



**Ngandu & another v Uwamba (Civil Appeal E375 of 2021)
[2022] KEHC 14341 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E375 OF 2021

DAS MAJANJA, J

OCTOBER 21, 2022

BETWEEN

BYRAN GITHINJI NGANDU 1ST APPELLANT

EXECUTIVE SUPER RIDES LIMITED 2ND APPELLANT

AND

THEO UWAMBA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Wanjala, PM dated 4th June 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 5548 of 2015)

JUDGMENT

1. This appeal stems from the respondent's claim before the subordinate court in respect to motor vehicle registration number KBX xxxP ('the motor vehicle'). The respondent purchased the motor vehicle from the appellants by a sale agreement dated July 26, 2015 ('the agreement') for Kshs 600,000.00 to be paid in instalments. The respondent paid part of the purchase price and upon default, the appellants proceeded to repossess and sell the motor vehicle in order to recover the balance of the purchase price.
2. This repossession prompted the respondent to initiate legal proceedings against the appellants initially for a mandatory injunction to compel the return of the motor vehicle, general damages for breach of contract, special damages, costs and interest of the suit. The respondent later amended his plaint to claim a refund of Kshs 469,000.00 among other reliefs for the wrongful repossession of the motor vehicle
3. In its amended statement of defence, the appellants admitted the fact that the parties entered into the agreement for sale of the motor vehicle but denied the allegations made against it. It averred that the



- respondent was in breach of the agreement by making late payments of the purchase price and or failing to complete payment of the balance of the purchase price and was not entitled to the reliefs sought.
4. After hearing parties, the court rendered judgment. The trial court accepted that the respondent had defaulted on his obligations under agreement but held that the repossession of the motor vehicle was unlawful and in breach of the agreement. The court also noted that the appellants did not follow due process in selling the motor vehicle and failed to render an account of the money received. The court awarded the respondent Kshs 400,000.00 being the price and Kes 45,000.00 being auctioneer's charges which the court found to have been paid illegally. The court did not award any damages for breach of contract on the ground that it had not been established.
 5. The appellants, being aggrieved by the judgment, filed this appeal based on the grounds set out in the memorandum of appeal dated June 29, 2021 seeking to set aside the judgment and dismissal of the suit. The appeal was canvassed by way of written submissions which I have considered in my determination.
 6. This being the first appeal, this court is bound to examine both the facts of the case and the law and reach its own conclusions making due allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle and Another v Associated Motor Boat Co and Others [1968] EA 130* and *Peters v Sunday Post Limited [1958] EA 424*).
 7. The underlying facts in this matter are not really in dispute. The respondent admitted that he defaulted in making payment and as a result the appellants repossessed and sold the motor vehicle. The question in this appeal is whether the appellants were entitled to repossess the motor vehicle and whether the respondent was entitled to the amount awarded.
 8. The parties filed written submissions in support of their respective positions. They agree that the sale of the motor vehicle is governed by the agreement and the *Sale of Goods Act* (Chapter 31 of the Laws of Kenya) ('the SGA').
 9. The appellants argue that in view of the admitted breach of the agreement by the respondent and indulgence granted to him, they had the right to repossess the motor vehicle. They argued that they merely exercised the rights of an unpaid seller by repossessing and selling the motor vehicle. The appellants' contend that the repossession is an affirmation of the rights of an unpaid seller and that they were forced to protect their interests once the respondent violated its obligation under the agreement.
 10. The respondent state that under the SGA, the remedy of an unpaid seller is not to repossess the motor vehicle but to sue for the balance of the purchase price. It supports the decision of the trial magistrate that the repossession was illegal in the circumstances. The respondent cited *Haulmart Kenya Limited v Tata Africa Holdings (Kenya) Limited [2017] eKLR* where the court elucidated various aspects of the SGA to support its position.
 11. Resolution of this appeal turns on the interpretation of the agreement and the application of the SGA. The right to repossess goods implies that property in the goods has not passed or has been reserved by the seller. In this case, the agreement provided for delivery of the vehicle to the buyer and for payment of the price by installments. The seller did not reserve the right to repossess the motor vehicle or otherwise secure the property in the motor vehicle. The court held that the under the agreement, the appellants could not repossess the vehicle without following due process and that having sold it they never rendered an account. In the absence of any provision in the agreement regarding the passage



of property, section 20(a) of the SGA which deals with when property shall pass comes into play. It provides as follows:

20. Rules for ascertaining intention as to time when property passes unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—
 - a. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;

12. In this case and in accordance with section 20(a) aforesaid, the property in the motor vehicle passed upon execution of the agreement and upon its delivery to the respondent. Once the property passed to the respondent and he failed to pay the balance of the purchase price, the appellants became unpaid sellers. Their remedy is for the purchase price and not the motor vehicle as provided for under section 49(1) of the SGA which states:

49(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

13. In their submissions, the appellants referred to section 28 and 40(1) of the SGA to argue that the buyer was obliged to pay the full purchase price and that the unpaid seller had the right to sell the goods. These provisions do not assist the appellants' case. Section 28 merely states that duties of the seller and the buyer, that is for the seller to deliver the goods and the buyer to pay for them in accordance with the contract of sale. The remedies for breach are prescribed elsewhere in the statute as I have shown.
14. Section 40(1) of the SGA provides for limited instances where an unpaid seller has a remedy against the goods where the property in the goods has passed. It provides as follows:

40. Rights of unpaid seller
 - (1) Subject to the provisions of this Act, and of any Act, in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of the goods, as such, has by implication of law –
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in the case of insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
 - (c) a right of resale limited by this Act.

15. This is not a case where the appellants were exercising their right of lien as the motor vehicle had already been released to the respondent (see *Marshall's East Africa Limited v Wilson Osoro NKUCA Civil Appeal No 52 of 1990 [1993] eKLR*). In any case, the right to a lien only entitles the holder to hold the goods until the price is paid. It does not confer a right to sell. Further, the wrongful act of a person is insufficient to found a legal lien. In sum and from the aforesaid provisions, neither the SGA nor the agreement conferred on the appellants the right to repossess and sell the motor vehicle.



16. I therefore find and hold that in the absence of property retention clause or security over the motor vehicle, the appellant could not repossess the motor vehicle. The trial magistrate therefore came to the correct conclusion that the repossession was illegal. In *Simon Muiruri Wanjohi v Resma Commercial Agencies & Another [2005] eKLR*, the court held that where there was no registered chattels mortgage, a party had no authority to repossess a chattel and its only recourse would be to seek the court's intervention. The court graphically expressed this positions as follows

The 1st respondent took the law into his own hands and unlawfully took possession of the said motor vehicle from the appellant.

In the event of breach of the agreement the 1st respondent was required to seek the intervention of the law and not use the law of the jungle to take away the appellants property --- the 1st respondent robbed the appellant of his motor vehicle.

(see also *Real People Kenya Limited and Another v John Nyandega t/a Akmal Enterprises and Another [2022] eKLR*).

17. Since the repossession was illegal, the only other issue is the relief the respondent was entitled to. The appellants' case is that since the respondent was in breach, he could not benefit from his own breaches by being awarded the price he had paid. From the respondent's point of view, it was entitled to damages for the illegal repossession of the motor vehicle.

18. Once the court held that the appellants' acted unlawfully, the respondent was entitled to relief. In *Simon Muiruri Wanjohi v Resma Commercial Agencies (Supra)* the court observed that since the vehicle in that case has been sold and could not be restored, it ordered refund of the purchase price. In this case, the appellants denied the respondent of his property for which he paid Kshs 400,000.00. He was therefore entitled that amount together with the costs incurred in the illegal repossession.

19. The appellants' right, as I have held, was for the balance of the purchase price for which it was entitled to sue. It however repossessed the motor vehicle and sold it. The trial court was right to conclude that to retain what the respondent had paid and proceeds of sale of the motor vehicle in light of the unlawful conduct would amount to unjust enrichment. I adopt the following words of the court in *Njoro Canning Factory (K) Ltd v John Michael Mbugua and Another NKU HCCA No 90 of 2014 [2018] eKLR*:

(12) Taking into account the above admitted facts it would in my view be unconscionable and fraudulent to allow the 2nd respondent to keep both the money and the vehicle as it would be an unjust enrichment that the law abhors. It is frowned upon by the court as unreasonable (sic) and illegal.

20. For the reasons I have stated, the appeal lacks merit and is dismissed. The appellants shall pay the respondents costs assessed at Kshs 40,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J. SERGON (DR)

JUDGE



Court Assistant: Mr M. Onyango.

.....instructed by Ogola Okello and Company LLP Advocates for the Appellants.

.....instructed by E. Omulloh Advocates for the Respondent.

