REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 88 OF 2007

KIMAIYO KIPROTICH..1ST PLAINTIFF

MARY JEMUTAI KIMAIYO..2ND PLAINTIFF

VERSUS

SIRIKWA MOTORS LIMITED...1ST DEFENDANT

MOSES KIPLAGAT CHANGWONY...................................2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

Kigen & CO. Advocates for the plaintiff

M/S Z.K Yego & CO. Advocates for the 2nd defendant

Nyaundi Tuiyot & CO. Advocates

JUDGEMENT

Introduction & Background

1. The suit herein was first filed in court on the 4th of September 1996 but the plaint was later amended on the 24th of February 1997 with the plaintiffs' various reliefs.

2. The plaintiffs' case is that by an agreement in writing made on the 30th of January 1995 between the 2nd defendant and the 1st plaintiff, the said defendant purported to sell to the 1st plaintiff motor vehicle registration Number KWK 426, a Toyota Hiace at a consideration of Kshs 520,000. It was the plaintiffs' case that subsequent to the execution of the agreement above, the 2nd plaintiff, wife to the 1st plaintiff and whom the 1st plaintiff claimed he was an agent of, paid to the 1st defendant the consideration of Kshs 520,000.00.

3. However, it was their contention that even after paying the consideration, the defendants never surrendered the log book to date to the plaintiffs' because they did not have good title to the same for them to pass good title to the plaintiffs'. As a result, the plaintiffs were unable to put the vehicle to use and returned the same to the defendants in exchange for another car a KYM 510. However, a few days before the plaintiffs took possession of the aforesaid motor vehicle registration number KYM 510, the same was destroyed by fire while in the 1st defendant's premises.

4. The plaintiffs averred that the said motor vehicle was intended for use as a public service vehicle for ferrying passengers and its estimated daily net profit would have been Kshs 4,000/=. It was their contention that as a result of breach of contract by the defendants jointly and severally, they have suffered loss and damage.

5. The suit was vehemently opposed by the defendants. The 2nd defendant entered appearance and filed the statement of defence dated 10th September 1996 denying the averments on the plaint. It was his position that he was not a party to the agreement between the plaintiff and the 2nd defendant and if there is a claim at all, then the same lay against the 1st defendant. On its part, the 1st defendant entered appearance on the 7th of October 1999, through its director one Abraham Kiptanui, assuming liability for any decree passed against the 2nd defendant. The 1st defendant filed reply to the amended plaintiff dated 2rd February 1998 acknowledging receipt of Kshs 310,000/= on behalf of the 2nd defendant.

6. The plaintiff thereafter files an application seeking security for due performance of the decree which was allowed by court on the 6th of November 1996 and the 1st defendant furnished a title to land parcel number Eldoret Municipality Block 9/1233 valued at Kshs 2,865,000/- at the time of the said security and which is still in court.

7. The matter proceeded on viva voce evidence.

THE EVIDENCE

The Plaintiffs' Case

8. The 1st plaintiff (PW1) testified on the 14th of May 1998 and told court that the 2nd plaintiff is his wife and that they sued the defendants for breach of contract that was entered between himself and the 1st defendant on the 31st of January 1995. It was his testimony that he sold a piece of land, 11 acres to be precise, and gave the 2nd plaintiff money to buy a vehicle so as so enable her operate a matatu business. He further testified that after the purchase of the said motor vehicle the same developed mechanical problems after about 6 months of usage which forced them to return the said vehicle to the 1st defendant's business premise for purposes of trade in with another vehicle – Peugeot 504. It was evident that he was advised to add some money which he did but the 1st defendant cunningly and fraudulently sold the same to another person. Unfortunately, the motor vehicle got burnt by fire while at the 1st defendant's premises undergoing wiring repairs. At this point, the 2nd plaintiff sought a refund of the purchase price and interest and costs of the suit.

9. On cross-examination, PW1 stated that he gave his money to the 1st defendant. He testified that he did not know the 2nd defendant and only saw him afterwards. He further testified that the net payment for the matatu business was Kshs 4,000/= and reiterated that it was the 1st defendant that sold the vehicle to him.

10. On re-examination, PW1 confirmed once again that he did not know the 2nd defendant.

11. PW 2, the 2nd plaintiff testified and confirmed that her husband had sold 11 acres of land in order to enable her purchase a matatu for business purposes. PW2 testified that she went to the 1st defendant to purchase the motor vehicle and paid Kshs 300,000/=. She testified further that she was informed that she would not be given the logbook unless she clears the remaining balance. She took the vehicle after paying the Kshs 300,000/= but was forced to return the same after 6 months due to mechanical defects. PW 2 stated that they returned the vehicle and were asked to select another and add more money amounting to Kshs 80,000/= which she did pay. The same was however refunded to her later on.

12. PW 2 produced the sale agreement dated 30th January 1995 as PEXH 1. He also produced receipt for Kshs 300,000/= issued to the 1st defendant and marked PEXH 2 and a further receipt of Kshs 210,000/= dated the 7th of March 1995 marked PEXH 3 which he testified he paid after receiving demand from the 1st defendant vide demand letter from 1st defendant marked PEXH 5. PW 2 also produces note from the 1st defendant accepting return of the vehicle and marked PEXH 4 and reiterated that the logbook was retained by the 1st defendant. PW2 thus reiterated their demand for refund of Kshs 520,000/= plus costs and interest.

13. On cross-examination, PW2 noted that the 2nd defendant was the salesman in the 1st defendant's business and was indeed receiving money on behalf of the 1st defendant. PW2 reiterated much of what she said during examination in chief and further testified that the motor vehicle Toyota Hiace burnt while in the 1st defendant's premises. She also testified that she paid the 1st defendant and not the 2nd defendant. She was however not able to produce any documents to support the claim that the matatu business gave them Kshs 4,000 per day. She finally testified that she cannot claim from the 2nd defendant when indeed she took the vehicle from the 1st defendant – a statement she reiterated during re-examination.

The Defendants' Case

14. The 1st defendant, through its directors, did not appear in court to give any evidence. Furthermore, in the course of the proceedings, the 1st defendant's advocates ceased acting.

15. However, through its affidavit dated the11th of September 1996 in opposition to the suit, the General Manager of the 1st defendant noted that the agreement dated 30th January 1995 and marked MJK-1 was entered into between the 1st plaintiff and the 2nd defendant in his personal capacity. It was therefore his position that the 1st defendant was only a broker for sell of the vehicle and that the 2nd defendant was the owner of the motor vehicle KWK 426. The 1st defendant also averred that it was not a signatory to the agreement and did not have any obligations thereunder.

16. The 1st defendant admitted receiving Kshs 310,000/= from the plaintiffs but averred that they paid out the same to the 2nd defendant through petty cash vouchers Nos 207, 257 and 258. It was their position that the 1st defendant was not obliged to deliver the log book to the plaintiffs and that if the vehicle was destroyed by fire, it was in the custody of the 2nd defendant and not the 1st defendant.

17. The 1st defendant thus averred that if any cause of action arose, it lay against the 2nd defendant who was the owner of the vehicle.

18. On the other hand, the 2nd defendant appeared in court on the 8th of June 2021 but the plaintiffs' advocate opposed his evidence on grounds that the 2nd defendant had not filed his statement of defence and on that basis, the 2nd defendant did not tender any evidence.

Submissions

19. The suit was canvassed by way of written submissions and all the parties, except the 1st defendant, filed their respective submissions.

Determination.

20. Having extensively perused and considered the pleadings, the submissions of the parties and all the annextures, it is my finding that 3 issues arise for determination namely;

a. Whether there exists a valid agreement for sale of motor vehicle between the 2nd plaintiff and the defendants,

b. Whether there was breach of contract by the defendants and finally,

c. Whether the plaintiffs have any cause of action against the defendants.

a. Whether there exists a valid agreement for sale of motor vehicle between the 2nd plaintiff and the defendants

21. The 2nd plaintiff testified how she received money from her husband for purposes of purchasing a matatu for a business venture. She indeed detailed how she proceeded to the 1st defendant's shop and bought the vehicle. Indeed the 2nd plaintiff produced an agreement made on the 30th of January 1995 indicating her as the purchaser and the 2nd defendant as the vendor. Clause 4 of the agreement shows the 1st defendant as the broker of the vehicle.

22. Indeed, as detailed in the agreement, the 2nd plaintiff was to pay Kshs 300,000/= to the vendor at the signing of the agreement and indeed, the 2nd plaintiff paid the said amount to the 1st defendant. The same was confirmed by the 1st defendant through the affidavit of its director dated 11th September 1996. The same is further confirmed through PEX 2 and MJK-2 being confirmation of payment of Kshs 300,000/= by the 2nd plaintiff.

23. Furthermore, there is every indication from evidence that when PW2 took possession of the car and delayed in making payments to the 1st defendant, they wrote to her demanding the balance through demand letter dated the 19th of June 1996 and which is marked MJK-6. The letter was from the 1st defendant. In response to the letter, the 2nd plaintiff made payments of Kshs 210,000/= and marked as MJK-3. This was also confirmed by the director of the 1st defendant through the affidavit dated 11th September 1996.

24. Moreover, the 2nd plaintiff testified that she took the vehicle back to the custody of the 1st defendant who acknowledged receipt thereof. This was after the vehicle developed mechanical challenges. The acknowledgement receipt was produced in court as PEXH 4 and was confirmed by the 1st defendant's director too. She was asked to add an additional Kshs 80,000/= in order to change the car which she did. This is confirmed through acknowledgement receipt of the 1st defendant dated 12th of March 1996 and marked as MJK-5. There is also a note from 1st defendant and marked MJK-7 from the sales department to the effect that the trade in was possible and that the Toyota Hiace would be replaced by a pick-up KYM 510.

25. From the foregoing evidence, there is no doubt that the 1st defendant's actions were pursuant to the agreement made on the 30th of January 1995. There is no doubt in my mind that the 1st defendant acted on behalf of the 2nd defendant pursuant to the agreement. By and large, as the broker, he had obligations under the agreement which he fulfilled accordingly. Furthermore, it is clear from the sales contract form marked MJK-3 and dated 7th of March 1995, the 1st defendant carried himself out as the seller of the vehicle. This is because the schedule therein provided clearly that the expression seller meant Sirikwa Motors Limited, the 1st defendant. There is therefore no denying that the 1st defendant made the plaintiffs believe that it was the seller or the seller's agent for purposes of the sale of the motor vehicle.

26. Similarly, it is clear that the 2nd defendant was described as the vendor in the same agreement and indeed affixed his signature on the same document. Indeed the 1st defendant argued that it transmitted all monies received from the plaintiffs to the 2nd defendant and produced receipts/payment vouchers confirming the same. The 2nd defendant cannot therefore deny that there existed no relationship between him and the plaintiffs. There is also no suggestion, that the 2nd defendant is disputing his ownership of the said vehicle. Finally, it is clear that the plaintiffs' made payments to the defendants directly pursuant to the agreement dated 30th January 1995.

27. Taken altogether, there is no doubt in my mind that there existed a valid agreement between the plaintiffs and the defendants on the sale of motor vehicle.

b. Whether there was breach of contract by the defendants

28. The terms of the agreement were to the effect that upon payment of the full purchase price, the log-book would be transferred to the new owner i.e the plaintiff. Prior to the payment of the full purchase price, the 1st defendant was entitled to remain with the log-book. This was the effect of clause 4 of the agreement.

29. There is also every indication, which remains uncontroverted and which is supported by evidence, that the plaintiffs' returned the vehicle to the 1st defendant when it developed mechanical issues. Indeed the 1st defendant acknowledged receipt thereof and was in the process of making repairs to the electrical wiring of the vehicle when it burnt. Furthermore, evidence on record which I have highlighted above shows

that it was the 1st defendant and not the 2nd defendant who proposed the exchange of the vehicle from a Hiace to a pick-up. In addition, it was the 1st defendant who received the purchase price, issued demand notices and invoices and accepted return of the vehicle for repairs. The 1st defendant also retained the log-book. Furthermore, the vehicle burnt in the hands of the 1st defendant.

30. Furthermore, it is clear from the schedule to the sales contract form marked MJK-3 that the expression seller has been clearly defined to mean the 1st defendant.

31. Despite the plaintiff abiding by the terms of the agreement and duly fulfilling them, the defendants have not shown the same commitment. On the contrary, it is clear that they want to reap where they did not sow. They are now trading in blame game in order to escape accountability.

32. From the evidence on record, I therefore find that an agency relationship had been created and the same can easily be construed from the conduct of the 1st defendant. In this regard, I share the views of the plaintiff's submission that a principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his or her behalf.

33. This position was affirmed by court in ***Heifer Project International v Forest City Export Services Limited & another [2017] eKLR*** where the Court citing ***Halsbury's Law of England 4th Edition Volume 1(2) para 19 and 20*** was of the view that a principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties.

34. The court further cited ***Cheshire and Fifoot, the Law of Contract, 5th Edition page 386-394***, noting that agency can be created in various ways including agency by Estoppel. In this regard, the court cited the quote by Lord Cransworth on how such an agency is created when he stated:

> ***"<u>No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him</u>… <u>this proposition, however, is not at variance with the doctrine that where one has acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that the other person is about to act on that behalf, then unless he interposes, he will in general be stopped from disputing the agency, though in fact no agency really existed</u>…."emphasis mine.***

35. I am also guided by the decision of court in ***Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353*** where Lord Pearson with the concurrence of the House stated as follows; -

> ***"The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it… the consent must, however, have been given by each of them, either expr<u>essly or by implication from their words and conduct.</u>"***

36. The demand letter in my view, alongside receipt of money by the 1st defendant together with the power it seems the 1st defendant had to trade-in the 2nd defendant's vehicle, was a clear manifestation of the 2nd defendant's intention that the 1st defendant be involved in the process of handling sale of the motor vehicle as its agents for purposes of ensuring the payment and delivery of the vehicle and to carry out repairs on his behalf.

37. Alternatively, if there is doubt as to the express appointment, the 2nd defendant, throughout the transaction held out the 1st defendant as its agent and this explains why the plaintiffs, believing this to be the case always dealt with the 1st defendant and even when the mechanical challenge set in, they took the same to the 1st defendant and not the 2nd defendant and the 1st defendant acknowledged receipt thereof. Furthermore, this would explain why when a dispute arose owing to the motor vehicle, it is the 1st defendant who informed the plaintiffs to do a top up of Kshs 80,000/= and proceeded to accept the same and even refunded her the money when it became clear that they were the ones who had sold that exchange car to another person. Indeed, the reaction of the 1st defendant to the demand by the plaintiff to refund the money topped up shows clearly how the 1st defendant valued the demand.

38. In addition, I am of considered view that this relationship was further exhibited by the fact that the 1st defendant took part/engaged with the plaintiffs far more than what the terms of the agreement entailed. This could not have been possible without the blessings of the 2nd defendant.

39. In the end, it is my finding that there existed an agency relationship between the 1st defendant and the 2nd defendant and consequently find that they breached the terms of the contract made on the 30th of January 1995.

c. <u>Damages</u>

40. The issue of damages flowing from breach of a contract was discussed by J. Nyamu in the case of ***PIL Kenya Vs. Joseph Oppong [2009] eKLR*** as follows:

"The circumstances of this appeal and in terms of reasoning, I adopt as good law the principle in the case of Companie Navifra Maro PA SA v. Bowaters Lloyd Pulp and Papers Mills [1955] OB 68, 98-9 where the court stated: "Whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach? If not, they are too remote… The question is one of causation, if the master, by acting as he did , either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the defendants would be relieved from the liability which would otherwise have fallen on them."

41. Furthermore, the court in ***Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd [2015] eKLR*** explained the purpose as follows:

"***The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".***

42. Finally, in ***Anson's Law of Contract, 28th Edition at pg 589 and 590*** the law is stated to be that: -

"**Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".**

43. From the evidence on record and the testimony of the Plaintiffs, I find that the plaintiffs have proved their case on a balance of probability that the defendants were in breach of the contract dated 30th January 1995.

44. Accordingly, this Court enters judgment for the plaintiffs against the defendants jointly and severally as follows: -

a. Kshs. 520,000/= being the cost of the purchase of the motor vehicle.

b. General damages for breach of contract assessed at the value of the said motor vehicle thus Kshs. 520,000/=.

c. Interests on (a) above from the date of filing the suit.

d. Interest on (b) above from the date of this judgment.

e. That the above shall be paid to the plaintiffs within 60 days of this judgement and in default thereof, the security deposited by the 1st defendant through its director Abraham Kiptanui shall pass herein to the plaintiffs.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 28th DAY OF MARCH, 2022.

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R. NYAKUNDI

JUDGE