Real People Kenya Limited v Joseph Tuwei t/a Chepsonoi Posho Mills (Civil Appeal 108 of 2018) [2022] KEHC 11849 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 108 OF 2018

EKO OGOLA, J

JULY 27, 2022

BETWEEN

REAL PEOPLE KENYA LIMITED ..... APPELLANT

AND

JOSEPH TUWEI T/A CHEPSONOI POSHO MILLS ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the Hon. CM C. Obulusta delivered on 10th August, 2018 in Eldoret Civil Suit No.88 of 2015)

JUDGMENT

1. The Appellant filed a plaint before the Chief Magistrate's Court at Eldoret dated November 3, 2015, claiming the sum of Kshs 6,633,793.74/= from the Respondent.

2. The Appellant's case was that on November 11, 2013 it advanced a loan facility of Kshs 4,649,999.00 to the Respondent as an asset finance to enable him acquire a public service motor vehicle at the Respondent's request. That upon receiving the said amount the Respondent purchased motor vehicle registration number KBW 635Z Eicher Bus. The Appellant argued that it was an express term of the loan agreement that the Respondent was to repay the said loan in monthly instalments of Kshs 231,475.00 without fail for a period of (36) months. After the Respondent acquired the said motor vehicle he defaulted in repaying the loan as agreed and as a consequence the Appellant decided to realize the amount due by exercising its statutory right of sale. The Appellant' s case was that even after it had sold the said motor vehicle, there was still an outstanding balance in the sum of Kshs 6,633,793.74 which sum the Respondent still failed to repay.

3. The Respondent on the hand filed an amended defence and counter-claim dated June 6, 2016 denying each and every allegation by the Appellant. The Respondent denied having been advanced a facility of Kshs 6,633,793.74 by the Appellant. In the Counter-claim the Respondent admitted that he had entered into a loan agreement with the Appellant for a sum of Kshs 4,649,999.00 to enable him

buy a motor vehicle registration number KBW 635Z Eicher Bus for public transport services. The Respondent contended that although he had received Kshs 4,649,999.00 from the Appellant, the actual value of the said motor vehicle at CMC motors was Kshs 5,510,000.00.

4. The Respondent upon the purchase of the said motor vehicle took actual possession and ownership thereof. The Respondent contended that shortly after the purchase of the said motor vehicle, it had a mechanical breakdown and he could not do business with it, and yet it was the only source of income that would have enabled him repay the loan.

5. The Respondent maintained that in view of the foregoing, on diverse dates he had called the Appellant and informed it of his predicament. The Respondent stated that he had sought for more time to repay the said loan. The Respondent's contention was that without notice to him, the Appellant seized the said motor vehicle and kept it in their possession for (3) months before returning it to him. The Respondent stated that he had bought an engine worth Kshs 800,000.00 and a gear box worth Kshs 300,000.00 in order for the said motor vehicle to start functioning again. That as soon as the Appellant noticed that the vehicle had been repaired it ordered for repossession of the said motor vehicle without giving any notice.

6. The Respondent's case was that the said repossession was wrongful and or illegal. The Respondent maintained that he is a bona fide owner of the subject vehicle and he did not at any time authorize the sale of the same. The Respondent's contention is that the Appellant did not have any court order authorizing the same and that the sale agreement between him and the Appellant was not a chattel agreement to warrant repossession. According to the Respondent the Appellant had no property rights that could be passed to a third party. The Respondent claimed loss of user of the subject vehicle as from the time of seizure to date at the rate of Kshs 25,000/= per day.

7. The suit was heard by Hon C Obulusta, (CM), and in a judgment delivered on August 10, 2018, the learned Magistrate allowed the counter-claim and found that the Appellant had acted unlawfully in repossessing and selling the Respondent's vehicle. He then ordered that the Appellant refunds the Respondent the entire purchase price for the subject vehicle and that once the Respondent has purchased and replaced the motor vehicle, the Appellant can then pursue him for any loan arrears.

8. Aggrieved by the said ruling, the Appellant filed an appeal before this Court citing eight grounds, namely:

    1. That the Honourable Magistrate erred in law and facts in holding that the repossession and sale of the suit motor vehicle was not in compliance with the law.

    2. That the Honourable Magistrate erred in law and fact in holding that the Defendant is entitled to the entire purchase price of a motor vehicle whose condition was poor at the time of sale, a fact admitted by the Defendant.

    3. That the Honourable Magistrate erred in law and fact in holding that the repossession and sale must be conducted through an auctioneer and in a public auction when the Appellant/ Plaintiff was allowed to dispose the motor vehicle by private treaty.

    4. That the Honourable Magistrate erred in law and fact in concluding that only after the Defendant will have received the purchase price for the motor vehicle then the Plaintiff will be in a position or be allowed to claim the balance of the mortgage sum.

    5. That the Honourable Magistrate erred in law and fact in failing to hold that the Defendant had failed to prove his case to the required standards.

6. That the Honourable Magistrate erred in law and fact in holding that the Defendant could be allowed to claim the purchase price of the motor vehicle which claim was untenable and unconscionable.

7. That the Honourable Magistrate erred in law and fact by failing to hold that the prayers that the Defendant sought in the Counter-claim were never pleaded.

8. That the Honourable Magistrate erred in law and fact in not appreciating that there had been a total failure on the part of the defendant to repay the loan.

9. That the decision of the Honourable Magistrate is as a whole legally and factually untenable and it ought to be set aside.

9. Parties agreed to dispose of this appeal through written submissions.

Appellant's submissions

10. The Appellant filed submissions dated April 12, 2022. The Appellant submitted that it is not in dispute that the Respondent owed it the said monies. The Appellant argued that the statement of account that was presented in Court clearly showed that Respondent owed it Kshs 6,633,793.74. The Appellant argued that although it was not disputed that the Respondent owed it, the trial Court found in favour of the Respondent instead of entering judgment in its favour for the undisputed sums. The Appellant contends that the trial Court had even ordered a set off.

11. The Appellant's case is that the Respondent did not make any repayments towards the loan facility and as a consequence the entire loan facility fell into arrears. The Appellant submitted that the Respondent having defaulted in repaying the loan, there was no other option than to attach and sell the subject motor vehicle.

12. The Appellant maintained that notice was sent to the Respondent, informing him of its intention to realize the security if the amounts due to it were not paid with the notice period. The Appellant contends that it did not receive the payments as demanded following which the auctioneers repossessed the vehicle for sale. The Appellant further submitted that the auctioneers then sold the said vehicle and forwarded to it the proceeds for the sale. The Appellant maintained that vide the letter dated June 11, 2014 the Respondent was made aware of his default but he did nothing about it.

13. The Appellant argues that the loan facility having been secured by a Chattels Mortgage, it had the right to repossess the vehicle and sell it either by private treaty or public auction. The Appellant maintained that prior to the sale it had issued notice and that the sale had been conducted via private treaty and not public auction.

14. The Appellant faulted the trial Magistrate for making a finding for the Respondent. According to the Appellant the trial Magistrate should have entered judgment for the appellant and then enter judgment on the Counter-claim and set off any amounts. The Appellant submitted that alternatively the trial Court should have ordered the Respondent to remit the outstanding balance, less the consideration for the subject vehicle.

Respondent's submissions

15. The Respondent filed submissions dated June 5, 2022. He submitted that he does not dispute the fact that a loan facility had been advanced to him by the Appellant and that he had defaulted. He however submitted the process of repossession and sale of the subject vehicle was not procedural and thus the trial Court had found in his favour. The Respondent maintained that in order to achieve a set off

the Court should ascertain the amount due to both parties. The Respondents further contends that the trial Court could not have ascertained the same because the value at which the subject vehicle was sold could not be ascertained as no auction was done, the subject vehicle was never valued, and that the amount the vehicle was allegedly sold was unreasonable and in dispute. The Respondent further submitted that the Appellant failed to comply with the provisions of Rule 12 of the *Auctioneers Rules*.

16. The Respondent argued that in view of the prevailing circumstances the trial Court could not have ordered a set off. The Respondent maintains that the argument by the Appellant regarding a set off therefore did not have any basis.

17. The Respondent submitted that the argument that the sale was by way of a private treaty and not public auction is a new fact that was never submitted at the trial Court, that the same is an afterthought only meant to challenge the judgment by the trial Court. The Respondent submitted that from the record it was evident that the Appellant has attached a copy of the Public Auction Report and cannot now turn away and run from its own claim. The Respondent maintained that the entire process of auction and sale that was exercised by the Appellant was illegal and never complied with set down rules of procedure.

18. The Respondent submitted that at trial the auctioneers who the Applicants claimed to have used to reposes and sale the subject vehicle failed to present any instruction notice from the Appellant. The Respondent further contends that the Appellants had failed to produce any proclamation and attachment notices to show the Court that the process of repossessing, attaching and selling the subject vehicle had been complied with. Further that the Appellant had failed to produce the notification of sale and the advertisement of the proposed sale. The Respondent further faulted the appellant for failing to present any proof of payment of the purchase price by the auctioneer. The Respondent has further faulted the Appellant for not being able to state the venue and or place of auction and the time of the auction. The Respondent has also faulted the Appellant for failing to produce any valuation report to show the value of the subject vehicle before the sale by auction.

19. The Respondent maintained that the agreement between him and the Appellant was not a Chattel instrument which could have enable the Appellant repossess the subject vehicle without recourse to the Court of law thus the seizure and the sale was illegal. The Respondent contends that the subject vehicle was not merchantable quality for the Appellant to have sold it. The Respondent cited the case of *Oakpark Apartments Mombasa Ltd v Kenya Revenue Authority* [2018] eKLR to buttress his submissions.

Determination

20. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The Court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

21. In the present case it in not disputed that the Appellant advanced a loan facility of Kshs 4,650,000.00 to the Respondent. It is further not disputed the Respondent defaulted in repaying the said loan prompting the Appellant to repossess and sell the subject vehicle that had been offered as security.

22. The only bone of contention is whether the sale was via a private treaty or public auction; and if the sale was by public auction, were the rules and procedures for a sale by public auction observed. What then would be the remedies available to the Respondent if the same were not observed.

23. The Appellant's case is that the Respondent having secured the loan facility with a Chattel Mortgage it had the right to, without notice, reposes the vehicle for sale by either private treaty or public auction. I have keenly perused the record and it is clear that there was no evidence presented before the trial Court and this Court that showed that the Chattel Mortgage had been registered.

24. Be that as it may, on record there is a loan agreement confirming that Kshs 4,650,000.00 had been advanced to the Respondent. 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.

25. The record indicates that the Appellant alleges to have sold the subject vehicle by auction to one Mr Zekekiah Evans Nyamongo Achira for the sum of Kshs 1,300,000/=. The Respondent has challenged the alleged sale by auction for not complying with set out procedures mandated to be followed. The Respondent contends that the Appellant did not issue the requisite notices before undertaking the said sale; that the venue and time of the auction was never stated; that the auction was never advertised and that the subject vehicle was never valued before the alleged sale. It is indeed true from the evidence on record that the Respondent was not served with the proclamation and the attachment notices, the sale was never advertised and the subject vehicle never valued prior to its sell. The sale by auction was without doubt unlawful. Section 26 of the *Auctioneers Act*, provides that any aggrieved party in an auction can only recover damages against the auctioneer for the auctioneer's wrongful acts during the public auction.

26. In my view the trial Court having found that the sale by auction of subject vehicle was unlawful as it had not complied with the laid out procedures, the Court should have then proceeded to award the Respondent general damages for the loss he had incurred under the said auction. Having said so, it is trite that since the subject vehicle had been given as security for the loan, it became a commodity for sale and it was therefore subject to sale in case of default in loan repayment in the event that the Appellant decided to exercise its statutory power of sale. However the exercise of that power of sale must always be lawful. In this case, the appellant sold the respondent's motor vehicle without notice, without valuation and in total violation of the respondent's property rights. The loan advanced was Kshs 4,650,000/-. The value of the motor vehicle upon purchase according to the proforma invoice dated October 15, 2013 wasKshs 5,510,000/-. Yet the appellant sold the motor vehicle at Kshs 1,300,000/- and now demands Kshs 6,633,793/-. This is the height of business fraud. How did the appellant come to the conclusion that the value of the motor vehicle was Kshs 1,300,000/-? At trial, PW1 who is the appellant's Operation Manager testified that she did not know how proclamation was done and she did not have the notification of sale. In the Plaint the appellant did not even attempt to disclose how much money was repaid, how much the vehicle was sold for, or how they arrived at Kshs 6,633,793.74/-. The alleged auction which allegedly took place was a travesty of justice, notwithstanding the fact that the respondent owed some money to the appellant. The vehicle was sold at gross under value. A vehicle whose value was Kshs 5,510,000/- in November 2013 was sold atKshs 1,300,000/- in August 2015, barely 20 months later. There is no parameter this court can use to quantify the damage payable to the respondent, simply because the appellant carried out the purported auction without doing a valuation. However, courts are peopled with reasonable minds, and an educated guess, in the circumstances, would put the value of the suit motor vehicle at the time of sale at more than half the price it was bought. For this reason, the court put the value at Kshs 2,700,000/-. Since the vehicle was sold at Kshs 1,300,000/- the appellant shall refund the respondent Kshs 1,400,000/-. In addition, the appellant shall pay the respondent Kshs1,000,000/- being damages for wrongful auction.

27. I have also keenly looked at the Respondent's Counter-claim and I note that although the Respondent claimed loss of user of Kshs 25,000.00 per day the same was not specifically pleaded. The Respondent

did not lead any evidence whatsoever with regard to the Kshs 25,000.00 per day for loss of earnings per day. *In Kampala City Council v Nakaite [1972] EA* Court of Appeal held:

> " It is settled law that special damages need not only be specifically pleaded but must also be strictly proved."

28. The Respondent also claimed Kshs 800,000.00 for the purchase of a new engine and Kshs 300,000.00 for the purchase of a new gear box. From the copies of receipts on record one cannot verify the purpose of the Kshs 800,000.00 paid as the receipt does not have a description as to the purpose. I am also not able to verify whether these items were being bought for the subject vehicle or any other vehicle. It is for the above stated reasons that I find that the Respondent failed to sufficiently prove his Counter-claim against the Appellant.

29. In view of the foregoing, the Appellant's appeal lodged on September 7, 2018 partly succeeds. The effect of this decision is that the judgment of the learned trial Magistrate be and is hereby set aside and substituted in the following terms:-

    1. Judgment be and is hereby entered in favour of the Appellant against the Respondent for the sum of Kshs 6,633,793/= together with interest thereon at court rates from November 18, 2015 until payment in full.

    2. Judgment be and is hereby entered in favour of the Respondent against the Appellant for the sum ofKshs 2,400,000/= being general damages for unlawful sale of the Respondents' subject motor vehicle, and part of the value of the said motor vehicle (Pursuant to paragraph 26 of this Judgment). This shall be paid with interests at court rates from July 29, 2015 until payment in full.

    3. Parties to bear their own costs

    4. It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF JULY 2022.

E. K. OGOLA

JUDGE