



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 36 OF 2016

LUCY MWIHAKI MUREITHI..... APPELLANT

VERSUS

SYLVANUS NGAIRA MUKOTSI.....RESPONDENT

JUDGMENT

(Appeal from the decision of Hon. Onesmus Towet SRM delivered on the 10th June, 2016 in CMCC NO.171 of 2015)

FACTS

1. The appellant and the respondent entered into an agreement for the purchase of motor vehicle registration no. KBE 272U for the consideration of Kshs.550,000/-; which was to be paid in two (2) instalments; the first instalment of Kshs.300,000/- was payable upon execution of the agreement; the second installment of Kshs.250,000/- was payable upon the appellant releasing the log book for the motor vehicle to the respondent;
2. The respondent paid the first instalment and took possession of the motor vehicle; but was unable to raise the second instalment when it fell due but paid a sum of Kshs.100,000/- leaving a balance of Kshs.150,000/-;
3. The appellant wrote to the respondent long after the lapse of the completion date which was 90 days from the date of execution of the documents notifying him that the Log Book and Transfer Form were ready for collection; but the respondent did not have the full balance therefore the appellant retained the said documents;
4. The appellant considered the respondent to be in breach of the agreement and filed Nyeri CMCCase No 171 of 2015 claiming the balance of the purchase price and damages for breach of contract; all in the total sum of Kshs.287,500/-;
5. The respondent filed a counterclaim for the delivery of the requisite documents and as the appellant had breached her part by failing to perform her part of the agreement as provided therein and hence was liable to pay damages to him;
6. The matter proceeded for hearing whereby the appellant's claim was dismissed whereas the respondents claim was upheld; the appellant being aggrieved with the trial court decision filed a Memorandum of Appeal and listed five (5) grounds of appeal as are summarized hereunder;
 - (i) In determining who had breached the Sale Agreement the trial court erred in restricting itself in the interpretation of the agreement;
 - (ii) The trial court erred in failing to consider the conduct of the parties and the correspondence exchanged prior to the filing of the suit;
 - (iii) The trial court failed to consider the evidence of **PW2** in its determination of the suit;
 - (iv) It failed to consider the import of two factors; the respondent paid the balance price after the suit was filed; and the appellant offered to surrender the completion documents to the respondents advocates prior to the suit being filed;
 - (v) The judgment was not supported by the evidence on record.
 - (vi) Reasons wherefore the appellant prayed that the appeal be allowed with costs.

7. At the hearing hereof the appellant was represented by Learned Counsel Ms. Lucy Mwai whereas Learned Mr. C.M. Kingori represented the respondent; both Counsel made oral presentations; hereunder is a summary of the respective rival submissions;

APPELLANTS SUBMISSIONS

8. The trial court was oblivious to the correspondence exchanged between the parties prior to the filing of the suit; three letters were exchanged; in one dated the 1/04/2015 the appellant demanded the payment of Kshs.287,500/- being the balance of the purchase price and damages for breach of contract; the respondent in its letter dated the 9/04/2015 denied the amount claimed and contended that the appellant was supposed to deliver the original log book before the payment was made; to which the appellant responded by stating that copies of the documents were available; upon receiving no response the appellant proceeded to file her claim on the 19th June 2015;

9. From the correspondence it was obvious that the respondent was the one who breached the agreement as the completion documents were ready but he did not have the balance of the purchase price; the trial court was enjoined to consider the conduct of the parties; case-law relied on **NAIROBI (MILIMANI) HCCC No.700 OF 2006 PURPLE ROSE TRADING Co. LTD vs BHANOO SHASHIKANT JAI; and NAIROBI HCC No.156 OF 2007 KENYA INSTITUTE OF MANAGEMENT vs KENYA REINSURANCE CORPORATION**; where it was held that *‘a contract may depend on a series of letters or other documents’*; therefore in determining the terms of the contract and the issue of breach the trial court was expected to consider all the relevant material; which it failed to do and therefore reached the wrong conclusion;

10. The trial court failed to consider the evidence of **PW2** who told the trial court that the respondent was unable to raise the balance in the sum of Kshs.250,000/- and had pleaded for more time; the evidence of this witness was crucial in settling the main issue in dispute as to who was in breach of the agreement; had it considered this evidence it may have been persuaded as to who was in breach;

11. The offer to surrender the completion documents was made on the 17th April, 2015; and copies of the documents were forwarded to the respondent’s advocates; no further communication was made by the respondent’s advocates;

12. During the month of October, 2015 whilst the case was pending the respondent made payment of the balance of the purchase price; the import of the facts was that the respondent was not ready with the balance of the purchase price; and was thus not ready to receive the original completion documents; had it considered these facts it would have reached a different verdict;

13. That the trial court reached a verdict the was not supported by evidence; it failed to interrogate the conduct of the parties, the correspondence exchanged and other relevant material;

14. Therefore the appellant prayed that the appeal be allowed with costs; and that the judgment of the lower court be set aside and substituted with a judgment allowing the appellant’s claim of Kshs.287,500/-;

RESPONDENT’S SUBMISSIONS

15. In response the respondent contended that the appellant’s complaint was that the trial court had restricted its decision on the interpretation of the Sale Agreement and had not considered the conduct of the parties attendant to the performance of the agreement;

16. The respondent does not dispute the validity of the subject sale agreement and the terms too are not disputed; that the subject term was clearly stated as **“after the release of the logbook”**; that the appellant did not release the logbook and instead filed a claim for the balance of the purchase price and for damages for alleged breach of contract by the respondent;

17. The respondent stated that there was no ambiguity on the parties intentions so as to invite the court to get a better meaning from the extraneous circumstances; and reiterated the **‘golden rule’** of interpretation of an agreement which is that the language in the document is to be given its grammatical and ordinary meaning unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document; case law referred to **Coopers & Lybrand vs Bryant (1995) 3SA 761; that the court needs to only consider the literal meaning of the subject words and phrases and may only go beyond the agreement to consider the background circumstances and extrinsic evidence when the language of the document is on the face of it ambiguous;**

18. That by asking the court to consider the conduct of the parties or other evidence beyond the subject agreement was inviting a breach of the golden rule;

19. The appellant when executing the agreement was bound by the doctrine of **“pacta sunt servanda” (agreements must be kept)** and the doctrine of **“caveat subscriptor”** (let the signatory beware) which dictates that when parties append their signatures to an agreement they are bound by its terms; case law referred to South African Railways (1903) TS 571; where it was held that;

“...it is a sound principle of law that a man when he signs a contract he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”

20. The respondent contends that the appellant was trying to escape from that which she had agreed to and executed; whereas the respondent’s counterclaim was well founded and based on the plain terms of the sale agreement; that he cleared the balance of the purchase price prior to the filing of the counterclaim whereas the appellant is yet to release the logbook as required under the sale agreement and is thus in clear breach of it;

21. The plain and clear stipulation of the sale agreement entitles the respondent to the agreed damages for the breach and specific

performance of the breached obligation as counterclaimed;

22. The respondent prayed for the dismissal of the appeal with costs.

ISSUES FOR DETERMINATION

23. After taking into consideration the oral and written submissions made by both Counsels the following are the issues that this court has framed for determination;

(i) Whether it was the appellant or the respondent who breached the Sale Agreement;

(ii) Who then is entitled to be paid the damages of Kshs.137,500/-

ANALYSIS

24. Being a first appeal this court is obligated to re-evaluate the evidence on record and arrive at its own independent conclusion; Refer to the case of **Arrow Cars Limited V. Bimomo & 2 Others**, C.A. No. 344 OF 2004;

Whether it was the appellant or the respondent who breached the Sale Agreement; Who then is entitled to be paid the damages of Kshs.137,500/-;

25. In this instance the parties had entered into a Sale Agreement dated the 22nd December, 2014 for the purchase of motor vehicle registration no. KBE 272U for the consideration of Kshs.550,000/-; the suit in the lower court was filed on the 19/06/2015 and by this time the appellant had been paid a total sum of Kshs.400,000/-; the appellant's claim was for the balance together with the sum of Kshs.137,500/- being the agreed damages for breach of the sale agreement bringing the total to Kshs.287,500/-;

26. The respondent filed his counterclaim for damages for failure of delivery of the logbook; and also claimed the agreed damages for breach of the sale agreement in the sum of Kshs.137,500/-;

27. The evidence of the appellant was that she never released the logbook to the respondent and her contention was that she was not obligated to do so before the respondent had cleared the balance of the purchase price; conversely the respondent contends that he had paid part of the balance of the purchase price prior to the institution of the suit in the lower court and that he was only obligated to pay the same **after** the appellant had delivered up the log book; (emphasis mine);

28. In its decision the trial court dismissed the appellant's suit and found that she had frustrated the sale agreement and should therefore bear the consequences; the trial court in rendering its judgment relied on the contentious clause 3 of the sale agreement;

29. It is trite law that parties are bound by the agreements they enter into freely; and the trial court in its judgment noted that the Sale Agreement dated 22/12/2014 was a free agreement entered into by the parties before a commissioner for oaths; it also made the following observation that;

“Parties to any agreement are bound by their agreements and each must keep his/her own part of the bargain.”

30. From the demand letter dated the 1/04/2015 and the evidence on record it is not in dispute that the agreement was subject to the Law Society (1989) Conditions of Sale which sets down the completion date to be ninety (90) days from the date of execution of the Agreement for Sale;

31. The above condition was incorporated into the Sale Agreement (**PEXh.3**) that the parties entered into as Clause 12 and it reads as follows; **Clause 12:**

“THAT this agreement is subject to the Law Society (1989) Conditions of Sale unless they are in consistent with any conditions herein in which case the conditions herein shall prevail.”

32. The trial court in its decision carefully analyzed this aforementioned Clause together with the contentious Clause 3 which reads as follows;

Clause 3:

“That 2nd and final instalment of the purchase price Kshs.250,000/- (two hundred and fifty thousand shillings) only will be paid to the VENDOR by the PURCHASER after the release of log book.”

33. It's analysis is as follows;

“The Plaintiff also referred this court to clause 12. The clause subject(sic) the agreement to the law society (1989) conditions of sale where this condition was inconsistent with clause 3 it follows that clause 3 shall prevail. In this case it was inconsistent as far as the handing over of the logbook was not executed for payment to be made. It is the vendor.....”

34. Its finding was that the time frame set out for the execution of clause 3 is clause 12; this court concurs that it was the vendor who frustrated the sale agreement in that after accepting the sum of Kshs.100,000/- paid to her on the 15/01/2015 she became indolent; and as the maxim goes '*equity aids the vigilant and not those who slumber on their rights*'; it was incumbent upon her to have instructed her advocate to seek the monies due before the onset of the completion date; the advocate would have sought an undertaking from the respondents advocates for the payment of the balance in exchange for the originals of the completion documents before the completion date of 90 days; going by the documentation the completion date would have been the 22/03/2015;

35. Instead the record shows that her advocate wrote the demand letter dated the 1st April, 2015; and compounded the appellant's indolence vide the letter dated the 17/04/2015 long after the lapse of the completion date they indicated that the completion documents were available and sent copies thereof;

36. By the 17/04/2015 the clause 12 had become inconsistent with clause 3 as regards the completion date; thus the terms of clause 3 became effective and it was therefore incumbent upon her to have released the logbook before the payment of the balance which was in the sum of Kshs.150,000/-;

37. This court is guided by the authority of Coopers & Lybrand vs Bryant [1995] SA

"... According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in the absurdity or some repugnancy or inconsistency with the rest of the instrument."

38. It went on to add that after the court has ascertained the literal meaning of the word or phrase in question, broadly speaking, that it;

".....may only go beyond the agreement to consider the background circumstances and extrinsic evidence when the language of the document is on the face of it ambiguous;

39. In this instance this court does not find the wording of Clause 12 nor of Clause 3 of the sale agreement to be ambiguous;

40. The appellant went further to file suit on the 19/06/2015 and further compromised her claim for the balance by receiving the amount of Kshs.150,000/- during the pendency of the suit; but she still did not deliver or release the logbook to the respondent and confirmed under cross examination that she would only do so upon payment of the damages; she stated as follows;

" When I demanded the balance, it was paid. I intend to transfer the vehicle anytime the soonest after he pays me the damages. That is all"

41. From the evidence it is evident that the appellant has not released the logbook even '**after**' the respondent paid up the balance of the purchase price; this court reiterates that it cannot relieve a person of the consequences of his or her own carelessness;

42. This court finds no good reason to interfere with the trial courts findings that the plaintiff's claim did not disclose any cause of action and that the dismissal of the suit was warranted as the appellant had no claim as against the respondent; and is satisfied with the trial court's finding that it was the appellant who was in breach of the sale agreement and that it was correct in upholding the respondent's counterclaim;

FINDINGS

43. For the forgoing reasons the court makes the following findings;

(iii) The appellant is found to have been the one who breached the Sale Agreement;

(iv) The respondent is entitled to be paid the damages of Kshs.137,500/-;

DETERMINATION

44. The appeal is found to be devoid of merit and it is hereby dismissed;

45. The decision of the lower court is hereby upheld;

46. The respondent shall have costs of the appeal;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of October, 2018.

HON. A. MSHILA

JUDGE