



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 72 OF 2018

KENYA MEDICAL RESEARCH INSTITUTE.....APPELLANT

VERSUS

GEORGE WAINAINA NGUGI.....RESPONDENT

(Being an appeal from the judgment of the Hon. M'masi SPM in CMCC no. 5818 of 2013 delivered on 14th September 2017 at Nairobi Milimani Commercial Courts)

JUDGEMENT

1) George Wainaina Ngugi, the respondent herein, filed an action before the Chief Magistrate's Court vide the plaint dated 24th August 2014 which plaint was amended by consent on 30th March 2017. In the aforesaid amended plaint, the respondent sought for judgment against Kenya Medical Research Institute, the appellant herein, as follows:

- a) An order compelling the defendant to release the original log book for motor vehicle registration number KZT 203 to the plaintiff to enable the plaintiff to transfer the said motor vehicle from the defendant to himself and procure regular registration plates.*
- b) Loss of user of the aforesaid motor vehicle from November 2011 to the time the log book bearing the defendant's name will be released.*
- c) Costs of the suit.*

In alternative

- a) Refund the plaintiff of all the monies paid to the defendant under the agreement of sale of the motor vehicle.*
- b) Damages for breach of contract of sale,*
- c) Interest on (a) and (b) at commercial rates.*
- d) Costs of this suit and interest at court rates.*

2) The appellant filed a defence to deny the respondent's claim.

The case was heard and determined in favour of the respondent by Hon. G. A. Mmasi learned Senior Principal Magistrate, as follows:

- a. ksh.1,000,000/= for damages for breach of contract*
- b. ksh.5,200/= refund as prayed in the amended plaint.*
- c. loss of user of ksh.1,000/= per day from 2011 to date i.e ksh.5,520,000/=.*
- d. Costs of the suit.*
- e. Interest at court rates.*

3) The appellant being dissatisfied filed this appeal and put forward the following grounds:

- i. The learned magistrate erred in law and fact in failing to take into account the submissions given on behalf of the appellants while considering her judgment.*
- ii. The learned magistrate erred in law and fact by awarding the respondents a decretal sum of ksh.3,325,500/-.*
- iii. The learned magistrate erred in law and fact in finding that the appellant had breached a contract with the respondent.*
- iv. The learned magistrate erred in law and fact in considering matters that were extrinsic to the case in arriving at her judgment.*
- v. The learned magistrate erred in law and fact in failing to state the reasons for his judgment and the reasons why she failed to consider the appellant's submissions.*
- vi. The learned magistrate erred in law and fact by awarding loss of user which were neither specifically pleaded or strictly proved in view of the evidence on record and in view of the fact that the same did not support the plaintiff's claim as specified in the plaint.*
- vii. The learned magistrate erred in law and fact by entering judgment against the appellants that was against the weight of the evidence adduced in court.*
- viii. The learned magistrate erred in law and fact in failing to appreciate all the evidence tendered in court in support of the appellant's arguments and misconstruing the law applicable to the entire case.*
- ix. The learned magistrate erred in law and fact in failing to consider the authorities referred to the honourable court by the appellants.*
- x. The learned magistrate erred in law and fact by entering judgment for the respondent against the appellants in the sum of ksh.3,525,500/= plus interest and costs which is a huge sum compared to the value of the subject motor vehicle in possession of respondent.*

4) When the appeal came up for hearing this court issued orders directing the appeal to be disposed of by written submissions.

5) I have re-evaluated the case that was before the trial court and also considered the rival written submissions plus the authorities cited. The background of this dispute is short and straightforward.

6) On 4th November 2011, the appellant conducted a public auction for the sale and or disposal of several motor vehicles. In the aforesaid auction, the respondent successfully bid for motor vehicle registration no. KZT 203 for ksh.200,000/=. The motor vehicle was initially donated to the appellant in the year 2003 by Japan International Cooperation Agency (JICA) after the conclusion of a project by KEMRI/JICA. The motor vehicle was registered in the name of JICA and the logbook was at the time of the auction still in the name of the donor and the respondent was made aware of that fact.

7) The respondent was authorized to take possession of the motor vehicle upon payment of the full purchase price of ksh.200,000/= to the appellant. He was also issued with a copy of the logbook which was in JICA's name. The appellant also issued the respondent with a partially executed transfer in his favour, copies of the appellant's PIN, valuation and inspection reports together with correspondences between the appellant and Kenya Revenue Authority (KRA).

8) For unexplained reasons KRA failed to effect the transfer the ownership of the aforesaid motor vehicle from JICA to the appellant. The appellant has therefore been unable to have the motor vehicle registered in the name of the respondent hence the respondent was prompted to file the suit before the trial court which gave rise to the judgment which is now being challenged on appeal before this court.

9) Though the appellant put forward a total of 10 grounds of appeal it appears those grounds can be determined together in two broad grounds. The first main ground is whether the appellant was in breach of the contract and whether it is liable to pay damages for such a breach.

10) It is the submission of the appellant that the contract between it and the respondent was frustrated by KRA a third party who is not under its control. The appellant pointed out that the respondent was issued with several documents showing that the subject motor vehicle was still in JICA's name.

11) The appellant also stated that the respondent was further issued with correspondences between the appellant and KRA indicating that the process of transferring the motor vehicle to its name and thereafter to the respondent's name. The appellant submitted that it applied to enjoin KRA as a third party in the suit but the trial court threw out its application. For the above reason the appellant stated that the performance of the contract was rendered impossible owing to KRA's inaction to transfer the logbook to the respondent.

12) The respondent on the other hand is of the opinion that the appellant breached the contract by failing to pass title of the motor vehicle to the respondent through its failure to surrender the original logbook in its name to the respondent.

13) The main issue to be determined is whether the appellant was in breach of contract. In her judgment, the learned Senior Principal Magistrate stated that the respondent had proved his case on a balance of probabilities and that he demonstrated that the appellant breached the contract.

14) After a careful re-evaluation of the evidence presented before the trial court, I am convinced that the learned Senior Principal Magistrate fell into error. It is apparent from the evidence that the respondent was given all the relevant documents in respect of the subject motor vehicle. It is also clear that the appellant informed the respondent of the steps it took to have the motor vehicle transferred to the respondent but all its efforts were frustrated by KRA which failed to effect the transfer of the motor vehicle from JICA to the appellant which in turn would thereafter transfer to the respondent.

15) It is not in dispute that the KRA was not under the direction or control of the appellant. It is therefore clear that the contract between the appellant and the respondent was frustrated thus rendering its performance to be impossible. In the circumstances of this case, it was therefore erroneous to find the appellant in breach of the contract hence this finding must be set aside.

16) The second main issue is whether the learned Senior Principal Magistrate was justified in awarding the respondent damages for breach of contract. It is the submission of the appellant that the respondent was not entitled to damages for breach of contract hence the trial magistrate misapprehended the law and erroneously awarded damages where there was no proof for breach of contract.

17) The appellant pointed out that even if there was proof of breach of contract the respondent would have been entitled to nominal damages. It was also pointed out that the award of loss of user was not justified since no evidence was tendered to establish the claim.

18) On his part the respondent argued that since there was proof of breach of contract on the part of the appellant, the trial court was right to award him damages for breach of contract and for loss of user. The respondent stated that the motor vehicle has never been used to date for lack of number plates. It is pointed out that the trial court was entitled to award a global figure in the circumstances. The respondent admitted that he did not provide any evidence to prove loss of user.

19) Having considered the rival submissions and having perused the trial court's judgement, it apparent that the magistrate awarded the respondent a sum of ksh.1000/= per day for loss of user and ksh.1000,000 as damages for breach of contract.

20) Having found that the contract was frustrated by a third party, who was not under the control of the appellant, hence the appellant should not have been found to be in breach of contract. Even if the appellant was found to be in breach of contract, then the trial court could award general damages but not damages for loss of user where there was no proof like in this case. The respondent should have tendered credible oral or documentary evidence to establish loss of user but he failed to do so.

21) In the end, the appeal is allowed. Consequently, the order finding the appellant in breach of contract is set aside and is substituted with an order declaring that the contract between the appellant and the respondent was frustrated by a third party who was not under the control or direction of the appellant. The awards made by the trial court in favour of the respondent are hereby set aside and are substituted with the following orders and or awards:

- i. The appellant is ordered to refund to the respondent the sum of ksh.205,200/=.**
- ii. The respondent to return to the appellant motor vehicle registration no. KZT 203 forthwith.**
- iii. Each party to meet its own costs of the appeal and suit.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13th day of November, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent