



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELATE SIDE

CIVIL APPEAL NO. 61 OF 2016

AUTO SELECTION (K) LIMITED.....APPELLANT

-VERSUS-

MARY CHOGE.....1ST RESPONDENT

PAUL SAWE.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's

Court at Eldoret (Hon. S. Telewa, RM) in Eldoret CMCC No. 131 of 2013 delivered on 31 March 2016)

JUDGMENT

[1] Before the lower court, the 1st Respondent, **Mary Choge**, had sued the 2nd Respondent (as the 1st Defendant) and the Appellant (as the 2nd Defendant) jointly vide a **Plaint** dated **27 February 2013**. Her cause of action was that, vide a written Sale Agreement dated **30 August 2009**, the 2nd Respondent had agreed to sell to her **Motor Vehicle Registration Number KBC 623**, Mitsubishi Pajero, at a consideration of **Kshs. 970,000/=**; and that she complied with the terms set out in the said agreement by making payments to the 2nd Respondent. She further stated that the 2nd Respondent similarly performed his part of the bargain by handing over the motor vehicle along with all the instruments of transfer, whereupon, ownership was transferred into her name.

[2] It was further averred by the 1st Respondent that she enjoyed peaceful ownership of the motor vehicle until **21 February 2013** when the Appellant, by itself or its authorized agents/servants impounded it at Eldoret Town and had it driven to its Mombasa Yard in a purported exercise of its right of repossession. Accordingly, the 1st Respondent moved the lower court seeking, inter alia, a mandatory injunction compelling the Appellant and the 2nd Respondent jointly and severally to reinstate possession of the motor vehicle to her or, in the alternative, a refund of **Kshs. 970,000/=**, being the purchase price paid by her for the motor vehicle. After hearing the parties and their witnesses, the lower court found in favour of the 1st Respondent and entered Judgment for her against the Appellant for refund of the purchase price together with costs and interest.

[3] The Appellant was aggrieved by that decision; accordingly, it filed this appeal on **14 April 2016** on the following grounds:

[a] The Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability and the law pertaining thereto superficially and consequently coming to a wrong conclusion on the same;

[b] The Learned Trial Magistrate misdirected herself in ignoring the written submissions presented and filed by the Appellant in their entirety;

[c] The Learned Trial Magistrate erred in not taking into account the fact that the Plaintiff's case failed to meet the threshold of proof required and hence the award relating thereto offends trite legal principles and is untenable;

[d] The Learned Trial Magistrate erred in failing to take into account the fact that the 1st Defendant/2nd Respondent lacked the legal capacity to sell the suit motor vehicle Registration No. KBC 623C to the Plaintiff/1st Respondent as he had no title or ownership of the same; and further the alleged sale agreement between the 1st and 2nd Respondents was void *ab initio* and was also rendered void due to fraud;

[e] The Learned Trial Magistrate erred in failing to take into account the 2nd Respondent had no express, implied, ostensible or apparent authority from the Appellant to sell the motor vehicle and was not the Appellant's agent;

[f] The Learned Trial Magistrate erred when she failed to find that, as per the Hire Purchase Agreement, the Appellant retained ownership of the vehicle until such time as the 2nd Respondent had completed all payments;

[g] The Learned Trial Magistrate erred in failing to consider that, in terms of the Hire Purchase Agreement, the Appellant was entitled to retain the log book and to repossess the vehicle.

[h] The Learned Trial Magistrate erred in failing to consider that the 1st Respondent had failed to ascertain or establish the ownership of the vehicle prior to entering into an agreement to purchase it, and had she done so, she would have known that the 2nd Respondent was not the legal owner and had no capacity to sell;

[i] The Learned Trial Magistrate erred when she failed to find that there was no proof that the 2nd Respondent had completed payment for the motor vehicle and further erred when he condemned the Appellant to refund the value of the vehicle;

[j] The Learned Trial Magistrate failed to apply herself judicially and to adequately evaluate the Appellant's evidence and submissions thereto, and thereby arrived at a decision unsustainable in law.

[4] For the foregoing reasons, the Appellant prayed that its appeal be allowed and the Judgment of the lower court be set aside with costs. The appeal was urged on behalf of the Appellant by **Mr. Maganga** by way of written submissions dated **29 November 2018**, which he highlighted on **26 March 2019**. He pointed out that the 2nd Respondent admitted before the lower court that he had a hire purchase contract with the Appellant for the purchase of the subject motor vehicle at **Kshs. 717,500**, in respect of which he paid a deposit of **Kshs. 400,000/=**. It was therefore the submission of **Mr. Maganga** that it beats logic that the 2nd Defendant would then allege that he completed making payments for the said motor vehicle without showing any evidence of such payment.

[5] It was further the submission of **Mr. Maganga** that the essence of a hire purchase agreement is that the goods remain on hire until the full purchase price is paid. Thus, he asserted that the 2nd Respondent could not therefore purport to sell the subject motor vehicle before being discharged from all obligations under the hire purchase contract; and therefore, that he could not pass a good title to the Plaintiff. Counsel relied on **Matayo Musoke vs. Alibhai Garage Limited [1960] EA 31** for the proposition that delivery of a registration book along with the motor vehicle does not, of itself, give the person to whom it is delivered the ownership of the motor vehicle or authority to sell, as happened in this transaction, since the registration book is not a document of title.

[6] Counsel further submitted that the motor vehicle was repossessed due to non-payment of the instalments pursuant to Clause 3 of the Hire Purchase Agreement; and that the Appellant was merely realizing the remedy available under their arrangement with the 2nd Respondent. In his submission, ownership of the motor vehicle was, at all material times, with the Appellant and any purported transfer to the 1st Respondent was null and void. He referred the Court to **McFoy vs. United Africa Co. Ltd** for the holding that if an act is void then it is in law a nullity; and prayed that the appeal be dismissed with costs.

[7] In response to the appeal, the 1st Respondent relied on the written submissions filed on her behalf by **Mr. Tororei** on **4 February 2019**. Those submissions were highlighted herein on **26 March 2019**; and in the submission of **Mr. Tororei**, the 1st Respondent acquired title to the subject motor vehicle without notice of the alleged hire purchase agreement. He pointed out that, from the evidence placed before the lower court, the Hire Purchase Agreement indicated the names of only two parties, namely **M/s Woodventure (K) Limited** and the 2nd Respondent; and that the Appellant did not lead evidence on any nexus between it and **M/s Woodventure (K) Limited**. It was therefore the submission of the 1st Respondent that the Appellant cannot rely on the Hire Purchase Agreement to assert its right to repossess the motor vehicle. He cited **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, arguing that a court cannot re-write a contract for the parties; and that the parties are bound by the terms of their contract as negotiated and executed.

[8] Counsel for the 1st Respondent further urged the Court to note that although the Appellant alleged theft of the motor vehicle's log book from its office, it failed to adduce credible or convincing evidence before the lower court to that effect; and instead conceded that no criminal proceedings were instituted in respect of its allegations of fraud against the 2nd Respondent. He urged the Court to find that, in the circumstances, the 2nd Respondent had validly exercised his option to purchase after fully paying the instalments; and that this was why he had been given the registration documents for the motor vehicle. Regarding the standard of proof where allegations of fraud are made, **Mr. Tororei** relied on **Vijay Morjaria vs. Nansing Madhusingh Darbar & Another [2000] eKLR** and submitted that the Appellant failed to prove its allegations that the documents were fraudulently obtained by the 2nd Respondent.

[9] Counsel further took issue with the fact that the Hire Purchase Agreement was not registered as required by **Section 5 of the Hire Purchase Act, Chapter 507 of the Laws of Kenya**. He therefore submitted that the Appellant cannot enforce the terms thereof or recover the motor vehicle from the hirer on the basis of an unregistered Hire Purchase Agreement. To augment this argument, **Mr. Tororei** relied on **Fidelity Commercial Bank Ltd vs. Agritools Ltd & 3 Others [2004] eKLR** and paragraphs 748 and 749 of **Halsbury's Laws of England, Fourth Edition, Vol. 9(1)**; adding that, in any event, no counterclaim was filed by the Appellant before the lower court to assert its right to repossession.

[10] In **Mr. Tororei's** submission, the case of **Matayo Musoke vs. Alibhai Garage Limited** (supra) is distinguishable from the facts presented before the lower court in this dispute, in that the Appellant herein was not privy to the Hire Purchase Agreement; and that the Appellant failed to prove its allegation that the 2nd Respondent was in default at the material time. He therefore urged the Court to uphold the decision of the trial court and dismiss this appeal with costs.

[11] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was placed before the lower court and make its own conclusions thereon, but always bearing in mind that it did not see or hear the witnesses. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, it was held that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] It is therefore imperative to reconsider the evidence presented before the lower court and ascertain whether it supports the conclusions and findings made by the Learned Trial Magistrate. The 1st Respondent, as the Plaintiff before the lower court, was **PW1**; and it was her testimony that she entered into a Sale Agreement with the 2nd Respondent on **3 August 2009** in respect of the **Motor Vehicle Registration No. KBC 623C**; and fully paid the purchase price of **Kshs. 970,000/=**. It was her evidence that the Agreement was witnessed by **Elijah Bett, PW2**. She produced the Sale Agreement as her **Exhibit No. 1** in support of her case. She further testified that the 1st Respondent handed over to her not only the possession of the motor vehicle but also its log book along with the transfer form; whereupon, she caused the ownership of the motor vehicle to be transferred and vested in her name.

[13] It was further the evidence of **PW1** that she had possession of the motor vehicle from **August 2009 to February 2013** when it was seized by the agents of the Appellant, on the ground that the 2nd Respondent had not fully paid the purchase price for it. She however testified that she was, at all material times, the rightful owner of the subject motor vehicle and that the Appellant had no right whatsoever to repossess it as it did. She produced a Copy of the Records and her payment receipts in addition to the log book and transfer form as exhibits before the lower court. She denied any knowledge of the alleged Hire Purchase Agreement between the Appellant and the 2nd Respondent.

[14] **Elijah Bett (PW2)** introduced himself to the lower court as a motor vehicle agent and a family friend to both the 1st Respondent and 2nd Respondent. He testified that he introduced the 1st Respondent to the 2nd Respondent for purposes of the sale of the subject motor vehicle; and that the two agreed on the purchase price of **Kshs. 970,000/=**, whereupon a Sale Agreement was drawn and signed by them on the **30 August 2009**. It was therefore the evidence of **PW2**, as a witness to the Sale Agreement, that the 1st Respondent paid the full purchase price and was consequently given the log book along with a duly signed transfer form by the 2nd Respondent; and that the 1st Respondent thereafter had the ownership of the motor vehicle transferred into her name.

[15] On his part the 2nd Respondent, as **DW1** before the lower court, testified that he bought the subject motor vehicle for **Kshs. 700,000/=** from the Appellant in Mombasa. That he paid a deposit of **Kshs. 400,000/=**, and was to pay the balance in 6 instalments of **Kshs. 50,000/=**; which he did and was given the log book and duly signed transfer forms by the Appellant. The 2nd Respondent confirmed that he later sold the said motor vehicle to the 1st Respondent for **Kshs. 970,000/=** and handed it over to her along with the duly signed transfer forms. He further confirmed that he got to learn that the motor vehicle had been impounded by the Appellant on the ground that he had not completed payment for it; which ground was, in his view unfounded. He added that there was no way the log book and transfer forms for the motor vehicle could be given to him if he had not fully paid the purchase price.

[16] The Appellant called its Assistant Director, **Duncan Okochi Wamalwa (DW2)**, as its witness before the lower court. It was the evidence of **DW2** that he was working for the Appellant in Mombasa at the time when the 2nd Respondent went there to buy the subject motor vehicle. That after negotiations, the Appellant agreed to sell the motor vehicle to the 2nd Respondent on hire purchase terms for which a Hire Purchase Agreement was drawn and signed between the parties. He testified that the 2nd Respondent paid **Kshs. 400,000/=** and was to pay the balance in instalments; but that he never paid the balance thereafter. **PW2** further testified that when they went to repossess the motor vehicle from the 2nd Respondent, they got to learn that he had sold it to the 1st Respondent. He added that the original log book for the motor vehicle got lost; that the matter was reported to Central Police Station in Mombasa; and that they were told to await the outcome of the investigations. **DW2** concluded his testimony by asserting that the 2nd Respondent had no right whatsoever to sell the motor vehicle to the 1st Respondent, for the reason that he had not fully paid for it in terms of the Hire Purchase Agreement; and therefore, that the Appellant was entitled to repossess the same.

[17] From the foregoing summary of evidence, there is no dispute that the subject motor vehicle, **Registration No. KBC 623C**, Mitsubishi Pajero, originally belonged to the Appellant; or that the Appellant sold it to the 2nd Respondent on **20 August 2009** at **Kshs. 700,000/=**. The 2nd Respondent was also to pay an additional sum of **Kshs. 17,500/=** being insurance premiums, thus making a total of **Kshs. 717,500/=**. The Appellant and the 2nd Respondent were further in agreement that, upon paying **Kshs. 400,000/=**, the 2nd Respondent was given possession of the motor vehicle on the agreement that he would pay the balance of the purchase price in 6 equal instalments of **Kshs. 50,000/=** and a final payment of **Kshs. 17,500/=** with effect from **20 October 2009**.

[18] There was credible and indubitable evidence presented before the lower court that the 2nd Respondent sold the subject motor vehicle to the 1st Respondent on **30 August 2009** for **Kshs. 970,000/=**, which sum was fully paid by the 1st Respondent. There is no dispute that the 1st Respondent was then given possession of the motor vehicle as well as duly signed transfer forms, on the basis of which she obtained a log book for the motor vehicle. The Log Book produced before the lower court and marked the **Plaintiff's Exhibit No. 2** confirms that, as of **1 April 2011**, the 1st Respondent was the registered owner of the subject motor vehicle. That state of affairs obtained as at **21 February 2013** when the motor vehicle was seized by the Appellant. A Copy of the Records obtained from the Registrar of Motor Vehicles dated **25 February 2013** was produced before the lower court by the 1st Respondent and marked the **Plaintiff's Exhibit No. 4(a)** confirms this fact.

[19] In the premises, and given the parties' pleadings and the prayers sought for in the Plaint, the learned trial magistrate correctly framed the issues for determination thus:

[a] Whether the 1st Defendant (the 2nd Respondent herein) had the right to sell the motor vehicle to the Plaintiff (the 1st Respondent herein);

[b] Whether the 2nd Defendant (the Appellant herein) had the right to impound the motor vehicle;

[c] Whether the Plaintiff should be given back the value of the motor vehicle and by who.

[20] A careful reconsideration of the evidence availed before the lower court shows that the 2nd Respondent walked into the show room of **Woodventure (K) Limited** in Mombasa and made an offer to purchase the subject vehicle; and that the 2nd Respondent did purchase the said motor vehicle by making a down payment of **Kshs. 400,000/=** on condition that the balance of **Kshs. 317,500/=** would be paid in 6 equal instalments of **Kshs. 50,000/=** and one final instalment of **Kshs. 17,500/=**. Thus, the terms governing the transaction were set out in the document marked the **Defendant's Exhibit No. 2** before the lower court; and the 2nd Respondent was in no doubt at all as to the nature of and purport of their agreement.

[21] For purposes of the **Hire Purchase Act**, a hire purchase agreement is defined as:

“...an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee; and, where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of those agreements was made...”

[22] On the face of it the agreement between the 2nd Respondent and **Woodventure (K) Ltd** is expressed to be a Hire Purchase Agreement. It provides, in an explicit manner, the terms and conditions of the transaction for purposes of **Section 6** of the **Hire Purchase Act**; including the provision for repossession in the event of default by the Hirer. Indeed, in Clause 6 of the Agreement, it was covenanted that:

“The said motor vehicle shall remain and be the property of the OWNERS until all payments in full of the aforesaid amount of this agreement shall have been made to the owner.”

[23] It is manifest therefore that the 2nd Respondent had up to **20 March 2010** to fully pay his instalments under the Hire Purchase Agreement; and that, in terms of their agreement with **Woodventure (K) Ltd**, ownership of the motor vehicle could only pass to him after **20 March 2010**. I note that before the lower court, it was the assertion of the 2nd Respondent that he had fully paid for the motor vehicle; and that the payments were made through the bank. He, however, failed to back up that assertion with documents, contending that it was not possible for him to trace the deposit slips evidencing payments. He therefore urged the lower court to surmise that the fact that he was given the Registration Book for the motor vehicle and duly signed transfer forms is sufficient proof of such payment. This assertion was vehemently disputed by the Appellant, who had alleged fraud against the 2nd Respondent, contending that the said documents were stolen from its offices and fraudulently used by the 2nd Respondent to sell the motor vehicle to the 1st Respondent. In agreeing with the 2nd Respondent, the lower court held that:

“...It is also questionable how the 1st defendant got the original log book and the duly executed transfer forms. I am inclined to say that the 1st Defendant must have cleared the payments before he was supplied with the second documents. There is no prove of fraud either against the 1st Defendant's part. No fraud charges have been preferred against the 1st Defendant either...”

[24] Whereas the learned trial magistrate cannot be faulted for holding that the Appellant had not proved its allegations of fraud against the Respondents, as indeed no such evidence was presented before the lower court, it remained the responsibility of the 2nd Respondent to prove on a balance of probabilities that it had fully paid the purchase price for the motor vehicle as at **30 August 2009** when he sold it to the 1st Respondent. On behalf of the Appellant, evidence was adduced by **DW2** to the effect that the log book for the subject motor vehicle had been stolen from its office along with others; and that a report had been made to **Central Police Station** in Mombasa. A letter dated **26 August 2011**, to augment that assertion, was produced before the lower court as the **Defendant's Exhibit No. 8**. That letter states as follows in part:

“In reference to the above, we would like to bring to your attention that 10 original logbooks for motor vehicles sold to different persons are missing from our office on HP terms.

We suspect that these original logbooks were stolen by subordinate staffs who are no longer working for us and they have collaborated with the customers who have not yet settled their HP accounts to our satisfaction, by giving the logbooks with forged signatures.

We are therefore in the process of recovering these motor vehicles so that we get our dues through legal means...”

[25] Thus, in addition to the mere fact of possession of the logbook, the burden of proof was on the 2nd Respondent to satisfactorily demonstrate that he had fully paid for the motor vehicle; and therefore, had been lawfully and regularly furnished with the logbook and duly signed transfer forms. In this regard, the provisions of **Sections 109** and **112** of the **Evidence Act** are explicit that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is

provided by any law that the proof of that fact shall lie on any particular person.

...

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[26] There was therefore no evidence upon which the lower court could conclude that full payment had been made. In any event, having entrusted the 2nd Respondent with the motor vehicle upon paying just about half of the purchase price, there would be no reason for the Appellant to thereafter deny receipt of the balance if indeed the same was paid by the 2nd Respondent as alleged. Hence, on the evidence, the lower court ought to have found that the 2nd Respondent had no right to sell the motor vehicle to the 1st Respondent on **30 August 2009** before making full payment to **Woodventure (K) Ltd** in terms of their Agreement dated **20 August 2009**.

[27] Regarding the question whether the Appellant had the right to repossess the motor vehicle, the applicable law, namely the **Hire Purchase Act** provides, in **Section 5(2) and (3)** thereof, that:

(2) The registrar shall, on payment of the prescribed fee, register any hire-purchase agreement delivered to him ... unless the agreement is liable to stamp duty and is not duly stamped, or is not in the English language.

(3) On registration of a hire-purchase agreement, the registrar shall deliver to the owner a certificate of registration, and a certificate of registration purporting to be given under the hand of the registrar shall be prima facie proof of the facts therein certified in any proceedings.

[28] And in **Section 5(4)** of the **Hire Purchase Act**, it is explicitly provided that:

Unless a hire-purchase agreement has been registered under subsection (2) of this section—

(a) No person shall be entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer.

[29] It is manifest that the Agreement dated **20 August 2009** was not registered for purposes of the Hire Purchase Act. Accordingly, the owner had no right to repossession. There is another reason as to why the repossession could not be countenanced. The so-called Hire Purchase Agreement was entered into between the 2nd Respondent and **Woodventure (K) Ltd** and not the Appellant herein. There was, therefore, no privity of contract between the 2nd Respondent and the Appellant. Indeed, **DW2** conceded in cross-examination that the Appellant's name did not feature anywhere in the Hire Purchase Agreement. Also questionable is the fact that the Appellant took over four years to purportedly repossess the motor vehicle for non-payment. That delay was not at all explained or justified. Clearly therefore, the answer to the second issue, based on a re-evaluation of the evidence, is that the Appellant had no right to impound the subject motor vehicle. In the premises, the learned magistrate cannot be faulted for coming to that conclusion.

[30] The final issue for determination is the question as to whether the relief granted by the lower court was the appropriate relief. The Plaintiff shows that the 1st Respondents prayers were:

[a] A Mandatory Injunction compelling the 2nd Defendant to avail to the Plaintiff Motor **Vehicle Registration Number KBC 623C** Mitsubishi Pajero;

[b] Damages for illegal possession and or loss of user for the period the vehicle remained unlawfully impounded at **Kshs. 3,000/=** per day from **21 February 2012** till its return to the Plaintiff;

[c] In lieu of (a) above, immediate payment of the sum of **Kshs. 970,000/=** with interest thereon from **21 February 2013** till payment in full;

[d] Costs of the suit.

[31] Thus, in her conclusion, the trial magistrate expressed herself thus:

"I am however of the considered view that the plaintiff has proved her case on a balance of probabilities. I enter judgment in favour of the plaintiff. The 2nd defendant pays costs. The 2nd defendant to refund the plaintiff the value for the motor vehicle with interests."

[32] The guiding principle expressed in **Peters vs. Sunday Post Limited [1958] EA 424** is that:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

[33] Likewise, in Mbogo & Another vs. Shah [1968] EA 98, it was expressed:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

[34] In my careful consideration, there having been no privity of contract between the 2nd Defendant/Appellant and the Plaintiff/1st Respondent, the question of a refund would not arise. And, having found, on the basis of the evidence placed before the lower court that the Plaintiff had no basis for impounding the subject motor vehicle, the appropriate relief in the circumstances would have been an order commanding the Appellant to restore the subject motor vehicle to the possession of the 1st Respondent; which was the 1st Respondent's main prayer. Having opted for the alternative prayer, the trial court was, to my mind, bound by the parties' pleadings to direct that order to the 2nd Respondent; for in paragraph 10 of the Plaint, the 1st Respondent's prayer was explicitly set out thus:

“In the alternative, the plaintiff prays that the 1st Defendant, in view of the illegal possession of the subject motor vehicle by the 2nd defendant, refunds in full the amount of Kshs. 970,000/= received by him from the plaintiff with interest from 21/02/2013 till full payment.”

[35] It is a cardinal principle that a court of law can only grant relief prayed for in the pleadings. For instance, in Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] eKLR, the Court of Appeal, in discussing this point cited with approval, the following excerpt from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal problems, at page174:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

[36] Thus, having clearly deviated from the pleadings in granting relief which was not prayed for and which is clearly untenable on the basis of the evidence, I am satisfied that the lower court committed an error of principle. Thus, I would allow the appeal but only to the extent aforementioned and order that the final order in the Judgment of the lower court be set aside and replaced with a Judgment in favour of the Plaintiff/ 1st Respondent against the 1st Defendant/2nd Respondent in the sum of **Kshs. 970,000/=** with interest and costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2019

OLGA SEWE

JUDGE