



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 65 OF 2017**

**JOSEPH KIPROTICH CHELULE.....APPELLANT**

**VERSUS**

**ISAAC KIPROP LAGAT.....RESPONDENT**

**(Being an appeal from the judgment of Hon N. Moseti, Resident Magistrate in Eldoret CMCC No. 17 of 2013 delivered on the 9<sup>th</sup> May, 2017)**

**JUDGMENT**

1. The Appellant (**JOSEPH KIPROTICH CHELULE**) had sued the Respondent (**ISAAC KIPROP LAGAT**) for vandalizing his tractor registration number **KSG FORD 6600** and sought for the following reliefs: -

- a. An order compelling the Respondent to buy the vandalized parts tractor registration number KSG 655 FORD 6600, repair it and return it to the Appellant in the same state or condition it were in when the Respondent borrowed it in 2009.
- b. An order compelling the Respondent to pay the agreed commission of Kshs.20,000/= plus interest from 2009 to conclusion of the suit.
- c. Costs of the suit.

2. The trial magistrate dismissed the appellant's case on basis of non-existence of an agreement and that the appellant had failed to prove his case on a balance of probabilities. Aggrieved by the findings, the appellant appealed on grounds that:

- i. The trial Magistrate erred in dismissing the Appellant's case on the basis of non-existence of an agreement.
- ii. That the trial magistrate erred in failing to appreciate that there was a commitment agreement signed by the respondent to repair the appellant's tractor.
- iii. The trial magistrate erred by failing to pay due regard to the overwhelming documentary evidence tendered by the appellant.
- iv. The trial magistrate erred in finding that the appellant failed to prove his case on a balance of probabilities and thus dismissing the same with costs despite the overwhelming documentary evidence in support of the appellant's contention.
- v. The trial magistrate erred by failing to exercise his discretionary powers to dismiss the respondent's defence.
- vi. The trial magistrate failed to consider the submissions filed and used the wrong principles on arriving at the said judgment.

3. The appellant prays for the judgment of the lower court to be set aside and/or varied and the appeal be allowed.

4. The background to the matter is that Appellant entered into an oral agreement with the Respondent allowing him to use his tractor registration number **KSG 655 FORD 6600** while maintaining the same. Even though there was no formal written agreement to that effect, there were subsequent commitment agreement where the Respondent committed himself to repair the Appellant's tractor and the said agreement was produced in court as **PEXH4**. The said commitment agreement was entered into at the police station when the Respondent was arrested by the police for vandalizing the Appellant's tractor.

5. **PW4 (Inspector Zablon Ondieki)** confirmed that he arrested the Respondent who then agreed in writing that he would repair the Appellant's tractor by purchasing the vandalized spare parts.
6. The Respondent went ahead to buy some of the spare parts as evidenced by his testimony where he stated that he bought some of the spare parts at Kshs. 29,000/= and produced a receipt which was marked as DEX1.
7. The appellant contends that the Respondent committed himself to repair the tractor and he went ahead to buy some of the spare parts is proof of the existence of a relationship between the Appellant and the Respondent over the subject tractor the court erred in relying on the fact that there was no initial agreement indicating that the Appellant had entrusted the tractor with the Respondent to use while remitting to him **Kshs.20,000/=**, and the court should have found the Respondent liable.
8. The respondent testified that the appellant lent him the tractor registration KSG 655 FORD 6600 to use on his farm at Cheptiret for six months and thereafter return with a commission of Kshs.20,000/=.
9. It was agreed that the appeal be canvassed by way of written submissions.
10. The appellant submitted that he entered into an oral agreement with the respondent allowing him to use his tractor registration KSG 655 FORD 6600 while maintaining the same.
11. The appellant referred to the commitment agreement produced at the trial, where the respondent committed himself to repair the tractor. That the same was confirmed by pw4 who arrested the respondent for vandalizing the appellant's tractor and that he committed himself to repair it.
12. It is submitted that by virtue of the fact that the respondent made a commitment in writing and went ahead to buy some of the vandalized spare parts is proof enough and that the court should have found the respondent liable. It is pointed out that the Appellant produced enough documentary evidence as well as the testimonies of all the witnesses who testified in his favour during hearing proved his case to the required standards
13. The respondent argued that it is incumbent upon the appellant to prove the existence of the said contract on a balance of probability. That in any event, the evidence presented in court was a departure from the pleadings which was to the effect that the respondent had borrowed the tractor for use on his farm, and return it at a commission, yet the appellant appeared to introduce the concept of an agreement.
14. That the evidence before the court was only that of the appellant alone, which did not meet the threshold in proving oral agreements. It is argued that the contents of the commitment agreement do not justify reaching a conclusion that indeed there existed the alleged oral agreement.
15. The evidentiary value of the documents produced before the trial court is faulted as not supporting the appellant's pleadings and specifically that of vandalization, repair and commission charges alleged to have been agreed upon by the parties.
16. It is contended that whereas the respondent was arrested, he was not charged with any offence and the agreements entered into prior to and after the arrest all point to the fact that the respondent's duty was to purchase specific parts of the tractor whereas the appellant was to purchase the others and meet the repair costs.
17. This court is urged to find that the trial court rightly found that there were triable issues which ought to have been decided arising from the defendant's defence hence the trial and resultant judgment.
18. Also, that the trial court rightly exercised its discretion in coming up with an independent decision. The court's role was only to be guided by the submissions and not to be bound by the same.
19. The main issue for determination is whether the commitment agreement is a valid proof of the oral contract between the appellant and the respondent.
20. A commitment agreement to repair the tractor several months later cannot be a basis upon which the court can make a finding that there existed an agreement between the appellant and the respondent for use, repair and payment of a commission of Kshs. 20,000/=. The burden of proving that the alleged agreement existed fell on the appellant.
21. A commitment agreement produced as P.Exb 1 does not indicate the reason as to why the listed spare parts were being bought. The same document is not dated neither does it refer to any agreement prior to its drafting.
22. Justice Anyara Emukule in *Bid Insurance Brokers Limited v British United Provident Fund [2016] eKLR* stated that. Before however taking these issues, it is necessary to understand the nature of contract. According to Black's Law Dictionary, 8<sup>th</sup> Edition –

**“The term “contract” has been used differently to refer to three different things –**

**(i) the series of operative acts by the parties resulting in new legal relations;**

**(ii) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;**

**(iii) the legal relations resulting from the operative acts, consisting of a right or rights in person and their corresponding duties, accompanied by certain powers, privileges, and immunities. The sum of these legal relations is often called “obligation” William R. Anson – Principles of the Law of Contract”**

23. The court further stated that these attributes may be found in “**oral contract**”, also called “**parole contract**”, or “**simple contract**”, which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, reduce or vary, a contract in writing.

24. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced.

25. The appellant has failed to prove that there existed an oral agreement between him and the respondent. The appellant has also failed to prove his case on a balance of probabilities.

26. The appellant has also not demonstrated how the trial court erred in its decision and whether it applied the wrong principles. A lament about multiple errors by the trial court without specific demonstration of those errors, does not suffice. However, with regard to the commission, there was an admission on the 20,000/= due after use of the tractor by respondent, and the trial the trial court erred in not awarding that amount. It is to this extent only that the judgment is varied and substituted with an award of kshs.20,000/= commission plus interest at court’s rates from the date it was due. Consequently, I hold and find that the appeal succeeds in part. The respondent bears 1/3 costs and appellant bears 2/3 costs.

**Delivered and dated this 18<sup>th</sup> day of December, 2019 at Eldoret**

**H.A. OMONDI**

**JUDGE**

**In the presence of:-**

**Mr. Okara for the Appellant**

**Mrs Chumba holding brief for Songok for the Respondent**

**C/Assistant - Komen**