REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 579 OF 2017

WILL M. OMIDO.....1ST APPELLANT

JANET A. OMIDO.....2ND APPELLANT

VERSUS

HUZEIFFER M. HEBATULLA.....RESPONDENT

(Being an appeal from the judgment and decree of Mr. I. Orenge, Senior Resident Magistrate at the Chief Magistrate's Court at Milimani Commercial Court, Nairobi delivered on the 27/09/2017 in Milimani CMCC 3150 of 2013)

JUDGMENT

1. The respondent (Huzeiffer M. Hebatulla) sued the appellants (Will M. Omido and Janet Omido) in Nairobi Civil case 3150 of 2013 vide a Plaint dated 27th May 2013 praying and seeking the following:

a) The sum of Kshs. 2,300,000/= plus costs and interest at court rates.

2. The appellants filed a defence dated 29th July 2013, denying the claim. The matter proceeded to full hearing with the respondent calling two witnesses. The appellants on the other hand called three (3) witnesses. Judgment was finally entered against the appellants in the sum of Kshs.2, 300,000/= with costs and interest at Court rates.

3. Aggrieved by the judgment, the appellants filed this appeal through Mbugua Mureithi & Co. Advocates raising the following grounds:

a) That the learned trial magistrate erred in law and in fact by failing to determine and consider that the respondent did not have authority to sue on behalf of the subject motor vehicle registered owner.

b) That the learned trial magistrate erred in law and fact by failing to consider that the appellants repudiated the sale agreement and asked the respondent to return their deposit and collect the subject matter motor vehicle.

c) That the learned trial magistrate erred in law and fact by shifting the blame squarely on the appellants despite the fact that the appellants had notified the respondent of their intention to cancel the sale agreement.

d) That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellants instead of the respondent.

e) That the learned trial magistrate erred in fact by stating that the appellants ought to have returned the vehicle subject matter and pursue court action against the respondent.

f) That the learned magistrate erred in law and fact by failing to find that the appellants held on to the vehicles subject matter as security for the return of the deposit money.

g) That the learned trial magistrate erred in law and fact by failing to consider the evidence of the appellants in its entirety.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. A summary of the evidence adduced before the lower court was that on or about October 2012 the appellants visited the respondent's yard/showroom and were shown various motor vehicles. They identified motor vehicle No. KBT 555D Range Rover sports as their choice one. They jointly entered into an agreement for its purchase for Kshs.5,800,000/=. A deposit of Kshs.3,500,000/= was paid with an outstanding balance of Kshs.2, 300,000/= which they agreed to pay in three installments. They gave out three postdated cheques in the names of the respondent (PEXB 3a, b & c).

6. After two months of using the vehicle the appellants wrote a letter to the respondent informing him that they had decided to cancel the agreement and the postdated cheques. The respondent tried to reach out to them with a view of securing his payment but they refused and/or neglected to pay the outstanding balance of Kshs.2,300,000/=.

7. In their filed defence the appellants denied the respondent's claim and averred that the respondent fraudulently misrepresented the mileage of the motor vehicle and the year of manufacture. They stated that they were holding the vehicle as lien for the deposit paid to the respondent and that he also had offered to reduce the agreed price by Kshs three hundred thousand (Kshs 300,000/=) after being informed of the true mileage of the said vehicle. They insisted that the vehicle was not in good condition to warrant the amount agreed upon.

8. Mr. Olewe for the appellants submitted that from the respondent's testimony, he was not the registered owner and was selling on behalf of the company. He further submitted that a letter of authority does not give one authority to initiate court proceedings. Further that the respondent had confirmed that he does not have power of attorney which is the legal document recognized by law to institute proceedings for and behalf of the donor.

9. He relied on the case of **Arrow Hi-fi (E.A) Limited v City Nominees Limited (2015) eKLR** where the honourable judge stated;(page 5)

> *"Accordingly, I am satisfied that according to the pleadings and the evidence tendered, the Plaintiff was an agent of Premium Automotive Group who was a disclosed principal. The issue whether the Plaintiff had locus standi to sue in the circumstances was a natural consequence though it was not raised in the issues submitted by the parties. My finding is that, as an agent of a disclosed principal, the Plaintiff could not sue on the contract which DW 1 admittedly stated to have been between the Defendant and the said disclosed principal. To that extent the Plaintiff's suit as pleaded fails and is for dismissal."*

10. He further relied on the cases of **(i) Edmund Mwangi Waweru v Gabriel Wanjohi Waweru & another (2017) eKLR**.

(ii) Carolyne Mpenzwe Chipande vs. Wanje Kazungu Baya (2014) eKLR.

(iii) Carolyne Mpenzwe Chipande v. Wanje Kazungu Baya which dealt with the issue of capacity to sue. The courts also referred to Order 9 Rules 1 & 2 of the Civil Procedure Act.

11. Counsel submitted that the sale agreement was entered in based on the specifications given by the appellant but upon inspection they discovered that the motor vehicle had suspension issues and it was a 2005 model and not a 2006 model. This prompted the appellants to inform the respondent that they wanted to cancel the agreement as the vehicle was not what they had asked for.

12. He has also submitted that that there was an implied condition in the agreement between the appellants and the respondent which falls under the known exceptions to the legal provisions that in a contract of sale there is no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied. This is provided for in **Section 16 of the Sale of Goods Act** which states;

> *"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—*
>
> *(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:*
> *Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;*
> *(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:*
> *Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;*
> *(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;*
> *(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."*

13. Counsel has submitted that the contract cannot be considered to be valid if one of the parties has misrepresented facts and acted in bad faith given that it is the respondent's area of expertise. He argues that the respondent misrepresented key information. He faulted the trial magistrate for not addressing important issues raised during the trial. That it was unjust to entirely blame the appellant as they entered into an agreement in good faith as well as guidance from an expert in that area as it is what he does as his business.

14. In response Ms. Kangethe for the respondent submitted that the respondent's authority to sue was not an issue framed for determination nor was it an issue that lent itself for determination from the pleadings. The appellants did not dispute the respondent's authority to file the case in their defence or evidence in court and she relied on the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu (1998) MWSC3 in which the learned judges stated;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

15. She further relied on two authorities namely:

a) **Joseph Mbuta Nziu vs Kenya Orient Insurance Company Ltd (2015) eKLR** where the court noted with approval a decision of **Nigerian Supreme Court Adetoum Oladesi (Nig) Ltd vs Nigeria Breweries PLC S.C 91/2002** stated;

"it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

b) **Agriculural Finance Corporation vs Lengetia Limited & Jack Mwangi (1985) eKLR** where the court stated ;

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

16. Counsel submitted that the appellants could not repudiate the sale agreement as they had inspected the motor vehicle and even subjected it to further inspection by a professional. She submits that the sale agreement had clearly shown that mileage was not a condition in the contract and if they intended to make it in their contract nothing would have been easier than to state so in their contract. Counsel further submitted that it was not the trial court to rewrite the contract for the parties. She relied on the case of **National Bank of Kenya vs Pipelastic Sankolit (k) Ltd & Another (2001) KLR 112** where the court held that:

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

17. She further relied on the case of **Eldo City Ltd Vs Corn Products Kenya Ltd & Another (2013) eKLR**

"It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be, the court's duty is to give effect to it."

18. On ground (3) Counsel submitted that the trial court observed that appellants retained the said motor vehicle and their assumption of possession was inconsistent with ownership of the motor vehicle by the respondent. This is in line with provisions of **Section 36 of the Sale of Goods Act** which provides that;

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

19. It is counsel's contention that the appellants had a duty to prove fraud as alleged which duty they did not discharge. She supports the Magistrate's reliance on **Section 107 of the Evidence Act Cap 80 Laws of Kenya** which provides that;

"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."

She went on to argue that if at all the appellants had rejected the motor vehicle they ought to have returned it and pursued court action. They instead continued to use it for years, and there was no evidence adduced to show that the motor vehicle was a form of security.

20. On ground (7) counsel submitted that the appellants' evidence was that there was breach of contract on the allegations of discrepancy of mileage, which was later found not have been mentioned by the parties in their agreement. She relied on **Section 13 of the Sale of Goods Act**

"Once goods have been accepted by the buyer, breach of any condition by the seller can only be deemed as a breach of warranty which would not be sufficient ground for treating the contract repudiated."

21. She further relied on the case of **Dickson Maina Kibira vs David Ngari Makunya (2015) eKLR** where the court stated;

"If at all there was any breach on the part of the defendant then Section 13(2) of the Act clearly shows that sort of breach could only be treated as breach of warranty whose remedy was in damages rather than repudiation of the contract"

Analysis and Determination

22. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See ***Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968)E.A 123; Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.***

23. Having considered the grounds of appeal, evidence on record and both submissions and authorities cited, I find the issues falling for determination to be as follows:

a) Whether the learned magistrate erred in law and fact by failing to determine and consider that the respondent did not have authority to sue on behalf of the registered owner.

b) Whether the trial magistrate erred in law by failing to consider if indeed there was a sale agreement or a breach of contract or a lien as alleged by the appellants?

I will deal with the two issues simultaneously.

24. Section 3 of the Sale of Goods act states as follows;

"Sale and agreement to sell

(a) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(b) There may be a contract of sale between one-part owner and another.

(c) A contract of sale may be absolute or conditional.

(d) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(e) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

25. It is not in dispute that there was a motor vehicle registration KBT 555D Range Rover sports which is the subject matter herein and was sold to the appellants after they had inspected it and later on paid a deposit of Kshs.3,500,000/=, leaving a balance of Kshs.2,300,000/=. The appellants insisted that they were holding the vehicle as lien for the deposit paid. The respondent on the other hand insists that there was an agreement and if the appellants felt like they were aggrieved they should have returned the motor vehicle and not continued to use it. It is therefore not disputed that there was a sale and a deposit paid.

Was there breach of contract?

26. I rely on the case of **Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448,** the High court in Kampala on the issue whether there was a breach of contract court stated:-

"In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous. Support for the proposition can be found in Sarkar on Evidence at 849 where the author said:

"When any document comes before a Court for interpretation it will first try to ascertain its meaning by looking at the language itself. When the words used in it are plain in themselves is perfectly clear and free from ambiguity and there is no doubt or difficulty as to the proper application of the words to existing facts, parol evidence is not admissible to show that the parties intended to mean other than what they have said."

27. Black's Law Dictionary 8th edition by Bryan A. Garner defines *"valuable consideration"* as follows;-

> *"Consideration that is valid under the law; consideration that either confers a pecuniarily measurable benefit on one party or imposes a pecuniarily measurable detriment on the other" "By a valuable Consideration is meant something of value given or promised by one party in exchange for the promise of the other..... The thing thus given by way of consideration must be of some value. That is to say, it must be material to the interest of one or the other or both of the parties. It must either involve some loss or disadvantage to the promisee for which the benefit of the promise is a recompense" John Salmond, jurisprudence 360 (Glanvile L. Williams ed, 10th ed 1947)."*

28. A reading of the impugned judgment shows that the learned trial magistrate considered the evidence adduced, the law and decided cases before arriving at the decision he made. The appellants never had an issue with the respondent's authority when they were sued by him in the lower court. They did not bring it out as an issue in their pleadings nor challenge him during the hearing. It is therefore clear that they accepted to enter into an agreement with him way before and never questioned his position. He never hid anything from them. The postdated cheques (PEXB 3a-c) were also issued in his names.

29. In **Halsbury's Laws of England Vol 1 4th edition** states as follows with regard to authority of agents;-

> *"In the absence of express directions the agent may exercise his discretion so as to act in the best manner possible for the principal. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places reasonable construction on his authority; but where the limits imposed are definite he has no right to exercise his discretion"*

30. The sale agreement was entered into in 2012 and a deposit of more than half of the agreed price paid. The appellants took possession of the motor vehicle KBT 555D Range Rover sports and have been using it to date. Had they been serious and if there was breach of the agreement they should have returned it and demanded for a refund of the deposit. Instead, they claim to be holding it as a lien over Kshs 3,500,000/= paid as deposit. As they held it, they were still using it. It just does not add up.

31. My finding is that the learned trial magistrate analysed the evidence well, applied the law correctly and arrived at the right decision.

32. The upshot is that the appeal lacks merit and is dismissed with costs to the respondent. The judgment by the learned trial magistrate is hereby upheld.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2021 AT NAIROBI.

H. I. ONG'UDI

JUDGE