



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 140 OF 2018**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**FRANKLINE ONKUNDI NYATARO.....APPELLANT**

**AND**

**GEORGE MOKUA OGENDI.....RESPONDENT**

*(Appeal from the original Judgment and Decree of Hon. P. Wamucii, RM dated 20<sup>th</sup> November 2018 at the Magistrates Court at Kisii in Civil Case No. 17 of 2015)*

**JUDGMENT**

1. The appellant, **FRANKLINE ONKUNDI NYATARO**, appeals against a judgment dismissing his case against the respondent. He was the plaintiff before the subordinate court while the respondent was the defendant. I shall refer to the parties in their respective capacities before the trial court in this judgment unless the context otherwise admits.

2. The plaintiff's case was that he entered into an agreement with the defendant dated 1<sup>st</sup> July 2013 to purchase motor vehicle registration number KBJ 010D ("the car") for the price of Kshs. 430,000/-. He paid the price and took possession of the car. In due course the car was impounded by the police after it was alleged that he did not have proper documentation. The plaintiff filed suit claiming that the defendant had fraudulently obtained money from him by failing to give him a good title to the car. He claimed the purchase price together with general damages.

3. The defendant, in his defence, admitted that he sold the car to the plaintiff but denied the allegations of fraud. He stated that prior to selling the vehicle he had a genuine logbook and the Criminal Investigations Department had given a clearance report. He further stated that plaintiff was not entitled to damages as he took possession of the vehicle after the sale agreement and had enjoyed the benefits of the vehicle until it was impounded by the police.

4. After hearing the evidence, the trial magistrate held that the defendant did not breach the sale agreement on the ground that at the time of sale he had a good title to the car and thus by the time he sold the car, he was the owner and was able to pass good title to the plaintiff. It is this finding that had precipitated this appeal whose grounds are set out in the memorandum of appeal dated 14<sup>th</sup> December 2018.

5. The thrust of the appellant's case as urged by Mr Ochoki, counsel for the appellant, was that the defendant failed to give the plaintiff good title to the car as it was taken by the police on the ground that it was registered in the name of a third party. He submitted that although there was a valid sale agreement, the defendant failed to give the plaintiff a good title hence the purchase price was due contrary to the finding of the trial magistrate.

6. The respondent through his advocate, Mr Aunga, countered that all the documents given to the plaintiff were genuine and that the defendant had exercised all the due diligence when it sold the car. Counsel supported the conclusions of the trial magistrate that the defendant passed a good title to the plaintiff and that the plaintiff was not entitled to any damages for breach of contract as alleged.

7. Both parties agree that the issue for determination is whether the respondent had a right to sell the car and whether he passed good title. The statement of law on the duty of the seller to warrant a good title to the goods can be found in the case of **Stephen Kilonzo Nyondo v Samuel Wahome Kibuthu NYR HCCA No. 57 of 2011 [2015]eKLR** where the court stated as follows:

*In every contract of sale, there is an implied condition that the seller has a right to sell goods and in the case of an agreement to sell he will have such a right at the time when the property is to pass. The liability thus imposed is a strict liability and does not depend upon the fault or knowledge of the seller. A seller will clearly have no right to sell the goods when he has no title to the goods and*

*can pass none to the buyer.*

8. The question before the court is one of fact and in resolving the issue, it is important to recall the general principle governing first appeals. I must bear in mind that the primary role of the first appellate court is to re-evaluate the evidence before the trial court and then determine whether the conclusions reached by the learned trial magistrate stand or not while making allowance for the fact that I neither heard nor saw the witnesses testify (see *Kenya Ports Authority v Kuston (Kenya) Limited [2009]2 EA 212*).

9. At the trial the plaintiff (PW 1) testified. The defendant (DW 2) testified and called a mechanic, Vincent Aberi Maaga (DW 3) and Ibrahim Abdalla Ibrahim (DW 4), an officer from National Transport and Safety Authority (NTSA) as witness. Although PC George Makai Musira (DW 1) was initially called as a witness for the defendant, he was stood down and was not cross-examined.

10. From the totality of the evidence, it is not in dispute that the plaintiff and defendant entered into an agreement dated 1<sup>st</sup> July 2013 and that the plaintiff paid the purchase price and took delivery of the car. It is also not in dispute that at the time of the sale, the defendant gave the plaintiff the logbook, a copy of his identity card and the PIN certificate. PW 1 testified the car was impounded in October 2014 on suspicion that it was stolen and when he conducted a search on the car on 23<sup>rd</sup> October 2014, the copy of records from Kenya Revenue Authority showed that the car was in the name of *Kusero Evans*.

11. The defendant testified that apart from furnishing the plaintiff with all the documents, he applied for report from the Criminal Investigation Department to confirm that the vehicle was genuine and according to the tape lift dated 16<sup>th</sup> November 2012, the chassis and engine numbers were confirmed to be intact and no interference was noted. He maintained that he had a good title to the car before he sold it to the plaintiff.

12. DW 4 testified that from the records held by NTSA, the registered owner of the car was *Kusero Evans* and that the defendant was its third owner having been registered on 15<sup>th</sup> April 2013. In cross-examination, he told the court that he did not have or see any documents transferring the car from the defendant to *Kusero Evans* on 24<sup>th</sup> February 2014.

13. From the evidence of the plaintiff and defendant, it is common ground that the car was owned by defendant on the date of sale. DW 4 confirmed that according to its records, the defendant was the registered owner of the car at the time the vehicle was sold to the plaintiff. Since the defendant was the legal and registered owner of the vehicle he could pass good title. In addition, **section 8 of the Traffic Act (Chapter 403 of the Laws of Kenya)** raised a presumption in favour of the registered owner. It provides that, “*The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.*” Hence, it was the burden of the plaintiff to prove fraud. In this case, the plaintiff failed to prove fraud or show that the defendant did not have title to the car.

14. For the reasons I have set out above, I now dismiss this appeal. The appellant shall pay costs of the appeal which I assess at Kshs. 30,000/- exclusive of court fees.

**DATED and DELIVERED at KISII this 28<sup>th</sup> day of MARCH 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochoki instructed by Ochoki and Company Advocates for the appellant.

Mr Aunga instructed by Momanyi Aunga and Company Advocates for respondent.