



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 616 OF 2017

SIMON GICHURU NGOMONGE

T/A DOLLAR AUCTIONEERS.....APPELLANT

VERSUS

WILLIAM SAGINI ORIBU.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon L.W. Kabaria (SRM)* dated 6th November 2017 in which the learned trial magistrate partially allowed the respondent's claim against the appellant as pleaded in the plaint dated 11th April 2012 which instituted the suit in the lower court.

2. The respondent's claim against the appellant was for a refund of KShs.750,000 with interest at the commercial rate of 20% per annum with effect from 8th December 2011 until payment in full; damages for loss of user of motor vehicle registration number KAZ 718J (the suit vehicle) and interest and any other or further relief the court may deem fit to grant.

3. In support of his claim, the respondent pleaded that he bought the suit vehicle in a public auction conducted by the appellant on 12th November 2011 having emerged as the highest bidder with a bid of KShs.500,000; that after paying the purchase price, the appellant immediately put him into possession of the vehicle and this is when he discovered that the vehicle was in a serious state of disrepair; that in order to restore it into a roadworthy condition, he had to spend KShs.220,500.

4. Further, the respondent averred that on 8th December 2011, the police impounded the vehicle claiming that it had been stolen and efforts to secure its release or to recover its purchase price from the appellant bore no fruit but made him incur an additional expense of KShs.30,000 in the form of legal fees. This amount together with the purchase price of KShs.500,000 and repair costs in the sum of KShs.220,000 made up the total of KShs.750,000 pleaded as special damages in the suit.

5. In his statement of defence dated 27th June 2012, the appellant denied liability averring that he was wrongly sued in the matter as he had sold the vehicle as a licenced auctioneer on behalf of a disclosed principal who had not been enjoined as a party to the suit.

In addition, he denied that the respondent was entitled to reimbursement of repair costs claiming that the vehicle was sold on an "as is where is" basis.

6. After a full trial, the learned trial magistrate entered judgment for the respondent against the appellant in the sum of KShs.720,500 but declined to award him interest at the commercial rate pleaded in the plaint. She instead awarded him interest at court rates from the date of filing suit until payment in full together with costs of the suit.

7. The appellant was aggrieved by the trial court's decision hence this appeal. In the grounds encapsulated in his memorandum of appeal filed on 9th November 2017, the appellant listed twelve grounds of appeal in which he principally complained that in rendering the impugned judgment, the learned trial magistrate erred in law and fact by: failing to find that the appellant was only acting as an agent and that the suit was incompetent as it did not disclose a cause of action against him; condemning him to pay for the loss of the suit vehicle yet he had been discharged from any liability upon completing the auction sale; failing to find that the respondent's claim in other decisions in *High Court JR No. 170 of 2012* and *Criminal Case No. 110 of 2012 R V John Kibathi Muthama* had substantially dealt with issues raised in the suit and had exonerated him from blame; finding that the respondent had proved his case on a balance of probabilities and in making an award for special damages when the same were not specifically proved.

8. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellant were filed on 10th September 2020 while those of the respondent were filed on 29th September 2020.

9. This being a first appeal to the High Court, it is my duty to revisit all the evidence placed before the trial court and to subject it to an exhaustive re-examination and re-evaluation to draw my own independent conclusions. The duty of the first appellate court is now well settled. It was succinctly articulated by the Court of Appeal in the case of **Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR** where the court emphasized that the first appellate court's duty was to:

“... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

10. I have duly considered the grounds of appeal, the evidence adduced before the trial court and the parties' rival written submissions alongside all the authorities cited.

Having done so, I find that it is not disputed that the respondent bought the suit vehicle in a public auction conducted by the appellant on 12th November 2011 and that the vehicle was subsequently impounded by the police on allegations that it was stolen. What is disputed and was the bone of contention in the lower court was whether the respondent had proved to the required legal standard that the appellant was liable to pay him the special damages pleaded in the plaint. The prayer for general damages for loss of use of the suit vehicle was apparently abandoned by the respondent in the course of the trial.

11. The record of the trial court shows that both the respondent and the appellant testified in support of their respective cases and none called an additional witness. In his evidence, the respondent (PW1) narrated how he bought the suit vehicle on 12th November 2011 at a cost of KShs.500,000 in a public auction conducted by the appellant trading as Dollar Auctioneers. The vehicle was released to him but a month later, it was impounded by the police. He testified that before it was impounded, he had spent KShs.220,500 in repair costs to put it into a roadworthy condition. He produced as exhibit 4 a receipt dated 11th April 2012 as evidence of costs of the alleged repairs. He claimed that upon demand, the appellant refused to refund him the purchase price for the vehicle.

12. In cross-examination, PW1 admitted that the appellant sold to him the vehicle in his capacity as an auctioneer on behalf of his client. He also admitted both under cross-examination and re-examination having been shown a document dated 17th November 2011 in which *E. Njeru Gichovi Advocate* acknowledged receipt of KShs.419,000 from Dollar Auctioneers.

13. On his part, in denying the respondent's claim, the appellant relied on the court's decision in Judicial Review Case No. 170 of 2012 which in his view vindicated his claim that he had exercised due diligence and had followed the law in disposing of the suit vehicle in the public auction. He maintained that he was wrongly sued in his individual capacity yet he had sold the vehicle as a licensed auctioneer on behalf of a principal who he had disclosed in documents attached to letter dated 15th November 2011 issued to the respondent after the auction. He also testified that after the auction, he immediately forwarded the proceeds of sale less his professional fees to his instructing client's advocates *Messrs. Njeru Gichovi & Company Advocates* which fact was also communicated to the respondent.

14. In her judgment, the learned trial magistrate after considering the evidence adduced by the parties and their respective submissions started and correctly so I must add, by seeking to determine the appellant's contention that he was wrongly sued because he had sold the vehicle as an agent of a disclosed principal who had not been enjoined in the suit.

15. In resolving this issue, the learned trial magistrate stated as follows:

“I have considered the evidence: the advertisement availed to the court indicated that the defendant's herein would auction the vehicle on instruction from the client, the 'client' is not disclosed. I have also seen the letter to Mr. Sagini from Messrs Dollar Auctions informing him that he was the highest bidder, that letter does not disclose the instructing client either, the defendant I find is properly sued.”

16. From my independent evaluation of the evidence on record, I find that though the learned trial magistrate correctly found that the appellant had sold the suit vehicle as an agent and not in his private capacity, she erroneously held that his principal had not been disclosed. This finding was not supported by the evidence on record.

17. A close scrutiny of the advertisement giving notice of the public auction though not specifically stating who had given Dollar Auctioneers instructions to conduct the public auction expressly indicated that the auction was pursuant to distress for rent and named the parties involved in the matter. Secondly, the appellant's principal was disclosed in the documents attached to the letter dated 15th November 2011 issued to the respondent by the appellant immediately after conclusion of the auction.

18. The documents included the letter dated 5th September 2011 in which the appellant trading as Dollar Auctioneers was instructed by *Wonderful International 'K' Limited* to levy distress against *Mr. Elisha K. Rotich's* household goods and another letter dated 3rd November 2011 in which *Messrs. Njeru Gichovi & Company Advocates* reiterated the instructions given to the appellant in the letter dated 5th September 2011 and specifically instructed the appellant to sell the suit vehicle on behalf of their clients, *Wonderful International 'K' Limited* who were copied in the letter.

19. Besides availing evidence disclosing his principal, the appellant also produced evidence which substantiated his claim that on 16th November 2011, he forwarded the proceeds of sale of the vehicle less his professional fees to the principal's advocates whose receipt they acknowledged on the face of the said letter. The respondent in his evidence admitted having seen the said acknowledgement.

20. In view of the foregoing, it is very clear that in selling the suit vehicle, the appellant acted as an agent of a disclosed principal who was identified as *Wonderful International 'K' Limited*. As reiterated by the Court of Appeal in **Victor Mabachi & Another V Nurtun Bates Limited, [2013] eKLR**, an agent for a disclosed principal should not be sued for anything done in execution of his principal's instructions. In

making this finding, the Court of Appeal cited with approval its earlier holding in Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank, Civil Application Nos. NAI 5 & 48 of 2002, wherein it stated thus:

“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

21. The learned trial magistrate failed to properly interrogate the evidence placed before her in its totality and thereby arrived at the erroneous conclusion that the appellant had failed to avail evidence that disclosed his principal. And considering that the respondent’s claim included a claim for refund of the purchase price for the vehicle which the appellant had already dispatched to his principal through its advocates, there cannot be any doubt that the respondent’s cause of action lay against his disclosed principal and not against the appellant.

22. It is also important to note that the respondent’s claim was anchored on the fact that a month after the auction, the vehicle was impounded by the police. There was no claim that the appellant played any role in having the vehicle impounded. It is also pertinent to note that in his suit, the respondent did not claim that the appellant had conducted an unlawful auction or that he was negligent in the manner in which he executed his duties as an auctioneer. It was therefore not relevant to consider whether or not he had conducted a search to establish ownership of the vehicle before attaching and selling it in a public auction especially in the face of evidence in the letter dated 3rd November 2011 which confirmed instructions to the appellant by his principal to proceed with the sale as scheduled as the tenant had not lodged an objection to enforcement of the distress.

23. Flowing from the foregoing, it is my finding that the learned trial magistrate erred by failing to appreciate that the suit did not disclose a cause of action against the appellant and in basing her decision on extraneous and irrelevant considerations.

24. Having found as I have above, I find that this appeal is merited and it is hereby allowed. Consequently, the trial court’s judgment is set aside and is substituted with an order dismissing the respondent’s suit with costs.

25. As costs follow the event, the appellant is awarded costs of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mogikoyo for the respondent

No appearance for the appellant

Mr. Ichuloi: Court Assistant