REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.14B OF 2020

MUKURWE-INI WAKULIMA DAIRY LIMITED.....APPELLANT

VERSUS

JOHN GICHUKI MUNYI.....1ST RESPONDENT

SAMMY TRADERS LIMITED.....2ND RESPONDENT

IGARE/MADUME AUCTIONEERS.....3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. Angima, RM,

in Mukurwe-ini PMCCC No.10 of 2019 delivered on 5/3/2020)

JUDGMENT

1. The appellant had sued the respondents at the lower court after their motor vehicle registration No.KCC O84M that they had bought from the 1st respondent was repossessed by the 3rd respondents under instructions of the 2nd respondent. After a full trial the trial court dismissed the suit against the 2nd and 3rd respondents but ordered the 1st respondent to refund the purchase price to the appellant.The appellants were aggrieved by the decision of the court and filed this appeal.

2. The grounds of appeal are that:

(1) The learned trial magistrate erred in law and in fact in making a finding against the weight of the evidence.

(2) The learned trial magistrate erred in law and in fact in failing to award general damages as prayed.

(3) The learned trial magistrate erred in law and in fact by failing to award costs.

3. The appeal was canvassed byway of written submissions of the advocates for the parties, **Nderi & Kiingati Advocates** appearing for the appellants, **J. Makumi & Co. Advocates** for the 2nd respondent and **Omondi, Abande & Co. Advocates** appearing for the 2nd and 3rd respondents.

4. The case for the appellant as testified by its Chief Executive Officer **PW1**, was that on the 22/1/2016 they had bought the subject motor vehicle from the 1st respondent at a consideration of Ksh.1,220,000/-. They took possession of the motor vehicle and deployed it as a sales vehicle for their company products in Mombasa. They had the vehicle registered in the joint names of their company and the 1st respondent. That on the 28/2/2018 the motor vehicle was ceased by some auctioneers, the 3rd respondents. They did investigations and learnt that the vehicle had been ceased on instructions of the 2nd respondent who claimed that they were the original owners of the vehicle. That they had sold it to one Kenneth Bryan Onyango on hire purchase terms. That the said Brian owed them pending arrears of Ksh. 535,000/-, hence their repossession of the vehicle.

5. The 1st respondent, **DW1**, on his part testified that he is in the business of buying and selling motor vehicles in partnership with one **Peter Mwangi Kiarie, DW2**. That his said partner had bought the subject motor vehicle from one Kenneth Bryan Onyango and they in turn sold it to the appellants.

6. **Peter Mwangi** in his evidence testified that at the time of sale the motor vehicle was registered in the name of the 2nd respondent. That the

seller of the motor vehicle, Kenneth Onyango, told him that the vehicle was bought on hire purchase terms from the 2nd respondent Company based at Kisumu. That he, Onyango and his business partner went to the offices of the 2nd respondent and were told that there was a balance of Ksh.270,000/-. He and his partner paid the balance. They were issued with a receipt. The company gave them the log book, PIN certificate, certificate of incorporation and a rubber- stamped transfer form. They went and finalized the transaction with Brian. They later sold the vehicle to the appellants.

7. It was further evidence of the 1st respondent that after the vehicle was repossessed they went to the offices of the 2nd respondent and they were told, this time round, that the arrears unpaid by Bryan was Ksh.535,000/-. That they discovered that the 2nd respondent had obtained orders from Winam Court in Kisumu to repossess the motor vehicle. He filed an application at Winam court seeking for the vehicle to be released to the appellants. That the application was still pending at the time he testified in court.

8. It was the case for the 1st respondent that all the statutory formalities for the sale of the vehicle up to registration were done with the knowledge and participation of the 2nd respondent and that the appellant had acquired good title. The appellant on his part urged the court to find that the sale of the motor vehicle was valid and that its repossession was illegal, null and void.

9. The 2nd and 3rd respondents did not adduce evidence in the case.

The judgment of the trial court–

10. The magistrate in her judgment considered whether the matter that was before her was *sub-judice* and found that the pending application by the 1st respondent at Winam Law courts was seeking to discharge the repossession orders and have the motor vehicle returned to the plaintiff/appellant. The magistrate consequently held that:

> **"…Needless to say that at the core of that application will be a determination on who really owns motor vehicle KCC 084M. This court has no evidence to make such determination and even if it was on record, the court is bound by the principle of *sub-judice* which lays very thinly in the issues of this matter. As a result therefore, I find that I am without jurisdiction to determine this mater as prayed by the plaintiff on prayers (a) and (b).**

11. On prayer (c) of the plaint where the appellant was seeking, in the alternative, for an order for refund of the purchase price on the ground that the 1st defendant/respondent had failed to pass good title to the plaintiff, the magistrate held that:

> **It is my considered opinion that that the 2nd defendant has questioned the authority of the 1st defendant to sell the subject motor vehicle within the legally stipulated period, and as such, unless and until the Winam applications are determined to give direction on ownership of the vehicle, the 1st defendant had no good title to pass to the plaintiff even with the 3 years quiet enjoyment of the vehicle and transfer with the Registrar of Motor Vehicles.**
>
> **It therefore follows that the plaint is allowed in terms of prayer (c). The 1st defendant is ordered to refund the plaintiff the consideration for the subject motor vehicle KCC 084M amounting to Ksh.1,220,000/-.**

Submissions –

12. The advocates for the appellant submitted that there was no suit in existence challenging the appellant`s ownership of the subject vehicle nor was there a traverse on the plaintiff/appellant`s title. Therefore, that the trial court had the requisite jurisdiction to try the suit.

13. It was submitted that the Traffic Act is clear that the record of the motor vehicle as appears in the registration book is *ipso facto* evidence of ownership of motor vehicle which could only be displaced by cogent evidence to the contrary. That such evidence was not available. That the 2nd respondent did not challenge by way of counterclaim the existing facts and therefore that the court could not arrive at a different conclusion.

14. The appellant concluded their submissions by stating that the claims of trespass to goods and general damages were proved on a balance of probabilities and consequently that the appellant was entitled to the orders sought together with costs of the suit.

15. The advocates for the 1st respondent on their part submitted that the finding of the trial court that it had no jurisdiction to try prayers (a) and (b) of the appellant`s claim was made in error of facts and the law. That the trial court failed to discern that the issues for determination in Winam Misc Application No. 86 of 2019 were very different from the issues in Mukurwe-ini PMCC No. 10 of 2019 so as to render prayers (a) and (b) of the plaint *sub-judice*. That in the Winam case the appellant alongside the 1st respondent sought for re-possession and release of the suit motor vehicle to the appellant, whereas in the Mukurwe-ini suit the appellant sought a declaration of ownership of the motor vehicle against the three respondents.

16. The advocates submitted that the appellant had adduced sufficient evidence that proved that it was the legal owner of the suit motor vehicle. That a certificate of search from the Registrar of motor vehicles was produced that showed that they were the registered owners of the motor vehicle together with the 1st respondent. That the appellant produced a sale agreement of the motor vehicle with the 1st respondent. That the evidence of Peter Mwangi DW2 showed that the transfer of the motor vehicle to the appellant was with the consent of the 2nd respondent. That the 2nd and 3rd respondents did not rebut the appellant`s claim nor did they file a counterclaim on ownership.

17. It was submitted that though the trial magistrate found that she had no jurisdiction to determine ownership, she still ended up finding that

the 2nd and 3rd respondents were the owners of the suit motor vehicle. That this was made despite an official search having been presented showing the appellant and the 1st respondent as the registered legal owners of the vehicle. That in effect the magistrate cancelled the appellant`s title and proceeded on the assumption that its title had been defeated by fraud yet the 2nd and 3rd respondents did not plead, particularize or lead any evidence to support fraud. The advocates relied on the case of **Nancy Kahoya Amadiva v Expert Credit Limited & Another** (2015) eKLR where the Court of Appeal held that fraud must be specifically pleaded and proved. Therefore, that as this was not done the appellant`s title could not be defeated.

18. Turning to the order for refund of the purchase price to the appellant, the advocates submitted that the prayer for refund was only sought in the alternative should the court find that the 1st respondent did no pass good title to the appellant. That this prayer would only have issued had the 2nd and 3rd respondents filed a counterclaim and successfully defeated the appellant`s title. That by finding that the 1st respondent had no good title the learned magistrate determined the issue of ownership in favour of the 2nd and 3rd respondents without any legal basis.

19. It was submitted that the 1st respondent is not liable to pay general damages to the appellant as any loss of use of the motor vehicle was attributable to the 2nd and 3rd respondents and not to the 1st respondent.

20. The advocates urged the court to allow the appeal with costs to the 1st respondent, both in this appeal and at the lower court.

21. The advocates for the 2nd and 3rd respondents submitted that they were inagreement with the decision of the trial court that the matter was *sub-judice*. That it was the duty of the 1st respondent to join Bryan Onyango in the case which he failed to do. That the damages claimed do not qualify as general damages but special damages that must be specifically pleaded and proved. That the appellant did not provide receipts to prove actual loss incurred for non-use of the motor vehicle.

22. It was submitted that the award of costs is at the discretion of the court. That the trial court did explain the reason for not awarding costs. That the discretion was exercised judiciously.

Analysis and Determination –

23. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions though it should always bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify -see **Selle & Another v Associated Motor Boat Company** (1968) EA 123.

24. I have considered the grounds of appeal, the evidence adduced before the trial court and the submissions by the respective advocates for the parties. The issues for determination in the appeal are:

(1) Whether the trial court erred in holding that prayers (a) and (b) of the plaint were sub-judice.

(2) Whether the trial court erred in making an order for the 1st respondent to refund the purchase price of the motor vehicle to the appellant.

(3) Whether the trial court erred in failing to make an award for general damages.

(4) Whether the trial court erred in failing to award costs.

25. It is not in dispute that after the subject motor vehicle was impounded by the 2nd and 3rd respondents in Kisumu, the appellant, the 1st respondent and Peter Mwangi Kiarie (DW1) filed a Misc Application No. 86 of 2019 dated 12th April 2019 at Winam Court against the 2nd and 3rd respondents. The appellant and their fellow applicants were seeking for orders that:

(1) Spent

(2) That the court be pleased to discharge its orders issued on 22nd June 2018.

(3) That motor vehicle registration No.KCC 084M be unconditionally returned to either of the 1st, 2nd and 3rd applicants (who in this matter are the Peter Mwangi Kiarie, the 1st respondent and the appellant respectively).

26. The basis of the said application was that the appellant and the 1st respondent were the bona fide owners of the subject motor vehicle.

27. After filing the Winam application, the appellant moved to Mukurwe-ini court on the 16th April 2019 and filed another suit against the respondents where this time round it was seeking for:

(a) An order for injunction restraining the 2nd and 3rd defendants/respondents, their servants and or agent from parting with possession, selling or in any other way dealing with motor vehicle registration No. KCC 084M.

(b) An order that motor vehicle KCC 084M legally belongs to the plaintiff/appellant and alleged repossession is illegal, null and void.

(c) In the alternative and without prejudice to the foregoing, an order that the 1st defendant/respondent has failed to pass good title to the plaintiff/appellant hence an order for the refund of purchase price.

(d) General damages for loss of use of the motor vehicle for the period it has been held.

(e) Costs and interest.

28. The trial magistrate held that prayers (a) and (b) of the Mukurwe-ini suit were *sub-judice* in that there was a pending matter at Winam court wherein the central issue was ownership of the motor vehicle, which was also the main issue in the Mukurwe-ini matter. The question then is whether the magistrate was right in holding so.

29. The sub-judice rule is provided in Section 6 of the **Civil Procedure Act** that states that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

30. In **Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 Others** (2019)eKLR the Court of Appeal considered the purpose of the said section and held that:

Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.

31. The Supreme Court of Kenya in***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)****(2020)eKLR* had occasion to pronounce itself on the subject of *sub judice wherein it stated* that: -

[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

32. In **Paul Kihara Kariuki, Attorney General & 2 Others Expert Law Society of Kenya (2020) eKLR** Mativo J. held that:

." The test for applicability of the *sub-judice rule* is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.

33. The conditions precedent for the sub-judice rule to apply were restated by the court in ***Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR*** that:

"…Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed…"

34. In ***Thika Min Hydro Co. Ltd vs Josphat Karu Ndwiga (2013) eKLR*** the Court opined that:

"It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases."

35. There is no dispute that the Winam matter was instituted before the Mukurwe-ini matter. The Winam matter was seeking for the motor vehicle to be returned to either the appellant, the 1st respondent or 1st respondent's business partner. The issue of return of the motor vehicle could not be determined without touching on the issue of ownership.The issue for determination was therefore as to who was the legal owner of the motor vehicle.

36. On the other hand, the Mukurwe-ini suit was seeking for a declaration that the appellant was the legal owner of the motor vehicle which was also an issue of ownership. It is then clear that the substance of the suits in the two matters was ownership of the motor vehicle. The parties were the same. Both matters were in courts of competent jurisdiction. It does not matter that the Mukurwe-ini suit had additional

prayer for an injunction and general damages as the same issues could competently be handled in the case that had been filed earlier on at Winam. There was then a possibility of the two courts arriving at conflicting decisions on the same facts. I therefore concur with the trial court that the matter was *sub-judice*. The Mukurwe-ini suit should therefore have been stayed to await the outcome in the Winam matter.

37. Once the trial court had come to the conclusion that the matter was *sub-judice*, it could not delve into whether the 1st respondent had good title to pass to the appellant as that was an issue that was substantially in issue in the Winam matter. The trial court therefore acted in error in determining prayer (c) of the Mukurwe-ini matter. It was an error for the court to imply that some issues in the same matter were not *sub-judice* while others were *sub-judice*. The court ought to have downed its tools on the whole matter and leave the Winam court to determine the issues. In the premises I set aside the order for refund of the purchase price of the motor vehicle to the appellant by the 1st respondent.

38. The appellant faults the trial court for failing to award general damages as prayed. The trial court held that the prayer for general damages was better tried by the Winam court. Further that the appellant had not produced evidence to show that they had hired another motor vehicle for which they were paying Ksh.2,000/- daily.

39. The law is that a party should plead his entire claim when he institutes a suit. Order 3 Rule 4 of the Civil Procedure Rules, 2010, provides that:

> (**1) Every suit shall include the whole of the claim which the plaintiff is entitled to in respect of the cause of action, but a plaintiff may relinguish any portion of his claim.**
>
> **(2) Where a plaintiff omits to sue in respect of or relinguishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinguished.**
>
> **(3)…..**

40. In view of the above stated rule, it was untenable for the appellant to have filed two suits in two different courts over the same subject matter. I agree with the trial magistrate that the claim for general damages ought to have been handled in the Winam matter.

41. Costs are usually at the discretion of the trial court. The trial magistrate in this matter ordered each party to bear its own costs. It is trite law that costs follow the event. The trial magistrate held that the suit that was before her was *sub-judice* since there was a similar suit at Winam court. It is the appellant who was at fault in filing two concurrent suits in two different courts. They should then have been condemned to pay the costs of the suit. I therefore set aside the order for each party to bear its own costs and order that the costs of the suit at the lower court be borne by the appellant.

42. The up short is that there is no merit in this appeal. The appeal is accordingly dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JANUARY 2022.

J.N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Appellant for 1st Respondent

No appearance for appellant for 2nd & 3rd Respondents

Parties: Absent

Court Assistant: Mr. Kinyua.

30 days R/A.