REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 24 OF 2020

TIMOTHY MOMANYI MANGERA.....APPELLANT

VERSUS

GETBUCKS & OPPORTUNITY KENYA LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N.S. Lutta (S.P.M.)

dated the 29th day of January 2020, in the Kisii CMCC No. 638 of 2018)

JUDGMENT

1. The suit giving rise to this appeal was instituted by the appellant against the respondent. In his amended plaint, the appellant claimed that he had entered into a loan facility agreement with the respondent in which the respondent agreed to lend him Kshs. 300,000/= upon the deposit of the logbook of his motor vehicle registration number KBN 730R (herein "the subject vehicle"). The terms and conditions of the loan facility were captured in an offer letter dated 31st May 2018.

2. He claimed that it was a condition of the agreement that the respondent would procure for him an insurance cover then recover the same from the monthly premiums. The appellant claimed that despite paying his monthly installments of Kshs. 48,184/= inclusive of the insurance premiums, the defendant did not issue him with an insurance policy in breach of contract. He therefore had to incur additional costs by taking out a cover with Directline Assurance to comply with the law. He claimed that due to the respondent's failure to furnish him with a cover, he was unable to use his vehicle to generate income.

3. The appellant further averred that on 1st October 2018, the respondents, through their agents, illegally attached the subject vehicle for purposes of recovering the loan balance which was not yet due. In July 2019, the respondent sold the subject vehicle notwithstanding the fact that an appeal on the matter was pending before the High Court vide Kisii HCCA 78 of 2019. The appellant therefore sought;

a. A declaration that the proclamation and attachment of the subject motor vehicle was illegal

b. An unconditional release of the subject vehicle held by the defendant's agents

c. General damages with interest for illegal proclamation of the subject vehicle

d. An order of the value of the subject vehicle and/or a return of the vehicle to the appellant's possession

e. General damages for breach of contract

f. Costs and interest of the suit.

4. In response to the claim, the respondent filed a statement of defence in which he admitted the terms of the contract as set out by the appellant but denied that it had acted in breach of the contract.

5. The appellant reiterated the averments he had made in his amended plaint when the matter came up for hearing before the trial court. He complained that the assessment of the vehicle at Kshs. 930,000/= was less than what he had paid for the vehicle as he had bought it at Kshs. 1.6 million shillings. He claimed that he would make up to Kshs. 6,000/= daily from it. He was of the view that the respondent should have deducted the loan amount of Kshs. 300,000/= and given him the balance.

6. The appellant further testified that he had been paying the monthly installments of Kshs. 48,184/= but admitted that he had not paid the monthly installment due for the month of September. He produced a copy of the logbook, the agreement, the offer letter, insurance cover from Directline Assurance, a copy of an email and attachment and a bundle of car hire receipts in support his testimony.

7. Wycliffe Kiprono (DW1), the respondent's collection manager, adopted his written statement and listed documents as his evidence during trial. He testified that they had agreed that vehicle was to be comprehensively insured but he claimed that the appellant did not collect the insurance sticker. Regarding the repayment of the loan, DW1 testified that they had issued demand letters to the appellant's last known address because the repayments were irregular. He testified that two valuation reports had been prepared for the appellant and the other at the instance of the respondent and that they had sold off the vehicle at a public auction. He could not tell the appellant's loan balance but indicated that they were willing to refund him any balance after computation.

8. Based on the evidence adduced before it, the trial court found that there was no term in the contract for provision of an insurance cover by the respondent and so the respondent did not breach the contract. The court further held that the appellant had not proved that the attachment and sale of the vehicle had been irregular. It found that the respondent exercised its power of sale in accordance with the loan agreement and thus dismissed the suit.

9. Aggrieved by the trial court's decision, the appellant lodged this appeal vide a memorandum of appeal dated 27th February 2020. He faulted the court for failing to find that the respondent had breached the terms of the contract. He also faulted the court for finding that the respondent exercised their power of sale in accordance with the loan agreement. He argued that the trial court erred by failing to find that the respondent had colluded with its agents in attaching the vehicle without due process yet the balance was not due.

10. The appellant's counsel submissions focused on the findings by the trial court on the provision of an insurance cover for the vehicle. Counsel insisted that the parties had agreed that the respondent would secure an insurance policy. He maintained that the appellant had proved that the respondent had not provided an insurance cover as agreed, thereby frustrating the contract. That since the respondent had frustrated the contract, he was stopped from benefiting from its mistake.

11. Counsel further submitted that the contract between the parties was to a large extent, ambiguous and should have been construed against the respondent who had drawn the contract. He placed reliance on the case of ***United Millers Limited v Nairobi Java House Limited [2019] eKLR*** to support this position. He submitted that the trial court erred by interpreting the contradicting clauses relating to the insurance of the vehicle in favour of the drawer of the contract.

12. On the other hand, the respondent's counsel insisted that the respondent had procured a comprehensive cover for the said vehicle as seen in the documents produced by the respondent. Counsel argued that the appellant had breached the terms of the agreement by his irregular repayment of the loan and that the respondent was within its right to recover the loan amount together with interest, charges and costs through the disposal of the vehicle. He referred to the auctioneer's report which indicated that the appellant had dismantled the vehicle's tracker system in default of the contract. He insisted that the respondent had attached and resold the vehicle in accordance with the provisions of the contract. Counsel also accused the appellant of being a perennial litigant as this was the second appeal on the same subject matter. He urged the court to dismiss the appeal with costs to the respondent.

ISSUES, ANALYISIS AND DETERMINATION

13. Having considered the parties' pleadings, the evidence before the trial court, the record of appeal and the parties' submissions, I find that the issues arising for determination in this appeal are two fold; the first is whether the trial court erred in finding that the respondent had not breached the contract by failing to secure an insurance policy cover for the subject vehicle and the second is whether the trial court erred in failing to find that the respondent had irregularly attached and sold the vehicle.

14. The existence of an agreement between the parties is not disputed. Its terms were set out in a letter of offer dated 31st May 2018. According to contract, the respondent would extend to the appellant a credit facility of Kshs. 300,000/= payable in 12 equal monthly instalments of Kshs. 48,184/= and in turn the appellant would offer his vehicle registration number KBN 730R to secure the loan.

15. It is clear from the facts that the respondent held its end of the bargain by availing the loan to the appellant. The appellant's contention however, is that the respondent failed to procure a comprehensive insurance cover for the subject vehicle in accordance with the agreement which forced him to obtain a comprehensive cover with Directline Assurance on 12th September 2018.

16. The appellant faulted the trial court for making a finding that there was no requirement on the part of the respondent to issue the insurance cover in the contract between the parties. I agree with the appellant that the trial court erred by making that finding. I am also of the view that a lot of energy was expended in determining whether or not the parties had agreed that the respondent was required to get the insurance cover as that issue was not in dispute.

17. From its defence, and the evidence of DW1, it is quite evident that the respondent admitted that it was required to ensure that the vehicle was insured. The respondent's position was that it had in fact taken out a comprehensive insurance cover as agreed and the appellant had collected the insurance sticker for the subject vehicle from them.

18. The respondent demonstrated that it had it acquired the comprehensive insurance cover with APA Insurance Limited running from 30th May 2018 to 29th May 2019. DW1 produced a motor vehicle insurance endorsement letter signed by the appellant and a copy of the insurance sticker in support of this assertion. The respondent's argument that the appellant opted to insure his vehicle with Directline Assurance when he lost the insurance sticker issued to him could therefore be true. Although the trial court erred in finding that the respondent was not required to take out the insurance cover, I find that the respondent procured a comprehensive insurance cover for the subject vehicle and did not breach that term of the agreement.

19. The other issue raised by the appellant related to the attachment and sale of the subject vehicle. He contended that the trial court erred in finding that the respondent had exercised its power of sale in accordance with the loan agreement. According to him, the respondent had colluded with its agents in attaching the vehicle without due process. The appellant was particularly aggrieved by the attachment and sale of the vehicle without prior notice and without a clear indication of what the outstanding arrears were.

20. At the hearing of the matter, the appellant testified that apart from the month of September, he had been paying the monthly installments faithfully as indicated in the agreement. In the event that the appellant failed to pay the monthly installments as agreed, the agreement provided that the respondent could sell the subject vehicle to recover the amount due. The agreement provided;

> *"The loan repayments to be made as they fall due and any defaults in repayment will lead to recovery of the Motor Vehicle and subsequent sale through private or auction process."*

21. The agreement also provided as follows on when the loan would fall due;

> *"The Borrower agrees and declares that if any of the following events occur, the loan will be construed to be default: -*
>
> *(a) the Borrower fails to pay on the due date any money or to discharge any obligation or liability payable the Borrower to the Lender or fails to comply with any term, condition, covenant or provision of the Agreement or if any warranty or undertaking from time to time made to the Lender by the Borrower is becomes incorrect or misleading; or ...*
>
> *(i) Upon the happening of any of the events in this clause 3 the Borrower agrees and declares that the outstanding loan amount shall immediately become due and payable and the Lender shall be entitled at its option to initiate recovery and disposal of the Motor Vehicle and/or sue the Borrower to recover the outstanding loan amount together with interest, charges and costs."*

22. In the case of ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*** the Court of Appeal cited with approval the decision by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported)* thus;

> *"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain"*

23. Similarly, the court in **John Njoroge Michuki v. Kenya Shell Ltd, C.A No. 227 of 1999** held that courts ought not to frustrate the clearly expressed intentions of parties and should instead seek to enforce such intentions.

24. The appellant admitted that he had not paid the installment due for the month of September. From the terms of the agreement set out above, the respondent was entitled to initiate the recovery process immediately the appellant failed to pay the installment as agreed.

25. Through copies of copies of notices dated 11th and 17th September 2018 the respondent demonstrated that it had notified the appellant of the default and had notified him that if he failed to pay the outstanding installment, it would proceed to realize its security to recover the debt. In addition to the notices, DW1 also produced postal receipts to show that the notices had been sent to the appellant via registered post to his last known address. The trial court's finding that the respondent had exercised its power of sale in accordance with the loan agreement was therefore well grounded.

26. The inevitable conclusion from the foregoing is that this appeal is lacking in merit. It is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF OCTOBER 2021.

R.E. OUGO

JUDGE

In the presence of: -

Miss Nyandaro **For the Appellant**

Respondent **Absent**

Ms Rael **Court Assistant**