Africa China Motors Group Limited v PN Mashru Limited (Civil Suit 6 of 2009) [2024] KEHC 16958 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16958 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 6 OF 2009

F WANGARI, J

MARCH 15, 2024

BETWEEN

AFRICA CHINA MOTORS GROUP LIMITED ..... PLAINTIFF

AND

PN MASHRU LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff filed a Plaint dated 18/2/2009 which was amended on 23/11/2016 pursuant to the withdrawal of CMCC 1804 of 2008 and consolidation with this suit vide the ruling dated 10/7/2009 by F. Azangalala, J (as he then was) and further, pursuant to the orders dated 11/6/2016.

2. In the amended Plaint, the Plaintiff averred that it is the sole distributor of Sino truck vehicles in Kenya. By an agreement dated 7/5/2008, the defendant bought 10 trucks at a cost of Kshs. 4,000,000 each totaling to Kshs. 40,000,000. The Defendant traded in 10 trucks valued at Kshs. 1,000,000 each totaling to Kshs. 10,000,000. The defendant was to pay the difference of Kshs. 30,000,000 in cash.

3. Upon perfection of the agreement through delivery and the trade-in of the trucks, it was discovered that 7 of the trucks delivered by the Defendant had irregularities and defects on the chassis and engine numbers on the trucks and the logbooks. Further to that, the trucks had been worn out rendering them unfit for the purpose that they were traded in for.

4. Due to failure of the sale of the traded in vehicles, the Plaintiff sold the same as scrap metal at a total value of Kshs. 3,000,000 hence making a loss of Kshs. 7,000,000 on the trade in value as earlier agreed upon the parties. Further to this, 3 of the trucks supplied to the Defendant developed mechanical problems. The Plaintiff supplied the three (3) engines at a cost of Kshs. 1,870,675.15/= Since they were not covered under the warranty, the Plaintiff claims the said amount from the Defendant.

5. The Plaintiff therefore claimed against the Defendant for;

a. Kshs. 7,000,000 being the loss of value of the trade in motor vehicles which would not have been realized from the sale of scrap metal.

b. Kshs. 1,870,675.15 being the cost of engine replacement.

c. Interests of (a) and (b)

d. Costs of the suit

6. The Defendant filed a Statement of defence dated 9/3/2009, and which was amended on 1/12/2015/ and further amended on 20/12/2016 and 22/3/2023. The Defendant denied the contents of the Amended Plaint and put the Plaintiff to strict proof thereof. It was averred that the Plaintiff and the Defendant had inspected the vehicles to be traded in, and the Plaintiff was aware of the conditions of the discrepancies in the logbooks.

7. The Plaintiff was to surrender the logbooks for purposes of regularizing them. The Plaintiff frustrated the same by their refusal of releasing the logbooks. The Defendant further denied that they were under obligation to collect the 10 trucks from the Plaintiff and pay the balance of Kshs. 30,000,000/=. It was further averred that there was no proof that the Plaintiff sold the trucks for Kshs. 3,000,000/=.

8. On the replacement of engines, the Defendant averred that the mechanical defects occurred within the warranty period hence not liable to pay the money claimed.

9. The Defendant preferred a Counterclaim as against the Plaintiff. The counterclaim was severally amended and the last amendment was on 22nd March. 2023. Under Order 7 Rule 8, it shall be treated as a cross action. For the tidiness of the record, both parties shall retain their original titles. The Defendant averred that due to the mechanical problems of the three (3) trucks, it suffered loss of profits due to loss of use of the vehicles for a cumulative seventy-three (73) weeks amounting to USD 269,449.20.

10. The Defendant therefore sought for judgment against the Plaintiff for: -

a. USD 269,449.20 at the prevailing exchange rate of Kshs. 65 per USD together with interest at commercial rates until payment in full.

b. Costs of the counterclaim to the Defendant

c. Any other remedy the court deems fit to grant.

Evidence

11. During the hearing, Mohamed Sajad Farooq (PW1), the Manager at the Plaintiff's company adopted his witness statement dated 11/2/2023 and bundle of documents dated 23/11/2026. He testified as per the contents of the Plaint. He said the Plaintiffs kept their part of the bargain but the Defendants were in breach of the trade in agreement.

12. On cross examination, he said he was not working for the company as at the time of the agreement. He said the transaction was handled by one Ikbal Osman who was now deceased (his witness statement is on record). He relied on the company's documents. The Defendant got the trucks for purposes of their transport business. He said that he was not aware that the discrepancies were known before the transaction was complete.

13. He also denied that they frustrated the efforts to regularize the discrepancies by holding on to the original logbooks. The Defendant was told to collect their trucks and it is after they failed to do so that the same was sold as scrap metal. He admitted that he had no document in support of the same. On

replacement of the engines, he said the same was done out of goodwill and that did not mean that they were not to charge for the same, but that the Defendant was to pay later.

14. In defence, Francis Mulili, an Administration Manager with the Defendant's company testified in opposition to the Plaintiff's claim and in support of the counterclaim. He adopted his witness statement as evidence in chief and the bundles of documents as listed in the lists of documents as the documentary exhibits.

15. The witness testified that he participated in the transaction representing the Defendant, while the Plaintiff was represented by one Osman Ikbal. Ikbal inspected 40 trucks belonging to the Defendant and he selected 10 trucks which were to be traded in. He inspected the documentation. The issue of the discrepancies was identified while the vehicles were still at the yard prior to taking of the vehicles. The Plaintiff was to send to the Defendant the logbooks so that the records could be regularized.

16. The witness further testified that the trucks were fit for purpose and they were driven to Nairobi. He denied that they had been requested to go collect the trucks and that the same was sold as salvage for Kshs. 3 million. He said the claim for Kshs. 7 million was not justified.

17. On the replacement of the engines in the 3 trucks, the witness testifies that that fell under the warranty which was still in force. He denied that the Defendant was issued with an invoice for the engine replacement.

18. On the counterclaim, the witness testified that the Defendant suffered loss of USD 269,000 being loss of use for the 3 trucks for 73 weeks. The Defendant had a transport contract with a Ugandan company and it had to go to court to have the 3 trucks released by the Plaintiff.

19. On cross examination, he reiterated the contents of his evidence in chief. He admitted that the Defendant did not reply to the latter dated 19/6/2008 giving the state of the traded in trucks. He also stated that the Defendant reported to the Plaintiff about the defects in the 3 trucks, and the same was done on phone. No invoice was issued as the warrant was still in force.

20. On the value of the vehicles, he testified that as per the agreement, the traded in trucks were valued at Kshs. 1 million each. On the counterclaim, he testified that the figures were based on previous transactions as per the documents produced.

21. In re-examination, the witness reiterated that the Plaintiff had inspected the vehicles before being driven to Nairobi. He could not tell why the letter dated 19/6/2008 was on "without prejudice" basis. He confirmed that the trucks were in working condition.

22. At the close of the Defence case, the parties were directed to file their respective submissions.

23. The Plaintiff submitted that the Defendant was in breach of the trade in contract as it delivered trucks that had documentary irregularities and were of unusable condition. When the Plaintiff wrote to the Defendant the letter dated 19/6/2008 informing them of the condition of the trucks, and they failed to reply, the trucks were sold at a scrap value of Kshs. 3,000,000/=.

24. The Plaintiff submitted that they ought to be awarded damages for the breach of contract and they relied on the cases of Kenya Tourism Development Corporation v Sundowner Lodge Ltd [2018] eKLR and Dormakaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136nof 2020) [2021] KEHC (KLR).

25. The Plaintiff further submitted that they mitigated further the loss by selling the unusable vehicles as scrap metal. They relied on the case of African Highland Produce Ltd v John Kisono. On replacement

of engines, the Plaintiff submitted that the vehicles had been delivered to the Defendant in good condition, and that replacement of the engine was not part of the warranty.

26. On the Defendant's counterclaim, the Plaintiff submitted that the claim for loss of profits was in the nature of special damages which are 'ascertainable and quantifiable at the date of the action'. The Defendant failed to proof to the court what the company was making prior to the vehicles being repaired to justify the claim of USD 269,449.20, hence the court should decline to award the claim.

27. On the other hand, the Defendant submitted that the Plaintiff failed to proof damages in form of special damages for breach of contract. It was not shown that the 10 trucks were not in working condition and that they suffered loss of Kshs. 7,000,000/=. Further, there was no evidence to show that the vehicles were sold as scrap metal for Kshs. 3,000,000/=.

28. On breach of warranty, the Defendant submitted that the Plaintiff was under obligation to replace the engines and in a timely manner to avert any business losses. Instead, the Plaintiff detained the vehicles for a period of 73 weeks leading to a loss of USD 269,449.20 at an exchange rate of Kshs. 65. The Defendant relied on the authorities as filed. It was the defence prayer that the Plaintiff's suit be dismissed and the counterclaim allowed.

Analysis and Determination

29. I have carefully considered the pleadings, the evidence, submissions for and against, the cited authorities as well as the law. Before delving on the issues for determination, there are certain uncontested facts. First, both parties confirm that they entered into an agreement/contract in which the Plaintiff was to deliver ten (10) new Sino trucks to the Defendant at a cost of Kshs. 4,000,000/= per unit. On the part of the Defendant, it was to give ten (10) used trucks to the Plaintiff at a cost of Kshs. 1,000,000/= per unit. This was as a way of trade in. The balance of Kshs. 30,000,000/= was to be paid to the Plaintiff in cash.

30. Secondly, both parties performed their respective functions as per the contract, that is, the Plaintiff delivered ten (10) new Sino trucks to the Defendant while the Defendant gave the Plaintiff ten (10) used trucks. To this end, there is no dispute that both parties performed as agreed.

31. The precursor to the dispute is the letter dated 19/06/2008. From both parties' submissions, they identified issues for determination and having reviewed the same, I settle for the following as the issues for determination: -

    a. Whether the trade in agreement dated 7/05/2008 was breached;

    b. If the answer to (a) above is in the affirmative, by which party;

    c. Whether either party is entitled to the reliefs sought;

    d. Who bears the costs?

32. On the first issue, the basis of the dispute is the agreement dated 7/05/2008. The fact that both parties ended up in court each blaming the other means that the contract they entered into had been breached. Despite an attempt to mediate the matter as evidenced by the mediator's report dated 19/07/2019, parties could not agree. I thus return an affirmative finding on the first issue.

33. As stated elsewhere in this judgement, the existence of a duly executed contract/agreement is not in dispute. What is in contention is which party is to blame for the non-performance of the contract. On the Plaintiff's part, the Defendant is to blame since it delivered trucks that had serious irregularities and defects between the chassis and engine numbers on the trucks and the log books.

34. Equally, the Plaintiff contended that the trade-in trucks were seriously worn out and thus unfit for the purpose for which they had been traded in for. For the said reasons, it had to sell the trucks as scrap metal and only realized Kshs. 3,000,000/= thus losing Kshs. 7,000,000/= which it had invested. The Plaintiff also made a claim for Kshs. 1,870,675.15/= being the cost of replacing the three (3) engines.

35. On the Defendant's part, out of the ten (10) motor vehicles supplied by the Plaintiff, three (3) developed engine failure on 13/06/2008, 21/06/2008 and 22/06/2008 respectively. The Plaintiff was notified and it undertook to deliver new replacement engines as per the warranty terms. Upon delivery of the three (3) trucks to the Plaintiff, the vehicles were detained ostensibly for monies allegedly owed and only released on 9/12/2008 upon service of a court order. This detention resulted in loss of anticipated profits to the tune of USD 269,449.20 which the Defendant counter-claimed as against the Plaintiff.

36. It now behooves this court to put the agreement dated 7/05/2008 into perspective. The Plaintiff's contention is that the trade in trucks supplied by the Defendant had disparities between the engine and chassis numbers and they were equally worn out. At clause 2 of the agreement, there was no doubt as regards the vehicles the Plaintiff was purchasing. This clearly means that the goods being sold were identifiable or ascertainable. I would be slow to invoke the *Sale of Goods Act* at this juncture as there is in place express contract provisions.

37. Could the same be said of the ten (10) trucks the Defendant was acquiring? The answer must be in the negative since if that were so, the same could have either been identified through chassis numbers or the truck registration numbers. From the vehicle order dated 9/05/2008, there is no doubt that the units being acquired had not been registered. In the description part, it was noted as follows: -

> "Balance of 30,000,000/= to be paid by one cheque once the new units are registered." (Emphasis added)

38. The trucks to be supplied to the Defendant by the Plaintiff only got to be ascertained on 15/05/2008 through chassis numbers as per the invoices and subsequently through registration numbers on 19/05/2008 as per the delivery notes.

39. Back to the agreement dated 7/05/2008, clause 6 thereof provided as follows: -

> "Both parties have agreed/entered into this Agreement and have seen, Tested the motor vehicles accordingly."

40. Based on the above chronology, the vehicles being seen and tested must have been those ascertained at clause 2 of the agreement since what had not been ascertained could not be subject of any testing or viewing. Equally, the vehicles being offered by the Defendant were old vehicles as confirmed by both parties. Therefore, the due diligence required of the Plaintiff ought to have been higher.

41. Clause 6 of the agreement is akin to "as is where is basis" which simply postulates that the purchaser is acquiring an asset with all its existing rights, obligations and liabilities. The seller gives no warranty as to the fitness of the property for the purpose of the buyer.

42. Consequently, the buyer bears the responsibility to conduct proper checks and inspect the property thoroughly beforehand for he shall be regarded as having inspected and accepted the property in its actual state and conditions once the option to purchase is accepted and exercised.This principle puts the risks and burdens of a transaction on the buyer, and it is the buyer's duty to do his due diligence and checks when deciding whether to go ahead with the transaction or not.

43. The defects are of two kinds, patent and latent defects. Patent defects are those that can be discovered by a reasonable inspection and ordinary vigilance on the part of the purchaser. The issue of the trucks being old, in total abandoned condition and with worn out tyres as captured in the letter dated 19/06/2008 are all patent defects which ought to have been noticed upon sight and testing. The complaint more than one (1) month later was simply belated and could not be said to be a breach of contract on the part of the Defendant.

44. The second category of defects is latent. They are those defects which could not be discovered by a reasonable thorough inspection before completing the purchase.The issue of variance between chassis and engine numbers is a latent defect. It is not in dispute that the Plaintiff was given the original logbooks of the traded in vehicles.

45. At the time of contracting, National Transport and Safety Authority (NTSA) was not yet in place. As such, registration of motor vehicles was under Kenya Revenue Authority (KRA). It was the Plaintiff's duty to ascertain whether the vehicles being given to it indeed belonged to the Defendant and whether the particulars in the logbooks were matching with those in the search certificates. The vehicles being traded in were not in an auction sale but in a willing buyer willing seller scenario.

46. It is a rule of thumb that any buyer should bear in mind that the onus is on him to ensure that all proper due diligence is made, particularly so when he has seen, inspected and tested that which he intends to buy. One must also be vigilant when inspecting the property for defects, for he or she will have no recourse against the seller for any defects which could have been discovered through due diligence and proper inspection of the property.

47. To this end, the issue of disparities between the chassis and engine numbers was something which the Plaintiff ought to have noticed had it conducted due diligence before executing the contract dated 7/05/2008. Equally, there are affidavits by DW1 dated 20/11/2008 which the Defendant disclosed the disparities with a view of having KRA rectify the same.

48. The Defendant in its evidence confirmed that the original logbooks were given to the Plaintiff but it refused to release back the same for rectification. This evidence was not controverted and as such, I do not see how the Defendant would be said to have breached the contract by failing to rectify the disparities between the chassis and engine numbers when it had not received the logbooks which were a pre-condition for rectification.

49. So if the Defendant did not breach the contract, then who did? The answer to this question would be found in the analysis below.

50. The trucks delivered by the Plaintiff to the Defendant were new trucks. This is confirmed by invoices number 10009 and 10008 dated 15/05/2008. They were described as zero rated meaning they had zero mileage. As per the delivery notes number 10003 and 10002, they were delivered on 19/05/2008. The Plaintiff issued the Defendant with a warranty registration card and conditions as well as an engine disclaimer both dated 15/05/2008.

51. Out of the ten (10) trucks delivered to the Defendant, three of them, that is, truck registration numbers KBB 796X, KBB 793X and KBB 795X broke - down on 13/06/2008, 21/06/2008 and 22/06/2008 respectively. This was a period within one (1) month of the delivery. According to the warranty registration card at clause 2 (1) under Warranty Regulations (General principles), the warranty scope provided as follows: -

> "During the warranty period, SINOTRUK or SINOTRUK authorized institutions will replace or repair the parts which are not included in the non-warranty scope and are also

because of the defects of the material or workmanship in the normal situation. SINOTRUK would be responsible for sending the replacement parts by ship or other ways which SINOTRUK could accept to the frontier/territory of destination country free of charge and all other procedures and charges in the destination country will be borne by the customer, such as clearing, custom, inland transportation, labor cost, etc."

52. At clause 2 (2), the warranty period was to start from the date of the invoice. On-road vehicles were to be covered for a period of 12 months or not more than a mileage of 100,000km, whichever is reached first. Off-road vehicles were covered for a period of 12 months or not more than a mileage of 60,000km, whichever is reached first. The Non-warranty scope is provided under part C of the warranty registration card.

53. A review of the scope simply discloses circumstances when SINOTRUK will not be responsible for repairs of the vehicle. This includes improper operations or over loading, breaking of anti-tamper seals and using parts and components which are not specified by SINOTRUK among others. According to the Defendant, the three trucks broke down within the warranty period and as such, it was the duty of the Plaintiff to replace the damaged or broken parts as soon as they were made aware. Section 2 of the *Sale of Goods Act*, Cap 31, Laws of Kenya define warranty as follows: -

> " warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

54. It is a less important term of a contract. It is a minor term that is subsidiary to the main part of the contract. The innocent party cannot terminate the contract and is obliged to perform the contract but may sue for damages for losses sustained by the breach of warranty.

55. In opposition, the Plaintiff urged that engine break down was not provided for in the warranty card citing the engine disclaimer. However, under points for attention in the engine disclaimer, clause 1 thereof reads as follows: -

> " The engine has been tested strictly in accordance with the test stipulations before delivery. The throttle has been sealed, and it is forbidden to dismantle the seal optionally and to enlarge the throttle. Otherwise we would not provide free service for any damaged engine." (Emphasis added).

56. My understanding of the above clause and the entire engine disclaimer does not in my view, mean that any damage in the engine is not covered by the warranty. It simply means that failure to follow the conditions set out in the engine disclaimer would lead to refusal by the manufacturer or distributor to replace a damaged engine.

57. Upon break down of the three trucks, the Plaintiff was notified of the same through a letter dated 9/07/2008 and received on 16/07/2008. Based on the job cards produced, the three trucks were taken in on the very dates they broke down but were only released to the Defendant on 9/12/2008 as a result of a court order issued on 5/12/2008 in Mombasa CMCC No. 1804 of 2008.

58. The Plaintiff produced three (3) job cards numbers 3077, 3083 and 3084 which clearly confirmed that by 26/06/2008, all the three (3) trucks had been repaired. Why the same were held on until 9/12/2008 is only known to the Plaintiff.

59. There was no evidence by the Plaintiff that the engine break-down was caused by Defendant's failure to abide by the terms of the warranty registration card and conditions as well as the engine disclaimer. From the job cards, the truck that had covered greater distance was KBB 795X at 4,725km.

60. Though the Plaintiff stated that it repaired the three (3) trucks at its own costs and which costs it was claiming from the Defendant, detaining the three (3) vehicles until 9/12/2008 was a material breach of the agreement dated 7/05/2008.

61. They would have released the vehicles to the Defendant as soon as they had repaired the same but not detaining them. This was because engine repair was a warranty which simply entitled the innocent party a remedy in damages which the Plaintiff had assigned a figure of Kshs. 1,870,675.15/=. I think I have said enough to show that the party who breached the contract was the Plaintiff.

62. Having found as above, who was entitled to the reliefs sought between the two parties? It is a principle of evidence law that he who alleges must prove. Section 107 and 108 of the *Evidence Act* is the starting point. It provides thus: -

> 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies in that person.
>
> 108. The proof a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

63. Both parties' claims are in the nature of special damages. In Hahn v Singh [1985] eKLR, the Court of Appeal (Kneller, Nyarangi, JJA and Chesoni, Ag. JA) held as follows: -

> " ...Special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act..."

64. On the claim for Kshs. 1,870,675.15/=, the Plaintiff produced job cards which had figures totaling to the claimed amount. However, there were no receipts to back the said amounts. A job card is neither a receipt nor evidence of expenditure. Even an invoice does not pass muster unless the same is endorsed "paid". The witness who testified on behalf of the Plaintiff confirmed that he was no present when the agreement was entered into and the subsequent repairs undertaken. In Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2000] eKLR, the Court of Appeal held as follows: -

> " ...With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for... What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word "PAID" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a pro forma invoice is given in respect of an advice sought from a supplier as to what the cost of the goods wanted would be i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet to be made. In either case, neither of the two documents amounts to a receipt..."

65. With no receipt or an invoice endorsed as above, the claim for Kshs. 1,870,675.15/= must fail.

66. On the claim of Kshs. 7,000,000/= being the loss of value of the trade in trucks, it was the Plaintiff's averment that as result of the bad state of the trucks and the chassis and engine numbers discrepancies, it was forced to sell the trucks as scrap metal and only managed to get Kshs. 3,000,000/=. It thus lost a sum of Kshs. 7,000,000/= which it was now seeking to recover from the Defendant.

67. For the Plaintiff to succeed, it was incumbent for it to produce at least evidence of sale of the units as scrap metal, assessment reports prior to sale, photographs etc. This was never done and all the Plaintiff did was to pluck a figure from the air and tell the court, this is what I have lost, award me the same.

68. There was no evidence of sale of any unit be it as scrap metal or otherwise. Though it was specifically pleaded, there was not prove at all. (See the Court of Appeal decision in David Bagaine v David Bundi [1997] eKLR). This claim similarly fails.

69. In totality, even if the Plaintiff had succeeded in proving that the contract had been breached by the Defendant, it would not have succeeded on the special damage claim based on the above assessment. The Plaintiff's claim thus fails in totality and the same is dismissed with no order as to costs.

70. On the counter-claim, the Defendant sought for a sum of USD 269,449.20 being the sum of lost profits due to loss of use of the three trucks from the date of engine failure until their release. Similarly, being a special damage claim, the Defendant was required to specifically plead the same and strictly prove the loss. In David Bagaine v David Bundi (above), the Court of Appeal held thus: -

> " ...We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can." The damages as pointed out earlier by us must be strictly proved..."

71. At paragraphs 22, 23 and 24 of the further amended statement of defence and counter-claim, the Defendant specifically pleaded its claim thereunder. In prove of the same, the Defendant produced an agreement dated 3/1/2008 between itself and a Ugandan company called Roofings Limited, statements dated 28/02/2009 and invoices for various periods between 9/06/2008 and 18/02/2009. There was also a schedule of loss of income for the three (3) trucks and bundle of invoices for diesel fuel consumed.

72. According to the Defendant, its reason for acquiring the ten (10) trucks was in furtherance of its transport business and more so the contract it had with Roofings Limited. This was confirmed by PW1. As a result of the detention of the three trucks, it lost income which the 3 trucks would have brought in had they been operating.

73. The court notes that in the warranty registration card and conditions at part D thereof which provides for charges as follows: -

> " SINOTRUK guarantees to replace the parts that must be replaced in the warranty period and deliver the parts to the ports where it belongs to the country registered in this Warranty Registration Card & Conditions, and will not undertake any other loss cost. For instance, the repair labour cost, economy and time lost due to nonuse of vehicle; stop vehicle fare; vehicle rents fare; lodging, meal, communication and travel fare, accident fare, outside the service shop fare, trail vehicle fare, clearance custom fare, tariffs, transportation in customer's country and so on." (Emphasis added)

74. Does this disclaimer avail itself to the Plaintiff? I am afraid it does not. The reasons are as follows; First, the genesis of the present dispute is the contract/agreement dated 7/05/2008. It is between the

Plaintiff and the Defendant. The Defendant is not privy to whatever arrangement the Plaintiff has with SINOTRUK. It is thus not bound by what SINOTRUK wants to avoid. In Gragan (K) Limited v General Motors (K) Limited & Another [2016] eKLR, the Court while dealing with an almost similar issue noted as follows: -

> " ...In addition, loss of user claim was expressly excluded from the warranty. The law is clear that courts cannot re-write contracts between parties. The court only enforces/interprets the contracts to give effect to the intentions of the parties to the agreement and not to deviate from the intention of the parties to a contract..."

75. Had the contract been between the Defendant and SINOTRUK, the above holding would have come to the Plaintiff's aid. However, that is not the case herein and therefore the exclusion clause fails.

76. Secondly, from job cards number 3077, 3083 and 3084, all the 3 trucks were ready for collection on 26/06/2008. This was way before the letter dated 9/07/2008 was sent. However, it had the Defendant to obtain a court order to have the trucks released and this only happened on 9/12/2008. If indeed the Plaintiff were repairing the trucks on goodwill, nothing stopped it from releasing the trucks on goodwill and thereafter pursue its claim.

77. The court is satisfied that indeed the Defendant lost the use of the three trucks for the period pleaded and since the agreement dated 3/1/2008 includes the schedule of applicable rates, the amount pleaded is well founded. I thus proceed to find that the Defendant proved its counter-claim to the required standard and I thus enter judgement for the Defendant as prayed in the counter-claim with interests at court rates from the date of filing suit.

78. Lastly on costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

79. Any departure from this trite position can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by

and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

80. The Defendant having succeeded in its counter-claim and with no evidence of any wrongdoing on its part, I see no reason why it should not be awarded costs of the counter-claim which I so award.

81. The upshot of the foregoing is as follows: -

a. The amended Plaint dated 23/11/2016 lacks merit and the same is dismissed with no orders as to costs.

b. The further amended Defence and Counterclaim dated 22/3/2023 is allowed as hereunder;

i. Judgment is entered in favour of the Plaintiff in the counterclaim against the Defendant in the counterclaim, in the sum of USD. 269,449.20 at an exchange rate of Kshs. 65 per USD.

ii. The sum attracts interests at court rates of 14% from the date of filing suit till payment in full.

iii. Costs awarded to the Plaintiff in the counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 15TH DAY OF MARCH, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

M/S Farha Advocate h/b for Saad Advocate for the Plaintiff

Busieka Advocate for the Defendant.

Barile, Court Assistant