



IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO 70 OF 2014

(From original Decree passed on 05/09/2014 in Murang'a CMCC No 72 of 2014 – J Wekesa – SRM)

DAVID MAINA GITUNDU.....APPELLANT

VERSUS

WILSON KURIA KAMAU.....RESPONDENT

J U D G M E N T

1. This is an appeal against that part of the decree of the lower court by which the Applicant's (plaintiff's suit) was dismissed. By the same decree the Respondent's (defendant's) counterclaim was dismissed. He did not cross-appeal. The lower court directed that parties bear their own costs of the suit.
2. The Applicant's suit was a simple claim in contract. He had sold to the Respondent a motor vehicle (upon a written sale agreement) for the consideration of KShs 500,000/00. The Respondent paid KShs 400,000/00 and was given possession of the vehicle which he retains to this day. He failed to pay the balance of KShs 100,000/00. The Appellant sought judgement for that sum plus interest and costs.
3. In his statement of defence and counterclaim the Respondent denied the sale, or that he was given possession of the motor vehicle, and put the Appellant to strict proof thereof. He also pleaded that the motor vehicle allegedly sold to him belonged to a third party and not to the Appellant, and that therefore the Appellant could not have sold what he did not own. In the alternative he pleaded that the motor vehicle sold "was not of merchantable quality, a latent fact well known to the (Appellant) that was not disclosed to the (Respondent)". In this line he further pleaded that "the sale of a non-working motor vehicle is no sale at all".
4. The Respondent further pleaded in the alternative that the written sale agreement was modified by an oral agreement to the effect that payment of the balance of the consideration "would be subject to the operational capacity of the motor vehicle", which capacity has never been achieved despite the Respondent's efforts in that regard and at his considerable expense.
5. The Respondent counterclaim the KShs 400,000/00 he paid towards the consideration upon the basis that –
 - (a) That the motor vehicle "has never become operable, is unmoveable and the (Respondent) has incurred significant expenses trying to convert it to usable mode".
 - (b) That the sale "was orchestrated by the fraud and deception of the (Appellant)".
 - (c) That the agreement is "rescinded for failure of material conditions, including legal capacity of

Vendor to sell, lack of merchantability and the motor vehicle having been unfit for sale”.

6. I have considered the submissions of the learned counsel for the Appellant, as well as those of the Respondent who was unrepresented.

7. The agreement between the parties was produced in evidence as Exhibit P1. It is a simple sale agreement dated 06/09/2013 that the parties apparently made for themselves. Apart from the details of the motor vehicle sold, its two main terms were –

“2.The total cost of the said motor vehicle is KShs 500,000/00 where KShs 400,000/00 has already been paid.

3.The remaining balance of KShs 100,000/00 will be cleared at the end of this month, and the logbook of the vehicle will be handed over to the buyer on completion of the payment”.

8. The sale agreement did not provide for any warranty, and obviously the motor vehicle was being sold and purchased as it was. Presumably the Respondent had inspected the vehicle before he agreed to buy it. If it was in “moving” condition no doubt he would have test-driven it, or have it test-driven. As is common in transactions involving sale of motor vehicles, he would have had a person knowledgeable in such matters have a look at the motor vehicle, if he was not himself so knowledgeable, before deciding to buy it.

9. The Respondent cannot now be heard to complain that he bought a vehicle that was “useless”! The price itself is probably indicative of the possibly poor condition of the motor vehicle!

10. As for payment of the balance of the purchase price, the only condition attached to it in the sale agreement was that it was payable on 30/09/2013. It was **not** payable upon transfer of the vehicle to the Respondent. Only upon payment of the balance would the vehicle’s registration papers (logbook) be handed over to the Respondent.

11. It was stated to court at the hearing of the appeal that the Appellant had the necessary transfer form for the vehicle duly signed by the person currently registered as the owner thereof. It is not uncommon for a person who has no intention of keeping a motor vehicle for long before selling it off to simply hold (without registering) the transfer form duly signed by the registered owner thereof, as long as the vehicle is not used on the road for more than 14 days after the date of the transfer as required by the law. By the pleadings and testimony of the Respondent himself, the vehicle sold to him was not usable on the road.

12. There was thus no frustration of the contract between the parties herein at all. Possession of the vehicle (as it was) was given to the Respondent upon payment of KShs 400,000/00. He was to get the registration documents (logbook) and (presumably) a duly executed transfer form upon paying the balance of KShs 100,000/00 on 30/09/2013. He never paid the balance. He pleaded fraud and deception which he never even attempted to prove. His counterclaim was properly dismissed.

13. As for the Appellant’s claim, it was clearly wrongly dismissed. He established his case for payment of the balance of the purchase price to the required standard by production of the sale agreement. That written sale agreement could not be unilaterally altered by one of the parties to suit his purposes. Nor was the court entitled to change its terms, or introduce others that the parties never intended.

14. In the event I will allow the Appellant’s appeal. The judgment of the lower court is hereby set aside and in its place are substituted the following orders –

1. The Plaintiff’s suit is allowed with costs, and he shall have judgment for KShs 100,000/00 as prayed. There shall be interest upon that sum at court rates from the date of filing suit until payment in full.

2. The Defendant’s counterclaim is dismissed with costs to the Plaintiff.

15. The Appellant shall have costs of this appeal. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF JUNE 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 16TH DAY OF JUNE 2017