



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO 15 OF 2014**

**JOHN WEYUSIA WANYAKHA.....APPELLANT**

**VERSUS**

**JOHN OTIENO OSIENYA.....RESPONDENT**

*[An appeal from the judgment and decree in original Bungoma CMCC 143/2010*

*delivered on 10.2.2014 by P.N. ARERI Senior Resident Magistrate]*

**JUDGEMENT**

By plaint dated 5/02/2010, the appellant in this appeal John Weyusia Nanyakha sued the Respondent John Otieno Osienea seeking;

- a) *A declaration that the sale agreement dated 14/9/2007 entered between the plaintiff and the defendant over sale of motor vehicle registration No. KAM 503H make Toyota Corona Model AT 170 Chasis Number 0025625 be declared null and void for all purposes and that the monies paid by the plaintiff to the defendant being consideration thereof be refunded to the plaintiff by the defendant.*
- b) *Damages for breach*
- c) *Costs*
- d) *Interest on (a) and (b)*

The Plaintiff claim against the defendant is for declaration that the sale agreement dated 14/7/2007 entered between the plaintiff and the defendant over sale of motor vehicle registration No. KAM 503H be declared null and void for all purposes and that the monies paid by the plaintiff to the defendant being consideration thereof be refunded to the plaintiff by the defendant. By statement of defence dated 9<sup>th</sup> March 2010 the defendant denied the claim as set out in the plaint and joined issue with the plaintiff that if there was an agreement for sale of motor vehicle registration No. KAM 503H the said agreement was duly executed and plaintiff took possession of the said motor vehicle and has been in use of the same for a period of 3 years and this cannot claim refund.

Brief facts of the matter is that on the 14.09.2007 the Respondent entered into a motor vehicle sale agreement with the Respondent for sale of motor vehicle registration No. KAM AT 170 Chasis No.0025925 at consideration of Kshs.350,000/= and Appellant paid in full while the Respondent agreed to deliver log book to Appellant and parties duly executed the transfer forms on 14.11.2007 but the Appellant failed to deliver the log book. Later after using the car for two years the Appellant reported the matter to police against Respondent for obtaining money by false pretense and Respondent agreed to refund Kshs.250,000/=.

The Respondent in his statement of defence denied the allegations in the plaint and instead averred that the Respondent had taken over the motor vehicle and used it for 3 years and thereof cannot seek declaration that the same was null and void and seek refund. After full hearing the appellant claim was dismissed and filed this appeal on the following grounds;

- i. That the Hon. Magistrate erred in both law and fact when he dismissed the Appellant's case without regard to the terms of the sale agreement dated 14/9/2007 hence occasioning a miscarriage of justice;*
- ii. That the Hon. Magistrate erred in both law and fact when he dismissed the Appellant's case but he failed to take into account the undertaking entered by parties on the 12/11.2009 hence occasioning a miscarriage of justice.*

*iii. That the Hon. Magistrate erred in both law and fact when he dismissed the Appellant's case without taking into account the admission by the Respondent that he was ready to pay Ksh.170,000/= to the Appellant instead of Kshs.250,000/= hence occasioning a miscarriage of justice.*

*iv. That the learned trial magistrate erred in law in awarding the plaintiff award that was inordinately excessive given the injuries suffered.*

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

***“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif Vs. Ali Mohammed Solan [1955] 22 EACA 270).***

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Onchiri for the appellant submitted that the learned trial magistrate failed to consider the terms of the sale agreement dated 14/9/2007 and that it was a term of the agreement that the Respondent to surrender the log book to appellant upon payment of the purchase price. and therefore, since the respondent breached this term of the agreement and he was eligible to pay Appellant the damages of breach and not dismissing the suit. He also submitted that both parties were bound by the undertaking that the Respondent was to pay Kshs.250,000/=. On 5/2/2010 in case of default legal action was to be taken against the Respondent citing supporting authorities to the same. He also submitted that court would have considered that the Respondent was willing to pay Kshs.170,000/= since the Appellant had taken possession of the motor vehicle for over 3 years. He finally submitted that the appeal was meritorious and asked this court to set aside the judgment.

The Respondent did not file any submissions with regard to the appeal at hand.

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are:

*i. Whether the learned magistrate considered terms of the sale agreement dated 14/9/2007.*

*ii. Whether the learned magistrate took into account the undertaking between the parties and willingness of Respondent to pay Kshs.170,000/=.*

The evidence before the trial court was that, the appellant John Weyusia Nanyakha testified as Pw1, he testified that on 14.9.2007 they entered into an agreement for sale of motor vehicle registration No. KAM 503H Toyota Corona at Kshs.350,000/= and motor vehicle was handed over to the Respondent and Appellant agreed to give the log book to Respondent on 14.11.2007 and it was reduced into writing. The Respondent produced copy of the agreement as an exhibit. He testified that the log book was never delivered and he reported the matter as a Criminal Case No. 320/2010. He also testified that he conducted a search at KRA and noted that the record showed that Motor Vehicle KAM 503H is a Toyota Station Wagon Buj and record shows that the motor vehicle he was buying was is different from one registered at KRA and produced copy of records to that effect. He testified that he reported the matter to police against Appellant for obtaining money by false pretense and Appellant agreed to refund Kshs.250,000/= and it is the Defendant who made the proposal and they entered an agreement that was prepared by police officer and the amount was to be paid on the 5.2.2010 and he produced agreement as an exhibit. He testified that the Appellant breached the agreement.

The Respondent in his defence as Dw1 testified that he knew the Respondent and sold him motor vehicle Registration KAM 503H at Kshs.350,000/= on the 14.09.2007 and they agreed that he was to give him his log book on 14.11.2007 but he did not deliver the same as he was looking for the log book. He testified that he was later on summoned to CID office Bungoma and he agreed to refund Kshs.250,000/=.

This court has perused through the evidence tendered in respect of the alleged breach by the Respondent. There is no dispute that in execution of contract between the parties the appellant paid respondent Kshs.350,000/= as consideration for purchase of motor vehicle paid the issue of contention that arises is that Respondent breached the contract when he did not surrender the log book to the Appellant upon payment of purchase price as agreed in the terms of the contract.

Looking at sale agreement dated 14<sup>th</sup> September 2007 clause

9 provide;

***“That the said M/V log book plus duly signed transfer shall be surrendered by the seller upon payment by the purchaser”.***

It my considered view that in failing to submit the log book as agreed the appellant was indeed in breach of the said agreed between the parties. It is also clear from both parties contention that when the respondent failed to deliver the log book he agreed to refund the appellant Kshs.250,000/= to appellant herein.

In the forgoing it is clear to my view that the Respondent in this circumstance was in breach of the agreement and was to be held liable on the

same on his part under the terms of the contract.

It is evident that upon default by the Respondent to fulfill his obligation under the contract the Appellant reported the matter to Bungoma Police Station and the parties entered into another agreement dated 12<sup>th</sup> November 2009 where appellant respondent agreed that he will Ksh.250,000/= on 5/2/2010 and failure to fulfill the conditions then legal action to be advanced against the Respondent which has led to the case at hand. In my view the parties willfully entered in an undertaking and thereof they were bound by it and the Respondent is in breach of the said undertaking which he is hereby bound to fulfill.

The upshot of the foregoing is that we find that the appeal herein has merit and is allowed with costs. The Judgment dated 10.2.2014 is set aside and the file remitted to the Chief Magistrate's Court for assessment of damages.

**Dated and Signed at BUNGOMA this 9<sup>th</sup> day of August 2019.**

**S.N. RIECHI**

**JUDGE.**