



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 31 OF 2016

FRANKLINE MATATA MWAGONA.....APPELLANT

VERSUS

BONIFACE KALAMA.....RESPONDENT

(Being an appeal against the judgement of the learned magistrate Hon. L. Juma delivered at Kilifi on 23rd August, 2016 in CMCC. No. 247 of 2014)

CORAM: Hon. Justice R. Nyakundi

Mr. Obara for the Appellant

Mr. Kanyi for the Respondent

JUDGEMENT

The appellants Frankline Matata Mwangona appeal arises out of dismissal of his claim in the court below where he sought the following reliefs:

- 1. A permanent injunction restraining the defendants or servants from transferring, sections, in any way interfering with proprietary rights in the motor –vehicle registration number KBU 922U.***
- 2. A mandatory injunction compelling the defendant either by himself, agents, or servants to forthwith hand over motor-vehicle registration Number KBU 922V to the plaintiff.***
- 3. The Honourable Court be pleased to order the O.C.S. Kilifi police station to oversee and enforce the orders granted by the court.***
- 4. Costs of the suit.***

The appellant was at all times the owner of the subject matter of this appeal being motor vehicle Kbu 922v which was offered for sale to the respondent. In regard to the oral agreement the appellant sold his vehicle to the respondent at ksh 1, 800,000 which offer was accepted without any conditions by the respondent. It was alleged by the appellant that despite parting with possession not a single installment has been made to settle the sale price as agreed with the respondent. The appellant there fore instituted suit to seek an order of repossession of the motor vehicle from the respondent.

The respondent Boniface Kalama in his statement of defence admitted purchasing motor vehicle registration KBU 922V from the appellant at Kshs.1,400,000. The respondent also alleged making an initial payment of Kshs.400,000 to Shami Trading Co., being the outstanding instalment the appellant owed the company leaving a balance of Kshs.1000,000 due to the appellant .

The respondent further alleged that the balance of the purchase price was paid on diverse dates to either the appellant's wife or his brother as initially directed, only leaving a balance of Kshs.288,000 due and owing.

The hearing nevertheless proceeded before the trial court where the appellant was the only witness while respondent summoned three other witnesses in support of his defence. The respondent cross- petitioned the court for an order of the court for release of the logbook by the appellant as a condition to settle the balance.

By her judgement dated 23rd August, 2016 which is the subject matter of this appeal Hon. L.N. Juma dismissed both the claim filed by the appellant and counter-claim by the respondent.

Aggrieved by the dismissal of the suit the appellant has appealed to this court.

Learned counsel for the appellant arguing on the grounds of appeal submitted that the learned trial magistrate erred in law and fact in dismissing the claim even with the overwhelming evidence which was tendered by the appellant.

The appellant's counsel further contention was that the respondent had accepted the offer to purchase the motor vehicle at a price agreed with the appellant. That by the said agreement the respondent made an undertaking to liquidate the sale on stipulated conditions of instalments.

The primary arguments before the trial court were that the appellant parted with possession of the vehicle but the respondent breached the terms making payments as agreed. On the other hand the respondent maintained having paid for the vehicle leaving a balance of about Ksh. 288,000 pending the transfer and release of log book by the appellant.

As mentioned in her judgement and findings the evidence was tainted with inconsistencies and contradictions by the appellant and respondent rendering both their claims not proved on a balance of probabilities

The law, Analysis and Determination

The principles to guide the first appellate court are well settled. The central duty is to evaluate the evidence and primarily come up with its own conclusion – see **Kenya Commercial Bank v Tony Manaseh Civil Appeal No. 105 of 1998, Okeno v R (1972) EA.**

This appeal concerns a motor vehicle known as KBU 288V in possession of the appellant. The respondent being the purchaser offered to buy it from the appellant. What happened at the time was that the appellant PW1 testified and gave evidence in chief that he sold the motor vehicle at Kshs.1.8 million to the respondent payable by instalments. PW1 further testified that he was leaving the country for the United Kingdom and in his absence the money was to be deposited in his account. It was the testimony of PW1 that the vehicle was handed over to the respondent but no agreed instalment has ever been paid to complete the transaction. The appellant contested some money was paid to Shami Trading Co. or any further payments being made through his wife or brother. According to the appellant the outstanding balance is still Kshs.1.8 million and not Kshs.288,-000 as alleged by the respondent.

The respondent on his part disputed the claim by the appellant both in his oral agreement and testimony. The respondent admitted taking possession of the vehicle and also making several instalments towards liquidating the sale price. Regarding his counter claim he testified before court relying on handwritten document showing payments purportedly made as agreed with the appellant.

Although the respondent stated that he has not been given the logbook the evidence in his possession shows that the amount due is about Kshs.288,000. In support of his piece of evidence the respondent is stated to have paid Kshs.450,000 in a receipt taken by the appellant's wife, later on 17th February, Kshs.400,000 was paid to Silvester, on 19th February Kshs.20,000 was paid to Mwagona and a further Kshs.50,000 to Eric. It was also his testimony that on 23rd March in company of Eric and appellant's wife he paid Kshs.20,000 to Shami Trading Centre. On 10th June, the wife of the appellant was given Kshs.100,000 being the last payment.

PW2 Julia Changore testified in support of the respondent's case where she acknowledged payment of Kshs.400,000 to Shami Trading Co. In cross-examination PW2 told the court that she changed her answer and confirmed only witnessing payment of Kshs.100,000 to mama Rachel. DW3 Stephen Ambulil also in his testimony testified as engaged by the appellant to dispose of the subject motor vehicle Accordingly, to the respondent the agreed price for the vehicle was Kshs.1.4 million. In his further evidence Kshs.400,000 was to be paid to Shami Trading Co. and the rest as instructed by the appellant. Although this piece of evidence was challenged by the appellant there was no doubt that the subject motor vehicle was sold by the appellant which the respondent accepted to purchase. What is unfortunate in this suit is the manner in which the sale price was settled by the respondent a fact vehemently denied by the appellant.

In light of the above background what are the issues that stand out in this appeal?

- 1. What were the terms of the contract between the appellant and the respondent?***
- 2. Whether either party was in breach of the contract***
- 3. Whether in construing the contract the learned magistrate erred in law and fact in dismissing both claims***
- 4. What will have been appropriate remedy in the facts of this case?***

Analysis and Determination

The Law

In his response to the issue whether the parties entered into a valid contract I make a reference to the Law of Contract by Edwin G.H. Treitel London, Sweet & Maxwell 2009, where the learned author dealt with the doctrine by observing as follows:

“That under the law of contract it is general acceptable the terms of any agreement will not be reduced into writing save where

the expressly provides for such contracts to be in written form. The law applicable on all contracts whether oral or written to be ascertained from the agreement must fulfil the following conditions:

- a) The intention of the parties*
- b) sufficient offer and acceptance*
- c) capacity*
- d) lawful subject matter*
- e) mutuality of obligation*
- f) consideration”*

The law on contract in Kenya for the sale of goods I believe quite clearly is laid down under Section 19 of the Sale of Goods Cap 31 of the Laws of Kenya among other legal instruments. It provides as follows:

1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

In addition Rule 20 provides:

“a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;

b) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof.”

c) where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done, and the buyer has notice thereof;

d) when goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer –”

In considering whether there was a valid contract the court ascertains intention from the conduct of the parties and peculiar circumstances of each case. In my view as already stated under Section 19 of the Act and attended Rules in Section 20 when parties to a contract ascribe different meanings to a material term of a contract the parties have not manifested mutual assent, no meeting of the minds has occurred and there is no valid contract. The only exception to the rule is when one party unilaterally exercises an option to frustrate the contract in order to give a different meaning in the agreement.

What is the tenor of the words and intention of the parties where there is vagueness or ambiguity the court can interpret such intention that may give reasonable meaning to the agreement in dispute. A contract in law is considered facially ambiguous when the oral written terms substantially conflict as they relate to the contingency of the intention of the parties. The test and the rules to apply and which are of importance on the efficacy of a valid contract can be traced way back to the writings by Chitty on Contract Vol. 1 2009 Edition where the learned author express himself as follows:

“... express terms are those which are actually recorded in a written contract or openly expressed at the time the contract is made. The implication of a term is a matter for the court and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surround circumstances.”

Having said this much in this appeal from the judgement of the learned trial magistrate she made the correct findings of the existence or a valid oral contract between the appellant and the respondent. The learned magistrate rightly so framed the issues as she did for determination. Secondly on the basis of the evidence she seems to have established that the agreement between the two upon acceptance of the offer by the respondent the consideration of the vehicle was set at Kshs.1.4 million. It is also to be noted from the judgement that the learned trial magistrate specified that the Kshs.450,000 was paid on 17th February, 2014 by the respondent to Shami Trading Co. in the presence of the appellant's wife. The balance therefore due to the appellant can be said to be Kshs.950,000. In so far as the payment for this balance is concern the respondent in answer to this issue produced some handwritten document bearing signatures presumably of the wife and brother to the appellant as having received the payments on his behalf while he was in the United Kingdom. This piece of evidence was however ruled as inadmissible by the trial court. As per the evidence on record if the trial magistrate formed the opinion that the balance was due and payable in my considered view she could have invoked Order 16 rule 7 of the Civil Procedure Rules. The wife and the brother to the appellant were indispensable witnesses in this claim filed at the trial court. What is more the arguments on the dispute was basically non-

payment of the purchase price by the respondent on a vehicle already in his possession. Whilst the learned trial magistrate ruled out the handwritten payment schedule as inadmissible there is prima facie evidence available which required an answer from the respondent on the money due and owing to the appellant for payment of the vehicle.

My reading of Rule 7 and Section 1A for the Civil Procedure Act the court is clothed with wide discretion to grant orders in adjudication of disputes to meet ends of justice. The trial magistrate in this case had the jurisdiction in terms of Order 16 rule 7 of the CPR in her motion to recall the persons of concerned mentioned in the evidence rendered on oath by the respondent.

The basis of subpoena of such witnesses had been both laid by the respondent in his witness statement and oral testimony in court. For such directions to be made at any time I direct myself to rely on legal principle in persuasive authority by Lord Esher in **Coulson v Disborough** where he held as follows:

“If there be a person whom neither party to an action chooses to recall as a witness and the judge thinks the person is able to elucidate the truth, the judge in my opinion himself entitled to call him, and I cannot agree such a course have never been taken by a judge before.”

In the present appeal the record bears me witness that in escapable conclusion that in the said agreement the respondent exonerates himself from liability by naming certain persons who received money on instructions from the appellant. In respect of instalments paid to such persons in the absence of the appellant the court’s discretion was to be exercised that they be summoned as witnesses having been mentioned adversely in support of the respondent case.

There is therefore support for the view I hold that Order 16 rule 7 of the CPR and the dicta in **Coulson case** (supra) would have come in handy to clear the contradictions in the evidence in adjudicating the competing rights of both parties. Without the benefit of this exhibit and evidence of the person purported to have received or witnessed the money it was not possible for the trial court to decide where the truth lies. If, she had may be summoned the witnesses, I think the outcome of the suit would not have been dismissal.

There was therefore misapprehension of evidence by the trial magistrate and in accordance with Section 1A of the Civil Procedure Act and Order 16 rule 7 both parties did not have a fair trial. The appellant and respondent’s rights which gave rise to the existence of a contract fell short of being determined by the court.

So, if the respondent acted in any way to deprive the appellant of the agreed purchase price it was imperative that the trial magistrate to piece together the oral evidence and make an appropriate finding on the issue at stake. I am of the considered view that the learned trial magistrate was entirely wrong not to rule on this evidence and its import to the claim.

I also pause the question as to whether the appellant at the time he entered into an agreement for the sale of motor vehicle with the respondent he had in his possession a clean title to transfer it.

With respect to the learned trial magistrate the legal and beneficial ownership of the subject matter of the contract prominently featured during the trial. The pleadings and the testimony of both witnesses tended to bring to the fore an aspect of a motor vehicle being owned and registered in the name of Shami Trading Co. If the appellant had no legal ownership at the time of the contract with the respondent, then he had no capacity to transact. As such the alleged ownership was a live issue before the trial court.

In such circumstances what happened in the course of the trial from the evidence of PW1 and further defence given DW1, DW2, DW3 and DW4 the legal and beneficial ownership was intended to fortify both the appellant’s and respondent’s positions. Although this evidence was placed on record the judgement of the lower court is silent on the matter whether indeed the respondent on instructions by the appellant paid out instalments to the persons named in the handwritten document.

There is therefore an error of principle on the part of leader trial magistrate. Consequently, for this court I hold that a decision reached under circumstances is unjust and must therefore be interfered with by having it set aside. I find fortress in the case of **Ephantus Mwangi & another 1982-1988 1KAR 278**). In the impugned judgement the subscribers to the contract one essential condition to be satisfied was whether title had passed from Shami Trading Co. to the appellant to free the subject motor vehicle for sale to the respondent. This condition unless fulfilled the contract in question will constitute an illegality.

I am persuaded that this view of the law though deduced from the pleadings and evidence was never actually dealt with by the trial court. The jurisdiction of the court includes reading the small print in the pleadings so as to ensure that there was no possibility of injustice in the suit. The learned trial magistrate did not believe the appellant or the respondent on the privity of contract notwithstanding clear evidence that the appellant engaged an agent to sell his motor vehicle. So the situation obtaining as to the delivery of judgment seems to suggest that both parties had no contractual relationship, Its for this reason that I find from the material available before the learned trial magistrate the issue of legality of the contract though not specifically sought as a relief in this regard she ought to have ruled on it. I much prefer the legal proposition set out in persuasive case of **Keng Soon Finance HJO v Retiman Holdings SDN BHD & another 19891 MLJ 457** where the court stated”

“That the illegality of an agreement sued upon is matter of which the court is obliged, once it is appraised of facts tending to support the suggestion to take notice ex proprio motu and even though not pleaded (see Edler v Auerbach 1950 1KB 359) for clearly, no court knowingly be party to the enforcement of an unlawful agreement.”

Considering all that was said by the parties and facts I set out in the trial court there is no finding on this issue on enforcement of the contract. The outstanding issue was whether the contract was tainted with illegality.

Having already analyzed the material and evidence on record which culminated in the sale of the motor vehicle there are serious issues which the trial court left unresolved. She was therefore mandated under the law to make a conclusive determination on each element of the dispute. Although the learned trial magistrate made in-roads in her judgment she did not go far enough to address the aggregate issues which emerged from the pleadings and evidence. The judgment therefore also contravenes Order 21 rule 4 of the Civil Procedure Rules. In such circumstances both parties did not have a satisfactory trial within the tenets of Article 50 of the Constitution.

In overall the learned trial magistrate exercised discretion to dismiss both the appellant's claim and the respondent's counterclaim was prima facie wrong on grounds that she failed to invoke Order 16 rule 7 of the Civil Procedure Rules under Article 159(d) of the Constitution to deliver substantive justice.

I think therefore there are sufficient grounds for this court to apply the provisions in terms of Section 78(1) of the Civil Procedure Act to remedy the defect in the judgment, by invoking any one of the various alternatives provided to cure circumstances where a litigant has been prejudiced or failure of justice occasioned.

“That subject to that conditions and limitations as may be prescribed an appellate court shall have power to (1) determine a case finally (2) to remand a case (3) to frame issues and refer them for trial (4) to take additional evidence or to require evidence to be taken (5) to order new trial.”

Applying these provisions to the facts of this case the ends of justice would be met if the learned trial magistrate resolved the following:

First, summon the witnesses named by the respondent to have received money on behalf of the appellant. Secondly, whether there was an agreement by the appellant to the respondent to pay any money to Shami Trading Co. which was the initial owner of the motor vehicle. Thirdly, whether on completion of the sale transaction the respondent had unreasonably refused to complete the payment due and owing to the appellant. Fourth, whether the appellant while temporarily domiciled in the United Kingdom he issued instructions to the respondent to make his payment to his relatives positively identified in evidence by the respondent. Fifth, whether the sale price was ascertained to be Kshs.1.8 million or 4.1 million given the conflicting testimony between the appellant and respondent. Sixth, whether the contract was tainted with an illegality.

The upshot of all these is that the appeal has merit and substance for this court to set aside the entire judgement of the lower court delivered on 23rd August, 2016. In its place the following orders shall abide:

a) The entire claim in SPMCC. No.247 of 2014 be and is hereby remitted to Kilifi Law Court with a direction that it be heard by a different magistrate other than L.N. Juma for purposes of summoning and admitting evidence of the witnesses. Known as (i) Mama Renet (ii) the brother Eric Mwagona (iii) the principal officer from Shami Trading Co. (iv) Sylvester Karisa. (v) This new trial be prioritized in view of the time the parties have taken to litigate both at the trial court and on appeal. (vi) Each party to bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30th DAY JULY, 2019.

R. NYAKUNDI

JUDGE