REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 17 OF 2020

(CORAM: F.M. GIKONYO J.)

(*Being an appeal from the Judgement of Hon. G.N. Wakahiu (C. M) Delivered on 14th July, 2020 in Narok CMCC No. 148 of 2018)*

JUSTUS KANTET MATTEU.....APPELLANT

VERSUS

KIRIAINE OLE LUKA.....RESPONDENT

JUDGMENT

The appeal

[1]. This appeal arose from the judgment delivered by Hon. G.N. Wakahiu (C. M) Chief Magistrate on 14th July, 2020 in Narok Chief Magistrate's Court Civil Suit No148 of 2018.

Background

[2]. The Appellant's claim against the Respondent in the magistrate's court was anchored on an agreement for sale of motor vehicle registration number KBY 386J *(hereinafter referred to as "the motor vehicle")* entered into on 16th September 2017 between the Respondent as the seller/vendor and the Appellant as the purchaser.

[3]. Pursuant to the said sale agreement, the motor vehicle was to be purchased by the Appellant at a sum of Kshs. 660,000/=in three installments. The 1st installment of Kshs. 200,000/= was paid before execution of the agreement but acknowledged in the agreement, the 2nd installment of Kshs. 310,000/= was paid upon execution of the sale agreement on 16th September 2017 and the balance of Kshs. 150,000/= was to be paid on or before 30th September 2017.

[4]. The appellant took possession of the motor vehicle on the 16th September, 2017 upon signing the agreement pursuant to clause 6 of the said agreement.

[5]. The motor vehicle was repossessed by M/s. Sanjomu Auctioneers on the 21st February, 2018 on account of instructions by M/S Kiptoo & company advocates acting on behalf of the Respondent.

[6]. In the said suit, the Appellant had sued the Respondent herein for breach of contract. The appellant claimed a liquidated amount of Ksh.929,500/=, interest on the sum paid to the respondent at prevailing bank rates, general damages for breach of contract and interest in all above from the Respondent.

[7]. The appellant averred that his failure to settle the balance of Kshs. 40,000/= was due to the Respondent's breach to secure the transfer of the motor vehicle.

[8]. The Respondent averred that it was the Appellant who had breached the contract and was subject to the 30% penalty.

[9]. The appellant testified that the respondent made him to believe that he was the owner of the motor vehicle in question. Thus, he made the appellant to believe that he would acquire from the respondent good title to the vehicle and obtain quiet possession thereof. It was on this basis that the appellant like any reasonable and prudent man, decided to buy the vehicle.

[10]. At the time of reducing the agreed terms into writing, the appellant paid the respondent a further sum of Kshs. 310,000/=. this made a

total of Kshs. 510,000/= it was a term of the contract at paragraph 4 that the sum of Kshs. 150,000/= was to be paid by the appellant by 30/09/2017.additionally at paragraph 5, the respondent was to sign the transfer together with other documents in respect of the said motor vehicle upon signing this agreement. it turned out that the respondent after signing the agreement and receiving the Kshs. 310,000/= vanished into thin air.

[11]. Later in January 2018, the respondent asked for some payments from the appellant which totaled Kshs. 100,000/=. On 2nd March 2018, the respondent repossessed the motor vehicle from the appellant through the firm of M/S Sanjomu Auctioneers. The motor vehicle was never given back to the appellant to date. This completely frustrated the business which the appellant had put the vehicle. It is upon this background that the appellant instituted civil suit no. Narok CMCC No. 148 of 2018 against the respondent. The defendant filed a defence and counter claim thereto. The claim proceeded to full hearing and judgment was delivered on 14th July 2020. In the said judgment the court made findings which made the appellant dissatisfied hence the appeal herein.

[12]. The trial court rendered its judgment on 14/07/2020 issuing the following orders;

> **"Within three (3) months from the date of this judgment, the plaintiff to pay the defendant (deposit in court for the account of the defendant), the sum of Kshs. 150,000/= and the defendant to pay the auctioneers charges and to transfer motor vehicle KBY386J to the plaintiff failure to which the plaintiff shall be at liberty to extract a decree in the following terms;**
>
> > **1) A refund of Kenya shillings five hundred and ten thousand (510,000/=) only plus 30% penalty amounting to Kenya Shillings one hundred and fifty-three thousand (Kshs 153,000/=) only all totaling Kshs. 663,000/=**
> >
> > **2) Interests on (a) above at court rates from the date of judgment.**
> >
> > **I have already made an order that each party shall bear its own costs."**

[13]. The appellant being dissatisfied filed this appeal and put forward 13 grounds of appeal as follows:

i. **That the Learned Magistrate erred in law and in fact in finding that the appellant had a duty, under the agreement entered into on 16th September 2017, to have further payments on the sale of the motor vehicle captured when there was no express provision or even independent evidence to that effect of such a finding being re-writing the contract for and on behalf of the parties.**

ii. **That the Learned Magistrate erred in law in misinterpreting the law on the import of Section 6 (1) of the sale of goods act and section 3 of the law of contract in relation to a sale of goods (in this case heifers) when there was no evidence at all to support it.**

iii. **That the learned magistrate erred in law and fact in making a finding that there was a contract for the purchase of heifers between the plaintiff and the defendant without any evidence at all, of either the purchase or delivery.**

iv. That the learned magistrate erred in both law and fact in finding that the plaintiff/ appellant herein is obligated to pay for a vehicle he was disposed of by the defendant.

v. That the learned magistrate failed in law and fact to appreciate and take judicial notice of the fact that the value of the vehicle had extremely vanished from the when the defendant took possession of it to the time of judgment, thereby destroying the substratum of the contract and causing a fundamental breach by the defendant, of entered into on 16th September 2017.

vi. That the learned trial magistrate erred in law and in fact in making an award in favour of the defendant contrary to his pleadings and prayers.

vii. That the learned magistrate erred in law by accepting parole evidence from the defendant to alter the express terms of the contract.

viii. That the learned magistrate erred in law and in fact in misdirecting himself that the plaintiff was bound to fulfill the obligation to make the payment of the balance of the purchase price as at 30th September 2017 while the defendant had committed a fundamental breach of the contract.

ix. That the learned trial magistrate erred in law by shifting the burden of proof to the plaintiff regarding the defendant's allegation regarding the purchase of the two heifers.

x. That the learned magistrate was biased and manifested it by requiring the plaintiff to prove in writing the reason of the payments he made and which were acknowledged by the defendant while not requiring the defendant to prove in writing his allegations about the reason of receipt of payments.

xi. That the learned trial magistrate erred in law and fact in wholly ignoring the plaintiff's evidence and submissions, against the weight of evidence before him.

xii. That the learned trial magistrate erred in law and in fact in misinterpreting clause 9 of the agreement dated 16th September 2017 by finding the interest payable to be different from that agreed upon by parties.

xiii. That the learned trial magistrate erred in law in enforcing a contract which had been fundamentally breached by the defendant.

SUBMISSIONS

[14]. By Consent, parties agreed to have the Appeal disposed of by way of written submissions.

Appellant's Submissions

[15]. The appellant submitted that the trial magistrate erred in law and in finding and concluding that the appellant also was in breach of the contract. The appellant argues that the respondent failed to sign the transfer and other documents upon execution of the agreement as stated in paragraph 5 of the agreement **(P Exh1**). The appellant contends that the breach occurred on 16th September 2017; the date of execution of the agreement, and not on 30th September 2017 when the appellant failed to make further payments. The formation of the contract in issue and the circumstances of the present case leaves one undeniable conclusion that the property in motor vehicle KBY 386J was to pass upon execution of the agreement. The respondent breached this condition therefore, this was not open to the court to conclude that this was a mere breach that only entitled the defendant to treat the contract as still subsisting and thereafter (2 weeks later) subject the plaintiff to a breach as to punish him as the court concluded regarding breach by saying that both parties were in breach.in the circumstances the buyer (the appellant herein) was not under any further obligation to perform the contract. Consideration failed; therefore, the appellant was discharged from further performance; no obligation to pay Kshs. 150,000/= balance on or before 30th September 2017.The appellant relied on Section 19, 4(1) and 14(a) of the Sale of Goods Act, Section 120 of the Evidence Act, ***Heribert Maier V Eva-Marie Kersten [2004] eKLR***, R.A. Mann & B.S Roberts, essentials of business law and the legal environment, Cengage, 2019 P., E. Mckendrick, contract: text, cases and materials (oxford university press, 2014 p 3338), ***Stephen Kilonzo Nyondo V Samuel Wahome Kibuthu [2015] eKLR*** and ***Rowland Vs Divall [1932] 2 K.B. 500.***

[16]. The appellant submitted that the trial magistrate was one sided and did not give effect the intention of the parties. The appellant contends that in the present case, the intention of the parties from the totality of the agreement dated 16th September 2017 was for due performance of the respective obligations of the parties. The party that failed to fulfil his end of the bargain was to meet a penalty expressed in paragraph 9 of the agreement. Further the appellant contends that the vehicle was repossessed by the respondent for almost 3.5 years now, and the same has deteriorated to the extent to disuse, the appellant lost all the business he had put the vehicle to use. the intention of the parties was not to transfer a shell of the vehicle but a vehicle good working condition. the appellant relied on the case of ***Storer V Manchester City Council [1974] 1 W.L.R 1403.***

[17]. The appellant submitted that the trial court erred in law in misconstruing the import of Section 6(1) of the Sale of Goods Act and Section 3 of the Law of Contract. The appellant contends that without any written document or evidence of acknowledgement of the payment of a sum of Kshs. 100,300/= for heifers, there was no basis for the trial magistrate to conclude that the sum was for the purchase of heifers. The appellant argued that the sale of heifers took place from 19th September 2018 onwards. The respondent should have transferred the vehicle on 16th September 2017 but did not. therefore, the counterclaim even if it was taken to have validity or a basis and facts/ evidence relating thereto, a secondary separate contract which has no relation whatsoever to the agreement of 16th September 2017 should have been drafted. The pleadings by the respondent does not support the allegations. It only states that the appellant approached the respondent for purchase of the two heifers but does not indicate whether the contract was completed. The appellant relied on Section 6 (1) of the Sale of Goods Act, Section 107 of the Evidence Act the case of ***Daniel Otieno Migore V South Nyanza Co. Ltd [2018] eKLR.***

[18]. The appellant submitted that the trial magistrate erred in law in making a finding that there was a contract for the purchase of heifers between the appellant and the respondent without any evidence at all of either the purchase or delivery. The appellant contends that he made the payment of the sum of Kshs. 100,000/= via m-pesa as part of the payment for the purchase of the motor vehicle just like the Kshs. 200,000/= prior to the writing of the agreement. parties also had not specified the mode of payment. The appellant argues that he could not engage in purchase of heifers while the respondent was evasive and dodgy with the earlier agreement. the appellant relied on Section 119 of the Evidence Act.

[19]. The appellant submitted that the learned magistrate erred in law in finding that the appellant is obligated to pay for a vehicle he was disposed of by the respondent. Both parties were in agreement that the vehicle in question was repossessed by M/S Sanjomu Auctioneers from the appellant under the instructions of the respondent. Further the award was neither supported by the pleadings nor evidence adduced in court.

[20]. The appellant submitted that the learned trial magistrate failed in law and fact to appreciate and take judicial notice of the fact that value of the vehicle had extremely vanished from when the respondent took possession of it to the time of judgment, thereby destroying the substratum of the contract and causing a fundamental breach by the respondent of the contract entered into on 16th September 2017.the appellant relied on section 60(1) of the evidence act, and the case of ***Joseph Macharia Nderitu V Real Insurance Company Limited [2014] eKLR.***

[21]. The appellant submitted that the learned trial magistrate erred in law and in fact in making an award in favour of the respondent contrary to his pleadings and prayers. The appellant had prayed for an award of interest at banks rates which was supported by the contents of the agreement.

[22]. The appellant submitted that he was abandoning Grounds 7, 11, 12 and 13 of the appeal.

The Respondents' Submissions.

[23]. The respondents submitted that this court as an appellate court will only interfere with the conclusions and findings of a trial court if the findings and conclusions were not supported by evidence or were premised on wrong principles of the law. The respondent contends that the trial court's judgment is well thought and researched, entails the exercise of discretion that was exercised judiciously, based on evidence and the learned magistrate applied the correct principles of law in reaching the conclusions and finding. There is no evidence whatsoever that the findings of the magistrate's court were based on no evidence or that the trial court applied the wrong principles of law in reaching the conclusions and findings made. The respondent relied on the cases of ***Samuel Muiga Kiritu V B.O.G Athwana Secondary School [2021] eKLR, Francis Lokadongoy Lokogy V Reuben Kiplagat Kiptarus [2020] eKLR, and Elizanya Investments Limited V Lean Energy Solutions [2021] eKLR***

[24]. The respondents submitted that the respondent was discharged from the liability of the contract when the appellant failed to pay the purchase price on the agreed date of 30th September 2017. The respondent relied on the cases of ***William Kazungu Karisa Vs Cosmas Angora Chanzera [2006] eKLR, Silvester Momanyi Marube V Gulzar Ahmed Motors & Another [2012] eKLR, Mwangi Vs Kirio, And Njamunyu Vs Nyaga [1993] KLR 282, and Edward Mugambi V Jason Mathiu [2007] eKLR***

[25]. The respondents submitted that the reasons given by the appellant for failure to pay balance of purchase price cannot be believed. The respondent contend that the appellant stated that he did not pay the balance because the respondent had not signed the transfer documents or did not have the log book. The appellant also admitted that he took possession of the subject motor vehicle upon execution of the sale agreement up until 21st February 2018 when it was repossessed. The respondent relied on the case of ***Jonathan Kiplagat Muigei V Kipngetich Lelmen [2019] eKLR***

[26]. The respondents submitted that nothing has been placed before this court by the appellant to warrant a finding that the learned magistrate did not properly exercise his discretion. Therefore, this appeal lacks merit and should be dismissed with costs.

ANALYSIS AND DETERMINATION

Duty of court

[27]. I have considered the appeal herein, the record of appeal and the respective parties' written submission. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** I also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

Party's primary claims as filed

[28]. On 11th July, 2018, vide a plaint dated 11th July, 2018, the appellant, filed the suit and sought judgment against the respondent for the following orders: -

a. refund of Kenya shillings six hundred and ten thousand (Kshs. 610,000/=) only

b. 30% penalty amounting to Kenya shillings one hundred and ninety-eight thousand (Kshs. 198,000/=) only

c. Interest on the sum paid to defendant at prevailing bank rates.

d. loss of business for thirty days, amounting to Kenya shillings one hundred and twenty-one five hundred (121, 500/=) only

e. General damages for breach of contract as per the contract.

f. interest on (a) (b) (c) 9d) and (e) above

g. Any such further or other reliefs as this honourable court may deem fit and just to grant.

[29]. The respondent, filed the defence and counter claim dated 12th March, 2019 and sought judgment against the appellant for the following orders: -

i. The plaintiff's suit be dismissed with costs and judgment be entered for the defendants against the plaintiff

ii. This honourable court do make a determination that the plaintiff/defendant is in breach of the sale agreement and be penalized to pay damages in accordance with clause 9 of the sale agreement together with auctioneer's fees and related expenses.

iii. In the alternative, return the motor vehicle and pay the income generated by the said motor vehicle at the rate of Kshs. 5,000/= per day from September 2017 to the day when it was seized by the auctioneers.

iv. costs of the counterclaim and interest thereupon at such rate and for such period of time as this court may deem fit to grant and;

v. Such further or other reliefs as may be appropriate in the circumstances.

Core trial court's finding

[30]. The following finding made in the judgment of the trial magistrate are at the core of this appeal;

i. That the parties entered into a contract for the sale of two heifers.

ii. That the defendant is estopped by the rules of estoppel and the parole evidence rule from introducing evidence to prove that he did not have the log book or that he was not in a position to transfer the motor vehicle at the time of making the agreement for the sale of the motor vehicle. Nor can the defendant introduce evidence to prove that the plaintiff knew that the log book was in position of another person called Mr. Joseph Lekayiok Kulale. because Mr. Kulale was not the seller and was not privy to the contract which was reduced into writing by the plaintiff and defendant only.

iii. That since each party caused the other to fail to realize their intentions both parties were at fault and therefore breached the contract.

iv. That the plaintiff cannot be awarded Kshs. 121,500/= prayed in paragraph (d) of the plaint because he did not bring evidence from an independent source such as the bank statements and KRA to prove he paid taxes from his earnings.

v. That none of the consequences for breach of contract provided in the agreement dated 16th September 2017 applies in the circumstances of the counterclaim.

vi. That the parties are keen to rescind the contract rather that complete their parts to effectuate their intentions in the contract. the said move is immature.

vii. That the defendant succeeded in the counter claim in proving that the payment by m-pesa by the plaintiff to the defendant of Kshs. 100,300/= was for purchase of heifers and not for the subject motor vehicle.

viii. That the entire purchase price of Kshs.660,000/= of the subject motor vehicle had not been fully paid and the plaintiff still owes the defendant the sum of Kshs.150,000/=

ix. That the amount to have been paid by the plaintiff to the defendant towards the purchase of the motor vehicle KBY 386J is Kshs. 510,000/=.

x. That the documents in support of earnings for loss of business do not prove the special damages. nor can an order for damages issue since they are both in breach.

Issues

[31]. I have isolated the following issues as falling for determination by this court;

i. **Who is in breach of the agreement dated 16th September, 2017;**

ii. **Was there an oral agreement for the purchase of two heifers?**

iii. Who then is entitled to be paid the damages?

Who breached the Sale Agreement?

[32]. It is not in dispute that the parties herein entered into an agreement dated 16th September, 2017 for sale of motor vehicle registration number KBY 386J at a consideration of Kshs. 660,000/=. The purchase price was to be paid in three instalments. The 1st instalment of Kshs. 200,000/= was paid prior to the signing of the agreement. The 2nd instalment of Kshs. 310,000/= was paid upon the execution of the agreement. The 3rd instalment of Kshs. 150,000/= was to be paid on or before 30th September, 2017.

[33]. The said agreement also provided, *inter alia*, in clause 5 thus: -

''That the seller undertakes to sign transfer together with other documents in respect of the said motor vehicle upon signing this agreement.'

[34]. In view of the foregoing clause, and the uncontested fact, the motor vehicle was released to the appellant as per clause 6:

"That the buyer takes possession of the said motor vehicle upon signing of this agreement''

[35]. Barely 6 months after the appellant had taken possession of the vehicle in accordance with the agreement, the said motor vehicle was repossessed by M/S Sanjomu Auctioneers at the instance of the respondent on the 2nd March 2018. The evidence adduced by the appellant was that he made further payments totaling Kshs. 100,300/= towards the purchase of the motor vehicle between 14/1/2018 and 13/02/2018 but the respondent proceeded to repossess the suit motor vehicle.

[36]. The appellant submitted that the respondent failed to sign the transfer and other documents upon execution of the agreement as stated in clause 5 of the agreement.

[37]. The respondent was adamant that the appellant breached the contract, thus, the repossession of the vehicle was justified. He admitted payments were made to him by the appellant subsequent to the agreement, but, on account of purchase of two heifers and not payments towards the purchase of the motor vehicle. I shall however revisit this latter argument; to determine the counter-claim or whether it formed part of the purchase price of the vehicle.

[38]. From the arguments of the parties, *inter alia*, questions have arisen on: -

i) **The seller's right to sell and transfer property in the motor vehicle; and**

ii) **Warranty that the buyer shall have and enjoy quiet possession of the motor vehicle.**

[39]. A car is a chattels personal, thus, the Sale of Goods Act applies to the agreement of sale herein. The issues above will also be resolved through the said law. In particular, Section 14 of the Sale of Goods Act, Cap 31, Laws of Kenya, provides that:

"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 a 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 before or at the time when the contract is made."

[40]. From the proceedings and the evidence of the parties at the trial court, whilst the parties to the sale agreement dated 16th September, 2017 were the Respondent as the vendor and the Appellant as the purchaser, the subject motor vehicle was registered in the name of Mr. Joseph Lekayiok Kulale.

[41]. As the vehicle was registered in the name of another person, the respondent was under obligation to disclose that fact especially in light of clause 5 of the agreement. Clause 5 obligated the respondent to sign all transfer forms and other relevant documents in favour of the appellant upon execution of the agreement. He did not do so. Without doubt, the respondent did not act in accordance with the law and the agreement.

[42]. Worse still, despite the failure by the respondent to execute transfer and other relevant documents, barely six months after the appellant took possession of the motor vehicle in accordance with the agreement, the respondent, without a court order or proper authorization in law or the agreement, repossessed the said motor vehicle, and evidence on record show that the vehicle has never been released back to the appellant.

[43]. In light of these events, the Respondent did not ensure that the appellant has or enjoys quiet possession of the said vehicle.

[44]. In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing. The respondent failed to ensure quiet possession of the motor vehicle by the appellant. The respondent did not sign transfer forms upon execution of the agreement. Nothing shows that the respondent made full disclosures that the vehicle was registered in the name of a third party hence, his title and ability to deliver on the undertaking made in clause 5 of the agreement was greatly impaired. The respondent was in breach of the terms and conditions of the agreement. As such, being a party in default cannot insist on strict performance of the contract by the other party.

[45]. Be that as it may, the appellant as at the time of the commencement of the claim was yet to clear the balance of the purchase due of Kshs. 150,000. It was on the said basis that the respondent claimed he had breached the contract. The appellant proved that indeed there was interference with his possession of the vehicle by respondent which subjected him to loss of business. The appellant claimed he was using the vehicle to transport potatoes to Narok and Nakuru. The said vehicle made an average of Kshs. 4,000/= per day. It is on the foregoing basis that the appellant sought compensation for loss of business for 30 days at a sum of Kshs. 121,500/=.

[46]. The appellant seems to explain, and blames his failure to pay the balance of the purchase to the failure by the respondent to sign the transfer documents despite repeated request for him to do so. This argument will be appreciated when it is seen within the implied presumptions of title, ability to pass title, and legitimate expectations of the buyer to have quiet enjoyment and possession of the motor vehicle. He got none of these things which are core in guaranteeing title and ability to pass the property in the motor vehicle; and the foundation of every such contract; absence of these warranties, makes it unreasonable to expect furtherance of a contract.

[47]. The breach occurred on 16th September 2017; the date of execution of the agreement, and not on 30th September 2017 when the appellant failed to make further payments.

[48]. The upshot of the foregoing analysis is that the respondent was in breach of the contract and should not be allowed to reap from his own breach. All the subsequent actions in repossessing the motor vehicle were in furtherance of his breach; rude interruption of the quiet possession and enjoyment, and harassment, of the respondent.

[49]. In light thereof, the respondent was liable to the penalty clause; to pay the appellant a sum equal to 30% of the total purchase price as provided for by the contract.

Counterclaim and oral agreement

[50]. The respondent contends that the appellant approached him for the purchase of two heifers at Kshs. 100,000/= and therefore for he still owes him Kshs. 150,000/= balance of the price of the motor vehicle.

[51]. The appellant stated that the respondent refused to deliver the signed transfer documents but kept asking for money from the appellant. The appellant paid Kshs. 25,000/= on 14/1/2018, Kshs. 10,100/= on 19/1/2018, Kshs. 15,000/= on 21/1/2018 and Kshs. 50,200/= on 13/02/2018. All the further payments totaled Kshs 100,300/=

[52]. Other than merely stating that he sold two heifers to the appellant, there is no evidence of any such sale or delivery of the heifers. It is surprising that; i) the alleged sale of two heifers happened after the alleged breach of the agreement for sale of motor vehicle; and ii) payment was in instalments. The manner in which the respondent ruthlessly acted- by repossessing the vehicle- it is not believable he could enter into another sale agreement with the appellant. The explanation given by the appellant that these further sums were paid upon demand by the respondent, and averted immediate repossession of the motor vehicle, is quite plausible and in tandem with the evidence adduced. The respondent did not prove the sum of Kshs. 100,300/= was paid by the appellant to the respondent on account of sale of heifers. In fact, evidence show it was paid on account of the purchase of the motor vehicle in question.

[53]. In the upshot, I find that the respondent has not proved its counter claim on a balance of probabilities. Accordingly, I dismiss it.

Who is entitled to damages?

[54]. I have dismissed the counter claim. But, is the appellant entitled to damages?

[55]. Clause 9 of the agreement provided that in default a 30% penalty shall be imposed upon the defaulting party and in this case be it the seller he too shall refund all monies received at prevailing bank rates interest and too to pay damages.

[56]. On the basis of my findings that the respondent breached the agreement herein, I find that the appellant was entitled to damages for the breach. This should be taken care of through the penalty provided in the agreement.

Loss of user

[57]. The appellant under loss of user claim produced a copy of his business records books in ten transcripts as **P Exh 4 (a)** and **(b)** for the motor vehicle so as to establish that it relied on it for earnings. It is not contested that the same having been used for commercial purposes, inter alia, ferrying potatoes. I am in agreement with the appellant that he suffered loss of user for the period of approximately 30 days when the motor vehicle was repossessed to when he wound up his business. Noting that to date the vehicle has not been returned to the appellant.

[58]. The net incomes as per the ten worksheets vary between approximately Kshs. 500/= and Kshs. 4,500/=. It can be noted that on some days the business made no profit at all. As much as I agree with the appellant that indeed he suffered loss of user, I am in disagreement with his prayer for a multiplier of ksh. 4,000/=. I find that a multiplier of Kshs. 3,000/=would be reasonable in the circumstances.

[59]. In so finding, I find solace from the Court of Appeal in Civil Appeal no. 283 of 1996, (David Bagine versus Martin Bundi) which stated that damages which are claimed under the title “loss of user” are special damages which must be proved. The Court stated as follows: -

> **“We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can”. These damages as pointed out earlier by us must be strictly proved.”**

[60]. In the instant case, I find that the appellant proved loss of user and is therefore entitled to the same. I will accordingly make an award thereto.

Auctioneers charges

[61]. The respondent admitted that he went direct to the auctioneers to repossess the suit vehicle and did not obtain a court order. In the circumstances I find that the respondent is not entitled to a refund of the auctioneer’s fees. He shall bear his own cross- as it were.

Penalty for breach

[62]. According to the agreement, the appellant is entitled to be paid the penalty of breach of Kshs. 183,090/= by the respondent.

Conclusions and Orders

[63]. I hold that the learned trial magistrate erred in ordering the respondent to transfer the motor vehicle registration KBY 386 J to the appellant as he had no capacity to do so. In any case, the vehicle has been in the custody of the respondent through his auctioneers for over 3 ½ years- and given the depreciation rate of motor vehicles, and the very high possibility of great wear and tear to it due to long period of being stationery, makes it imprudent to ask the appellant to take back such vehicle. needless to state that, the respondent repossessed it without proper or lawful authorization.

[64]. For all the foregoing reasons, I set aside the judgment of the trial court. I also dismiss the counter claim.

[65]. Accordingly, I enter judgment for the appellant in the following terms:

a) The Appellant has partially succeeded on damages to the extent noted in the judgments and shall be paid by the respondent a sum of Kshs. 183,090/= being 30 % penalty provided in the agreement;

b) The respondent shall refund a sum of Kshs. 610,300/= which was paid by the appellant towards the purchase price with interest at court rate from the date the vehicle was repossessed until payment in full.

c) The respondent shall pay Kshs. 90,000/= being the loss of user calculated at the rate of Kshs. 3,000/= per day for 30 days.

d) The respondent shall keep the vehicle and bear auctioneers' charges.

e) Costs of the suit go to the appellant.

f) Each party shall bear its costs of appeal.

g) Any relief not specifically granted in this judgment is deemed to be denied.

[66]. **Orders Accordingly.**

Dated, signed and delivered at Narok through Teams Application, this 27th day of April, 2022.

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F.M. GIKONYO

JUDGE

In the presence of:

1. **Bonareri for Nyachiro for Appellant**
2. **Ole Kamwaro for Respondent**
3. **Mr. Kasaso -Court Assistant**