



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.34 OF 2019**

**BETWEEN**

**AMBROSE OFAFA OCHINGO.....APPELLANT**

**AND**

**MARTIN ONYANGO KAGAGA.....RESPONDENT**

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No. 165 of 2016 by Hon. Mary A. Ochieng –Senior Resident Magistrate).

**JUDGMENT**

1. The appellant herein was the defendant in Ndhiwa Senior Resident Magistrate's SRMCC No. 165 of 2016. The learned trial magistrate delivered judgment dated 14<sup>th</sup> February 2019 in favour of the plaintiff.
2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by Ambrose Ofafa Oching, advocate. The appellant raised four grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and in fact in finding that the matter in dispute was a breach of contract.
  - b. That the learned trial magistrate erred in and in fact in failing to take into account the issues she ought to have taken into account and as such fell into error in evaluating and analyzing the evidence and/or submissions made before her by the appellant.
  - c. That the learned trial magistrate erred in law and in fact in making a finding that there was a misrepresentation and withholding of material facts by the appellant
  - d. That the learned trial magistrate erred in law and in fact in making a finding that the sale agreement dated 4<sup>th</sup> August 2015 between the appellant and the respondent was null and void ab initio.
3. The respondent was represented by the firm of Nyauke & Company, Advocates. The appeal was opposed.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The genesis of this case is a sale agreement the appellant and the respondent entered on 4<sup>th</sup> August 2015. This was in respect of sale of motor vehicle registration number KBK 082T.
6. Both parties are in agreement that the appellant sold the said motor vehicle to the respondent at Kshs. 220,000/= an amount the= at was paid in full.
7. The appellant did not transfer the motor vehicle to the respondent and it was later impounded by the police on allegation that it was stolen.
8. Later it emerged that the said motor was registered in the name of Joel Malei, who is not the appellant.

9. There could have been no issue had the appellant ensured that the motor vehicle was transferred in the name of the respondent who was the purchaser from him. We are aware some parties after the sale of a motor vehicle take time to effect transfer but in most cases as a show of good faith they sign the transfer form. The motor vehicle was the subject of police investigation and at the time of hearing of the suit it had not been released. In the instant case, the appellant did not sign any transfer form. He had no title to the vehicle the subject of the agreement. He therefore had no capacity to transfer any title.

10. The learned trial magistrate interpreted the evidence correctly and her verdict cannot be impugned. The appeal lacks merit and the same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 19<sup>TH</sup> DAY OF MAY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**