



**Ragwe v Abongo (Civil Appeal E028 of 2020)
[2023] KEHC 26156 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E028 OF 2020
RE ABURILI, J
NOVEMBER 29, 2023**

BETWEEN

CONSOLATA RAGWE APPELLANT

AND

JOANES OGWENO ABONGO RESPONDENT

*(An appeal arising out of the Judgement & Order of the Honourable
Lina Akoth in the Chief Magistrate's Court at Kisumu delivered
on the 26th November 2020 in Kisumu CMCC No. 133 of 2019)*

JUDGMENT

Introduction

1. The appellant herein Consolata Ragwe vide a plaint dated 5th March 2019 instituted suit against the respondent claiming for specific performance of payment of Kshs. 200,000 which was allegedly the agreed purchase price for motor vehicle registration no. KAV 869P, as well as the interest on the sum above and costs of the suit.
2. It was the appellant's case that she entered into an oral agreement with the respondent for purchase of the suit motor vehicle at Kshs. 200,000 and after payment was not forthcoming from the respondent, they reduced the oral agreement into a written contract, to wit the sale agreement executed by the parties hereto on the 4th April 2018, wherein the respondent was to pay the purchase price within nine months but that he respondent failed to pay the same despite being in the possession of the suit motor vehicle.
3. In his defence, the respondent stated that he did not make the payments due to economic hardship and that later he was informed by one Bishop Peter Otieno that the suit motor vehicle belonged to him.



4. In her judgement, the trial magistrate held that the appellant failed to prove that the suit motor vehicle was hers in the face of the defence by the respondent and as such, the contract was not breached by the respondent but was void ab initio. The trial magistrate dismissed the appellant's suit.
5. Aggrieved by the said decision, the appellant filed her memorandum of appeal dated 10th December 2020 and filed on the 21st December 2020 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred on law and fact in making a decision that the appellant wasn't the owner of motor vehicle KAV 869P contrary to the evidence presented before her in particular the sale agreement dated 4.4.2018.
 - b. That the learned trial magistrate erred in law and fact in failing to appreciate the evidence of the appellant that she was the owner of KAV 869P.
 - c. That the learned trial magistrate erred in law and fact in failing to evidence in consideration the fact the respondent has been in continued possession of the suit motor vehicle since 2014 without any interruption by third parties.
 - d. That the trial magistrate erred in law and fact in disregarding the appellant's written submissions and authorities thereof but only considered the respondent's evidence.
6. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

7. The appellant submitted that in the normal course of business, situations arise where the person named in the records may have passed the property in the vehicle to some other person without transferring the same to them as was noted by the court in the case of *Mubambi Koja v Said Mbwana Abdi* and that of Civil Appeal 192 of 2007 *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR.
8. It was submitted that the respondent's failure to raise concerns regarding proof of ownership at the onset of the transaction showed that he knew from the get go that the appellant had good title for the suit motor vehicle. Reliance was placed on Section 19 of the *Sale of Goods Act* that provides inter alia that where there is a contract for Sale of Goods, the property in them is transferred to the buyer at the time the parties intend.
9. The appellant submitted that the respondent refused to honour the terms of the agreement despite taking possession of the car and even embarked on repairing the car and that this amounted to breach of contract.

The Respondent's Submissions

10. It was submitted that the appellant purported to sell a vehicle that never belonged to her and she did not even disclose this to the respondent during the sale that she was neither the beneficial nor registered owner of Motor vehicle KAV 869P Mitsubishi Lancer which was registered in the name of one Bishop Peter Otieno Midodo, which made the contract void because it was entered into by a person who never had legal capacity to sell.
11. The respondent submitted that the appellant in her evidence never produced an agreement, log book, police abstract or insurance policy that she was indeed had actual ownership of the vehicle and that a purported agreement with the respondent does not confer ownership as the appellant had to produce evidence of ownership.



12. The respondent relied on the case of Court of Appeal in *Mubambi Koja v Said Mmbwana Abdi* and the case of *Kenya Limited v Kyumba Holdings Ltd.* [2005] eKLR where it was held inter alia that the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle.
13. The respondent further relied on Section 8 of the *Traffic Act* Cap 403 which states that The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.
14. It was submitted that the alleged sale offended Section 23(1) of the *Sale of Goods Act* Cap 31 which provides *inter alia* that one cannot sell that which he does not own as was reiterated in the case of *Bishopsgate Motor finance Corpn Ltd v Transport Brakes Ltd* [1949] 1 KB 322b and the case of *Katana Kalume, Roshanali Siura T/A Anytime Transport Services v Municipal Council Of Mombasa & Omar Hassan* [2019] eKLR.

Analysis and Determination

15. This court's role on appeal is stipulated in section 78 of the *Civil Procedure Act* and as was interpreted in case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123 that it is duty bound to revisit the evidence on record, evaluate it and reach its own conclusions. It must not, nevertheless, interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of the law or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was also the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –vs- Kiruga & Another* (1988) KLR 348).
16. In the instant case, the appellant testified that she entered into an oral agreement with the respondent for purchase of the suit motor vehicle at Kshs. 200,000 and after payment was not forthcoming from the respondent, they reduced the oral agreement into a written contract, to wit the sale agreement executed by the parties herein on the 4th April 2018, wherein the respondent was to pay the purchase price within nine months but the respondent failed to pay the same despite being in possession of the suit motor vehicle.
17. On his part, the respondent testified that he failed to pay the contract sum due to harsh economic times but that nonetheless, he subsequently learnt that the suit motor vehicle was not registered in the name of the appellant but of one Peter Otieno Midodo, whom he referred to as Bishop. The respondent produced a Motor Vehicle Copy of Records as DEx 1 in proof of this contention.
18. From the foregoing and as was held by the trial court, there indeed was a contractual relationship between the Appellant and Respondent. However, based on the contents of the Copy of Records, it is clear that the appellant was not the owner of the vehicle as at the time the parties herein entered in to the contract dated 4th April 2018.
19. The aforementioned Copy of Records shows one Peter Otieno Midodo as the registered owner of the said vehicle and that the date of registration of the said ownership was the 27.4.2006. In the case of *Husamuddin Gulambusein Potbiwalla Administrator, Trustee and Executor of The Estate of Gurlambusein Ebrahim Potbiwalla v. Kidogo Basi Housing Corporative Society Limited and 31 Others* Civil Appeal No. 330 of 2003 the court held that:

“ A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

20. Consequently, it is no function of this court to rewrite the contract between the parties. However, according to the Copy of Records, the appellant was not the owner of motor vehicle registration number KAV 869P.
21. It is important to note that the respondent having proved that the motor vehicle legally belonged to someone else and not the appellant, it was the duty of the appellant to adduce other evidence of Ownership in this case to show that she was the beneficial owner thereof. This she could have proved by way of an agreement of purchase, an insurance cover or other evidence showing that she was a special owner of the suit motor vehicle. She could even have produced a police abstract showing loss of documents that made her own the motor vehicle. Without any evidence of any form of ownership recognized in law, the property in the motor vehicle was not hers and therefore it could not be passed over to another person. This is so because one cannot sell what they do not have in the first place. Property whose ownership cannot be proved or established can be suspected to be stolen property and therefore such property cannot be sold by the person possessing it as no title can be passed to the buyer thereof.
22. At this stage I will borrow heavily from the judgment by Mativo J in *Stephen Kilonzo Nyondo v Samuel Wabome Kibuthu* [2015] Eklr.
23. The facts in this appeal are similar to those in the above case as they raise the question of what is the duty of a seller as regards title to goods and secondly when does title to goods pass to the buyer. The *Sale of Goods Act*, Cap 31 Laws of Kenya is the governing legislation in sale of goods. The Act contains certain implied terms in every contract of sale. Section 14 of the *Act* provides as follows:
 14. In a contract of sale unless the circumstances of the contract are such as to show a different intention, there is-
 - (a) An implied condition on the part of the seller that in the case of a sale he has right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.
 - (b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.
 - (c) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time when the contract is made.
24. Section 19 on when title is to pass provides as follows:
 1. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
 2. For purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
25. In a contract of sale, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell, he will have such a right at the time when the property is to pass.



26. In a contract of sale, there is also an implied term that-
- (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and
 - (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner of or other person entitled to the benefit of any charge or encumbrance so disclosed or known.
27. The above position is captured vividly in the book *Benjamin's Sale of Goods*, Fifth Edition, London sweet Maxwell, at page 168 where the learned authors observe as follows:

“...there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass. The liability thus imposed is a strict liability, and does not depend upon the fault or knowledge of the seller.....A seller will clearly have no "rights to sell the goods" where he has no title to the goods and can pass none to the buyer.”[emphasis added]

28. The authors further state that the words "a right to sell the goods" means that the seller has the power to vest full and complete rights over the goods in the buyer, and where there is a breach of this condition, the buyer is prima facie entitled to recover the whole purchase price as on a total failure of consideration.
29. This principle was established in the case of *Rowland vs Divall*. [1932] 2 K.B 500. In the said case, the defendant bought a motor car in good faith from a thief and resold it to the plaintiff, a car dealer, for 334 pounds. The plaintiff repainted the car and exposed it for sale in his showroom for two months until he resold it to a third party for 400 pounds. Two months later, the police took possession of the car on behalf of the true owner. The plaintiff refunded to the third party the money which he had been paid and brought action to recover from the defendant the 334 pounds. The Court of Appeal held that his action should succeed because there was total failure of consideration.
30. As Lord Wright observed in *Joseph Constantine Steamship Co. v. Imperial Smelting Corporation Ltd*, [1871] L.R. 6 Exch. 269:

“In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man.” Lord Wright clarified the position still further in the later case of *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.*, where he made the following observations:

“Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would, as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract..... To my mind the theory of the implied condition is not really



consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation."

31. In the case of *British Movietonews Ltd. v. London and District Cinemas Ltd.* [1942] A.C. 154 at 185], Denning L. J. in the Court of Appeal took the view expressed by Lord Wright as stated above as meaning that:

"the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation".

32. The learned Judge went on to say that:

"when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words. You ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers. We realize that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now."

33. The learned Judge stated and I agree that the court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by some scholars but it is certainly not, it is a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of the express and implied conditions under the Act. See *Mativo J in Stephen Kilonzo Nyondo v Samuel Wahome Kibuthu* [supra], which case I have cited extensively above.

34. I reiterate what the learned judge observed that, in every contract of sale, there is an implied condition that the seller has a right to sell the goods. Two warranties are also implied: that the goods are free from any charge or encumbrance in favour of a third party which is unknown to the buyer and that the buyer will enjoy quiet possession of the goods.

35. Thus, unless the contrary circumstances appears to show a different intention, there is an implied condition on the part of the seller that in the case of a sale, the seller has a right to sell the goods, and that in the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass; and an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and an implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party not declared or known to the buyer before or at the time when the contract is made.

36. The learned judge, turning to the facts of the case before him had this to say:

"Turning to the present case, it is not in dispute that the parties herein entered into a sale agreement for a motor cycle, that the Respondent paid Ksh. 63,000/= and that subsequently it was established that the registration number for the motor cycle belonged to a motor vehicle. A search was produced attesting to that fact. The police verified the said anomaly. It would be unreasonable to expect the buyer to have continued keeping the motor cycle under such circumstances. It is contrary to reason to suggest that the seller had a good title nor could he pass title to the buyer under such circumstances. The Respondent performed



his part of the contract. He paid the full purchase price. But the consideration failed, hence making the contract void or voidable at the instance of the innocent party.

I find no difficulty in concluding that the intention of the parties was that the buyer would have a good title and he paid the purchase price on that understanding. Applying the law and the principles cited above in the present case, I find no difficulty concluding that the Appellant did not have a good title to pass to the Respondent and that he was in breach of the express and implied terms of the contract he entered into with the Respondent and that there is total failure of consideration and consequently the Respondent was entitled to rescind the contract and claim back the purchase price. Consequently my answer to issue number one is in the affirmative.” [emphasis added]

37. A similar situation arose in *Maynard Mackenzie Dang'ana v Commissioner of Police & Another* [2011] eKLR where D. Musinga J (as he then was) had this to say:

“Section 23(1) of the *Sale of Goods Act* which states that:

“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”

Since Benson Wangalwa had no title to the motor vehicle, none of the subsequent purchasers can claim to be the lawful owners of the same, she added. Mrs. Otaba further submitted that Section 24 of the *Sale of Goods Act* has no application to the circumstances of this case for the reason that Benson Wangalwa’s title to the motor vehicle was void ab initio and not voidable.

From the affidavits on record, it is clear to me that Mr. Benson Wangalwa sold the motor vehicle in question to the interested party without consent and/or knowledge of the 2nd respondent. There is no dispute that the motor vehicle initially belonged to the 2nd respondent. The sale agreement that was executed between Mr. Wangalwa and the interested party, if at all, was not shown to the court. The interested party stated in paragraph 7 of his replying affidavit that the sale agreement has never been signed by the purported vendor. It is instructive that it is Mr. Wangalwa who procured the transfer of the motor vehicle from the 2nd respondent’s name to that of the interested party. When the 2nd respondent realized that the motor vehicle and two others had been unlawfully sold by Benson, a complaint was filed with the police. Benson was thereafter arrested and charged in a criminal case which is still pending before court.

In the circumstances as aforesaid, did the interested party acquire good title over the motor vehicle which he could in turn pass on to the petitioner” I do not think so. There is no evidence whatsoever that Benson had purchased the motor vehicle from the 2nd respondent. There is no material before the court from which it can be inferred that the 2nd respondent by its conduct is precluded from denying Benson’s authority to sell the motor vehicle. A buyer who purchases goods from a seller who had no authority to sell acquires no better title to the goods than the seller had. Benson’s title to the motor vehicle was not voidable, it was void ab initio. Jowitt’s Dictionary of English Law explains the word “void” as follows:

“An agreement or other act is said to be void when it has no legal effect, or not the legal effect which it was intended to produce... An act may be void either ab initio or ex post facto. Thus, if a contract is made without the true consent of the parties or for any immoral consideration



it is void ab initio. NO person's rights can be affected by it, whether he is a party or a stranger. In the case of a contract which is void for illegality, immorality, or on a similar ground, if money has been paid as the consideration of its performance, the party who has paid it may repudiate the contract and recover it back at any time before performance. But when an illegal contract has been executed, money paid under it cannot usually be recovered."

The same dictionary explains the word "voidable" as hereunder:

"An agreement or other act is said to be voidable when one of the parties is entitled to rescind it, while until that happens it has the legal effect which it was intended to have. It can however, be disputed only by certain persons and under certain conditions, and the right of rescission may be abandoned by the party entitled to exercise it... If that person acquires rights under a voidable contract or other transaction without notice and for value, they cannot afterwards be put in a worse position by its being set aside. Herein a voidable contract differs from a void contract, for in the latter case no third person can acquire rights under the contract unless the party against whom it is void elects to affirm it." [Emphasis added]

38. In the present case, just like in the above cases cited, I find that the appellant had no title to pass to the respondent and therefore the contract that the two entered into was not enforceable. moreover, there was no evidence that she had the consent of the registered or other beneficial owner to sell the said motor vehicle. Accordingly, the provisions of the *Sale of Goods Act* cannot come to her aid as cited by her advocate.
39. As was stated by Lord Denning in *Mcfoy v United Africa CO. LTD* [1967] 3 ALL ER 1169:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".
40. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of *Kirugi & Ano. v Kabiya & 3 Others* [1987] KLR 347 wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.
41. Moreover, according to Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
42. The appellant herein sought to have the contract over sale of the suit motor vehicle enforced due to the respondent's alleged breach. In response, the respondent adduced evidence voiding the contract on account of the lack of capacity of the appellant to enter into said contract as she had no title to pass to him. That evidence was not displaced at all.
43. It was upon the appellant to adduce evidence to the contrary showing that she had become the owner of the suit motor vehicle and that transfer of the same was pending. The appellant failed to discharge this burden. Even in cases where a widow or widower may possess a vehicle previously owned by their dead spouse, it would be expected that they produce evidence of ownership by their said spouse to demonstrate special or beneficial ownership. This was not the case here.



44. Consequently, I am in agreement with the trial magistrate that the contract dated 4th April 2018 was void ab initio as the appellant had no title whether beneficial or legal to enable her sell or pass ownership of the motor vehicle to the respondent.
45. The upshot of the above is that the instant appeal is found to be devoid of any merit and the same is hereby.
46. As the contract was void ab initio, I order that each party bear their own costs of the suit below and of this appeal.
47. This judgment and the decree together with the lower court file shall be returned to the trial court forthwith.
48. This file is closed.
49. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

