



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 396 OF 2018**

LUCY WAMBUI GITAU.....1<sup>ST</sup> APPELLANT

SIMON MACHARIA GITAU.....2<sup>ND</sup> APPELLANT

**VERSUS**

PATRICE ONYANDO MICHIRA.....RESPONDENT

*(Being an appeal from the judgment of Hon. D.W Mburu [p.M.] delivered on 12th July, 2018 in Nairobi CMCC No. 6891 of 2013)*

**JUDGEMENT**

**Background:**

1. The Respondent was the Plaintiff in CMCC NO. 6891 OF 2013, where he sued the appellants herein seeking the following: -

- a) A permanent injunction restraining the appellants, DCIO Kayole Police station by themselves, their servants and/or agents from repossessing, impounding and/or alienating motor vehicle registration number KBT 965P and/or interfering with the respondent possession and/or ownership of the said motor vehicle.
- b) A declaration that the plaintiff is the lawful and legal owner of motor vehicle registration number KBT 965P.
- c) Costs of the suit.
- d) Any other or further orders that the Honourable Court may deem just and expedient.

2. In response to the Respondent suit the appellants entered appearance and filed their defences and counterclaim dated 24<sup>th</sup> March, 2014, which they sought the following orders: -

- a) A declaration that the 1<sup>st</sup> Appellant did not execute the agreement for sale and transfer in favour of the plaintiff both dated 10<sup>th</sup> September 2013 with respect to motor vehicle registration number KBT 965P nor did she receive any money from the Respondent in consideration thereof.
- b) A declaration that the 1<sup>st</sup> Appellant is the bona fide registered owner of motor vehicle KBT 965P and is entitled to remain as so registered.
- c) Mandatory injunctions do issue directing the plaintiff to deliver up to the 1<sup>st</sup> Appellant motor vehicle KBT 965P within such time as the Honourable Court shall deem fit and in default the 1<sup>st</sup> Appellant be at liberty to instruct licensed reposessor to repossess the same.
- d) Any Other relief the Honourable Court may deem fit and just to grant.
- e) Costs of the suit.

3. After full trial, the court found that the Respondent had proved his case on a balance of probability and entered judgment for him as sought, finding that he is entitled to the ownership of the subject motor vehicle registration number KBT 965P.

4. Aggrieved with the said Judgment, the Appellants filed this appeal against the judgment on the grounds that-

- 1) That the learned magistrate erred in law and in fact when he found that the 1<sup>st</sup> Respondent is the lawful owner of the motor vehicle registration number KBT 965P and yet he has no document that can pass good title to him.
- 2) That the learned magistrate erred in Law and in fact when he found that the 1<sup>st</sup> Defendant is not the bonafide registered owner of the motor vehicle registration number KBT 965P and is entitled to remain as such despite the fact that she is holding the genuine logbook of the said vehicle.
- 3) That the learned magistrate erred in law and in fact when he failed to take into account the evidence tendered by the respondent that the logbook belonging to motor vehicle registration number KBT 965P in his possession for purposes of transferring the motor vehicle to his name was a forgery.
- 4) That the learned magistrate erred in law and in fact when he failed to consider the obvious disparity between the serial number of the logbook allegedly given to the respondent for purposes of transferring motor vehicle registration number KBT 965P to himself and the logbook still in the possession of the 1<sup>st</sup> Defendant could only indicate the respondents' logbook did not emanate from the defendants as alleged.
- 5) That the learned magistrate erred in law and in fact when he failed to consider that the disparities in the postal address in the sale agreement, the pin number in the logbook and transfer held by the Respondent and the original logbook held by the 1<sup>st</sup> Defendant was an indicator that the respondent did not transact with the appellants in the alleged sale of motor vehicle registration number KBT 965P.
- 6) That the learned magistrate erred in law and in fact when he found that the 1<sup>st</sup> Appellant had entered into a sale agreement for the sale of motor vehicle registration no. KBT 965P without any corroborative evidence from the witnesses at the time of execution, the author of the agreement or a documents expert.
- 7) That the learned magistrate erred in law and in fact when he considered a letter allegedly authored by S.M Thuku and Associates Advocate as evidence of the Respondent and the 1<sup>st</sup> Appellant having entered into a sale agreement for motor vehicle registration number KBT 965P without the author of the letter corroborating its content.
- 8) That the learned magistrate erred in law and in fact when he found that the defendants received 530,000/= from the Respondent being the purchase price of motor vehicle registration number KBT 965P without any evidence of such payment.
- 9) That the learned magistrate erred in law and in fact in finding that that the appellants acted fraudulently in the alleged sale of motor vehicle registration number KBT 965P without any evidence pointing at fraudulent conduct by the appellants.
- 10) That the learned magistrate erred in law and in fact when in essence found that fraudulent documents are a basis of a valid transaction therefore declaring the respondent the lawful owner of motor vehicle registration number KBT 965P.
- 11) That the learned magistrate erred in law and in fact when he found that due to the fraudulent conduct by the appellant, they should bear the cost of the suit.
- 12) That the learned magistrate erred in law and in fact when he failed to consider the evidence of the appellants in their defence.
- 13) That the learned magistrate erred in law and in fact when he failed to consider all the evidence before him and the submissions filed by the appellants thus arriving at a decision that was extremely unjust to them.

**The Evidence:**

5. The following is the summary of the appellants and respondents' cases at the lower court.

6. The Respondent at the lower court called two witnesses to advance his case, which is himself and one Francis Omondi (PW2). It was his case that on 9<sup>th</sup> September, 2013 he entered into an agreement with the appellants herein to purchase the motor vehicle registration number KBT 965P at a consideration of Ksh. 530,000/= .He testified that the said agreement was witnessed by among others an Advocate by the name S.N Thuku practicing under the name S.N Thuku and Associates Advocates situate at Shankerdass House Nairobi, and that he retained a copy of the said agreement, original logbook for the vehicle, a copy of the 1<sup>st</sup> appellant pin and ID Card as well as a transfer executed by the 1<sup>st</sup> Appellant.

7. The Respondent in his testimony stated that he immediately took possession of the motor vehicle and travelled with it back to Kisii. This was until the 18<sup>th</sup> September, 2013 when he received a call from Kayole Police station that there were issues regarding the said motor vehicle. He stated that on 24<sup>th</sup> September, 2013 he availed himself in the Kayole police station where he met and identified the appellants as the persons who sold him the motor vehicle, and were now alleging that the said vehicle had been hired out to one Calvin Ochieng Owino whom they alleged had overstayed with the same causing them to make a report with the police to have the said vehicle impounded.

8. He urged the court to find that he is the owner of the subject motor vehicle pursuant to the sale agreement dated 10<sup>th</sup> September, 2013 between him and the 1<sup>st</sup> Defendant.

9. PW2 Francis Omondi a CID officer testified that he handled the case herein involving the parties herein and in his conclusion he found that the appellants herein had sold the subject motor vehicle to the Respondent, this culminated in him charging the appellants with the offence of conspiracy to defraud contrary to section 317 of the Penal Code, a case he alleges he was transferred before it was concluded.

10. The appellants on their part claimed the ownership of the subject motor vehicle. The 1<sup>st</sup> Appellant (DW1) in his testimony testified that he is the proprietor of the subject motor vehicle which was in possession of the 2<sup>nd</sup> Appellant who used it to operate a taxi and that he informed her that he had hired the same to one Calvin Ochieng Owino for 3 days. The said Calvin failed to return the subject motor vehicle causing them to report to the police to have the same impounded.

11. The 1<sup>st</sup> appellant denied entering into an agreement with the respondent for the sale of the subject motor vehicle nor meeting him before the dispute herein arose. DW2 Simon Macharia Gitau is the son of the 1<sup>st</sup> Appellant and his testimony was basically a corroboration of the 1<sup>st</sup> appellant story.

#### **Submissions:**

12. The appeal herein was heard by way of written submission. The appellants filed their written Submissions dated 19<sup>th</sup> August, 2019 and filed on even date, whereas the Respondent submissions are dated 11<sup>th</sup> September, 2019 and filed on 12<sup>th</sup> September, 2019.

#### **Appellants' Submissions:**

13. The appellants in their submissions addressed three issues. The first is on the ownership of Motor vehicle registration number KBT 965P. In this regard they submitted that the 1<sup>st</sup> respondent did not prove that he was the owner of the subject motor vehicle. They contended that the logbook in the hands of the respondent was a forgery, in this they argued that the difference in the serial numbers of the logbooks indicates that one was fake, and that is the one in possession of the respondent.

14. Additionally, they submitted that their perusal on the agreement dated 10<sup>th</sup> September, 2013 for sale of the subject motor vehicle between the 1<sup>st</sup> appellant and the Respondent indicates that one digit of the 1<sup>st</sup> Defendant ID is missing and therefore alluding that the respondent was not keen and had been duped. In this they relied in the case of *Ignatious Makau Mutisya v Reuben Musyoki Muli (2015) eKLR*.

15. They further argued that their allegations were given credence by the evidence of PW2 who admitted that the logbook in possession of the respondent might be fake.

16. The second issue addressed by the appellants is on corroboration of evidence adduced by the Respondent. In this regard they submitted that the respondent evidence were not corroborated arguing that he ought to have called the advocate who witnessed the agreement allegedly signed by the 1<sup>st</sup> appellant dated 10<sup>th</sup> September, 2013 for the sale of the subject motor vehicle. They argued that this would have shed light on the alleged fraudulent transaction. This was despite the leave of the court to apply for summons.

17. In addition, they submitted that the respondent ought to have called someone to attest to the allegation that money changed hands, that is to prove that he actually paid Kshs. 530,000/= to the appellants. They submitted that at least he ought to have produced a CCTV footage from the banking hall or even his bank statements attesting to the withdrawal of the said sums.

18. They argued that the respondent did not discharge the burden of proof as required and relied in the cases of *Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Another (2014) eKLR*, *Kipkebe Limited vs Peterson Ondieki Tai (2016) eKLR* and *Masinga Ndonga Ndonge vs Kualam Limited (2016) eKLR*.

19. The final issue addressed by the appellants is on the proceedings in Criminal case number 4869 of 2013 in which they charged herein. In this regard they submitted that the lower court failed to take into account the proceedings in that case where the fraud allegations against the appellants were dismissed. And therefore the court ought to have given them the ownership of the subject motor vehicle.

20. In sum the appellants argued that the forged documents in possession of the respondent wouldn't pass him good title and ownership of the subject motor vehicle arguing that the entire contract stands invalid ab initio. In this they relied in the case of *China Petroleum Pipeline Burueu Limited vs Anderson Ndwiga Njau t/a Braja Enterprises & 2 Others (2014) eKLR* and urged the court to allow the appeal as prayed.

#### **Respondents Submissions:**

21. The respondent in his submissions addressed the above grounds of appeal as filed by the appellants. In respect to grounds 1,2,3,4,5 and 8 he submitted that the motor vehicle sale agreement between him and the 1<sup>st</sup> appellant was valid and binding on them.

22. In respect to the appellants claim that their acquittal in Makadara Criminal case No. 4869 of 2013 that the same was a confirmation that the 1<sup>st</sup> appellant was the true owner of the motor vehicle, he reiterated the lower court finding that the burden of proof in criminal is higher arguing that he had proved his case on a balance of probability as reached by the learned magistrate. In this he relied in the cases of *Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Limited & Another (2014) eKLR*.

23. In regard to grounds 6 and 7 that the respondent evidence were not corroborated, the respondent argued that the same were corroborated. And in answer to the appellants allegation that the respondent ought to have called the advocate herein who witnessed the agreement, the respondent submitted that the letter from the said Advocate confirming the fact that they attended to his chambers for the execution of the

said agreement was enough evidence as the appellants never challenged the production of the said letter as part of their evidence. On the appellants allegations that evidence of the proof of the 1<sup>st</sup> appellant signature in the agreement, the respondent argued that the burden of proof shifted to the appellant to prove the signature was not hers.

24. In respect to ground 9,10 and 11 of the memorandum of appeal, the respondent submitted that the lower court correctly found that the 1<sup>st</sup> appellant had hatched a plan to defraud the respondent. This they argue is supported by the fact that the appellants were charged before makadara court for fraud and uttering false documents. And on costs, they submitted that since they were successful in the suit, they deserved costs.

25. On grounds 12 and 13 of appeal, the respondent submitted that the trial court in its decision considered the evidence, exhibits, testimony and submissions of all parties arguing that the appellants' allegations to this effect are false.

26. In sum they submitted that the appellants appeal lacks merit and urged the court to dismiss the same with costs.

#### **Issues and Analysis:**

27. This is a first appeal and that being so, this Court is mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that it never saw or heard the witnesses testify. As was held in *Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126*, where the Court of Appeal held:-

***“..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...” See Jivanji vs. Sanyo Electrical Company Ltd (2003) KLR 425”.***

28. The key issue arising for determination in this appeal is whether the trial court erred in finding that the Respondent had proven his case to deserve the ownership of the disputed motor vehicle herein. It is apparent to this court that the issue herein revolves around the burden and standard of proof.

29. It is trite that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, this is pursuant to **section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

***“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

30. Therefore the evidential burden is cast upon any party who wants the court to believe in a particular fact. It is trite that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable.

31. In *Palace Investments Ltd vs Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR*, the Court of Appeal adopted the dictum of **Denning J.**, in *Miller v Minister of Pensions [1947] 2 All ER 372* discussing that burden of proof as follows;

***“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.***

***Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

32. Consequently, when a court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

33. Considering the instant appeal in view of the above principles, it is apparent to me that the appellant is basically telling this court that the Respondent never discharged their burden of proof to the required standard.

34. The appellants main basis of this appeal seems to me to be the fact that they were acquitted in the criminal case cited herein at Makadara, which they argue proves that indeed they never committed fraud and are urging this court to make a determination that they are the true owners of the subject motor vehicle herein.

35. I have considered the parties herein submissions, the lower court record and authorities cited herein. The Respondent herein case is that he entered into motor vehicle sale agreement with the 1<sup>st</sup> Appellant, he produced the said agreement which is dated 10<sup>th</sup> September, 2013, and that after payment of consideration, which is the sum of Kshs. 530,000/= he took possession of the said motor vehicle. And in his testimony he told the court that he knows the appellants herein as the persons who sold him the subject motor vehicle and signed the contract.

36. The appellants on the other hand are arguing that they never sold the subject motor vehicle to the respondent, and that they had hired the said motor vehicle to one Calvin Omondi who failed to return it as agreed forcing them to make a report to the police.

37. The main contestation from the appellants is that they deny entering into the subject sale agreement with the appellant, alleging that they had never met the respondent prior to the dispute herein and that they argue that the appellant ought to have called the Advocate herein who allegedly drafted and witnessed the agreement herein.

38. The issue therefore is which story is more probably in the circumstances? In my view I agree with the finding of the lower Court and nothing has been put forward for me to disturb the same, in view of the fact that the lower was in a better position to consider the demeanour of the witnesses as they testified.

39. It is apparent that the respondent produced a letter of the advocate who drafted and witnessed the motor vehicle agreement herein, which letter was not challenged or objected to by the appellants when the same was being produced in court. Additionally, the alluded missing digit of the 1<sup>st</sup> respondent ID cannot suffice in view of the fact that upon signing the agreement he handed a copy of the 1<sup>st</sup> Respondent Id and Pin and therefore the same might have been as a result of typographical error.

40. Further, the appellants have argued that their acquittal in the criminal case referred herein is a prove that they were not fraudulent as alluded to. In this regard, I agree with the finding of the lower court that the burden of proof is different, as in criminal cases the burden is that of beyond reasonable doubt and herein is on balance of probability. Therefore the fact that the appellants were acquitted does not suffice.

41. Furthermore, the appellants have argued that the logbook in possession of the respondent was a forgery as the 1<sup>st</sup> appellant is in possession of the original and therefore the same cannot pass good title to the respondent. In support of this assertion the appellants rely in the difference in serial numbers of two logbooks as recorded.

42. I have perused the record and in my view no analysis or examination was undertaken to ascertain which of the two logbooks was original and therefore this ground equally does not suffice. It seems it was on this basis that the appellants herein ended up being charged for fraud.

**Conclusion:**

43. In Conclusion, it is my finding that the instant appeal lacks merit and is dismissed with cost. Thus court makes the following orders;

*i. Appeal is dismissed with no orders as to costs.*

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUGE**