

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 130 OF 2017

AFRICARRIER LIMITED.....PLAINITFF

VRS

MILLENIUUM COACH LIMITED.....DEFENDANT

JUDGMENT

B.K.PHILLIP,J

This case arises from an agreement for sale of Motor vehicles between by the parties herein. The plaintiff prays for judgment and decree against the defendant as follows;

- i. Payment of overdue and outstanding balance on hire purchase agreement for all of 6 vehicles at sum of USD 506,721.00/=.
- ii. Payment of Tshs. 300,000,000/= being general damages or as shall be assessed by the court.
- iii. Payment to the Plaintiff on breach of contract, business frustration in following up overdue payments and other ancillary business inconveniences caused by the said breach by the Defendant at sum of Tshs. 200,000,000/=.
- iv. Commercial banks interests of 25% per annum from the date of filing this suit until judgment.

- v. Court's interest of 12% per annum from date of judgment until full payment.
- vi. Costs of this suit be provided.
- vii. Any other relief this honourable court may think fit and just to grant.

The plaintiff alleged that on 10th December 2014, 2nd January 2015 and 13th July 2015, it entered into an agreement with the defendant for sale of six (6) motor vehicles (Golden Dragon Buses) with registration Nos. T110 DCS, T786 DCQ, T110 DEE, T786 DED, T110 DEN and T786 DEM at the agreed price of USD 125,000/= per vehicle and the defendant made an advance payment of a sum of USD 200,000/=. It is alleged in the plaint that it was agreed that, the remaining balance of USD 527,721/= plus financial interests to be paid at equal monthly installments effective from September 2015. It is the plaintiff's case that the defendant failed to comply with what was agreed and efforts to settle the matter amicably has failed, as a result the plaintiff has suffered financial losses and damages due to non-payment of the outstanding amount.

On the other hand the defendant refuted all of the plaintiff's claims. It alleged that all of the purchase price that was due for payment to the plaintiff was paid as agreed. The defendant also raised a counter claim praying for judgment and decree against the plaintiff as follows;

- i. That the plaint be dismissed with costs and judgment of the counterclaim be entered in favor of the defendant.

- ii. That the plaintiff be ordered return to the defendant buses with registration number T110 DEE, T110DEN, and T786 DCQ together with their registration cards.
- iii. That Plaintiff be ordered to pay the sum of Tanzania Shillings one Fifty Million (150,000,000) being costs for loss of business name and business itself.
- iv. The Plaintiff be ordered to pay interests on the decretal sum at 12% per year from the date of filing this case until full payments.
- v. The Plaintiff be ordered to pay general damages as assessed by the court.
- vi. The Plaintiff be ordered to pay costs of the counterclaim.
- vii. Any other relief(s) that this honourable court may deem fit and just to grant.

In its counterclaim the defendant alleged that the plaintiff unlawfully confiscated three buses, with registration Nos. T110 DEE, T110 DEN, and T786 DCQ as a result, the defendant suffered damages. The defendant also alleged that the plaintiff being the supply of the aforesaid buses, it failed to supply the required spare parts, thus causing non-functioning of the buses sold to the defendant, consequently, the defendant suffered losses.

The learned advocate Ngassa Ganja Mboje and Nickson Ludovick appeared for the plaintiff and defendant respectively. The following issues were framed for determination by the court;

- i) **Whether the parties complied with the terms of the sale agreement.**
- ii) **What reliefs are the parties entitled to?**

At the hearing of this case, both parties brought two witnesses each. As regards the first issue that is, **whether the parties complied with the terms of the sale agreement**, PW1, Mr. Nazir Ally Khalfan testified to the effect that sometimes in December 2014, January and July 2015 the plaintiff and the defendant entered into an agreement for sale of six Vehicles, (Golden Dragon buses) to wit; T110 DCS, T786 DCQ, T110 DEE, T786 DED, T110 DEN and T786DEM at the agreed price of USD 125,000,000/= per Vehicle making the total purchase price to be USD 750,000/=. That in July 2015 the parties agreed to consolidate the all agreements into one and the total amount of advance payment made by the defendants by 2015 was USD 200,000/=only, leaving an outstanding balance of USD 550,000/= and after deducting the discount which was USD 22,279/= the outstanding amount due for payment was 527,721/= and the same was supposed to be paid within twelve (12) months with effect from 1st September 2015. PW1 further testified that, the defendant was required to pay interests to a tune of USD 126,136/=, since the Motor Vehicles were sold on credit. It was the testimony of PW1 that sale agreement was on credit basis/Hire purchase agreement whereby the defendant at all material time was merely a bailee of the plaintiff until full payment of the agreed purchase price, thus the plaintiff being a bailor had the right to seize the motor vehicles in event of default by the defendant as

mechanism in compelling the defendant to make payment of the purchase price as per the agreement. Furthermore, PW1 testified that, the plaintiff is entitled to the payment of USD 506,721/= being unpaid balance and USD 200,000/= being estimated general damages and interests at a commercial rate of 25% from the date of filing the suit to the date of judgment and interests at court's rate of 12% per annum from the date of judgment to the date of full payment of the decretal sum.

The testimony in chief of PW2, Mr. Mustafa Rashidi was similar to the testimony of PW1 which I have summarized herein above. PW2 tendered in court the following exhibits; the business licence- Exhibit P1, Registration cards for the following motor vehicles, Six Motor vehicles T786 DEM, T786 DED, T110 DCS, T786 DCQ, T110 DEN and T110 DEE.-Exhibits P2 collectively and Millenium Coach's Statement of Account- Exhibit P3.

Upon being cross examined by the defendants advocate, PW2 told this court that the plaintiff signed three contracts with the defendant. The 1st installment of USD 60,000/= was paid by the defendant on 8th December 2014. Upon being shown a copy of a document titled "*letter of agreement*" that was attached to the plaint as "annexture A2", PW2 told this court that, the amount of USD 100,000/= indicated in the document as being a deposit paid to the plaintiff was not paid, but it was the amount intended to be paid by the defendant. On the other hand he admitted that the initial deposit of USD 60,000/= which appears in annexture A2 as part of the USD 100,000/= indicated therein as deposit paid is the one reflected in exhibit P3 as part of USD 200,000/= shown to have been paid by the

defendant. PW2 also alleged that the agreement (Annexure A2 to the plaint) is not binding. Furthermore, PW2 told this Court that one Salum signed the contract for the sale of the Motor Vehicles on behalf of the Millenium Coach Company Ltd, the defendant herein. Also, PW2 admitted that the plaintiff has three buses in custody and the remaining three buses are under the possession of the defendant. In addition to the above PW2 said that he is aware that the defendants used the motor vehicles for business purposes and that the plaintiff is the exclusive dealer for Golden Dragon buses. It sells spare parts of the same. When re-examined by his advocate, PW2 told this court that Exhibit P3 shows the status of the amount paid and it is prepared by the plaintiff's accounts department.

On the other hand DW1, Hasnein Salim Mohamed, testified that at different times the defendant bought six buses from the plaintiff , to wit T110 DCS, T786 DCQ, T110 DEE, T786 DED, T110 DEN and T786 DEM at a purchase price of USD 125,000/= for each bus without any interests. Furthermore, he testified that, transaction involving the sale of the buses was based on mutual understanding and trust. It was DW'1 testimony that the whole of the aforesaid purchase price for all buses was paid though the plaintiff refused to give the defendant the registration Cards for the buses. Furthermore, he testified that, the plaintiff used to receive payments without issuing receipts to the defendant. That some of the money was paid in cash and no receipts were issued, some were paid through the plaintiff's sister company known as Cont Cars as it was directed by the plaintiff. In addition to the above it was DW1's testimony

was to effect that the plaintiff confiscated three buses with registration Nos. T786 DCQ, T110 DEE and T110 DEN from the defendant without good cause, and caused embarrassment and loss of business to the defendant. DW1 further testified that the defendant claims for the three buses to be brought back and payment of compensation for loss of income as the aforesaid buses were used for transportation business for Mtwara-Dar es Salaam route. DW1 tendered in court two exhibits to wit, proforma invoice dated 30/6/2015 for Tshs. 2,360,000/= - Exhibit D1 and Tax Invoice dated 06 January 2017 for Tshs. 1,800,000/= - Exhibit D2.

Upon being cross examined by the plaintiff's advocate DW1 told this court that the buses were purchased on credit and for each set of buses , a down payment was made before receiving the buses. That the defendant made a down payment for all buses to tune of USD 375,000/=. The remaining balance was paid in twenty four (24) installments in which the defendant used to deposit USD 35,000 every month and in total the plaintiff paid a sum of USD 840,000/= but the total purchase price was Tshs 750,000/=. Furthermore, DW1 told this court that, the plaintiff is a registered title holder of the buses and holds the buses as security, and was the sole distributors of spare parts for the Golden Dragon buses.

During re-examination, DW1 told this court that the defendant paid USD 840,000/= in total, because there were interests charged on the purchase price.

The testimony in chief of DW2, Ms. Shehnaz Salim Akber was similar to DW1's testimony in chief. During cross examination, DW2 told this court the following; That she is the first Director of the defendant. A down payment of USD 375,000 was made for all three sets of the buses and the balance paid in 24 installments. There was a charge of 2% interests per month. The payments were made either by cash or through the bank and some money were paid through Conti –Car. Further, she testified that the Plaintiff used not issue receipts for the payments made instead, they were given reference numbers and notification of the payments. Furthermore, DW2 told this court that the plaintiff is the title holder of the buses thus partially the owner of the same. DW2 reiterated the prayers in the counterclaim. Upon being re-examined, she told this court that the buses were for transportation business for a route between Mtwara and Dar es Salaam.

In his closing submission Mr. Ganja, invited this court to hold that the plaintiff complied with the terms of the sale agreement by supplying the six buses as agreed and the defendant breached the terms of the sale agreement for failure to pay the purchase price as shown in Exhibit P3 and as agreed in the sale agreement. To cement his arguments he referred this court to section 37(1) of the law of contract Act (Cap. 345 R.E. 2002) and the case of **Jiwaji Vrs Jiwaji (1968) EA 547** among others. He insisted that the plaintiff have adduced sufficient evidence on the existence of the contract. Relying on the case of **Christopher Mwakalinga vrs Director of Africarriers Limited, Civil Case No. 105 of 2012** in which, Hon.

Muruke, J while allowing Africarrier's counterclaim in the case, she ordered the sale of the motor vehicles in event of the plaintiff's failure to pay the outstanding purchase claimed in the counterclaim plus interests, Mr. Ganja submitted that, the seizure of the three buses was due to default in payment of the purchase price as agreed, thus, it was pure compliance of the sale agreement.

On the other hand Mr. Dickson invited this court to hold that the plaintiff did not comply with the terms of sale agreement as he failed to give the defendant the registration cards of the buses, after the defendant had finished paying the purchase price. He further submitted that the plaintiff was obliged under the law to prove that the defendant paid a sum of USD 200,000/= only and left an outstanding amount to tune of USD 506.721/=. He referred this court to Section 110(1) (2) , 111 and 112 of the Tanzania Evidence Act Cap 6, and a number of cases among them being the case of **Attorney General and 2 others Vrs Eligi Edward Massawe and 104 others, Civil Appeal No.86 of 2002** (unreported) and **Africarriers Limited Vrs Millenium Logistics, Commercial Case No. 131 of 2017** (unreported), in which this court (Hon. Mruma, J) dismissed the plaintiff's claims, which is quite similar to the case in hand on due to the contradictions in the plaintiffs evidence.

From the submission made by the learned Advocates Ganja and Nickson, I have noted that there is dispute on which party has the burden of proof on whether the parties complied with the terms of sale agreement in particular the issue of payment of the purchase price. It has to be noted

that in this case the defendant raised a counterclaim, therefore in my considered opinion, each side needs to prove its case, the plaintiff has to prove what it pleaded in the plaint while the defendant has to prove what it pleaded in the counterclaim, because a counterclaim is a plaint on part of the defendant, thus the provisions of section 110 (1) of the evidence Act is applicable to both sides. The provisions of section 110(1) of the law of evidence Act states clearly 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.

Now, starting with the plaintiff's case, In order to determine whether the parties complied with the terms of the sale agreement, it is obvious that, this court has to identify those terms of the sale agreement. In this case no written agreement between the parties has been tendered in court, however looking at the testimonies made by all witnesses, (PW1, PW2, DW1 and DW2), it is evident that the plaintiff and the defendant entered into the sale agreement for six buses (T110 DCS, T786 DCQ, T110 DEE, T786 DED, T110 DEN and T786 DEM) as both sides are not in dispute on the existence of the sale agreement and the six buses. Exhibit P2, shows that the plaintiff is the title holder of the buses while the defendant is the owner. The evidence adduced by all witnesses also, show that the buses were sold in three sets and the agreed price was USD 125,000/= for each bus, thus the total purchase price for all the buses is USD 750,000/=. The terms of the sale agreement pertaining to the payment of the purchase price, such as when were the installments supposed to be paid, at what

amount and how much was the initial payment are in controversy. The testimonies of PW1 and PW2 are to the effect that the plaintiff paid advance payment of USD 200,000/= only and the remaining balance was supposed to be paid within twelve months from September 2015, while DW1 and DW2 testified that before receiving the buses the defendant paid a down payment of USD 375,000/= and the remaining balance was supposed to be paid in 24 installments. Furthermore, DW1 and DW2 testified that every month the defendant used to pay USD 35,000/= and managed to finish paying the whole of the purchase price as agreed. Going by the assertion of plaintiff's witnesses, the whole of the purchase price was supposed to be paid in full by August 2016. The plaintiff has the burden of proof of the allegation that the defendant paid USD 200,000/= only and the alleged terms of the sale agreement that the outstanding amount was supposed to be paid in equal installments from September 2015 for a period of 12 months as well as proofing that the same were not complied with by the defendant, so as to justify its claims in the suit.

Upon perusing the pleadings, I noted that the plaintiff attached into the plaint two documents one titled "*letter of agreement*" dated 2nd January 2015 and the second one titled "*Letter of agreement for lease*", dated 13th July 2015, both are marked as annexure A-2 collectively. These documents could have been of help in establishing the terms of the sale agreement on the mode of payments of the purchase price they indicate the net amount due and the amount for the monthly installment, but none of them was tendered in court for reasons not disclosed by the plaintiff,

consequently no any agreement was produced in court which could indicate to this court the terms of agreement pertaining to the mode of payments of the purchase price. I have noted that when PW2 was cross examined on the contents of one of these documents (Annexure "A2"),he recognized it and told this court that it was signed on 2nd January, 2015 by both the buyer and the seller, though he contended that it is not binding to the parties. He could not say why the same is not binding while he admitted that one of figures indicated in that document (USD 60,000/-) is the same figure reflected in Exhibit P3.Also, during cross examination PW2 told this court that one Salim Signed the sale agreement on behalf of the plaintiff. In fact, in paragraphs 5 and 6 of the plaint the plaintiff alleged the existence of a written agreement. The plaintiff's deliberate decision not to tender in evidence, the said annexure 'A2' which have been referred in paragraph 5 and 6 of the plaint has weakened the plaintiff's case in proving the terms of the sale agreement before this court. Under the circumstances this court draws adverse inference to the plaintiff for the said deliberate move not to tender Annexure 'A2' to the plaint after having referred them to the plaint and attaching them thereto.

The only documentary evidence concerning the payment of the purchase price that has seen tendered in court is Exhibit P3. However, I have noted that the testimonies of PW1 and PW2 are contradictory to Exhibit P3. PW1 and PW2's testimony is to the effect that the sale agreements were three. They were made sometimes in December 2014, January and July 2015, and thereafter they were consolidated. The advance payment made by the

defendant is alleged to be USD 200,000/=only . In fact the plaint shows that the three agreements were made on 10th December 2014 , 2nd January 2015 and 13th July 2015.Exhibit P3 shows that USD 200,000/= was paid between 8th December 2014 and 25th June 2015, that means the 1st installment was made before the 1st agreement was entered into that is 8th December 2014 and the third advance payment was made before the third agreement was entered into that is 25th June 2015. The above contradictions make the information /datas contained in Exhibit P3 questionable and doubtful. Thus, I find myself unable to rely on the contents of Exhibit P3 as far as the issues of payments of the purchase price is concerned. Due to the above contradictions pointed out on the evidence tendered by the plaintiff, it is the finding of this court that, since the evidence adduced by the plaintiff have not been able to establish the agreed terms of sale agreement as far as the issue of payment of the purchase price is concerned which is the major issue in controversy in this case, in view of the contradictions pointed herein above, there are no basis for this court to answer the first question in the affirmative. Since, the first issue has not being answered in the affirmative, it goes without saying that the plaintiff has failed to prove its case to the standard required by law. I hereby dismiss the plaintiff's case.

As regards the counterclaim, according to the testimonies of DW1 and DW2 as summarized herein above, the initial deposit made by the defendant was USD 375,000/= and the remaining purchase price was supposed to be paid within 24 months. DW1 and DW2, did not bring any

documentary evidence to prove the payment of the purchase price, despite the fact that in their testimonies insisted that some of the payments were made through the Bank. Under normal circumstances the defendant's witness were expected to tender in court at least some of the pay-in-slips for some of the money deposited in the Bank. Surprisingly, DW1 and DW2 failed to bring in court any pay-in slip. The allegations by DW1 and DW 2 that the plaintiff's used not to issue any receipt against payments cannot be an excuse for failure to bring even a single pay-in-slip evidencing the payment of the purchase price made at the bank. During cross examination DW1 told this court the pay-in-slips from the bank for the money deposited at the bank were at her office. No convincing reason was adduce for failure to tender the receipts in court. Also, DW1 and DW2 did not tender any written sale agreement to prove the alleged modality in the payment of the purchase price. Exhibit D1 and D2 are all irrelevant in this case as they are invoices for windscreen and Gear Box respectively while in this case there is no any issue on the payments for spare parts.

In the circumstances, it is my settled view that the defendant has failed to prove that it paid all of the purchase price for the three motor vehicles which were confiscated by the plaintiff. I had said earlier in this judgment that each part has a burden to prove its case. For avoidance of doubt, let me make it clear that the plaintiff's failure to prove its case does relieve the defendant from proving its case (counterclaim). In other words, the plaintiff's failure to prove its case does not mean that the defendant's claims are meritorious. Under the circumstances, it is evident that the

defendant failed to prove its case. Consequently the counter claim is dismissed in its entirety. I give no order as to costs.

Dated at Dar es Salaam this 10th day of September 2019



A handwritten signature in black ink, appearing to read "B.K. Phillip", written over a horizontal line.

B.K. PHILLIP

JUDGE