



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E112 OF 2020

JOSEPH NG'ANG'A MUKUNDI.....APPELLANT/APPLICANT

-VERSUS-

MARTIN ANDREW MUGAMBI.....1ST RESPONDENT

PRESITIGE SAFE MOTORS LTD.....2ND RESPONDENT

JOHN M. MBIJIWE T/A BEALINE KENYA AUCTIONEERS.....3RD RESPONDENT

JUDGEMENT

1) Joseph Ng'ang'a Mukundi, the appellant herein, is the registered owner of motor vehicle registration no. KCU 770M Toyota Prado TX while Martin Andrew Mugambi, the 1st respondent herein, is the buyer or beneficial owner of the aforesaid motor vehicle, having bought the same from Prestige Safe Motor Ltd, the 2nd respondent herein, vide the sale agreement dated 6th December 2019.

2) The 2nd respondent is a motor vehicle dealer/agent. John M. Mbiyiwe T/A Bealine Auctioneers is an auctioneering agent who carried out the appellant's instructions to repossess the motor, the subject matter of this suit, from the appellant.

3) The background of this dispute is that on 6th December 2019, the 1st respondent executed a sale agreement with the 2nd respondent acting on behalf of the appellant to purchase motor vehicle registration no. KCU 770M. The 1st respondent surrendered his motor vehicle registration no. KCK 709Z Honda CRV valued at ksh.1,800,000/= and also issued three cheques worth kshs.900,000/= totaling ksh.2,700,000/= after which he was given possession of motor vehicle registration no. KCU 770M pending the registration and transfer of the same.

4) On 3rd June 2020, the appellant instructed John M. Mbiyiwe T/a Bealine Auctioneers, the 3rd respondent to repossess motor vehicle registration no. KCU 770M from the 1st respondent. The action prompted the 1st respondent to file the action pending before the trial court in which he contested the repossession of the suit motor vehicle by the appellant and further sought for an order of its release.

5) The trial magistrate vide her ruling delivered on 28th August 2020 granted the 1st respondent possession of motor vehicle registration no. KCU 770M pending the hearing and determination of the suit.

6) Being dissatisfied with the trial court's ruling the appellant preferred this appeal. Pursuant to the motion dated 15th September 2020 the appellant obtained inter alia orders staying of proceedings in C.M.C.C No. 2185 of 2020 and an order directing the motor vehicle to be stored in a reputable motor vehicle yard pending the hearing and determination of this appeal.

7) The appellant put forward the following grounds of appeal.

i. THAT the learned magistrate erred in law and fact in ordering the appellant to release his motor vehicle registration no. KCU 770M Toyota Prado to the 1st respondent despite her knowledge that the 1st respondent had purportedly purchased the said motor vehicle under an impugned contract due to fraudulent actions by the 2nd respondent.

ii. THAT the learned magistrate erred in law and fact by issuing final order depriving the appellant of his rights to won his property despite her appreciation in her ruling that the appellant to date has not received any consideration out of a purported sale of his motor vehicle of registration number KCU 770M Toyota Prado by the 2nd respondent.

iii. THAT the learned magistrate erred in law and fact by not appreciating that no good title ever passed to the 1st respondent as the 2nd respondent being the appellant's agent acted fraudulently for its sole purpose.

iv. THAT the learned magistrate totally misapprehended the law and the facts of the case leading to an erroneous decision.

v. THAT the learned magistrate erred in law and fact by issuing orders not prayed for in the Notice of Motion dated 4th June 2020.

8) When the appeal came up for hearing counsels made an order to have this appeal disposed of by written submissions.

9) I have re-evaluated the arguments made before the trial court. I have further considered the rival written submissions together with the cited case law. On the first ground of appeal, it is the submission of the appellant that the trial magistrate erred by directing the appellant to release his motor vehicle to the 1st respondent yet the 1st respondent acquired the same under an impugned contract due to the fraudulent actions by the 2nd respondent.

10) It is the averment of the appellant that he instructed the 2nd respondent to procure a potential buyer of motor vehicle registration no. KCU 770M and that he never authorized the 2nd respondent to sell to the 1st respondent the suit motor vehicle.

11) It is pointed out that the 2nd respondent forged the letter of authority to sell dated 6th December 2019. It is stated that the letter was written and signed when the appellant was in Spain on official government duty.

12) It is the argument of the appellant that despite having noted that the appellant's authority to sell was acquired by fraud the trial court erred by going ahead to erroneously hold that the 1st respondent had established a prima facie case and by proceeding to order the appellant to hand over the motor vehicle to the 1st respondent.

13) The 1st respondent is of the submission that the trial magistrate relied on the evidence and applicable law in ordering for the release of the motor vehicle to him. It is pointed out that the trial magistrate based her decision on the evidence led by the parties which confirmed that there existed a straightforward agency relationship between the appellant and the 2nd respondent.

14) After a careful consideration of the rival arguments over this ground, it is clear that the appellant and the 2nd respondent entered into an agency relationship over the sale of motor vehicle registration number KCU 770M. What is in dispute is the extent of the authority given to the 2nd respondent.

15) The appellant is of the averment that the 2nd respondent was required to only procure a potential buyer and that it was required to inform the appellant who would then execute the transfer documents after agreeing on the purchase price.

16) The appellant pointed out that the letter of authority to sell dated 6th December 2019 was a forgery since it was executed while the appellant was out of the country. There is no doubt that the question as to whether or not fraud was committed by the 2nd respondent has to be interrogated in a trial. The question as to whether the 1st respondent acquiesced the alleged fraud is also a matter for the trial court.

17) It must be appreciated that the trial magistrate was dealing with an interlocutory application for injunction. In determining such an application, the trial magistrate was bound to consider whether the applicant (1st respondent) established a prima facie case.

18) The 1st respondent presented evidence showing that he purchased the suit motor vehicle from the 2nd respondent who acted as an agent for the appellant. It is clear that the 1st respondent had established a prima facie case thus entitling the trial magistrate to grant the order.

19) It would appear from the arguments put forward that the trial magistrate erred by issuing orders releasing the suit motor vehicle to the 1st respondent yet its acquisition is contested. With respect, I agree with the appellant that the trial magistrate should instead have made an order for the motor vehicle to be kept by a neutral party instead of having it released to the 1st respondent.

20) In the second ground, the appellant accused the trial magistrate of making final orders thus depriving him of his rights to own property despite appreciating that the appellant to date has not received any consideration out of the purported sale of the suit motor vehicle.

21) The 1st respondent is of the submission that the trial magistrate did not issue final orders but instead issued orders pending the hearing and determination of the suit. With respect, I am persuaded by the 1st respondent's submission that the trial magistrate's orders were to subsist pending the hearing and determination of the suit.

22) In third ground of appeal the appellant argued that the trial magistrate erred by not appreciating that no good title ever passed to the 1st respondent as the 2nd respondent being the appellant's agent acted fraudulently. It is the submission of the appellant that the 2nd respondent forged the letter of authority to sell hence he is not bound by the letter of authority and the purported sale.

23) The 1st respondent on the other hand is of the submission that he obtained good title pursuant to the provisions of Section 23 of the Sale of Goods Act. It is apparent from the ruling of the trial magistrate that the court noted that the issue of fraud required to be interrogated in a trial. With respect, I must state from the onset that the issue on fraud or forgery is an issue which has to be determined at the trial of the suit. I therefore decline to make any conclusive finding on the issue in this appeal.

24) The learned trial magistrate correctly avoided making conclusive opinion on the matter. Therefore, the trial magistrate cannot be faulted in the manner she handled the matter.

25) The appellant in the fourth ground argued that the trial magistrate misapprehended the law and facts of the case leading to an erroneous decision. According to the appellant, the 1st respondent did not meet the principles of granting a temporary order of injunction. The 1st respondent on his part has argued that he demonstrated that he had a prima facie case and that he would suffer irreparable loss and would be more inconvenienced. In determining ground no. 1 of the appeal, I stated that the 1st respondent had shown he has a prima facie case. It cannot therefore be said that the trial magistrate had misapprehended the applicable principles.

26) In the final ground of appeal, the appellant argued that the trial magistrate erred by issuing orders which had not been sought in the motion dated 4th June 2020. The 1st respondent is of the submission that the orders issued had been prayed for hence the trial magistrate cannot be faulted.

27) I have carefully perused the motion which gave rise to the ruling delivered on 28/8/2020 and it is clear that some of the orders which were granted by the learned Senior Principal Magistrate were not prayed for. One of those orders is the one requiring the 2nd respondent to deposit in court the sum of kshs.2,700,000/=.

28) In the end, this appeal succeeds giving issuance of the following orders:

a) The orders issued on 28/8/2020 by the learned Senior Principal Magistrate are hereby set aside and are substituted with an order directing that motor vehicle registration no. KCU 770M, Toyota prado be kept in a reputable motor vehicle yard pending the hearing and determination of Nairobi C.M.C.C no. 2185 of 2020 Milimani Commercial Courts.

b) The appellant and the 1st respondent to equally meet the storage charges.

c) The aforesaid suit to be heard on priority basis.

d) In the circumstances of this appeal, a fair order on costs is that each party should bear its own costs of appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent