



**NCBA Bank Kenya Plc v Blue Pearl Logistics Limited (Civil Appeal E020 of 2022)  
[2022] KEHC 16897 (KLR) (Commercial and Tax) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E020 OF 2022  
DAS MAJANJA, J  
DECEMBER 21, 2022**

**BETWEEN**

**NCBA BANK KENYA PLC ..... APPELLANT**

**AND**

**BLUE PEARL LOGISTICS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. S. G.  
Gitonga, Adjudicator/RM dated 31st January 2022 at the Small  
Claims Court at Nairobi, Milimani in SCC Claim No. E503 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. Before the court for determination is an appeal by the appellant from the judgment of the Small Claims court dated January 31, 2022 where the court allowed the respondent's claim for Kshs. 900,000.00.
2. The facts giving rise to the suit before the Subordinate Court are common ground. Sometime in December 2019, the Appellant advertised for sale by way of public auction a number of motor vehicles and trailers it had repossessed from its defaulting customers. The Respondent successfully bid for and purchased a trailer described as Bhachu Flat Bed Trailer, Registration Number Zf0\*\*7 ("the trailer") for Kshs. 900,000.00. The Appellant released the trailer together with the relevant transfer documents to enable the Respondent effect the transfer and registration of the trailer to the Respondent's ownership with the National Transport and Safety Authority ("NTSA") database.
3. However, the Respondent was not able to transfer ownership and/or registration of the trailer to its name despite the Appellant issuing a letter of discharge of interest. The Respondent then caused the Directorate of Criminal Investigations ("DCI") to conduct a 'Tape-Lift' analysis to verify the



particulars for the trailer whereupon the said Tape Lift revealed that the Chassis and/or Serial Number on the trailer did not correspond to the Registration Certificate presented to the Respondent by the Appellant. Since the Respondent could not register and transfer the trailer, it filed suit against the Appellant demanding a refund of the Kshs. 900,000.00 together with legal costs of Kshs. 20,000.00 spent towards acquisition of the trailer.

4. In its defence, the appellant stated that the advertisement, bidding and sale of the trailer was subject to the attached terms and conditions available at its sale agent's website, <https://carduka.com/auction/terms>, which the Respondent accepted before placing its bid and that Clause 5.1, 5.2 & 5.3 of the said terms and conditions declared that the trailer was being sold on "as is, where is" basis and there was no warranty, express or implied, that the trailer would be fit for purpose or merchantable and that it was the Respondent's duty to investigate and establish "all vehicle related information" before placing a bid.
5. The Appellant further stated that if at all the Respondent experienced the challenges it alleged its claim, then the same was purely out of its neglect to inspect the trailer and that the Appellant could not be held liable for the Respondent's failures. The Appellant thus urged the subordinate court to dismiss the claim.
6. After considering the material on record, the Subordinate Court delivered its judgment on 31<sup>st</sup> January 2022. It found that from the circumstances of this case, the Respondent had no way of verifying such complicated details as the chassis and serial number of the trailer before purchase and could not have possibly known that the trailer would have such anomalies and was only prompted to notify the DCI to investigate once NTSA neglected to transfer the trailer to its name. The Adjudicator stated that the Respondent, as an innocent purchaser, paid for a trailer that was in fact not transferable due to an illegality and falsification of records and that it was unjust for the Appellant to stay with a trailer it paid for that was unusable since it could not transfer the ownership to its name and could subsequently not acquire the requisite licenses for its use or even get a motor vehicle insurance cover. The Adjudicator further held that the Respondent could not use the trailer for the intended purchase, a fault which could not be attributed to it and concluded that the intention of any buyer is to have a good title which could only be achieved if the Appellant had a good title in the first place to pass to the Respondent.
7. The Adjudicator concluded that due to failure of consideration, the Respondent was entitled to a refund of the purchase price but found no basis in awarding the legal costs of Kshs. 20,000.00. The court therefore awarded the Respondent Kshs. 900,000.00, interest thereon and costs thus precipitating this appeal.
8. The appeal was canvassed by way of written submissions which are on record and which reflect the parties' positions before the Subordinate Court.

### **Analysis and Determination**

9. The court's jurisdiction in dealing with appeals from the Small Claims Court is limited by section 38(1) of the *Small Claims Court Act*, 2016 which provides that 'A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).



10. The Appellant impugns the decision of the subordinate court for ignoring the terms of the contract between the parties, for finding that the Appellant lacked title to the trailer and for relying on unpleaded causes of action.
11. On the ground of that the Adjudicator ignored the terms of the contract between the parties, the Appellant submits that there was no evidence that the Respondent had attempted to verify that the chassis number on the trailer corresponds with the records held by NTSA and that it would have been a simple exercise of conducting a search and counter-checking with the physical trailer. Further, that it was not suggested that the Respondent would not request the DCI to conduct the “tape-lifting” before placing its bid, in the same way it got the DCI to do the “tape-lifting” after purchasing the trailer. The Appellant also faults the learned magistrate for ignoring the express obligation at Clause 5.3 of the conditions of sale that required the Respondent to investigate and establish “all vehicle related information” and that if the Respondent thought the obligation onerous, or impossible, it would have kept off the contract.
12. The Appellant thus states that the Respondent cannot enter into a contract and then say, “I did not know that which I was obligated to know” and that to conclude, as the learned Adjudicator did, that the Respondent could not know those details, and was therefore entitled to a refund, is to re-write the clear terms of the contract. The Appellant further states that it was also a re-writing of the contract when the learned Adjudicator concluded that the trailer was not fit for purpose, yet Clause 5.2 made it clear that the Appellant was not warranting that the trailer would be fit for a particular purpose.
13. The Respondent supports the decision of the Adjudicator that the Appellant failed to deliver good title to enable transfer of the trailer. It relies on section 14 and 19 of the [Sale of Goods Act](#) (Chapter 31 Laws of Kenya) which provides as follows:
  14. Condition and warranties implied in contracts of sale

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.
  19. Property in specific or ascertained goods passes when intended to pass
    - (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.



- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

14. The respondent thus submits that it demonstrated through evidence that the appellant had failed to pass good title to the respondent and that the adjudicator did not err or attempt to re-write the contract as put out by the appellant. That the court properly found that the Appellant had failed to deliver a title free from any encumbrance, due to the falsification of a title which applied to a totally different trailer from what was delivered to the Respondent, a challenge that was unforeseen by the Respondent at the time of entering into the agreement, also governed by the implied conditions and warranties above referenced.
15. A summation of sections 14 and 19 of the *Sale of Goods Act* is that in a contract of sale of goods, there is an implied term on the part of the seller that in the case of a sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have such a right at the time when the property is to pass. In a contract of sale, there is also an implied term that one, the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and two, the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner of or other person entitled to the benefit of any charge or encumbrance so disclosed or known.
16. The appellant did not contest that the details of the trailer's chassis did not match those indicated in NTSA's records or with the registration certificate that was presented to the respondent by the appellant, which means that the appellant was in possession of a trailer that most likely belonged to someone else. Obviously, the Appellant could not have and could not pass any good title for this trailer as it had no right to sell the same in the first place. When Mativo J, (as he was then) was faced with a case of similar circumstances as the present one in *Stephen Kilonzo Nyondo v Samuel Wabome Kibuthu* NYR HCCA No. 57 of 2011 [2015] eKLR, he held as follows:

Turning to the present case, it is not in dispute that the parties herein entered into a sale agreement for a motor cycle, that the Respondent paid Ksh. 63,000/= and that subsequently it was established that the registration number for the motor cycle belonged to a motor vehicle. A search was produced attesting to that fact. The police verified the said anomaly. It would be unreasonable to expect the buyer to have continued keeping the motor cycle under such circumstances. It is contrary to reason to suggest that the seller had a good title nor could he pass title to the buyer under such circumstances. The Respondent performed his part of the contract. He paid the full purchase price. But the consideration failed, hence making the contract void or voidable at the instance of the innocent party.

I find no difficulty in concluding that the intention of the parties was that the buyer would have a good title and he paid the purchase price on that understanding. Applying the law and the principles cited above in the present case, I find no difficulty concluding that the Appellant did not have a good title to pass to the Respondent and that he was in breach of the express and implied terms of the contract he entered into with the Respondent and that there is total failure of consideration and consequently the Respondent was entitled to rescind the contract and claim back the purchase price

17. Once it is established that a seller has no right to sell a good and that he cannot pass any good title of the same, then there is a total failure of consideration and the innocent purchaser is entitled to a refund of any sums paid. The learned Adjudicator was therefore right to find that the consideration failed in this



transaction and the Respondent was entitled to a refund of the sums it had paid. Whereas it is possible that the Appellant may not have been aware that the trailer's registration details were not matching with its chassis, it cannot lay blame on the Respondent for not conducting such due diligence before the sale. With or without any due diligence, the fact remained that the Appellant did not have a right to sell the trailer and it could not pass any good title to the Respondent or any other person for that matter.

18. The findings I have made settles the two issues raised by the appellant to the effect that it was intended between the parties when they entered into the contract of sale for the trailer that the respondent would get a good title for it and it paid the bid price on that understanding. I further find that indeed, the appellant lacked good title to pass to the respondent.
19. As to whether the adjudicator relied on pleaded causes of action in importing and applying the terms "unjust enrichment" and "failure of consideration" in allowing the claim, my answer is in the negative. Indeed, it is unjust enrichment for the appellant to receive and continue to hold payment for a trailer it had no proper or good title to. As I have also stated, it was a failure of consideration as the appellant did not have a good title to pass to the respondent and it was in breach of the express and implied terms of the contract it entered into with the respondent. I hold that the use of these expressions were mere surplusage and did not detract from the main issue that title to the trailer was defective and the respondent was entitled to a refund. I cannot say the adjudicator's decision was perverse so as to attract this court's interference.

### **Disposition**

20. The appellant's appeal lacks merit and is dismissed with costs to the respondent which are assessed at Kshs. 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER 2022.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr Opole Instructed by Muriu, Mungai and Company LLL Advocates for the Appellant.

Mr Chege instructed by Kamau, Chege and Kagunyi Advocates for the Respondent

