Maritim v Ngeno (Civil Appeal 16 of 2022)
[2024] KEHC 13169 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 16 OF 2022

RL KORIR, J

OCTOBER 29, 2024

BETWEEN

RICHARD MARITIM ..... APPELLANT

AND

ANNAH CHEBET NGENO ..... RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate, Kiniale L. at the Principal Magistrate's Court at Bomet, Civil Suit Number 23 of 2019)

JUDGMENT

1. The Appellant (then Plaintiff) sued the Respondent (then Defendant) for specific performance of the contract for the sale of motor vehicle registration number KBW 132L (Make Isuzu NKR). The Respondent denied the Appellant's allegations and counterclaimed against the Appellant citing breach of trust.

2. The Appellant called two witnesses before closing his case while the Respondent testified in person.

3. In its Judgment delivered on 14th March 2022, the trial court dismissed the Appellant's claim. The trial court further ordered the Appellant to release motor vehicle registration number KBW 132L (Make Isuzu NKR) to the Respondent.

4. Being aggrieved with the Judgment of the trial court, the Appellant filed its Memorandum of Appeal dated 24th March 2022 and relied on the following grounds:-

    I. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence thus arriving at a wrong Judgement.

    II. That the learned trial Magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at a wrong decision.

III. That the learned trial Magistrate erred in law and fact by failing to take concise of the fact that the balance of the monies payable to the Respondent were paid directly to the loan account in Equity Bank which thus enabled the Respondent clear the car loan and have the log book released to her as per the terms of the Agreement.

IV. That the learned trial Magistrate erred in law and fact by dismissing the Appellant's suit against the Respondent herein with costs.

V. That the learned trial Magistrate erred in law and fact by allowing the Respondent's counter claim with costs partially when no sufficient evidence had been brought before court.

VI. That the learned trial Magistrate erred in law and fact by failing to weigh all the evidence placed before her and/or relying on insufficient evidence.

VII. That the learned trial Magistrate erred in law and fact by failing to consider submissions by the Appellant.

VIII. That the learned trial Magistrate erred in law and fact in failing to be guided by recent court awards thus arriving at unconsciously wrong decision.

IX. That the learned trial Magistrate erred in law and in fact in failing to consider that the contract was valid and binding upon the parties.

X. That the learned trial Magistrate erred in law and in fact in failing to enforce the said contract.

XI. That the decision of the learned trial Magistrate as a whole contained in the Judgement dated 14th March 2022 is legally untenable, against the weight of evidence and ought to be set aside.

5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.

The Plaintiff's/Appellant's case.

6. Through his Plaint dated 28th February 2019, the Appellant stated that he agreed to buy motor vehicle registration number KBW 132L (Make Isuzu NKR) from the Respondent on 23rd December 2015 for Kshs 1,950,000/=. That the Respondent had since declined to avail the logbook and facilitate the transfer of the subject motor vehicle.

7. The Appellant prayed for specific performance of the contract and an order compelling the Respondent to avail the subject motor vehicle's logbook.

The Defendant's/Respondent's case

8. Through her statement of Defence and Counterclaim dated 21st March 2019, the Respondent denied that she agreed to sell the subject motor vehicle to the Appellant.

9. The Respondent stated that she defaulted in servicing her loan and the subject motor vehicle was repossessed by the bank. That the Appellant assisted her in securing its release by paying Kshs 250,000/= as part of offsetting her loan. She then handed possession of the motor vehicle to the Appellant.

10. It was the Respondent's case that she cleared her loan obligations but the Appellant had refused to return her vehicle. She claimed breach of trust and loss of user.

The Appellant's submissions.

11. Through his submissions dated 25th July 2023, the Appellant submitted that the trial court erred when it failed to enforce a valid contract that was binding to all parties. That the Respondent failed to prove coercion, undue influence, fraud or misrepresentation that would vitiate the contract.

12. It was the Appellant's submission that a court should not rewrite a contract between parties. That by awarding repossession and ownership back to the Respondent, the trial court attempted to rewrite the Sale Agreement between them. He relied on Samuel Kamau Macharia vs Daima Bank Limited (2008) eKLR. It was his further submission that having proved that a valid contract existed between them, it was only fair that the court enforces the said contract.

13. The Appellant submitted that the trial court erred when it dismissed his case and allowed the Respondent's counter claim. That the Respondent closed her case without calling any witnesses. He further submitted that the Respondent failed to prove her case on a balance of probability.

14. It was the Appellant's submission that the trial court awarded victory to the party that breached the contract instead of awarding victory to the party that suffered the breach. That it was conditional that upon full payment of the purchase price, the Respondent surrender the logbook of the subject motor vehicle. It was his further submission that the Respondent breached clause 6 of the Sale Agreement and it was beyond peradventure that the Respondent breached the terms of the Sale Agreement. That he was entitled to general damages for breach of contract and relied on Peter Umbuku Muyaka vs Henry Sitati Mmbasu (2018) eKLR.

15. The Respondent failed to file their submissions despite being granted time extension to do so.

16. I have gone through and carefully considered the Record of Appeal dated 26th May 2023 and the Appellant's written submissions dated 25th July 2023. The following issues arise for my determination:-

    i. Whether the Sale Agreement between the parties was valid.

    ii. Whether the Sale Agreement was enforceable.

    iii. Whether the Respondent merited the prayers in her counter claim

        i. Whether the Sale Agreement between the parties was valid.

17. The Appellant (PW1) stated that he entered into a Sale Agreement with the Respondent for the sale and purchase of the subject motor vehicle. Aaron Ngeno (PW2) who was an Advocate testified that he prepared the Sale Agreement and the same was executed on 23rd December 2015 by the Appellant and the Respondent. He produced the Sale Agreement as P.Exh 2.

18. On the other hand, the Respondent (DW1) denied entering into any Sale Agreement with the Appellant.

19. The question then becomes whether or not a Sale Agreement existed in the first place. I have looked at the evidence and I am satisfied that there existed a Sale Agreement. The Sale Agreement (P.Exh 2) was executed by the Appellant and the Respondent on 23rd December 2015. Advocate Aaron Ngeno (PW2) testified that he personally prepared the Agreement in his office and the same was executed by both parties. His testimony was uncontroverted upon cross examination. I am not convinced by the Respondent's contention that she did not enter into any Sale Agreement with the Appellant. She did not produce any evidence to support her position and as such her denial remained an allegation.

20. The next question was whether the contract was valid and enforceable. Section 2 (1) of the *Law of Contract Act*, Cap 23, Laws of Kenya provides that:-

> Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya:

Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal.

21. The principles in contract formation and execution were espoused in the case of G. Percy Trentham Ltd vs Archital Luxfer Ltd (1993) 1 Lloyds Rep 25, Where Lord Steyn stated thus: -

> " .....it is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See Brogden –v- Metropolitan Railway [1877] 2 AC 666; New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd. [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; Gibson v. Manchester City Council [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See British Bank for Foreign Trade Ltd. v. Novinex [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance..."

22. Similarly, the Supreme Court of the United Kingdom in the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) (2010) UKSC14,(45) held as follows:-

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they

regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement." (Emphasis mine)

23. In Omar Gorhan vs Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd (2020) eKLR, Nyakundi J. stated as follows: -

> "…….The appellant was therefore expected to proof on a balance of probabilities the following essential elements to a lease agreement with the respondent:
>
> a. An offer.
>
> b. An acceptance.
>
> (c) Any consideration.
>
> d. Any intention to create legal relations.
>
> The essential components of a contract as was observed by Harris JA in Garvey v Richards {2011} JMCA 16 ought to ordinarily reflect the following principles:
>
> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

24. I have looked at the Sale Agreement (P.Exh 2) and I have noted that the subject of the Sale Agreement was the subject motor vehicle. The Appellant made an offer to buy the motor vehicle for Kshs 1,950,000/= being the consideration and the Respondent accepted the terms of the Sale Agreement by executing the said Agreement on 23rd December 2015. The Agreement became binding to both parties the moment they all executed it. It is my view that the Sale Agreement satisfied all the elements of a Contract and I find that the Sale Agreement (P. Exh 2) was valid.

ii. Whether the Sale Agreement was enforceable.

25. Having found that the Sale Agreement was valid, it is salient to note that if one of the elements (offer, consideration and acceptance) was missing then the Sale Agreement would be unenforceable. Of particular interest to this court is the issue of consideration as it was the main dispute in this Appeal.

26. The Appellant bore the burden of proving his case and by extension proving that he paid the full purchase price of the motor vehicle to justify his continued possession. Section 107 of the *Evidence Act* describes the burden of proof as follows:-

1. 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.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

27. In the case of Mbuthia Macharia vs Annah Mutua Ndwiga & Another (2017) eKLR, the Court of Appeal stated that: -

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

28. The Appellant (PW1) stated that the Respondent requested him to buy the subject motor vehicle and he bought the same for Kshs 1,950,000/=. That out of the purchase price (Kshs 1,950,000/=) he was supposed to pay Kshs 250,000/= to the Respondent and the balance to Equity Bank. PW1 further stated that when the vehicle was taken by the bank, he paid Kshs 377,000/= to the bank for it to be released and the balance of Kshs 1,323,000/= was to be paid by monthly instalments of Kshs 82,000/=. He stated that he paid the whole balance by monthly instalments.

29. The Appellant called a witness Aaron Ngeno (PW2) who produced a Sale Agreement dated 23rd December 2015 as P.Exh 2. I have looked at the Sale Agreement and it confirmed that the purchase price of the subject motor vehicle was Kshs 1,950,000/= and that by executing the Agreement, the Respondent acknowledged receipt of Kshs 377,000/=. The Sale Agreement further confirmed that the Appellant was to take over the Respondent's loan at Equity Bank and the balance of Kshs 1,323,000/= was to be paid in monthly instalments of Kshs 82,000/= each.

30. On the other hand, the Respondent stated that she was offered a loan facility by Equity Bank for the purchase of the subject motor vehicle sometime in July 2013. That after purchasing the said motor vehicle, she begun servicing her loan with monthly instalments of Kshs 81,075/= until the year 2015 when she began experiencing financial difficulties. She further stated that her bank begun the recovery process in December 2015 by attaching the subject motor vehicle. She produced an Offer Letter and a Bank Statement as D. Exh 1 and D.Exh 2 respectively.

31. It was the Respondent's case that she approached the Appellant who agreed to pay Kshs 257,890/= to her bank to have the motor vehicle released. That the motor vehicle was released to her and she delivered possession of the motor vehicle to the Appellant so that he could use it to recover his money. It was her further case that she had an existing contract with Kabianga Tea Factory where the subject motor vehicle would deliver tea leaves.

32. The Respondent stated that the Appellant used the subject motor vehicle to recover his money and the vehicle was also used to deliver tea leaves to Kabianga Tea Factory. That she continued to service her loan with the proceeds from Kabianga Tea Factory where she paid Kshs 82,000/= until payment in full. She further stated that after the Appellant had recovered his money he refused to return her vehicle.

33. I have looked at the Offer Letter (D.Exh 1) and it showed that the Respondent was offered a loan facility for the purchase of a new Isuzu NKR truck. The offer was made on 31st July 2013. I have also looked at the Respondent's Bank Statement (D. Exh 2) and it showed on 23rd December 2015, Kshs 243, 695.72/= and Kshs 45,000/= was debited on the Respondent's account for loan repayment and repossession charges. This gave credence to the parties' assertion that the motor vehicle was repossessed by the bank and was later released after a portion (Kshs 250,000/=) of the loan balance was paid.

34. The Appellant's contention was that after the motor vehicle was released, he took over the Respondent's loan obligations and begun paying monthly instalments of Kshs 82,000/= until payment in full. The Respondent on the other hand stated that she used her proceeds from Kabianga Tea Factory to pay monthly instalments till payment in full.

35. The Bank Statement (D. Exh 2) reveals that from December 2015, Kabianga Tea Factory deposited Kshs 206,308/= on 23rd March 2016, Kshs 157, 234.90/= on 21st May 2016, Kshs 107,208/= on 21st July 2016, Kshs 106,631/= on 21st December 2016, Kshs 153, 724/= on 19th January 2017, Kshs 210,963.50/= on 18th February 2017 and Kshs 181,078.20/= on 18th March 2017. These remittances totalled Kshs 1,123,147.10/=.

36. The Appellant directly deposited money in the Respondent's bank account on 21st April 2017 for Kshs 155,000/= and on 27th April 2017 for Kshs 82,500/= making a total of Kshs 237,500/=.

37. From the above evidence, it is clear to me that proceeds from Kabianga Tea Factory substantially cleared the Respondent's loan obligations as exhibited by the entries above. On the Appellant's part, this court acknowledges that he helped the Respondent with her loan obligations by depositing money in her account on two occasions. He has not shown that he paid the full balance as he alleged.

38. The burden of proof was with the Appellant and he failed to discharge it. He tried his case in the trial court but did not adduce any evidence. The burden did not shift to the Respondent. The Respondent who was the Plaintiff in the counter claim discharged her burden of proof by trying her case and producing evidence (D.Exh 1 and D. Exh 2).

39. As earlier stated, if one of the elements of a contract is missing, then the contract becomes unenforceable. In the present case, the Appellant was unable to prove consideration and in the circumstances I agree with the trial court that the Sale Agreement was rendered void and unenforceable and therefore this court cannot grant the prayers sought by the Appellant.

iii. Whether the Respondent merited the prayers in her counter claim.

40. The Respondent claimed ownership and loss of user. In Samuel Kariuki Nyangoti vs Johaan Distelberger (2017) eKLR , the Court of Appeal stated:-

> " The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases." (Emphasis mine)

41. Similarly, I am persuaded by Mwita J. in Jackson Mwabili vs Peterson Mateli (2020) eKLR, where he held:-

> " .....loss of user of profit is in the nature of general damages and is proved on a balance of probabilities....."

42. As I have already found, the subject motor vehicle was in the possession and usage by the Appellant. While in the Appellant's possession, it was still used to deliver tea leaves to Kabianga Tea Factory which proceeds were used to clear the Respondent's loan. I am not satisfied that the Respondent merits the claim for loss of user. In any event, her prayer was not specific from which time she claimed loss of user. Was it for the whole period or was it after she had cleared her loan obligations and the vehicle was still in the Appellant's possession. Therefore I dismiss the Respondent's prayer for loss of user.

43. Regarding the prayer for the return of her motor vehicle, it was not in dispute that the same was in the Appellant's possession. It was also not in dispute that the loan obligation no longer existed. On this issue, the trial court held:-

> " In the circumstances, I would have ordered that the Plaintiff be refunded the Kshs 377,000/ = mentioned in the contract out of which only Kshs 355,000/- was confirmed in the statement of account but the court notes the Plaintiff has been in possession of the lorry and has been utilizing the said lorry since 2016 until now about 6 years down the line. That was sufficient for the Plaintiff to recover all the monies due to him from the Defendant.....
>
> .....I also grant prayer 1 of the counter claim that the same be released to the Defendants with immediate effect....."

44. I respectfully disagree with the trial court's position on the issue of refund. The Respondent admitted that the Appellant paid her Kshs 257,890/= so that the subject motor vehicle could be released by the bank. As earlier stated, the Appellant directly deposited Kshs 155,000/= and Kshs 82,500/= on 21st and 27th April 2017 respectively. This brings the total payment made by the Appellant and proven to Kshs 495,390/=. It is in the interest of justice and equity that if the Respondent was going to recover possession of the motor vehicle, then the Appellant be refunded the money that he clearly paid to halt the repossession of the motor vehicle by the Bank.

45. In the end, the Appeal dated 24th March 2022 succeeds partially as the Respondent is ordered to refund the Appellant a total of Kshs 495,390/=.

46. For clarity, the order of the trial court that the Appellant release the subject motor vehicle to the Respondent is upheld.

47. Each party shall bear their own costs in this Appeal while the costs in the suit remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 29TH DAY OF OCTOBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Mugumya for the Appellant, N/A for the Respondent and Siele (Court Assistant).