehicles are still in the custody of the Plaintiff.

63. Bearing the above in mind, the Court is of the view that granting a refund would amount to rewriting the parties' bargain and imposing obligations on the Defendant that it did not assume, contrary to the principle in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112**.

64. Accordingly, the Court therefore finds and holds that the Plaintiff is not entitled to a refund of the purchase price.

Whether the Plaintiff is entitled to its claim for loss of user

65. The Plaintiff claims **Kshs.20,200,800**/= for outsourcing transport. The Defendant, however, points to warranty clauses excluding consequential damages.

66. Clause (q) of the Defendant's warranty expressly excluded "... loss of user, costs of towing or the use of a courtesy, rental or other replacement vehicle, other incidental damages including loss of value of the vehicle, lost earnings, out of pocket expenses ..."

67. It is a settled principle of law that courts cannot rewrite contracts. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] KLR 50***7*, the Court of Appeal stated:

> "A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."

68. Further, it is equally settled that special damages must not only be pleaded, but must also be strictly proved. See **Vinayak v Santokh [2023] KECA 1433 (KLR),** where the Court of Appeal held:

> "Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts for payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt meets the test. (See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs Janevams Limited[2015] eKLR, Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR)."

69. In this case, the Plaintiff produced invoices but no receipts or bank statements proving payment. The claim, therefore, fails both on contractual exclusion and evidential insufficiency.

70. The Plaintiff's claim for loss of user in the sum of **Kshs.20,200,800/-** therefore fails.

Costs and Interest

71. On costs, S**ection 27 of the Civil Procedure Act** is clear that costs follow the event unless good reason is shown otherwise. The provision states that:

> "Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid … Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

72. In this case, the Defendant has successfully defended the claim and is therefore entitled to be compensated for the expense of litigation.

73. The upshot of the foregoing is that the Plaintiff's suit is dismissed with costs to the Defendant.

74. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 19TH JANUARY 2026

ADO MOSES
JUDGE

In the presence of: -

C/A – *Moses*

Maina..... for the Plaintiff.

Ms. Omondi..... for the Defendant.