



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 97 OF 2014

STEPHEN GACHUGU KIMANI.....APPELLANT

-VERSUS-

G.I. KARIUKI – DIRECT-O- SERVICES LTD....1ST RESPONDENT

TRUSTEE ECL OF KENYA.....2ND RESPONDENT

(An Appeal from the judgment of the Hon. Mungai, Chief Magistrate, Nakuru CMCC No.246 of 2005)

JUDGMENT

1. Brief Background

The Appellant Stephen Gachugu Kimani purchased motor vehicle registration No. KAM 854T from the 3rd Respondent Jacob Karore Kamau on the 6th November 2004. At the date of the purchase, it is alleged that it had been offered and used as a collateral security for a loan advanced to **Jacob Karobe Kamau**, now the 3rd Respondent by the 2nd respondent who was a guarantor.

2. The 3rd respondent had taken the loan from the 2nd Respondent but he failed to pay.

It is then that the 2nd Respondent Trustees ELC of Kenya instructed **G.I. Kariuki t/a Direct -O- Service Ltd** to attach the vehicle and to sell to recover the loan amount as per their terms of agreement.

3. The attachment of the vehicle was the subject of the primary suit **Nakuru CMCC No. 246 of 2005**. It was filed by the Appellant against the Respondents who sought orders directed to the Respondents to return the vehicle or in the alternative, refund of the total consideration paid by the Appellant to the **3rd Respondent Jacob Karobe Kamau**.

4. Upon hearing inter parties the trial court made findings that as the vehicle was registered in the names of Samuel Mbugua and as the 3rd respondent had not transferred to his favour at the time of sale, and further as the 3rd respondent had failed to disclose to the Appellant the fact that the vehicle had been used as security therefore

“--- it was too late in the day for the plaintiff to paint the agreement for the loan as unlawful when the plaintiff was not a party to the said agreement.”

5. It is this finding that led to the filing of this appeal.

6. The appeal

The Appellant faulted the trial magistrate's finding that the repossession of the motor vehicle KAM 842T was legal and regular without a chattel instrument or a decree from a court of law. All other grounds revolve around the above finding.

7. ISSUES

(1) Whether a vehicle can be used as security for a loan without a duly registered chattel transfer instrument or a court order.

(2) Whether the appellant (as purchaser) could obtain a better title to the vehicle free from encumbrances than the 3rd Respondent (seller).

(3) Whether an unregistered instrument of chattel's transfer can be legally enforced.

8. **The Appellant's submissions** are by and large that a vehicle being a chattel as defined under **Section 2 of the Chattels Transfer Act, Cap 38 Laws of Kenya**, and being a movable property whenever it is used to secure repayment of any money advanced to a party, the same must be by way of an instrument registered under the Act.

9. It is further submitted that any unregistered instrument ought to be deemed fraudulent and void against any person seizing the chattels or any part thereof comprised in the instrument in execution the process of any court authorizing the seizure of the chattels of the person by whom concerning whose chattels the instrument was made and against every person on whose behalf the process was issued.

10. **Section 13 (1) and (c) of the Act** were cited together with the case **Nyali Chemicals Ltd -vs- Thugi River Estate and Another (2005) e KLR** and **George Ndege Okello -vs- K-Rep Bank Ltd (2012) e KLR** in support of the above submission.

11. **The Respondent's submissions** are that as the 3rd submissions Respondent was not the registered owner of the subject vehicle, he could not purport to sell it to the Appellant based on **Section 23 of the Sale of Goods Act** and therefore could not acquire a better title than that of the 3rd Respondent and more so that at the time of the purported sale, the said vehicle had been encumbered (by the loan) a fact that was within the Appellant's knowledge.

12. It is therefore urged that the trial magistrate was correct when he found the Appellants remedy can only lie against the 3rd Respondent- by a recovery suit for the purchase price and sequential damages for misrepresentation – citing the case **Stephen Kilonzo Nyondo -vs- Samuel Wahome Kibuthu (2015) e KLR**.

13. It is further submitted by the respondents that non. Registration of an instrument does not affect its enforceability as a binding contract between two parties as the terms can be enforced between the two contracting parties and relied upon the holding in **David Mburu Kamau -vs- National Industrial Credit Bank (2010) e KLR** where the court held that failure to register an instrument does not affect its enforceability as a contract between two parties.

14. It is the duty of the first appellate court to re-consider and re-evaluate evidence adduced before the trial court and come up with its own findings and conclusions.

I have also looked at the legal underpinnings upon which each party relies on – **Stanley Maore -vs- Geoffrey Mwenda Nyeri Civil Appeal No. 147 of 2002 (2015) e KLR**.

15. I have considered the statement of defence and the Loan agreement between the 1st Respondent and one **Mary Wangui Mwaniki** in whose names the subject motor vehicle was registered.

16. I have noted that the beneficiary of the loan, the said **Mary Wangui Mwaniki** whose default caused the attachment of the vehicle is not and was not a party to the proceedings before the trial court.

The Appellants wife PW1 who held a general power of attorney from him testified that her husband, by a Sale Agreement (PExt 2) bought the vehicle and paid the full purchase price of Kshs.400,000/= upon which the log book was given to him – PExt 3 – but did not transfer the ownership into the appellants names.

17. In the statement of claim it is no wonder that as result of the attachment of the vehicle that he sought **in the alternative refund of the purchase price from the seller, the 3rd Defendant (3rd Respondent)**. In her judgment the learned magistrate rightfully found no dispute on the fact of the purchase price from the 3rd Respondent who at the time was also not the registered owner but one Samuel, also not a party to the proceedings.

18. I agree with the learned magistrate that upon the circumstances presented before the trial court by all the parties, the only logical thing and recourse was for the Appellant to claim a refund of his money from the 3rd Respondent.

19. I find no wrong by the 2nd Respondent who effected the terms of the agreement for the repossession of the vehicle if there was default in the Loan repayment.

I further find the conclusion by the trial magistrate that the Appellant had succeeded in proving his claim against the 3rd Respondent only and proceeded to dismiss the claim with costs against the 1st and 2nd Respondents.

20. Coming back to the issues that are basically on legal principles as opposed to the facts and evidence adduced before the trial court.

21. The Appellant invited the court to consider and determine only **one question**.

Whether an attachment can be made in respect of a chattel which has been used as security and where there is no registered chattel instrument.

22. While the above question is worth determining I must state that upon the evidence on record the chattel (vehicle) subject of the dispute did not legally belong the appellant at the time of the attachment.

23. This is so and has been well captured in the trial magistrate's judgment as the appellant did not have the legal proprietorship rights over the said vehicle. None of the Respondents had legal rights over the same as none had been registered as the owner. The registered owner was not a party to the proceedings and the court could not condemn such party unheard.

24. Whereas under the **Chattels Transfer Act** it is mandatory for an instrument of transfer to be registered within a specific period to be used as security (Section13), and whereas failure would cause the said instrument to be void and fraudulent against the party purporting to seize the security in case of default, that can only be so if the defaulter of the loan was the person in whose favour the proprietary rights are registered. In this case one **Samuel Mbugua**, and who was not sued.

25. The Respondents never pleaded to have had acted under the Chattel Transfer Act and therefore the necessity to register the instrument of transfer.

The re-possession of the vehicle was pursuant to the terms of the agreement between the parties as stated and not by a court order. Non-registration of an agreement does not affect its enforceability – **Amicabre Travel Services Ltd -vs- Alios Kenya Finance Ltd (2014) e KLR. See also HCCC NO. 253 of 2007 David Mburu Kamau – National Industrial Credit Bank Ltd (2010) e KLR** where the court expressed the same views.

26. Under the doctrine of privity of contract it is only parties to an agreement who can challenge its validity legally and enforceability. In the present appeal the appellant was not one of such parties.

27. I agree with the Appellants final submission that the Appellant was therefore entitled to the return of the vehicle or the value therefore which was placed at Kshs.400,000/= paid and the log book given to the Appellant facts not challenged by any evidence or at all.

28. This piece of evidence was not controverted.

I concur with the trial magistrates that the appellant(then plaintiff) had only succeeded to prove his claim against the **3rd defendant/3rd Respondent) Jacob Karobe Kamau.**

However, the trial magistrate failed to enter judgment based on her findings and conclusion. To that extent I find the trial magistrate to have erred in law and fact. Consequently the appeal succeeds on that aspect only. I proceed to uphold the findings that the trial court case against the 1st and 2nd defendants (now 1st and 2nd Respondents) stand dismissed with costs payable by the 3rd respondent.

29. Further **it is my findings and conclusion that the 3rd Respondent is liable to pay to the Appellant the sum of Kshs.400,000/= being the value of the motor vehicle registration No. KAM 841T with interest at court rates from the trial court's judgment date being the 18th June 2014.**

30. The upshot is that the appeal succeeds only as against the 3rd Respondent who is directed also to pay costs of this appeal to the Appellant.

The 1st and 2nd Respondents shall not be awarded costs of this appeal, the nature and circumstances pertaining thereto having been considered – **Section 27 of the Civil Procedure Act.**

Dated, signed and delivered this 20th Day of December 2018.

J.N. MULWA

JUDGE