REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 124 OF 2018

RAUF OCHIENG OKAL..... APPELLANT

VERSUS

ADALLA CRISPUS SALA..... RESPONDENT

[Being an appeal against the Judgment of Hon. Odawo (RM) in the orginal suit Kisumu CMCC No. 303B of 2017]

JUDGMENT

The Appellant, **RAUF OCHIENG OKAL**, had entered into a contract with the Respondent, **ADALLA CRISPUS SALA**, for the sale of a motor vehicle.

1. The subject matter of the contract was a Mercedes Benz vehicle, Registration Number **KAE 400C**. The agreed Purchase Price was Kshs 370,000/=.

2. It is common ground that the Respondent paid a total of Kshs 310,000/=.

3. Although the Appellant did hand over possession of the vehicle, to the Respondent, it was the Respondent's case that the Appellant failed to complete his part of the bargain. In particular, the Appellant is said to have failed to make available the original Log book together with duly executed Transfer Forms, which would have enabled the Respondent to transfer the ownership of the vehicle to his name.

4. On the other hand, the Respondent said that at all material times, he was ready to meet his part of the bargain, by remitting payment of the outstanding balance, amounting to Kshs 60,000/=.

5. The vehicle was taken away from the Respondent, and was sold-off by persons who were owed money by the Appellant.

6. In the light of those developments, the Respondent filed suit, seeking a refund of the sum of Kshs 310,000/=, which he had paid to the Appellant.

7. Through the said suit, the Respondent also lodged a claim for General Damages, costs of the suit and Interest on the various sums he had claimed.

8. By his Statement of Defence and Counterclaim, the Appellant said that he had always been ready to release the Logbook together with duly executed transfer forms, as soon as the Respondent settled the outstanding balance of

Kshs 60,000/=.

9. Secondly, the Appellant described the Respondent as being the author of his own misfortune, as the failure to remit the balance of the purchase price, had frustrated the Appellant's effort to clear the Loan Facility which the Appellant had obtained from **BRIDGES CREDIT LIMITED**.

10. Furthermore, it is the Respondent who was said to have acted in breach of the terms of the contract, by failing to make payments within the time-lines specified in the contract.

11. In particular, the Respondent is said to have failed to remit the *"Last Instalment of Kshs 120,000.00"* in one instalment, which was payable on or before 5th December 2016.

12. Following the said failure, the Appellant said that he exercised his contractual right, to rescind the agreement.

13. The failure by the Respondent to remit the last instalment, is said to have resulted in **BRIDGES CREDIT LIMITED** repossessing the vehicle, which they then sold-off.

14. The Appellant lodged a counterclaim against the Respondent for;

(a) Loss of ownership of the vehicle valued at Kshs 370,000/=;

(b) Loss of User of the vehicle KAE 400C;

(c) Loss of the outstanding balance of Kshs 120,000/= which the Respondent owed him;

(d) Pain and anguish caused by the embarrassment of the Respondent filing suit against the Appellant.

15. After hearing the case, the learned trial magistrate held that there had not been a full disclosure by the Appellant, at the time when he entered into the agreement with the Respondent.

16. The trial court was persuaded that the Appellant did not, at the outset, reveal to the Respondent that the vehicle which the latter was purchasing, was a security for a facility which Bridges Credit Limited had provided to the Appellant.

17. The learned trial magistrate also held that the Respondent did not comply with the express terms of the contract, as pertains to the dates when respective payments were due to be made.

18. However, as the Appellant accepted payments thereafter, the trial court concluded that the parties had, by their conduct, reviewed the terms to the contract.

19. In the final analysis, the Appellant was ordered to refund to the Respondent, the full amount which the Respondent had paid.

20. The court also ordered the Appellant to pay costs of the suit, and interest on the sums awarded.

21. Finally, the trial court rejected the Appellant's counterclaim, as well as the Respondent's claim for General Damages.

22. In this appeal, the Appellant submitted that the trial court was wrong to have concluded that the Appellant had not made a full disclosure about the charge over the vehicle.

23. As far the Appellant was concerned, the evidence embodied in the messages exchanged between the parties, clearly confirmed that the Respondent had knowledge of the existing Charge over the motor vehicle.

24. Secondly, as the Respondent had not paid the full purchase price, the Appellant submitted that the Respondent had never become entitled to have the ownership of the vehicle transferred to him.

25. The Appellant invited this court to delve into the messages exchanged between the parties, as the said communication constituted *"the heart"* of the matter.

26. The Respondent pointed out that the messages which the Appellant was making reference to, were exchanged after the parties had executed the agreement between them.

27. In any event, the Respondent insists that it was only when he put pressure on the Appellant, to have the ownership transferred to him, that the Appellant first disclosed the fact that the logbook was encumbered.

28. Being the first appellate court, I am obliged to re-evaluate all the evidence on record.

29. In that regard, I note that whilst the Appellant described the communication exchanged between the parties as constituting the heart of the matter, I also note that the Appellant made the following statement in his submissions;

"During the hearing, the Plaintiff's advocate, upon realization that the communication messages filed by themselves was not favourable to their case, decided not to produce the same."

30. If the communication messages were never produced in evidence, they cannot be part of the evidence to be taken into account.

31. However, as the Appellant pointed out to this court, he sought leave to produce the documents in evidence, and the Respondent told the court that he had no objection. The communication messages exchanged between the parties do form part of the evidence which was placed before the court.

32. In the circumstances, the court is obliged to take into consideration both the Sale Agreement dated 8th November 2016, and the

communication messages, so as to be in a position to fully appreciate the contractual relationship between the parties.

33. Pursuant to the Sale Agreement;

> ***(a) The Agreed Purchase Price was Kshs 370,000/=;***
>
> ***(b) Kshs 150,000/= was paid as a deposit;***
>
> ***(c) The vehicle was to be released to the buyer, on payment of Kshs 100,000/=(over and above the deposit);***
>
> ***(d) The balance of Kshs 120,000/= was to be paid by 5th December 2016;***
>
> ***(e) The Logbook and duly signed Transfer Form were to be given to the buyer once the balance was paid;***
>
> ***(f) The buyer had tested the vehicle, and was buying it as a used car on "where is as is basis."***

34. If the terms of the Sale Agreement were to be enforced strictly, it would imply that the failure by the Respondent to pay the balance of the purchase price by 5th December 2016 constituted a breach by the Respondent.

35. Secondly, the Appellant would only be under an obligation to provide the logbook and signed Transfer documents, upon receipt of the balance.

36. As soon as the Respondent failed to remit payment of the balance by 5th December 2016, it was open to the Appellant to repudiate the Sale Agreement.

37. However, the Appellant did not repudiate the agreement soon after 5th December 2016.

38. The evidence on record shows that the vehicle was impounded on 24th April 2017. As the Respondent conceded, the vehicle was impounded more than 4 months from the date when he ought to have paid the balance of the purchase price.

39. The Respondent's case was that he was ready and willing to pay the balance of the purchase price.

40. By the time the vehicle was impounded and sold by the Bridge Credit Limited, the Appellant had not taken any steps to either repudiate or rescind the agreement.

41. As the Appellant was not in possession of the log book, he was not in a position to effect the transfer of the ownership of the vehicle.

42. When Bridges Credit Limited impounded and sold-off the vehicle which was the subject matter of the agreement between the parties herein, it became impossible for the Appellant to complete the sale. The actions of Bridges Credit Limited literally frustrated the contract.

43. After the sale by Bridges Credit Limited, it would not have been possible for the Appellant to sell the same vehicle to the Respondent.

44. I hold the considered view that the notice by the Appellant, that he had rescinded the agreement, was of no value, because the vehicle had already been sold-off by Bridges Credit Limited.

45. I also find that, by their respective actions, the parties to the agreement varied the written terms of the contract.

46. The communication between the parties attests to the said mutual variation. Of course, the said communication has to be given consideration within the context of the oral testimony by the parties, when they gave evidence at the trial.

47. The Respondent said;

> ***"After 2nd instalment, defendant mentioned that the vehicle was tied somewhere and he he needed time to sort it out. But he didn't reveal any other details."***

48. It is noteworthy that when cross-examining the Respondent, the Appellant's advocate did not challenge that piece of evidence.

49. Accordingly, I find that the Appellant first told the Respondent about the vehicle being *"tied up somewhere"*, after 24th November 2016. In other words, the Appellant did not make it known to the Respondent, from the outset, that the vehicle which he was selling to him, had already been offered as a security to Bridges Credit Limited.

50. When the Appellant accepted payment of Kshs 60,000/= on 16th December 2016, which was more than 10 days after the date when the balance ought to have been paid, he is deemed to have made a conscious decision to receive payment even though such payment was late. By the said conduct, the Appellant gave an affirmative signal of his willingness to continue with the agreement between him and the Respondent.

51. In effect, the Appellant's conduct was inconsistent with either repudiation or rescission of the agreement. The conduct was consistent with a variation of the terms of the contract.

52. I also note that the Appellant expressly told the Respondent that he was taking action to challenge the auction of the vehicle. By that same communication, the Appellant said;

> ***"They should have followed due process.***
>
> ***Meanwhile, as that goes on, I'm working on your refund."***

53. When the Respondent complained that things were not looking good, and he therefore indicated that he would *"escalate action"*, the Appellant wrote back, saying;

> ***"Just be patient, please, you have all myassurance that I will refund all your monies."***

54. After that communication, the Respondent received the sum of Kshs 20,000/=.

55. The Appellant denied the contention that it is he who paid that sum to the Respondent. He made it clear that the phone number from which the Respondent had received payment, did not belong to the Appellant.

56. A perusal of the record of the proceedings did not yield any proof that the sum of Kshs 20,000/= was paid to the Respondent, by the Appellant.

57. However, there is communication which appears to leave no doubt that the money was paid with the knowledge of the Appellant. I so hold because the Appellant communicated as follows, to the Respondent;

> ***"Done part, let me see end month to reduce it further."***

58. As the Respondent had already paid Kshs 310,000/= to the Appellant, towards the purchase price of the vehicle **KAE 400C**, which was then auctioned by Bridges Credit Africa Limited, it meant that the Respondent had neither the money (so paid), nor the vehicle for which it had been paid.

59. It was right for the trial court to hold the Appellant liable for the refund of the money he had received, as there was a total failure of consideration.

60. I further find that the Appellant completely failed to prove the counterclaim. Therefore, the trial court was right to have dismissed the said counterclaim.

61. In the result, I find no merit in the appeal; it is dismissed.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **9th** day of **March** 2020

FRED A. OCHIENG

JUDGE