



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.95 OF 2015

ERASTUS MAIN MURAYAAPPELLANT

VERSUS

KIPLEGE ZOCHIN KHURERESPONDENT

(Being an appeal from the judgment and decree of R. Nyakundi C.M in Kakamega CMC Civil Case No.94 of 2007 prepared on 10/01/2012 and read by J.K Ngeno DM on 01/02/2012)

J U D G M E N T

The Respondent's Claim

1. The appellant herein was the defendant in the Chief Magistrate's Court at Kakamega Civil Case No.94 of 2007 whereas the Respondent was the Plaintiff.
2. By a plaint dated 14th March 2007 and amended on 16/09/2009 and further amended on 15th March 2010 the Respondent prayed for orders against the Appellant jointly and severally with John Mukenya Kitiabi t/a Nyuki Auctioneers who was the 2nd Defendant as follows:-
 - a. Performance of the contract/sale agreement dated 13th June 2006 by way of release of the Plaintiff's vehicle registration No.KAQ 335M and other property/goods including sofa sets, coffee tables, television set wall unit among others from the custody of the defendants jointly and severally to the Plaintiff
 - (a) Special damages of kshs.821,000/=
 - (b) Orders as per paragraph (6) of the plaint
 - (c) Costs
 - (d) Interest
 - (e) Any other or further relief deemed fit in favour of the plaintiff
 - (f) General damages
3. The Appellant duly filed his defence which was amended accordingly. He admitted having entered into an agreement with the Plaintiff/Respondent but denied the contents of the plaint and put the Respondent to strict proof. The 2nd Defendant also filed his defence and denied the contents in the amended plaint and put the Respondent to strict proof.

4. The case was heard before Honourable R. Nyakundi who entered judgment for the Plaintiff as against the defendant as follows:
 - a. On claim for costs of motor vehicle kshs.250,000/= awarded. The Defendant to shoulder this claim jointly and severally.
 - b. On household goods I award kshs.100,000/= as against 2nd Defendant only.
 - c. Costs of motor vehicle repair – nil
 - d. Cost paid to auctioneers – nil

The Appeal

5. The Appellant being aggrieved and dissatisfied by the above judgment filed this appeal on the following ground:-
 1. THAT the Honourable Magistrate erred in Law and in fact by holding that the Defendants were jointly and severally liable to the Plaintiff in the sum of kshs.250,000/= whereas there was overwhelming evidence to the contrary.
 2. THAT if indeed there was any judgment to be entered against the 1st Defendant it was for kshs.20,000/= being the excess from kshs.100,000/= he had received from the 2nd Defendant after deducting the outstanding debt of kshs.80,000/=.
 3. THAT the Honourable Magistrate erred in law [and] in fact by finding the 1st Defendant liable even after he had expressly stated in his judgment that the 1st Defendant had acted within the Law by issuing instructions to the 2nd Defendant to repossess motor vehicle in order to enforce a contract after the Plaintiffs breach by non-payment within the stipulated time.
 4. THAT the Honourable Magistrate erred in law and in fact and misdirected himself on the 1st Defendant's right of rescue as provided for under the sale of Goods Act Cap 31 Laws of Kenya.
 5. THAT the Honourable Magistrate erred in law and in fact by finding the 1st Defendant liable when the facts and evidence on record show that it was the 2nd Defendant who had not followed the law in the process of attaching the Plaintiffs goods, judgment should therefore have been entered against the 2nd Defendant and not both of them jointly and/or severally.
 6. THAT the Honourable Magistrate erred in law and in fact by finding the 2nd Defendant was an agent of the 1st Defendant. The 2nd Defendant was not acting on behalf of the 1st Defendant the moment he exceeded his lawful authority.
 7. THAT the Honourable Magistrate erred in fact and in law and misdirected his mind on the probative value of the evidence adduced by the Plaintiff.
6. The appellant prays that the appeal be allowed with costs, judgment and order of R. Nyakundi C.M set aside and/or varied so as to find that the case against the appellant had not been proved by the respondent on a balance of probabilities.

Submissions

7. Parties herein canvassed the appeal by way of written submissions which were filed and exchanged between them. In its submissions the appellant claimed that he had no hand in the attachment of house hold items of the Respondent. He claims that his instructions to the 2nd Respondent were clear and they were for repossession of the motor vehicle only and that he never authorized the 2nd Defendant to in any way attach the Respondent's household goods therefore any damages caused by the said 2nd Defendant cannot and should not attach to the Appellant.
8. The appellant further submits that the terms of the agreement he entered into with the Respondent were set out clearly in the agreement and the same having never been challenged bound the parties to the provisions in the said agreement and the Court was not to introduce other matters for purposes of contradicting or varying what was agreed between the parties.
9. The appellant has placed reliance on the case of **GLOBAL VEHICLE KENYA LIMITED –VS- LENANA ROAD MOTORS [2015] e KLR CIVIL APPEAL No.7 OF 2015** for the proposition

- that Courts ought not to frustrate the clearly express intention of parties to a contract and instead ought to enforce contracts to actualize. The appellant has further relied on several other authorities to buttress the proposition that in the absence of fraud or undue influence the Court will not rewrite contracts between parties and will instead enforce the contracts as agreed between them. He adds further that the trial Court misapprehended the evidence and proceeded to make pronouncements on matters not before its purview.
- 10.Regarding the issue of the 2nd Defendant's alleged agency relationship to the appellant submits, the issue was never pleaded before the Court and therefore a finding thereon deprived the appellant of the chance to reply to the existence or lack thereof of the issue. The Appellant has relied on the case of **THORP –VS- HOLDSWORTH [1876] 3 Ch D 637 at 639** as referred to in **GLOBAL VEHICLES KENYA LIMTIED –VS- LENANA ROAD MOTORS** (supra) on this point. Appellant maintains that the reliefs sought by the Plaintiff ought to be the sole liability of the 2nd Defendant.
 - 11.He adds that it is a well founded principle in Agency Law that when an Agent exceeds the authority granted by the principal the agent becomes responsible for damages for the breach of implied or expressed warranty of authority. According to the appellant it remains that parties are bound by their pleadings and that the Court should not by its own volition introduce issues to the dispute which do not arise from the pleadings. Appellant has relied on the case of **DAVID SIRONGA OLE TUKAI –VS- FRANCIS ARAP MUGE & OTHERS C.A No.76 OF 2014** where the Court emphasized that a remedy that has not been pleaded or applied for will not and should not be granted.
 - 12.The Respondent on his part submit that the judgment of the learned Magistrate was very specific on the matter. He maintains that the 2nd Defendant was acting as an agent of the Appellant in relation to the repossession, attachment and sale of the motor vehicle in question as he was acting on instructions that had been issued to him by the Appellant. The Court took issue with the manner of sale and repossession by the 2nd Defendant at the time.
 - 13.The Respondent has also made mention of Sections 26, 40 and 48 (2) of the Sale of Goods Act and maintain that the 1st Defendant was not entitled to keep all the money he received from the sale of the motor vehicle but should have remitted the balance to the plaintiff and also refunds the purchase price.
 - 14.The breach by the 2nd Defendant has also been discussed to the extent of his attaching the household goods and that th4e Appellant and the said 2nd Defendant are jointly liable for the sale of the motor vehicle and the attachment and sale of the household good. The Defendant further submits that they pleaded, established and proved damages and avers that the Appellant enriched himself unjustly by keeping the whole of the amounts being initial payments made and the money realized from the sale and thus the Respondent is entitled to the refund

Duty of this Court

- 15.This being a first appeal this Court has a duty to re-evaluate the evidence laid before the subordinate Court both on points of law and facts and come up with its own findings and conclusions. See **JABANE –VS- OLENJA [1986] KLR 661**, **SELLE –VS- ASSOCIATED MOTOR BOAT CO. LTD. [1968] E.A 123** and **PETERS –VS- SUNDAY POST LTD [1958] E.A. 424**.

Background

- 16.The respondent purchased motor vehicle KAQ 335M from the appellant for kshs.550,000/= and there was an agreement to that effect see PEx 1. He paid kshs.400000/= upfront and the balance of kshs.150,000/- was to be paid monthly at the rate of kshs.30,000/=. The respondent failed to pay the balance as agreed prompting the appellant to instruct auctioneers to repossess the motor vehicle. Thereafter, the respondent had negotiations with the appellant before the motor vehicle was repossessed and he paid kshs.70,000/= see receipt exhibit 3. By the time he paid this amount auctioneers had already moved to proclaim. See the proclamation exhibit 2.
- 17.The auctioneers thereafter attached the Respondent's motor vehicle together with his household

- goods claiming that there was an outstanding balance due and owing. Later on the vehicle was sold to a third party together with the Respondent's household goods. It was after the said sale that the respondent filed the plaint against the appellant with the above claims. He produced exhibits to prove his claim including the sale agreement, receipts and proclamation amongst others.
18. On his part the appellant confirmed that he entered into a sale agreement with the respondent for the sale of motor vehicle registration number KAQ 335M. The said vehicle was sold for kshs.550,000/=, with the Respondent making a down payment of kshs.400,000/=. The balance was to be paid in instalments of kshs.30,000/= until payment in full. For five (5) months the respondent did not make any single payment thus he was in breach of the agreement.
 19. The parties agreed to a rescheduling of the payment of the debt but in spite of involving an advocate this round, the Respondent did not honour the same. So the appellant instructed Nyuki Auctioneers to repossess the vehicle and sell it but no instructions were given to attach household goods. The vehicle was attached. The Respondent paid to the appellant kshs.70,000/= after three months. The vehicle was thereafter sold.
 20. The auctioneers on their part admitted having received instructions from the appellant to repossess motor vehicle registration no.KAQ 345M from the respondent. They did proclaim and under instructions from the appellant sold the same for kshs.150,000/=. They gave kshs.100,000/= to the appellant and the balance was treated as auctioneers charges.

Issues for Determination

21. From the above analysis of the evidence the following are the pertinent issues that need determination:-
 - a. Whether the Auctioneer was an agent of the appellant and whether they could be held jointly and severally liable.
 - b. Whether the trial magistrate relied on matters not pleaded to come up with his judgment.
 - c. Whether the trial Court was wrong on the right of resale.
22. In this case instructions were issued by the appellant to the auctioneer to go and repossess motor vehicle No. KAQ 345M and thereafter sell it to recover the balance. To appreciate the agency relationship,

“Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as third party”

23. This definition from BOWSTEAD & REYNOLD on AGENCY seventeenth edition page 1 gives the direction as to whether there existed an Agency relationship between the appellant and the auctioneer. From the definition. The appellant acted as the principal whereas the auctioneers were the Agents. It is not in doubt that the moment instructions were given by the appellant then the auctioneer acted in a fiduciary capacity for the appellant.
24. The Respondent remained to be the third party. See the case of **Davis and Shirliff –vs- Attorney General 1978 eKLR** where the Court of Appeal clearly pointed out that “Court brokers” (and there is no difference with auctioneers executing decrees of the Court) are agents of the Court. That authority was followed in **Nairobi City Council –vs- Patel KLR 60 1978 eKLR**.
25. This therefore settles the first issue to be determined only to add that in the face of an agency relationship, the principal will always be held liable for the acts of his agent. In this case, the 2nd Defendant was, indeed, the agent of the Appellant.
26. On the second issue as to whether the trial Magistrate acted on matters not pleaded I find that the trial Magistrate relied on the pleadings as they are and the oral evidence by the witnesses. He properly laid out what was contained in the pleadings and what was said by the parties during the

hearing. The exhibits produced properly guided the Court which in reaching its conclusions and finding in the judgment. I therefore find the Appellant's complaint that the trial Court dealt with matters not pleaded to be without basis.

27. Lastly on whether the trial Magistrate was wrong on the right of re-sale this Court finds that the right of re-sale was properly explained in the judgment. The trial Court set out the applicable law which requires auctioneers to issue notification of sale through the daily newspapers with wide circulation. The trial Court specifically referred to rules 11(1) (b) and 15 (12) (f) of the Auctioneers Rules which give strict timelines for the advertisements. The trial Court found as a fact that the 2nd Defendant did strictly comply with the law on sale by way of advertisement, and especially because the Respondent was not issued with notice of sale regarding time and place of sale. It was the considered view of the learned trial Magistrate that the sale of the subject motor vehicle was irregular and a nullity. I find no reason to depart from those findings.

Conclusion

In the premises, I find and hold that the Appellant's appeal lacks merit. The same is hereby dismissed with costs to the Respondent.

28. In the premises, I find and hold that the Appellants appeal lacks merit. The same is hereby dismissed with costs to the Respondent.

29. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 29th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

M/s P.K Kamau (present) for Appellant

M/s Rauto (present) for Respondent

Mr. Lagat - Court Assistant