



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 85 OF 2016**

**DAVID MWANGI WACHIRA.....APPELLANT**

**-VERSUS-**

**DAVID KIMANI CHEGE.....RESPONDENT**

***(Appeal from the of Hon. Liz Gicheha, Senior Principal Magistrate dated and delivered on 19<sup>th</sup> August 2016 in Chief Magistrate's Court at Nakuru Civil Case No. 613 of 2015)***

**JUDGMENT**

1. The dispute between the parties in the primary suit Nakuru CMCC No. 613 of 2015 was about ownership of a motor vehicle Registration No. KBX 432H which at all material times was registered in the Appellant names, David Mwangi Wachira, as against the Respondent's claim that he had purchased the same through the 1<sup>st</sup> defendant (not a party to the Appeal), by some import arrangement with an agent, the 1<sup>st</sup> Defendant in the subordinate case, in the sum of Kshs.850,000/= sometimes in the year 2013, but fraudulently registered in the Appellant's name on the 3<sup>rd</sup> March 2015 from which time the appellant repossessed the vehicle.

2. The Respondent sought for an order of injunction to restrain the appellant, his agents and servants from selling the vehicle, and an order directed to the Registrar of Motor vehicles compelling rectification of records of ownership of the suit vehicle with a declaration that the vehicle legally belongs to the respondent. He also sought damages, costs and interest.

3. The Appellant (then 2<sup>nd</sup> Defendant) denied the Respondent's claim of ownership of the subject vehicle by purchase or in any other manner, and by its defence and counter-claim dated 12<sup>th</sup> October 2015 declared that the subject motor vehicle was bought for the benefit of the appellant who is the current owner, having paid full consideration for the purchase of the motor vehicle.

4. The appellant further averred that it entered into a car-hire arrangement with the Respondent (then plaintiff) to pay Kshs.1,000/= per day for which he defaulted thus necessitated repossession of the vehicle and registration in to his names. He therefore sought declarations, among others that

*(a) that the appellant (then 2<sup>nd</sup> defendant) was the legitimate registered owner of the vehicle.*

*(b) An injunction to restrain the respondent from interfering in any way with the subject motor vehicle*

*(c) An order for payment of Kshs.241,353/= to the appellant with interest from (particulars stated) plus costs and interest at court rates.*

5. In the trial court's judgment, the Honourable Magistrate made findings that the subject motor vehicle was bought for the benefit of the respondent herein and was not leased to him, and dismissed the counterclaim with costs.

A further finding was that the vehicle was never bought for car-hire to the respondent, and there having been no proof of any damages to the appellant, the claim for damages and costs was also dismissed.

Finally the trial court ordered that the vehicle be released to the respondent forthwith.

6. The Appellant was dissatisfied with the judgment. He lodged this appeal on numerous grounds that may be summarised into four (4) which will also be the issues or determination in the appeal.

These are

(1) Whether the Respondent proved his case for purchase of the subject motor vehicle from the Appellant by Hire-purchase agreement.

(2) Whether the Respondent's evidence was riddled with material contradictions and inconsistencies.

(3) Whether there was sufficient evidence to sustain the counter-claim.

(4) Whether the Appellant is entitled to the remedies sought in the Memorandum of Appeal.

7. The issues in respect of the above grounds are intertwined and will therefore be interrogated simultaneously as to do otherwise would be repetitive and unnecessary.

A party is at all times bound by its pleadings and any evidence adduced that does not support the pleadings ought not be allowed. It is also trite that a court is likewise bound by the parties pleadings and ought not pronounce itself on any claim or defence that is not pleaded as to do so would lead to injustice to the parties – **Global Vehicles Kenya Ltd –vs- Lenana Road Motors (2015) e KLR**. See also **Mohamud Muhamed Sirat –vs- Ali Hassan Abdirahman & 2 others (2010) e KLR** where the court reiterated that a court will not make a finding on evidence adduced if such evidence is not supported by the party's pleadings.

8. The duty of a first appellate court has been stated in numerous judicial decisions. It will re-examine, re-evaluate and re-analyse the evidence adduced before the trial court and then determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way - **Abok Odera t/a A.J. Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates (2013) e KLR** and cited by the Courts of Appeal in **Margaret Njeri Mbugua –vs- Kirk Mweya Nyaga (2016) e KLR**.

9. The court on appeal will only interfere with the trial court's findings and judgment if it is convinced, from the evidence on record that the trial court misdirected itself on the matters of law, or that it misapprehended the facts or took into account irrelevant factors or failed to consider relevant ones or that the decision is plainly wrong – **Selle and Another -vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123**.

10. **Whether the appellant purchased the suit vehicle.**

Purchase of any commodity is demonstrated by payment of purchase price and a sale agreement where necessary - See **Laws of Contract Act, Chapter 23 Laws of Kenya, Section 8**.

I have considered the evidence adduced before the trial court.

The Court of Appeal in **Great Lakes Transport Co (U) Ltd –vs- Kenya Revenue Authority (2009) e KLR 720** rendered that

***“A mere invoice was incapable of proving purchase. An invoice was not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which the invoice was prepared were paid for.”***

11. The respondent to prove payments of the consideration submits that he had authorised the appellant to use the money he owed him for delivery of bottles, and convert it to, and as purchase for the vehicle, pursuant to an oral contract for the purchase of the vehicle made between himself and the appellant. It is further submitted that the deliveries and invoices were sufficient proof of the oral contract and the payment of the purchase price.

12. I agree that an oral contract may be deduced from the parties conduct and actions as submitted by the parties.

I have looked at the invoices – PExt 15, PExt 2 for Kshs.650,000/= upon which the payment of purchase price is grounded by the Respondent.

**PExt 2** is an invoice in favour of M/S. David Mwangi Wachira c/o Bisepts Ltd, the appellant. – It reads

***“Kshs.650,000/= is credited to David Mwangi Wachira being amount paid for motor vehicle registration No.Number KBS 432H, being part payment of goods supplied to him for various invoices and deliveries.”***

That was on the **26<sup>th</sup> November 2013**.

13. The next question would be, whether the said sum of Kshs.650,000/= was indeed paid to the said David Mwangi Wachira, as endorsed in the invoice.

Evidence of the (1<sup>st</sup> Defendant) agent before the trial court was that he was only an agent of the appellant for the purchase of the vehicle, and that he was paid in instalments of Kshs.200,000/= and Kshs.650,000/= by the appellant. He produced a bank statement – DExt 12 – to confirm that the appellant had sent to him Kshs.650,000/= to make the purchase price of Kshs.850,000/= after which he gave him the importation documents – DExt 2a – 2g, and the two car keys. He also arranged and obtained registration of the vehicle, and that completed his agency duties with the appellant.

14. It is evident that the appellant had forwarded out the purchase price of the vehicle to the agent who – acknowledged the same, a fact

confirmed in his bank statements. On the face of it, it seems that the vehicle was bought for the appellant, but a critical analysis shows otherwise.

15. I have considered the vehicle documents as submitted by the Respondent. They are all in the Respondent's names including the motor vehicle Insurance Cover taken from Gateway Insurance Company, Payment Receipt for the Insurance premium of Kshs.46,247/=, Kenya Revenue Authority payment of Domestic Taxes received from David Kimani Chege the respondent. I also note that the valuation and inspection report is also in the names of the Respondent.

16. This begs an answer. Why would the Appellant not have taken these vital documents in his names if the vehicle was his? How practical is this. Did he authorise the Respondent to obtain the documents in his names?

17. The appellant in my view failed to explain why the vehicles documents were in the Respondents names nor was the authority demonstrated. This scenario is not consistent with ownership of a vehicle. The appellant further failed to sufficiently explain why the Respondent was in possession of and used the vehicle for one year seven months before he caused its repossession, and eventual registration to himself on the 3<sup>rd</sup> March 2015, well over three years after its purchase.

18. Like the trial court, I find it unusual that the appellant would ask for car hire charges of Kshs.200,000/= from the Respondent even before he had been given the said vehicle by the agent.

The above conduct by the appellant does not constitute or show existence of any oral agreement that the vehicle was being purchased by himself for car-hire to the Respondent.

Even if that was so, it is also not usual that the alleged car-hirer, the Respondent would be given two keys to the hired vehicle, nor the importation and insurance documents, be taken out in the respondent's (hirer) names.

19. I agree with the appellant's submission that the Respondent had produced summation of invoices – **Ext 2** – dated 26<sup>th</sup> November 2013 showing payment of Ksh.650,000/= credited to the appellant deliveries of goods and which was converted to payment for the purchase of the motor vehicle KBX 423 H. I however do not agree with him that as the vehicle was registered the **next day, 27<sup>th</sup> November 2013** the invoice could only have been a forgery.

20. The appellant did not attempt to prove that the said invoice for Kshs.650,000/= was forgery before the trial court. This was discounted by the Agent's Bank statements that showed the sum of Kshs.650,000/= having been credited into his account. It is also not uncommon to have a vehicles registration number issued upon payment of the requisite fees, and the Number plates, bearing the registration number given collected thereafter. I therefore discount that argument, and find that indeed the Respondent had a contractual relationship with the Appellant in respect of the purchase of the subject motor vehicle by the appellant but for the benefit of the Respondent.

21. As to the Appellant's counter-claim, other than pleading, no evidence was placed before the trial court to persuade it to rule in his favour. I find that the trial court was quite in order to dismiss the counter-claim as having not been proved to the required standard, upon a balance of probability.

22. For those reasons, I find no merit in the appellant's appeal.

I uphold the trial court's judgment in its entirety and find that the subject motor vehicle **Registration No. KBX 423H is the property of the Respondent, David Kimani Chege.**

**Accordingly, I order that the vehicle be released to the said David Kimani Chege forthwith.**

23. The Appeal is dismissed with costs to the Respondent.

**Delivered, Dated and Signed at Nakuru this 30<sup>th</sup> Day of July 2019.**

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**J.N. MULWA**

**JUDGE**