



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 5 OF 2018**

**AMOS KAROBIA GICHUKI .....APPELLANT**

**-VERSUS-**

**BERNARD KAMAU WAGAKORU.....RESPONDENT**

(Appeal against judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 274 of 2016 (Hon. Ruth Kefa, Resident Magistrate) delivered on 22 January 2018)

**JUDGMENT**

By a plaint dated 28 June 2016, the respondent sued the appellant for the sum of Kshs. 420,000/= “being the sum received by the defendant pursuant to his fraudulent misrepresentation and for want of due consideration.”

The suit arose out of a sale agreement made on 6 September 2014 for sale of a motor vehicle registration number KBC 699C (Toyota Corolla) (hereinafter referred to as “the motor vehicle”). According to the agreement, the motor vehicle was registered in the name of one James Kiiru Gichuki who was described as the vendor; the respondent, on the other hand, was described in the same agreement as the purchaser.

In discharge of the terms of the sale agreement, the respondent paid the vendor the sum of Kshs 420,000/= being the agreed purchase price for the vehicle.

For the entire period of the transaction, the respondent knew the appellant to be James Kiiru Gichuki mainly because he held himself to be a person of that identity; as a matter of fact, the appellant executed the sale agreement as the vendor and after he received the purchase price, he handed over the vehicle to the respondent together with all the ownership and transfer documents. The respondent successfully transferred the ownership of the vehicle into his own name.

Almost two years after the transaction and, more particularly on 21 April 2016, one Kamau called the respondent and informed him that he was surprised to note that the respondent was indicated in the records at the Registrar of Motor vehicles as the owner of motor vehicle registration number KBC 699C yet he, the said Kamau, owned a vehicle of a similar registration number. Alarmed by this revelation, the respondent reported the matter to the police at Karatina police station where the vehicle was subsequently detained for investigations. In the course of those investigations, the respondent was informed that the particulars of the chassis and the engine of his motor vehicle were inconsistent with the records of that particular vehicle as registered with the Registrar of Motor Vehicles.

On 5 May 2016, the appellant was arrested by the police and it is then that the respondent discovered that James Kiiru Gichuki was not the same person as the appellant; the latter, he averred, had misrepresented himself to be James Kiiru Gichuki.

It is against this background that the respondent sought for judgment against the appellant for the refund of the purchase price of the vehicle as money had and received.

The appellant denied the respondent’s claim and filed a statement of defence to that effect; nonetheless, he admitted executing the sale agreement alluded to by the respondent except that he only represented his brother, James Kiiru Gichuki, who was always the registered owner of the vehicle but who was abroad studying at the time. Contrary to the respondent’s contention that the appellant misrepresented himself, the appellant averred that the respondent was always aware that James Kiiru Gichuki was the appellant’s brother and that the appellant was his agent.

In any event, the respondent subsequently registered the vehicle in his name and therefore it did not matter that James Kiiru Gichuki did not himself execute the agreement.

At the conclusion of the trial, the learned trial magistrate found for the respondent and entered judgment in his favour for KShs. 420, 000/= together with costs and interest calculated at court rates till payment in full. The basis for her decision was that the appellant misrepresented himself in the agreement as the owner of the vehicle and, secondly, the registration particulars of the vehicle were found to be wanting as a result of which it had been impounded by the police and thereby depriving the respondent of its possession.

It is against this decision that the appellant appealed; in his memorandum of appeal dated 1 February 2018 but amended on 13 February 2018, he raised the following grounds:

1. The learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities.
2. The learned trial magistrate erred in law and in fact in failing to make a determination on all issues in the suit.
3. The learned trial magistrate erred in law and in fact in failing to make a finding that the plaintiff had received a good title of the suit motor vehicle.
4. The learned trial magistrate erred in law and in fact in failing to make a finding that the plaintiff was the registered owner of the suit motor vehicle and as such was not entitled to a refund of KShs. 420,000/= that had been paid as consideration of the vehicle.
5. The learned magistrate erred in law and in fact in awarding costs of the suit to the defendants.

At the hearing, the respondent testified that he initially knew the appellant as James Kiiru Gichuki when he offered to sell and the respondent accepted to buy the motor vehicle in question. The appellant had three vehicles out of which he opted for the one registered as KBC 699C. After execution of the sale agreement, the appellant handed over to him the vehicle together with its logbook. The appellant also gave him a Personal Identification Number (PIN), a photocopy of the identification apparently in the name of James Kiiru Gichuki. With these documents, he was able to transfer the ownership of the vehicle into his own name.

On 21 April 2016, one Kamau called and told him his car bears the same registration details as Kamau's. However, a search at the Registrar of Motor Vehicles revealed that motor vehicle registration number KBC 699C was still registered in his name. He nevertheless went and reported the matter at Karatina police station. The motor vehicle was detained for verification of ownership. Kamau was also asked to bring his vehicle at the station. It turned out to be of the same make as the respondent's; apart from the similarity in colour, the particulars of registration of the two vehicles were similar. Upon inspection, it was noted that the respondent's vehicle's chassis number had been tampered with and for this reason the motor vehicle was retained by the police. Upon cross-examination he testified that it was the engine number that had a problem in that it was not the same number indicated in the logbook.

On his part, the appellant admitted that indeed he executed an agreement with the respondent according to which he sold the vehicle to the respondent. It was his evidence that he had advertised three vehicles for sale on OLX, an online advertisement. It was as a result of this advertisement that the appellant called him telling him that he was interested in the cars he had put up for sale. As far as the vehicle in question is concerned, it was his evidence that the vehicle belonged to his brother whom he identified as James Kiiru Gichuki. The latter had authorised him to sell the vehicle on his behalf.

The respondent, according to his evidence, was interested in his brother's car and had no problem in the appellant executing the sale agreement on his brother's behalf. On 5 May 2016 the respondent called him to say that the vehicle had been detained by the police. He was arrested and charged in connection with the transaction although the judgment of the criminal case had not been delivered as at 6 March 2017 when he testified.

Francis Ndirangu (DW2) testified that he was present on the material day when the respondent purchased the vehicle from the appellant. It was his evidence that the respondent knew that the vehicle was registered in the appellant's brother's name but he insisted on the appellant executing the agreement on his behalf.

James Kairu Gichuki (PW3) himself testified indeed he owned the vehicle which was sold to the respondent. He had bought the vehicle from one Waweru Njoroge in September 2011. He confirmed having instructed the appellant to dispose of the vehicle on his behalf since he had proceeded to South Africa for further studies. To this end, he had left him with his PIN certificate, a copy of his identification card, a duly signed transfer form and a letter authorizing him to sell the vehicle. As far as the criminal case against the appellant is concerned, he testified that the appellant was charged with the offence of what I understood to be impersonation; that the appellant sold the respondent the vehicle falsely representing himself as James Kiiru Gichuki.

When I consider the evidence on record I am bound to agree with the learned magistrate that it was reasonable to conclude that indeed there was a clear case of misrepresentation in which the appellant was the representor while the respondent was the representee; nowhere is this clearer than the contract which they both executed and which was pivotal in the determination of the suit in the lower court. In its pertinent parts, the contract stated as follows:

**“REPUBLIC OF KENYA**

**AN AGREEMENT FOR SALE OF MOTOR VEHICLE**

**THIS AGREEMENT made this 6 day of September Two Thousand and Fourteen between James Kiiru Gichuki ID NO. 20091623 of care of Post Office Box 789, KERUGOYA within the Republic of Kenya hereinafter referred to as “THE VENDOR” (which expression shall include his personal representatives and assigns where the context so admits) on one part AND BERNARD KAMAU WAGAKORU ID NO. 0318193 of Post Office Box 1158 KARATINA within the Republic of**

Kenya hereinafter referred to as 'THE PURCHASER'( which expression shall include his personal representatives and assigns where the context so admits) on the other part.

WHEREAS the vendor is the owner of the motor vehicle Registration Number KBC 699 TOYOTA COROLLA and is desirous of selling the same at an agreed consideration of Kenya Shillings Four Hundred & Twenty Thousand (Kshs 420,000) only.

NOW THIS AGREEMENT WITNESSETH as follows:

1. The vendor hereby agrees to sell and the Purchaser agrees to buy the said motor vehicle registration number KBC 699 C TOYOTA COROLLA at an agreed consideration of Kenya Shillings Four Hundred & Twenty Thousand only (Kshs 420,000/=) which sum shall be paid in full on execution of this agreement in cash, which the vendor acknowledges receipt by appending his signature hereto.

2. ...

3. ...

4. ...

5. ...

SIGNED by the said

JAMES KIIRU GICHUKI

In the presence of

WINFRED WANJIKU MWANGI

(ADVOCATE)

SIGNED by the said

BERNARD KAMAU WAGAKORU

In the presence of

WINFRED WANJIKU MWANGI

(ADVOCATE)"

The appellant admitted in evidence that indeed the names Amos Karobia Gichuki and James Kiiru Gichuki did not refer to one and the same person; he was himself Amos Karobia Gichuki while his brother, on the other hand, was James Kiiru Gichuki. Indeed, James Kiiru Gichuki testified and said that he was not only the appellant's brother but that he was also the registered owner of motor vehicle registration number KBC 699C.

Against the background of these undisputed facts it is apparent that the appellant held himself out not merely as an agent of the registered owner of the vehicle in question but he went further and assumed the owner's very identity. It is on this score that one cannot resist coming to the conclusion that the respondent made out a clear case of misrepresentation the basis upon which he was entitled to rescind the contract.

According to Halsbury's Laws of England, a misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor') makes a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded. (*See Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION, paragraph 701*).

The innocent party may invoke the aid of the court, which may confirm by declaration his entitlement to regard the contract as rescinded, and grant him such other relief as may flow directly from the fact of rescission, for example, the return of money paid or chattels delivered by him pursuant to the terms of the contract. (*See Paragraph 812 of Halsbury's Laws of England, supra*)

As to the nature and the form the relief of rescission takes, the object of all proceedings based upon the quest for such a relief is: (1) to obtain a judicial declaration and judgment that the contract in question has always been, and still is, voidable by reason of the misrepresentation; (2) the annulment of the contract by the court, pursuant to its declaration, which annulment relates back to the date of the contract; and (3) such consequential directions and relief as will restore the parties to the exact position in which they were before the contract was entered into, this being the inevitable operation of any avoidance ab initio. In other words, there has to be a complete *restitutio in integrum*.

I am satisfied that the decision arrived at by the learned magistrate is well grounded in law and, for reasons proffered, the respondent was entitled to rescind the contract; owing to the appellant's deliberate misrepresentation, the contract between them was void *ab initio* and therefore the respondent was entitled to a refund of the consideration paid in discharge of his obligations under the contract. As to whether the appellant was entitled to damages arising out of what may have been the wear and tear or depreciation of the vehicle in issue, no basis was laid before court for its interrogation into that question because the appellant never lodged any counter-claim.

In the final analysis I find no merit at all in the appellant's appeal. It is dismissed with costs to the respondent.

**Dated, signed and delivered on 20 November 2020**

**Ngaah Jairus**

**JUDGE**