Muu v Aberdare Maize Milling Co Ltd & 4 others (Civil Appeal E025 of 2021) [2023] KEHC 21902 (KLR) (17 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E025 OF 2021

FN MUCHEMI, J

AUGUST 17, 2023

BETWEEN

WILLIAM MWINGA MUU ..... APPELLANT

AND

ABERDARE MAIZE MILLING CO LTD ..... 1ST RESPONDENT

PATRICK KINYUA MUNYITO ..... 2ND RESPONDENT

JANE MUTHONI KINYUA ..... 3RD RESPONDENT

PAUL NGATIA KINYUA ..... 4TH RESPONDENT

GEORGE MITHAMO KINYUA ..... 5TH RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. W. Kagendo (CM) delivered on 19th May 2021 in Nyeri CMCC No. 196 of 2019)

JUDGMENT

Brief facts

1. This appeal arises from the judgment in Nyeri CMCC No. 196 of 2019 where the appellant's claim was for Kshs. 2,080,000/- as damages for breach of contract arising from an agreement dated 26th August 2015 for the sale of motor vehicle registration number KAU 045L. The trial court found that the appellant did not prove his case beyond reasonable doubt but awarded Kshs. 1,000,000/- as refund of part of the purchase price of the said motor vehicle.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in her finding that the respondents had failed to deliver a good title and motor vehicle thereby failing to award the appellant the just recompense stipulated in the agreement;

    b. The learned magistrate erred in fact and in law in taking into account irrelevant matter and failing to take into account relevant matters that led her to the wrong conclusion.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. Pursuant to an agreement dated 25th August 2015, the appellant purchased from the respondents jointly and severally a motor vehicle registration number KAU 045L for a consideration of Kshs. 1,600,000. The appellant submits that he paid the entire purchase price on the said date and upon taking possession.

5. It was a term of the said agreement that the sellers were to warrant a good title, would indemnify and keep indemnified the purchaser for any defect that may arise from want of good title. For a good measure, the parties agreed that should any of them be in breach, a liquidated sum of damages equivalent to 30% of the purchase price would be due. The parties further agreed that the completion would be within 60 days to enable the seller perfect the documentation.

6. The appellant submits that on 21/6/2017 whilst he was operating the motor vehicle, it was seized from him by auctioneers. He further states that he learnt that the vehicle had been charged to Uwezo Dtm Limited under whose instructions the repossession had taken place. The appellant submits that he proceeded to demand the refund of the purchase price and penalties for a failed consideration.

7. The appellant further submits that the respondents filed their defence and counterclaim whereas it was pleaded that the appellant in purchasing the vehicle had agreed and undertook to be servicing the defendants' debt with Uwezo Dtm Limited. On the counterclaim, it was the respondents' case that the appellant should account for the sum he made in profits since taking possession of the motor vehicle. The appellant argues that when it was time to testify, the defendants witness abandoned the allegation that he had undertaken to pay the debt. The witness however posited that the lorry must have made profits which the appellant ought to account to the defendants and or set off and pay over the balance.

8. The appellant submits that the trial court was of the view that he had failed to substantiate his case against the defendants. The court observed that the claim of fraud could not pass muster while one of breach of contract could not be pleaded together or in the alternative and made a consolation award of Kshs. 1,000,000 with no orders as to costs.

9. The appellant argues that the cause of action in this matter emanated from a breach of contract to wit, the agreement for sale. It was about total failure of consideration. The issue of fraud pleaded were acts of deceit that the plaintiff claimed to have been used as enticements to enter into contract. The appellant further argues that as far as the evidence was led, there was an admission or at least a unanimity that the sellers did not convey what had been bargained for.

10. The appellant submits that parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. It is not the business of courts to rewrite contracts for

the parties. The appellant argues that the agreement dated 26/8/2015 provided that the seller would warrant possession of good title notwithstanding the fact that the log book was to be held by Dtm Uwezo for two months, which they did not.

11. The appellant states that the agreement as in contract law provided the remedy, refund of the amount paid and an ensuing penalty. Therefore whether he made a profit as alleged by the defendants or incurred further costs on the said motor vehicle were non-issues. He thus argued that the trial court in entertaining those issues fell into misdirection and reached an unsupportable conclusion.

12. The appellant further submits that it was wrong for the court to take into account the period he had the lorry as this assumed that such possession was profitable when such had been alleged and not proved as the basis of the counter claim. It was a mere conjecture with no basis in law. Even by parity of reason, the court would have found that the defendants had received the entire purchase price which they had been utilizing profitably for the entire period.

13. The appellant relies on the decision in *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another* [2011] eKLR and argues that save for special circumstances where equity might be prepared to relieve a party from a bad bargain, it is no part of equity's function to allow a party to escape from a bad bargain. The appellant further argues that the respondents filed a counterclaim against him for monies during the time he had been using the said motor vehicle. Furthermore, they did so without performing their part of the contract. Therefore the trial court having dismissed the counter claim ought to have enforced the terms of the contract.

14. The appellant argues that it is the duty of the party who defaults the contract to make it whole. Instead, the respondents misrepresented facts to him that they had good title to pass and that he would have and enjoy quiet possession of the motor vehicle. The appellant thus argues that pursuant to the Section 14 of the *Sale of Goods Act*, he cannot recover the price from the respondents as the consideration for its payment has totally failed. He further argues that the respondents ought to return him to his initial position and pay the liquidated damage due under the agreement. As such, the trial court ought not to have interfered by rewriting the terms of their agreement since the respondents never proved that the contract was illegal, void, voidable or unconscionable. Therefore, the appellant prays that the court allow the appeal with costs and grant him costs in the trial court.

The Respondents' Submissions

15. The respondents submit that the appellant did not prove his case on a balance of probabilities. They argue that the appellant did not prove that they made fraudulent misrepresentations to the appellant which made him enter into the agreement dated 26/8/2015. The appellant in his plaint alleged that the respondents presented to him an old logbook and failed to disclose that the motor vehicle was co registered with a financier. The respondents state that from the record, the old log book shows that motor vehicle registration number KAU 045L was registered in the names of the 1st respondent and Consolidated Bank.

16. Further the respondents state that the fact that the logbook was in the custody of the Dtm Uwezo was also disclosed in the agreement. From the foregoing, the respondents argue that the allegation made by the appellant that they hoodwinked him with an old log book has no basis in that there was no logbook presented to the appellant as the log book for the vehicle was in custody of Dtm Uwezo which fact was within the appellant's knowledge.

17. The respondents submit that a prudent purchaser would have been expected to conduct a search to establish the status of the motor vehicle. No explanation is given why the appellant took more than two years without asking for a log book. The conduct of the appellant shows that there was a special

relationship between the parties herein. It is the respondents' submission that the special relationship is that the appellant had undertaken to pay the outstanding loan as stated in the defence.

18. The respondents state that as rightly held by the trial magistrate the sale agreement was based on some future happening. The motor vehicle was delivered to the appellant he had all the opportunity to examine the same and the relevant documents as envisaged under Section 35 of the *Sale of Goods Act*. The appellant accepted the same and by his conduct he had no issue with the motor vehicle and the documents. He retained the motor vehicle knowing its status and as such he accepted the same as was envisaged under Section 36 of the *Sale of Goods Act*. The respondents thus argue that the suit filed before the trial court was an afterthought and has no basis at all.

Issue for determination

19. The main issue for determination is whether the appeal has merit.

The Law

20. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

21. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

22. The Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

23. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appeal has merit.

24. Section 107 of the *Evidence Act* Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts. He who alleges must prove. This degree of prove is well enunciated in the case of *Miller vs Minister of Pensions*

[1947] cited with approval in *D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati* [2014] eKLR. The court stated:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

25. In this appeal, the appellant contends that the respondents fraudulently misrepresented facts to him that they had the capacity to transfer the suit motor vehicle knowing too well that they did not. He listed the particulars of fraud in his plaint dated 16th July 2019 which basically provide that the respondents did not disclose to him that the motor vehicle was co-registered with a financier. He further stated that the respondents handed him an old generation log book to hood wink him that there are no record of mortgage. The record of appeal reveals that the appellant and the 1st respondent entered into an agreement dated 26th August 2015 for the purchase of motor vehicle registration number KAU 045L. The purchase price of the motor vehicle was Kshs. 1,600,000/- to be paid on 27/8/2015. On further perusal of the agreement I have noted that the seller undertook to ensure that he hands in a duly executed transfer in favour of the purchaser, the PIN Certificate and the initial log book to the motor vehicle. It was a further term of agreement that the seller undertook to hand over the log book to the purchaser two months from 25/8/2015, but in the meantime parties agreed that the log book shall remain in the custody of Dtm Uwezo for two months. From the terms of the agreement, it is evident that the appellant did not tell the truth that he knew that the log book was in the custody of Dtm Uwezo as a security for a loan borrowed by the respondents that had not been repaid. It was a term of the agreement that a duly executed transfer was to be handed over to the appellant within two (2) months. The respondents may have estimated that two (2) months from the date of the agreement was sufficient time to clear the outstanding loan.

26. The appellant alleged that the respondents were guilty of fraudulent misrepresentation. Upon perusal of the parties, it is clear that at the time of entering the agreement both parties were aware of the encumbrance in the log book. As such, the appellant failed to prove any fraud on part of the respondents. It was clear in the agreement that the original logbook was held by Uwezo D.T.M as a security of an outstanding loan.

27. The other issue is what happens to the purchase price which was paid fully by the appellant upon execution of the agreement. The trial court awarded the appellant kshs.1,000,000/- taking into account the period the appellant had used the lorry for business. Evidently, the appellant had made profits for the three and a half years he used the lorry. There is evidence to show that the appellant was fully aware of the encumbrance on the vehicle but may have been hopeful that the respondents would sort out the problem without delay.

28. In my considered view, the trial magistrate meted out justice to the appellant for ordering the refund of part of the purchase price, even though his case was quite shaky. The counter-claim of the respondents for the appellant to account for the profits made for the period the appellant had the lorry was dismissed. The respondents were satisfied with the judgement and did not appeal.

29. In conclusion, I find that the appellant has not satisfied this court in regard to any of his grounds of appeal. In my considered view, this appeal has no merit and it is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 17th day of August , 2023