



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 459 OF 2016**

**SCANPEX COMMUNICATION SYSTEMS LIMITED.....APPELLANT**

**VERSUS**

**TRENDY AUTOMOBILES LIMITED.....1<sup>ST</sup> RESPONDENT**

**I.B.C. JAPAN LIMITED.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the judgement and decree of the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi delivered on the 22<sup>nd</sup> day of June 2016 by the Honourable Principal Magistrate M. Obura (Mrs))

**JUDGEMENT**

1. By way of plaint filed on 17/8/2007 the appellant filed claim for;

**1) Kshs. 415,164/=.**

**2) Costs.**

2. Inter alia later plaint was amended and dated 23/8/2011 to include 2<sup>nd</sup> respondent without any change in reliefs sought. The suit was against both respondents.

3. The claim was for breach of agreement to sell to appellant an imported motor vehicle free from any mechanical defects.

4. The 1<sup>st</sup> respondent imported the subject motor vehicle from 2<sup>nd</sup> respondent and delivered to the appellant in a defective state.

5. The appellant contended that it had to undertake substantial report on the motor vehicle amounting to Kshs.415,164/= . It demanded same from respondents but in vain thus constrained to file suit.

6. The 1<sup>st</sup> respondent entered appearance and filed counterclaim averring that it was only an importing agent and that it was not privy to the sale agreement between appellant and 2<sup>nd</sup> respondent.

7. It contended that it only facilitated the importation of the motor vehicle selected by the appellant and was in no position to ascertain the mechanical status of the motor vehicle.

8. It disputed that the motor vehicle had mechanical defects since it had been cleared by Japan Auto

Appraisal Institution (JAAI).

9. It also averred that if at all there were mechanical defects then same was due to the appellant's negligence.

10. It counterclaimed Kshs.22,358/= being agency charges which appellant failed to pay plus Kshs.5,358/= being money it allegedly spent as registration fees and part charges for the said motor vehicle.

11. Interlocutory judgement was entered against the respondent/respondent No. 2 on 3/5/2012 after it failed to enter appearance and file defence within the stipulated period in law.

12. After hearing the suit, the trial court entered judgement against 2<sup>nd</sup> respondent in appellant favour and dismissed suit against 1<sup>st</sup> respondent. The court also entered judgement in counterclaim against appellant in 1<sup>st</sup> respondent's favour.

13. Being aggrieved by the above decision, the appellant lodged instant appeal setting out 8 grounds namely:-

**1) That the learned trial magistrate erred in law and in fact in failing to appreciate the triable issues raised in the appellant's plaint and in allowing the 1<sup>st</sup> respondent's counterclaim.**

**2) That the learned trial magistrate erred in law and in fact in arriving at her decision without making any preliminary or any final determination on the issue of whether the 1<sup>st</sup> respondent was an agent of the 2<sup>nd</sup> respondent.**

**3) That the learned trial magistrate erred in law and in fact in failing to weigh and evaluate the evidence placed before the court and in dismissing the appellant's claim.**

**4) That the learned trial magistrate erred in law and in fact in failing to take cognizance of the admissions made by the 1<sup>st</sup> respondent during cross-examination and in dismissing the appellant's claim.**

**5) That the learned trial magistrate erred in law and in fact by finding that the 1<sup>st</sup> respondent had proved its counterclaim against the appellant whereas the 1<sup>st</sup> respondent did not produce any or any sufficient evidence in proof of the counterclaim.**

**6) That the learned trial magistrate erred in law and in fact in failing to appreciate the issues raised by the appellant during the trial and in finding that the 1<sup>st</sup> respondent was entitled to the sums sought in the counterclaim without producing any or any sufficient documentary proof in support thereof.**

**7) That the learned trial magistrate erred in law and in fact in finding that the 1<sup>st</sup> respondent was entitled to special damages or any sums as claimed in the counterclaim.**

**8) That the learned trial magistrate erred in law and in fact in holding that the 1<sup>st</sup> respondent was entitled to the costs of the suit payable by the appellant.**

14. The appeal was directed to be canvassed via submissions but only appellant filed the same.

#### **Appellant's Submissions:**

15. It is the appellant's submission that the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was clearly that of a principal and an agent.

16. In *Industrial & Commercial Development Corporation (ICDC) vs Patheon Limited Civil Appeal No. 74 of 2011* an agent was defined by the Court of Appeal as follows:

**“The Concise Dictionary of Law, 2<sup>nd</sup> Edition, page 17 defines as “agent” as, “a person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party.”**

17. From the foregoing definition it is evident that an agent is person who has received the powers to act on behalf of another, binding that other person as if he or she were themselves making the decisions. By placing an advert in the dailies and issuing a quotation to the appellant it is evident that the 1<sup>st</sup> respondent was negotiating a contract between the appellant and the 2<sup>nd</sup> respondent which contract was binding upon the 2<sup>nd</sup> respondent. The placing of an advert and issuing of a quotation were the initial steps into the creation of a legally binding contract which actions were for the sole benefit of the 2<sup>nd</sup> respondent.

18. It is through the adverts and the 1<sup>st</sup> respondent’s actions that the 2<sup>nd</sup> respondent was able to sell vehicles in a Kenyan market where ordinarily as an overseas seller it would have been unable to penetrate. We hereby submit that the 1<sup>st</sup> respondent was the 2<sup>nd</sup> respondent’s agent.

19. The general proposition under the law of agency is that, **“whatever a person who is sui juris can do personally he can also do through his agent.”**

20. The reason for the above proposition were ably illustrated in *Mayfair Holdings Limited vs Ahmed (Civil Appeal No. 18 of 1990)* where the court held:

**“In the expanded intercourse of modern society it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life must require the aid and the assistance and labours of many persons, in addition to the immediate superintendence of him whose rights and interest are to be directly affected by the results.”**

21. The further held that:

**“The relationship of principal and agent can be created in many ways, for example by a verbal telephone conversation, by fax, telex or even by circumstances from which agency can be implied.**

**Two further aspects of the general law relating to agency may also be stated. First that the general rule is that an agent is ordinarily neither entitled to sue or liable to be sued on a contract made by him in a representative capacity, and secondary that if an agent is acting for a foreign or overseas principal, the agent was formerly presumed to contract personally with the third party...”**

22. The trial court found the 2<sup>nd</sup> respondent liable for the losses incurred by the appellant in repairing the vehicle but however exonerated the 1<sup>st</sup> respondent from liability.

23. In every contract for sale of goods, the law presumes an implied warranty that the object sold shall be merchantable quality. This is captured in section 16 of the Sale of Goods Act (Cap. 16 of the Laws of Kenya) which provides that:-

**“(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skills or judgement, and the goods are of a description which it is in the course of the seller’s business to supply (whether he be the manufacturer or not) there is an implied condition that**

**the goods shall be reasonably fit for that purpose.**

**(b) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed.”**

24. The 1<sup>st</sup> respondent was under an obligation to deliver the motor vehicle which should have been of the desired quality. The vehicle delivered was however defective and had to be repaired by the appellant to ensure it was of the desired quality. There was a clear breach of a warranty as to merchantable quality.

25. The remedies for breach of a warranty in a sale transaction of this type are clearly spelt out under section 53 of the Sale of Goods Act. The section provides as follows:

**“Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of the breach of warranty entitled to reject the goods; but he may –**

**(a) Set up against the seller the breach of warranty in diminution or extinction of the price or maintain an action against the seller for damages for the breach of warranty.**

**(b) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.”**

## **ISSUES**

26. After going through the evidence on record and submissions, the court finds the issues are:-

***(i) Whether there was agency relationship between 1<sup>st</sup> and 2<sup>nd</sup> respondent.***

***(ii) Who was liable to the supplied motor vehicle?***

***(iii) Was counterclaim proved on balance of probabilities?***

***(iv) What is the order as to costs?***

## **Analysis and Determination:**

27. On the first issue, it is not disputed that the vehicle imported was a second hand vehicle and that the 2<sup>nd</sup> respondent was the seller while the appellant was the buyer. It also emerged that the 1<sup>st</sup> respondent acted as the importing agent on a balance of probability.

28. DW1 testified that he was under no obligation to ascertain the mechanical condition of the vehicle. He said that as an agent, his duty was only to facilitate the importation of the vehicle.

29. Circumstances under which warranties or conditions may be implied in a contract are expressly provided for and in particular, the Act, in section 16 thereof, expressly states that subject to certain exceptions, no warranty or condition as to the quality or fitness for any particular purpose of goods should be implied in an agreement. This provision states:-

***“Section 16 - No implied warranty as to fitness, except in certain cases***

***Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a***

*contract of sale, except as follows—*

***(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:....."***

30. The trial court held that it was not persuaded that the appellant proved on a balance of probability that the 1<sup>st</sup> respondent breached the contract. I have gone through the evidence on record and I I agree with the trial court finding. The 1<sup>st</sup> respondent just like appellant merely relied on documentation and specification provided by the seller. At no time was the 1<sup>st</sup> respondent obligated to inspect the vehicle or to verify its mechanical state as an importing agent.

31. Section 16 (a) Supra obligates seller to the extent that, “ ***where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:....."***

32. The 2<sup>nd</sup> respondent was solely responsible for the condition of the vehicle. Thus the claim against the 1<sup>st</sup> respondent was doomed to fail.

33. The appellant however proved his case against the 2<sup>nd</sup> respondent. Thus judgment was rightfully entered for the appellant against the 2<sup>nd</sup> respondent only as prayed for in the amended plaint dated 23<sup>rd</sup> August 2011. The suit as against the 1<sup>st</sup> respondent was correctly dismissed with costs.

34. On the counterclaim, there was no basis for denying 1<sup>st</sup> respondent its due. PW1 said he was willing to pay the 1<sup>st</sup> respondent once his claim is satisfied. In view of aforesaid findings above, the finding that counterclaim was merited was justified. The 1<sup>st</sup> respondent was entitled to its charges and reimbursement of monies spent in processing the registration of the vehicle.

35. Thus court makes the following order;

***i. Appeal is hereby dismissed with no orders as to costs for want of merit.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

.....

**C. KARIUKI**

**JUDGE**