



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J

CIVIL APPEAL NO. 126 OF 2019

BETWEEN

JOBU MUTHIGANI.....APPELLANT

AND

SHADRACK MACHARIA NDEKERE.....1ST RESPONDENT

MBAABU JACOB JULIUS.....2ND RESPONDENT

(Being an Appeal from Judgement and decree in Maua CMCC No. 62 of 2018 by Hon. O. Wanyaga(SRM) on 20th September, 2019)

JUDGMENT

SHADRACK MACHARIA NDEKERE'S CASE

1. By a sale agreement dated 12th January, 2018 **PEXH. 1**, **SHADRACK MACHARIA NDEKERE** offered to sell and sold M/V KCA 946W (*suit motor vehicle*) to **JOBU MUTHIGANI** for Kshs. 400,000/-. Appellant paid Kshs. 100,000/- and offered to pay the balance within 2 months from the date of sale.

2. It was the **SHADRACK MACHARIA NDEKERE**'s case that the **JOBU MUTHIGANI** failed to pay the balance of Kshs. 300,000/- and that by a letter dated 29.03.2018 **PEXH. 2**, he demanded Kshs. 300,000/- being the balance of the purchase price and penalty of Kshs. 400,000/- from **JOBU MUTHIGANI** notwithstanding that he had subsequently transferred the *suit motor vehicle* to his name in between 11th and 23rd April, 2018. His witness **Caren Kawiria Mutura** denied that she received Kshs. 150,000/- from **Bishop Peter Miriti** for onward transmission to her husband **SHADRACK MACHARIA NDEKERE**. **SHADRACK MACHARIA NDEKERE** thus filed suit seeking orders:

- 1) **Specific performance of the agreement dated 12.01,2018**
- 2) **Repossession of M/V KCA 946W as an alternative to the balance of purchase price**
- 3) **Damages for breach of contract**
- 4) **Costs**

JOBU MUTHIGANI'S CASE

3. **JOBU MUTHIGANI**'s case was that he paid the balance of the purchase price of Kshs. 300,000/- in two instalments of Kshs. 150,000/- cash directly to **SHADRACK MACHARIA NDEKER** and Kshs. 150,000/- through his witness **Bishop Peter Miriti** who told court that he had given the money to **SHADRACK MACHARIA NDEKERE**'s wife who was the area chief.

4. Subsequently by a sale agreement dated 27th February, 2018, **JOBU MUTHIGANI**'s sold the *suit motor vehicle* to the **MBAABU JACOB JULIUS** for Kshs. 600,000/- which was paid in full and possession of the *suit motor vehicle* was handed over to the **MBAABU JACOB JULIUS**. He thus filed defence and counterclaim seeking orders:

1. **A declaration that the transfer of M/V KCA 946W by the SHADRACK MACHARIA NDEKERE to himself during the**

subsistence of the suit is illegal, unlawful and fraudulent

2. M/V KCA 946W be and hereby declared the property of MBAABU JACOB JULIUS

In the alternative

3. A declaration that SHADRACK MACHARIA NDEKERE has breached the agreement dated 12.01.2018 and was liable to refund the consideration sum and pay liquidated damages for breach of the agreement with interest as agreed

4. Costs of the suit and counterclaim

MBAABU JACOB JULIUS' CASE

5. MBAABU JACOB JULIUS's case was by a sale agreement dated 27th February, 2018, JOBU MUTHIGANI sold the *suit motor vehicle* to him for Kshs. 600,000/- which he paid in full and took possession of the *suit motor vehicle*. He improved the *suit motor vehicle* at the cost of Kshs. 49,000/- before it was repossessed. He thus filed claim against JOBU MUTHIGANI seeking orders:

1. Refund of the purchase price

2. Special damages

3. General damages

6. After hearing the parties, the Learned Trial Magistrate in a judgment delivered on 20th September, 2019 made orders THAT:

1. The court declares that the property in motor vehicle KCA 946W Subaru is still in SHADRACK MACHARIA NDEKERE and directs that the same be released to him

2. MBAABU JACOB JULIUS is directed to release the original logbook for the said vehicle to the SHADRACK MACHARIA NDEKERE

3. JOBU MUTHIGANI is ordered to refund Kshs. 600,000/- to the MBAABU JACOB JULIUS that was admittedly paid for purchase of the said motor vehicle KCA 946W Subaru. This amount will attract interest at court rates from the date of this judgment until payment in full

4. JOBU MUTHIGANI to pay costs of this suit to SHADRACK MACHARIA NDEKERE and MBAABU JACOB JULIUS

5. SHADRACK MACHARIA NDEKERE is ordered to refund Kshs. 100,000/- to the 1st Defendant JOBU MUTHIGANI. Such costs shall be set off against the costs awarded in (4) above.

The Appeal

7. JOBU MUTHIGANI dissatisfied with the lower court's decision preferred this appeal by way of the Memorandum of Appeal filed on 18th February, 2020 setting out 13 grounds which I have summarized into five grounds that:

1. The Learned Trial Magistrate erred holding that JOBU MUTHIGANI had breached the sale agreement

2. The Learned Trial Magistrate erred in failing to find that the property in motor vehicle KCA 946W had passed to JOBU MUTHIGANI on the issue of goodwill and came to a wrong conclusion

3. The Learned Trial Magistrate erred in rewriting the contract between the parties by including a clause for repossession whereas the agreement provided for damages by the party in breach

4. The Learned Trial Magistrate erred in overlooking JOBU MUTHIGANI 's uncontroverted defence and counterclaim to the Plaintiff

5. The Learned Trial Magistrate erred in make an order for refund of the purchase price which was not a term of the contract

SUBMISSIONS BY THE PARTIES

8. The appeal was canvassed by way of written submissions which the Appellant and 1st Respondent dutifully filed.

Appellant's submissions

9. Appellant holds the view that he paid the total purchase price of Kshs. 400,000/- to first Respondent. That it was 1st Respondent that breached the agreement and unlawfully transferred the **suit motor vehicle** that was lawfully sold to 2nd Respondent to himself thereby frustrating the agreement between him and the 1st Respondent and between the Respondents.

10. Concerning 1st Respondent's failure to file a response to the counterclaim, the Appellant submitted that the same ought to be deemed as admitted. Reliance was placed on a Court of Appeal decisions in Mount Elgon Hardware v United Millers Ltd [1996] eKLR and Katiba Wholesellers Agency (K) Ltd Vs United Insurance Co. Ltd., Civil Appeal No. 140 of 2002.

11. On when the property in the **suit motor vehicle** passed to the Appellant reliance was placed on the Court of Appeal decisions in Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 others [1996] eKLR and Joel Muthuri v Julius Gichuru Guantai [1996] eKLR.

12. 1st Respondent contends that the Appellant did not pay the purchase price and that for his failure to pay the balance of the purchase price, the property in the **suit motor vehicle** did not pass to him.

Analysis and Determination

13. I have considered the Appeal in the light of evidence on record and submissions by the Appellant and 1st Respondent and I have deduced the following issues for determination:

1. **Whether failure by the 1st Respondent to file defence to counterclaim was an admission of the counterclaim**
2. **When did property in motor vehicle KCA 946W pass to the Appellant**
3. **Did Appellant pass a good title to the 2nd Respondent**
4. **Was there a breach of the Contract between the Appellant and 1st Respondent**
5. **If so, what was the remedy**

14. I now turn to the issues for determination which I address is hereunder.

1. Whether failure by the 1st Respondent to file defence to counterclaim was an admission of the counterclaim

15. There is no dispute that 1st Respondent's did not file defence to Appellant's counterclaim. In the case of Joash M. Nyabicha vs Kenya Tea Development Authority KSM CA No. 302 of 2010 [2013] eKLR, the Court of Appeal held as follows: -

"..... Having failed to file a defence to the counterclaim, there was a joinder of issue and not an admission which served to deny those allegations. It is only if the appellant had filed a defence to the counterclaim and failed to traverse the claims contained therein that an admission could be derived". (Emphasis added).

16. From the foregoing, I find that failure by the 1st Respondent to file a defence to the counterclaim was not an admission as contended by the Appellant.

2. When did property in motor vehicle KCA 946W pass to the Appellant

17. For ease of reference, I have listed relevant clauses of the contract between the Appellant and 2nd Respondent as follows:

1. **Clause 2. That upon signing this agreement, the seller receives and acknowledges Kshs. 100,000/- and the balance of Kshs. 300,000/- to be paid within the next two months**
2. **Clause 3. The buyer takes possession of the motor vehicle after signing this agreement**
3. **Clause 5. That the logbook shall be received by the buyer after signing of this agreement**

18. Section 19 of the Sale of Goods Act chapter 31 Laws of Kenya (*the Act*) provides that:

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.

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.

19. Section 20 thereof that deals with Rules for ascertaining intention as to time when property passes provides:

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 (Emphasis added).

20. The passing of possession of the *suit motor vehicle* and its logbook to the Appellant illustrates that the intention of the parties was to pass the property in the said vehicle to the Appellant when the contract was made notwithstanding that the time of payment of the balance of Kshs. 300,000/- had been postponed.

21. From the foregoing, I find that the Learned Trial Magistrate, with respect erred in finding that the passing of the *suit motor vehicle* was dependent on payment of the full purchase price and delivery of all documents including those for change of engine.

3. Did Appellant pass a good title to the 2nd Respondent

22. Having found that the property in the *suit motor vehicle* passed to the Appellant when the contract was made notwithstanding that the time of payment of the balance of Kshs. 300,000/- had been postponed, I on that basis find that the Appellant could pass a good title to the 2nd Respondent. On that basis, I find that the Learned Trial Magistrate, with respect erred in finding that the Appellant did not a good title to the *suit motor vehicle* which he could pass to the 2nd Respondent.

Was there a breach of the Contract between the Appellant and 1st Respondent

23. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

24. Further **Section 109** in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

25. Neither the Appellant nor his witness could recall the exact date when the balance of Kshs. 300,000/- was paid to the 1st Respondent. Consequently, I find that the Appellant failed to demonstrate that he had completed his part of the bargain and was therefore in breach of the contract.

26. As concerns the 1st Respondent, his remedy in case of a breach was not in repossession of the *suit motor vehicle* or transfer of the said vehicle to himself as he did. His remedy lies in Clause 6 of the agreement which provides that "**Any party in breach of the agreement to pay the innocent party Kshs. 400,000/- of the consideration price being the liquidated loss and damages and any other recovering costs arising therefrom**".

27. From the foregoing, I find that the Learned Trial Magistrate, with respect erred in sanctioning the illegal and fraudulent transfer of the *suit motor vehicle* to the 1st Respondent.

28. I have agonized as to whether an order for release of the *suit motor vehicle* to the 2nd Respondent. Due to passage of time since the vehicle was repossessed from 2nd Respondent, an order to restore the *suit motor vehicle* is sustainable for the reason that it might be out of reach and even if it is available, it most likely will not be in the same state as it was when it was repossessed.

29. Consequently, the orders which commends to me and which I hereby issue are **as follows**:

1. Judgment delivered on 20th September, 2019 is set aside in its entirety and substituted with orders THAT:

(i) A declaration be and is hereby issued that the transfer of M/V KCA 946W by the SHADRACK MACHARIA NDEKERE to himself was illegal, unlawful and fraudulent

(ii) Having illegal repossessed and unlawful and fraudulent transferred M/V KCA 946W to himself, SHADRACK MACHARIA NDEKERE (1st Respondent) shall refund Kshs. 600,000/- to MBAABU JACOB JULIUS (2nd Respondent) that was admittedly paid for purchase of the said motor vehicle KCA 946W, since it is not practicable to restore the said vehicle to MBAABU JACOB JULIUS (2nd Respondent)

(iii) SHADRACK MACHARIA NDEKERE (1st Respondent) shall refund Kshs. 100,000/- to JOBU MUTHIGANI (Appellant).

(iv) A declaration be and is hereby issued that both JOBU MUTHIGANI (*Appellant*) and SHADRACK MACHARIA NDEKERE (*1st Respondent*) breached the agreement dated 12.01.2018 and none is entitled to pay the other Kshs. 400,000/- of the consideration price being the liquidated loss

(v) The sums in (ii) and (iii) shall attract interest at court rates from the date of judgment in the lower court

(vi) SHADRACK MACHARIA NDEKERE (*1st Respondent*) shall bear the costs of this appeal and of the proceedings in the trial court

DATED AT MERU THIS 20th DAY OF May 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - Mr. Thangichia for M/s. Thangichia M.David & Co. Advocates

For 1st Respondent - N/A for M/s Njiru Kithaka & Co. Advocates

For 2nd Respondent - N/A for Mbaabu MÍnoti & Co. Advocates