IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 7 OF 2015

BETWEEN

GLOBAL VEHICLES KENYA LIMITED……APPELLANT

AND

LENANA ROAD MOTORS……..……RESPONDENT

(Appeal from the judgment and decree of the Court of Kenya at Mombasa (Kasango, J.) dated 17th December 2014

in

HCCC No. 100 of 2013)

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JUDGMENT OF THE COURT

The appellant, ***Global Vehicles Kenya Ltd*** is aggrieved by the judgment of the High Court at Mombasa ***(Kasango, J.)*** dated 17th December 2014, by which the learned judge dismissed with costs, its claim against the respondent, ***Lenana Road Motors***, for return of 17 motor vehicles sold and delivered to the respondent, but not paid for, or payment of ***Kshs 20,615,000.00***, being the agreed purchase price. The learned judge held that the appellant had failed to prove its ownership of the said motor vehicles and was therefore not entitled to their return or payment of their value.

The background to the dispute is not complicated. The appellant, a limited liability company based in Mombasa, describes itself as an automobile importer and seller in Kenya. The respondent, also a limited liability company, sells new and second hand motor vehicles on a site along Lenana Road in Nairobi. By some 17 separate agreements in writing entered into on divers dates between 8th March 2011 and 23rd December 2011, the appellant sold to the respondent, at agreed purchase price per vehicle, the following 17 motor vehicles.

i. *KBQ 945 M*

   Toyota Land Cruiser Prado

   Chassis No. KDJ121-0001867

ii. *KBQ 214 K*

Toyota Hilux Surf

Chassis No. RZN215-0013918

iii. *KBQ 054 Q*

Toyota Hilux Surf

Chassis No. RNZ215-0013909

iv. *KBQ 993 X*

Toyota Rav 4

Chassis No. ACA21-0300064

v. *KBQ 299 L*

Toyota Wish

Chassis No. ANE11-0020300

vi. *KBQ 917 Q*

Toyota Allion

Chassis No. AZT240-0018709

vii. *KBQ 143 B*

Toyota Wish

Chassis No. ZNE10-0155584

viii. *KBQ 055 Y*

Toyota Wish

Chassis No. ZNE10-0167772

ix. *KBP 239 Z*

Toyota Probox

Chassis No. NCP51-0065032

(x) KBQ 947 A

Toyota Wish

Chassis No. ZNE10-0131828

xi. *KBQ 628 K*

Suzuki Swift

Chassis No. HT51S-752889

xii.*KBQ 714 V*

Subaru Legacy

Chassis No. BP5-056909

xiii.*KBQ 654 R*

Toyota Wish

Chassis No. ZNE10-0166795

xiv.*KBQ 870 X*

Toyota Wish

Chassis No. ZNE10-0196629

xv.*KBQ 924 M*

Toyota Corolla Fielder

Chassis No. ZZE122-0167354

xvi.*KBQ 184F*

Toyota Camry

Chassis No. ACV30-0298202

xvii.*KBQ 026 Q*

Toyota Probox

Chassis No. NCP58-0033803

It was a term of all the agreements that the motor vehicles would be released to the respondent upon payment of agreed deposits and the transfers and logbooks would be handed over to the respondent upon payment of the balance of the agreed purchase price. In default of payment, the appellant reserved for itself the right to repossess the motor vehicles, with the respondent forfeiting 10% of the purchase price.

The respondent took possession of the motor vehicles but defaulted in paying the purchase price as agreed or at all. By another agreement in writing between the parties dated 5th August 2013 and titled ***"Debt Settlement Agreement"***, the respondent acknowledged delivery of the motor vehicles and indebtedness to the appellant for Kshs 20,615,000.00. It was a term of that said agreement that the respondent would pay the said amount in agreed instalments, the first such installment being payable on 20th September 2013 and the last on 1st August 2015. It was further agreed between the parties that each time the respondent paid a total of Kshs 1,000,000.00, the appellant would release motor vehicle logbooks to the respondent until payment in full. In default of any one installment, the entire amount was to become due and payable and the appellant would be at liberty to execute for recovery of the full amount or to repossess the motor vehicles.

A curious clause in the agreement (clause 2), provided that upon the signing of the Debt Settlement Agreement, the appellant would file a suit in court against the respondent, which the respondent undertook not to defend. Instead the respondent agreed to file in the suit a statement of admission of the appellant's claim. The Debt Settlement Agreement was also to be filed in Court. The agreement was signed by ***Manuwan Yusuf,*** a director of the appellant and ***Moses Wairagu***, a director of the respondent.

On 29th August 2013, the appellant filed ***High Court Civil Suit No. 100 of 2013*** against the respondent, seeking judgment for Kshs 20,615.000.00 or return of the motor vehicles. The appellant contends that the suit was filed pursuant to clause 2 of the Debt Settlement Agreement. On the other hand the respondent contends that the suit was filed in breach of the Debt Settlement Agreement, and even before the agreed period for payment of the instalments had expired.

Be that as it may, the respondent filed a defence dated 4th October 2013 in which it was pleaded in paragraphs 2 and 3 that it had paid in full for the vehicles it had purchased from the appellant. In paragraph 6 the respondent pleaded that it would request accounts to be taken to correct the appellant's erroneous allegation of indebtedness by the respondent. Lastly, in paragraph 7 the respondent pleaded that despite paying in full for the vehicles, the appellant had failed to release the logbooks to it.

This defence was never amended. As is crystal clear from it, the respondent never denied the sale of the motor vehicles to it or the ownership of the motor vehicles by the appellant. Its defence was simply that it had paid in full for the motor vehicles it had purchased from the appellant. Neither did the respondent, in its defence, challenge any aspect of the agreements it had entered into with the appellant.

Kasango, J. heard the suit, in which the appellant's director, Manuwan Yusuf and the respondent's director Moses Wairagu, were the only witnesses. As earlier stated, the learned judge dismissed the suit with costs, thus precipitating this appeal.

The appellant's memorandum of appeal raises 11 grounds of appeal, which are prolix, repetitive and overlapping. In our view, the appeal raises only 3 issues, namely, whether the learned judge:

i. ***failed to confine herself to the agreements between the parties and took into account extraneous matters that purported to vary or amend the agreements;***

ii. ***failed, in the absence of pleaded or proved fraud or undue influence, to enforce the intention of the parties as manifested in the agreements;***

iii. ***erred by delving into questions of ownership of the motor vehicles by the appellant and due execution of the agreements while such issues had not been raised in the pleadings.***

In support of the appeal ***Mr. Ojode,*** learned counsel for the appellant, submitted that the terms on which the appellant sold its motor vehicles to respondent were set out clearly in the agreements between them, which were produced before the trial court as evidence and were never challenged or otherwise disputed by the respondent in its statement of defence. In counsel's view, the appellant, the respondent and the trial court were obliged to confine themselves to the terms of those agreements and not to introduce extraneous matters for the purposes of contradicting or varying what was agreed voluntarily by the parties.

It was further submitted that the learned judge had erred by failing to enforce the clear intention of the parties as expressed in the agreements between them. The intention of the parties, it was submitted, was that in default of payment of any one installment by the respondent, the appellant was free to repossess its vehicles. The respondent, it was further urged, had not in its pleadings challenged the validity of the agreements or otherwise suggested that they were vitiated by fraud or misrepresentation. On the contrary, it was argued, the respondent recognised the agreements in its statement of defence and purported to have fully paid for the motor vehicle.

The appellant relied on the judgment of this Court in ***JOHN NJOROGE MICHUKI V KENYA SHELL***

LTD*, *CA NO. 227 OF 1999 to submit that courts ought not to frustrate the clearly expressed intention of parties to a contract and instead ought to enforce contracts to actualize such intentions. Also relied upon was ***NATIONAL BANK OF KENYA V. PIPE PLASTIC SAMKOLIT (K) LTD. & ANOTHER*, *CA NO. 950 OF 1999*** and ***ALFRED M.O. MICHIRA V. M/S GESIMA POWER MILLS LTD* *CA NO. 197 OF 2001*** for the proposition that in the absence of fraud or undue influence, the court will not rewrite contracts between parties and will instead enforce the contracts as agreed between them.

Next, it was submitted that the learned judge had erred by declining to enforce the Debt Recovery Agreement allegedly for lack of due execution by the respondent while the respondent had never raised that issue in its pleadings. It was contended that the learned judge had allowed herself to be influenced by extraneous matters irregularly raised in submissions rather that confining herself to the agreement. Learned counsel submitted on the authority of S. 34 of the Companies Act that contracts by companies do not have to be under seal.

Lastly, Mr. Ojode submitted that the learned judge had misapprehended the evidence before her by concluding that the appellant's suit was filed prematurely before the final installment was due from the respondent whilst under the Debt Settlement Agreement, the parties had agreed that the suit would be filed immediately. We were urged to allow the appeal to forestall unjust enrichment of the respondent.

For the respondent, ***Mr. Gathuku,*** learned counsel, opposed the appeal and urged us to dismiss the same. Counsel submitted that this Court will not interfere with findings of fact by the trial court unless they are based on no evidence or on misapprehension of evidence or if the trial judge is shown to have acted on a wrong principle of law. In this appeal, it was submitted, there was no basis for interfering with findings of the trial judge who had the advantage of seeing and assessing the demeanor of witnesses.

It was submitted that the trial court properly held that the Debt Settlement Agreement was unenforceable because respondent's director and witness, Moses Wairagu had signed the same without the authority of the respondent while the appellant's director and witness Manuwan Yusuf had signed the same but failed to affix the appellant's seal.

It was further submitted that the trial court had equally and properly concluded that there was no evidence to show that the appellant owned the motor vehicles in dispute because it did not produce their logbooks as exhibits. Having failed to prove ownership of the motor vehicles, it was submitted, the appellant was not entitled to an order to repossess them.

Mr. Gathuka next argued that the suit in the High Court was filed in breach of ***Order 1 Rule 4*** of the ***Civil Procedure Rules***, which require suits by corporations to be supported by a verifying affidavit sworn by an officer duly authorised to do so under seal of the corporation. It was submitted that Manuwan Yusuf filed no such authority in the High Court and therefore the suit was null and void.

Lastly it was submitted that the High Court had properly dismissed the appellant's suit because in the intervening period, the respondent had sold some of the vehicles to third parties who were not parties to the suit and in respect of whom no orders could be issued. We were accordingly urged to find the appeal lacking in merit and to dismiss the same.

We have anxiously considered this appeal. We agree with the respondent that this Court will not readily interfere with findings of fact by the trial court, save in the circumstance it has adumbrated. And before determining whether or not there is basis for interfering with the findings of the trail court, we are required in a first appeal like the present one, to reconsider the evidence, assess it and make our own conclusions. (See ***EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI WAMBUGU* *[1982-88] 1 KAR 278).***

Before we consider the issues raised in this appeal, it bears repeating the central role of pleadings in dispute resolution in our jurisdiction. Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly it is through pleadings that the fair hearing that is promised by Article 50(1) of the Constitution is

actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

Jessel M. R. articulated this view very well in ***THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639***, as follows:

> ***"The whole object of pleadings is to bring the parties to an issue and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing."***

Lastly pleadings help in keeping the judge, literally, on a short leash because as a neutral umpire, the judge determines only the issues the parties have placed before the court. Without pleadings, the judge may be tempted to determine issues of interest to him or her, which are outside the contemplation of the parties, or to even determine matters that are not in dispute at all.

It is for the above reasons that it has been emphasized time and again that

except where an issue has been sufficiently raised, succinctly made an issue at the trial, and left to the trial court to decide, parties are bound by their pleadings and that the court should not by its own volition introduce issues to the dispute which do not arise from the pleadings. Thus in ***DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014***, this Court expressed itself thus:

> ***"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."***

(See also ***GANDY V. CASPAR AIR CHARTERS LTD (1956) 23 EACA 139; ODD JOBS V. MUBIA, (1970) EA 476;*** and ***KENYA COMMERCIAL BANK LTD V SHEIKH OSMAN MOHAMMED, CA NO 179 OF 2010).***

In its defence dated 4th October 2013, the respondent did not deny or dispute that the appellant was

the owner of the 17 motor vehicles. It did not deny either, that it had entered into the agreements with the appellant to purchase the said motor vehicles. Nor did it deny taking possession of those motor vehicles from the appellant. Lastly the respondent did not plead that the agreements in question were in any way vitiated by lack of due execution or lack authority on the part of directors to bind the two companies. Its defence was simply that it had paid the appellant in full for the motor vehicles and despite the full payment; the appellant had failed to release the logbooks to it.

Granted the pleadings and in particular the above defence, we find it difficult to comprehend how the learned judge could hold that the appellant's ownership of the motor vehicles was not proved, whilst that ownership was not disputed by the respondent in the first place. When the appellant's witness, Manuwan Yusuf testified on 23rd June 2014, he told the court under cross examination that he did not have the logbooks with him in court but they were in his office. The learned judge addressed that issue thus:

> ***"The plaintiff essentially relied on five photocopies of logbooks of five vehicles. [The] plaintiff did not produce original logbooks of the twenty one (21) motor vehicles it seeks to repossess and at worse failed to produce search of those vehicles to prove they are registered in plaintiff's name. In my view [the] plaintiff failed to prove its entitlement to repossess those motor vehicles because of failure to prove ownership."***

Having carefully re-evaluated the evidence on record, we notice that, whatever it was worth in light of the pleadings, the appellant had produced in its list of documents copies of logbooks for all the 17 motor vehicles and not merely 5 as the learned judge stated. All those logbooks show the registered owner of the motor vehicles to be ***Global Vehicles K Ltd; PIN No. P051336072F; of P.O. Box 94028-80107, Mombasa***. As ownership of the motor vehicles was not an issue from the pleadings, it is not surprising to us that the appellant's witness did not carry the logbooks with him to court.

The other issue that is of concern to us is that from the pleadings, which were not amended, the motor vehicles in dispute were 17 in number. The judgment proceeds on the basis that the dispute was in respect of 21 motor vehicles. The parties, without any amendment of the pleadings, introduced the figure 21 in evidence and we think that it was a fundamental misdirection on the part of the learned judge to proceed on the basis of evidence that had no bearing to the pleadings. The case that was presented to the court for determination related to 17 motor vehicles and that is what the court ought, in the absence of amendment of the pleadings, to have determined.

The other issue that has caused us considerable anxiety is the manner in which the learned judge introduced and resolved the question of due execution of the agreements between the parties, an issue that was again not pleaded. The learned judge expressed herself thus:

> ***"7. On the first issue the debt is represented by the agreement, that is Plaintiff Exhibit No. 1, dated 25th August 2013. That agreement which in part is reproduced above is between two entities, the Plaintiff and Defendant. The agreement however was signed by Manuwan Yusuf on behalf of Plaintiff and Moses Wairagu on behalf of Defendant. Moses Wairagu gave evidence on behalf of Defendant and this is what he stated in respect to that agreement-***
>
> > *"The agreement dated 25th August 2013. I signed it in Mombasa with Mr. Yusuf. We agreed that we would have it signed by our co-directors and be sealed by Company seal and we were to agree on the final figure. He confused me he said "sign then it will be signed by your partner (Director) later."*
>
> ***8. The Defendant is a Limited Liability Company. The position in law in respect to a Limited Liability Company is as was stated in the case VALENTINE OPIYO & ANOTHER –Vs- MASLINE ADHIAMBO T/A ELLYAMS ENTERPRISES [2014] eKLR…***
>
> ***9. The defence witness was clear that he signed that agreement acknowledging Defendant owed Plaintiff Kshs. 20,615,000/- without the authority of the Board of the Defendant Company since***

his co-director was unaware of the same…

10. The Defendant witness signed the acknowledgment of the debt without the authority of the Board of the Defendant Company. It follows he had no authority to give an undertaking on behalf of Defendant Company to repay that debt. On similar grounds Yusuf, who signed on behalf of Plaintiff also failed to place a Company seal next to his signature, which in essence showed that he did not have the authority of the Plaintiff's Board of Directors to sign the agreement. It follows that as far as the Plaintiff and Defendant Companies are concerned that agreement has no legal effect. It is unenforceable either on behalf of the Plaintiff's Company or against the Defendant's Company. It essentially seems to be an agreement between Yusuf and Wairagu and not the Plaintiff and Defendant Companies."

Again we must emphasize that the respondent was obliged, if its defence was that the agreements were not duly executed or were otherwise vitiated, to plead the same and give particulars of the facts vitiating the agreement. That was never done. The issue of the validity of the agreements was not raised expressly or even obliquely by any of the parties in their pleadings. ***Order 2 Rule 4*** of the ***Civil Procedure Rules*** obliged the respondent to specifically plead facts, which it alleged made the appellant's claim unmaintainable. This, the respondent did not do, and having failed to satisfy the requirements as to pleadings it could not purport to lead evidence to prove facts that were contrary to its pleadings. It was clearly misdirection on the part of the judge to rely on issues that were not pleaded and constitute them the basis upon which the suit turned.

The learned authors of ***Bullen and Leake and Jacob's Precedents of Pleadings, Sweet & Maxwell, 12th Edition, P. 6-7*** explain the rationale of the requirement of specific pleadings as follows:

"The effect of the rule is for reasons of practice and justice and convenience, to require the defendant to tell his opponent what he is going to the court to prove. Thus, when a contract, promise, or agreement is alleged in the statement of claim, a bare denial by the defendant will be construed only as a denial in fact of the express contract, promise or agreement alleged or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement. It is, therefore, often not enough for the defendant to deny an allegation in the statement of claim; he must go further and dispute its validity in law or set up some affirmative case of his own in answer to it. Accordingly, the defendant has the duty to state any special defence or any new fact on which he will rely at the trial, as otherwise a plaintiff may legitimately complain that he has been taken by surprise." (Emphasis added).

We also agree with the appellant that the learned judge misapprehended the provisions of the Debt Settlement Agreement relating to the filing of the suit in the High Court. The learned judge held rather peremptorily that the High Court suit was filed prematurely before the stipulated time, namely August 2015, by which the respondent was to pay the last installment. That may well have been one way of looking at the agreement. However clause 2 of the agreement also provided that the appellant would file the suit immediately after the Debt Settlement Agreement, and the respondent would file a statement of admission in lieu of defence. The question of the constitutionality and enforceability of that clause, which the responded attempted to raise before us, was never raised and was never considered by the trial court. Moreover, the agreement also provided that in default of any one installment, the appellant was at liberty to repossess the vehicles from the respondent. In determining whether the suit was filed prematurely, the learned judge was obliged to consider all the provisions of the agreement and not merely one clause in isolation. Quite clearly the learned judge did not consider those other provisions of the agreement and that was in itself a further misdirection.

The respondent's contention that the appellant's suit was filed in violation of Order 1 Rule 4 of the Civil Procedure Rules, need not engage us simply because the issue is being raised too late in the day. The objection ought to have been taken before the trial court. As it is, the issue was not raised and was never addressed by the trial court. We do not think it is an issue that can properly be raised for the first time on appeal. Indeed there is neither a cross appeal filed by the respondent nor a notice of grounds for

affirmation of the judgment of the High Court.

Lastly the learned judge postulated that "in all probability those vehicles may be registered, owned and possessed by third parties not before the Court" and therefore the Court could not issue any order as prayed. This was to avoid affecting such parties without first affording them the right to be heard. While the concern was legitimate, nevertheless it must be remembered that the appellant had not exclusively sought return of the 17 vehicles; it had sought in the alternative payment by the respondent, of the agreed purchase price. There was therefore nothing to bar judgment being entered against the respondent for the purchase price agreed with the appellant for the motor vehicles.

Upon full evaluation of the evidence on record, we are satisfied that the appellant did adduce sufficient evidence to entitle it to judgment against the respondent for Kshs 20,615.000.00, less Kshs 1, 500,000.00 which both parties admitted was paid to the appellant by the respondent after the Debt Settlement Agreement. The respondent did not adduce evidence to show that other than the Kshs 1,500,000, it had paid in full for the motor vehicles as it had pleaded in its defence. Accordingly, we allow this appeal, set aside the judgment of the High Court, and substitute therefor judgment for the appellant for ***Kshs 19,115,000.00*** with interest from the date of filing suit in the High Court. The appellant will have costs both in the High Court and in this Court. It is so ordered.

Dated and delivered at Malindi this 31st day of July 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.