REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 57 OF 2011

STEPHEN KILONZO NYONDO.....……..APPELLANT

VERSUS

SAMUEL WAHOME KIBUTHU.....……..……..RESPONDENT

(An appeal from the Judgment and Decree of the Hon. K. Cheruiot, R.M. delivered on 10.5.2011 in Nyeri C.M.C.C. No. 427 of 2006)

JUDGMENT

This appeal arises from the decision of the Chief Magistrate at Nyeri in C.M.C.C No. No. 427 of 2006 in which the appellant was sued by the Respondent for recovery of Ksh. 85,000/= , plus interests thereon, loss of use & costs of the case.

The Respondents' claim against the appellant in the said case is enumerated in a plaint dated 27.6.2006 in which the Respondent averred *inter alia* as follows:-

That vide a written agreement produced in court, the Respondent purchased motor cycle Registration number KAM 708 W from the appellant at a price of Ksh. 63,000/=, that the Appellant knew it was to be used for business, that there was an implied condition that the Appellant would have the right to sell and that the same would be in good condition, that there was an implied warranty that that the Respondent would enjoy quiet possession and the same would be free from encumbrances, that the Appellant breached the said conditions, that the motor cycle was detained by the police on account of ownership dispute and that in addition to the purchase price he incurred Ksh. 22,000/= by way of repair charges.

The Appellant herein filed a defence in the said case in which he denied the said allegations and sought to have the case dismissed with costs.

This being a first appeal, this court is enjoined to re-evaluate and re-analyse the evidence tendered in the lower court so as to arrive at its own conclusions. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda[1] "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions..."***

The Respondent's evidence in the lower court was that he purchased the motor cycle from the Appellant at Ksh. 63,000/=, that they signed a written agreement, (Ex No. 1) and he spent a total Ksh. 22,000/=on repairs, that the appellant gave him a log book in the name of a different person, signed transfer forms, copies of PIN and Id for the said person, but upon checking at the Registrar of motor vehicles, he was informed that the log book was for a car. Fearing the possible repercussions of staying with such a motor cycle, the Respondent on his own motion took the motor cycle to the CID and they retained it. The CID

confirmed that the log book belonged to a Toyota Celica. He recorded statements with the police and the police did not return the motor bike to him because it was not registered. He testified that the Appellant was arrested and locked up by the police who told him they would call him, that they talked with the Appellant who promised to refund the money, but he never did so. He stated that he was doing business and was losing Ksh. 200/= daily.

The Respondent also called PW2 who confirmed that he was present with other persons when the parties herein discussed about the refund of the Ksh. 85,000/= and the Appellant agreed to refund the same.

PW3 a police officer confirmed for the police records, the motor cycle was sold under unclaimed gods act, that the purchaser confirmed that the number was for a Toyota vehicle and that the buyer proceeded to Police headquarters and was referred to the Registrar of motor vehicles, that he took the motor bike for inspection and at the time of giving evidence, the motor cycle was awaiting fresh registration.

The Appellant admitted selling the motor cycle to the Respondent for Ksh. 63,000/= and stated that he purchased it from Dittune Commercial Agencies on 2.11.2004, that it belonged to him, that he had a right to sell it, that it was in good condition and denied knowledge of any police investigations.

After evaluating the evidence, the learned magistrate identified one key issue, that is whether the appellant had genuine title to the said motor cycle and concluded that the appellant did not have a good title to the same, that the claim for repair charges was not proved as no motor vehicle assessment report was produced, and further the claim for loss of use was not proved but found that the Respondent was entitled to a refund of the Ksh. 63,000/= and entered judgment in favour of the Respondent for the said sum plus costs and interests.

Aggrieved by the said verdict, the appellant instituted this appeal and cited eight grounds. I find that grounds 1-6 & 8 can be reduced to one ground, namely, whether the magistrate erred in finding that the Respondent had proved his case on a balance of probabilities as required in civil cases and ground 7 can be addressed separately, namely, whether the plaint was incurably incompetent for failing to plead the particulars of misrepresentation, fraud or breach of trust as provided for under Order 2 Rule 10.

Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:-

1. *Whether the Respondent proved his case to the required standard.*
2. *Whether the plaint was defective.*

The facts in this appeal raise the question of what is the duty of a seller as regards title to goods and secondly when does title to goods pass to the buyer. The Sale of Goods Act[2] is the governing legislation in sale of goods. The Act contains certain implied terms in every contract of sale. Section **14** of the Act provides as follows:-

> *14. In a contract of sale unless the circumstances of the contract are such as to show a different intention, there is-*
>
> > *(a) An implied condition on the part of the seller that in the case of a sale he has right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.*
> >
> > *(b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.*
> >
> > *(c) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time when the contract is made.*

Section **19** on when title is to pass provides as follows:-

1. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2. For purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

In a contract of sale, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass. In a contract of sale, there is also an implied term that- **(a)** the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and **(b)** the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner of or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

The above position is captured vividly in the book *Benjamin's Sale of Goods*[3] where the learned authors observe as follows:-

"...there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass. The liability thus imposed is a strict liability, and does not depend upon the fault or knowledge of the seller.....A seller will clearly have no "rights to sell the goods" where he has no title to the goods and can pass none to the buyer."

The words "a right to sell the goods" means that the seller has the power to vest full and complete rights over the goods in the buyer, and where there is a breach of this condition, the buyer is *prima faci*e entitled to recover the whole purchase price as on a total failure of consideration.[4]This principle was established in the case of *Rowland vs Divall*.[5]In the said case, the defendant bought a motor car in good faith from a thief and resold it to the plaintiff, a car dealer, for 334 pounds. The plaintiff repainted the car and exposed it for sale in his showroom for two months until he resold it to a third party for 400 pounds. Two months later, the police took possession of the car on behalf of the true owner. The plaintiff refunded to the third party the money which he had been paid and brought action to recover from the defendant the 334 pounds. The Court of Appeal held that his action should succeed because there was total failure of consideration.

As Lord Wright observed in *Joseph Constantine Steamship Co. v. Imperial Smelting Corporation Ltd*.[6]

"In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man." Lord Wright clarified the position still further in the later case of Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd., where he made the following observations:

"Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would, as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract..... To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation."

In the case of *British Movietonews Ltd. v. London and District Cinemas Ltd*.[7], Denning L. J. in the Court of Appeal took the view expressed by Lord Wright as stated above as meaning that *"the court really exercises a qualifying power-a power to qualify the absolute., literal or wide terms of the contract in order to do what is just and reasonable in the new situation".*

The learned Judge went on to say:-

> *"when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words. You ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers. We realize that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now."*

In my view, the court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by some scholars but it is certainly not, it is a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of the express and implied conditions under the act.

As observed earlier, in every contract of sale, there is an implied condition that the seller has a right to sell the goods. Two warranties are also implied: that the goods are free from any charge or encumbrance in favour of a third party which is unknown to the buyer and that the buyer will enjoy quiet possession of the goods.

Thus, unless the contrary circumstances appears to show a different intention, there is an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass; and an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and an implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party not declared or known to the buyer before or at the time when the contract is made.

Turning to the present case, it is not in dispute that the parties herein entered into a sale agreement for a motor cycle, that the Respondent paid Ksh. 63,000/= and that subsequently it was established that the registration number for the motor cycle belonged to a motor vehicle. A search was produced attesting to that fact. The police verified the said anomaly. It would be unreasonable to expect the buyer to have continued keeping the motor cycle under such circumstances. It is contrary to reason to suggest that the seller had a good title nor could he pass title to the buyer under such circumstances. The Respondent performed his part of the contract. He paid the full purchase price. But the consideration failed, hence making the contract void or voidable at the instance of the innocent party.

I find no difficulty in concluding that the intention of the parties was that the buyer would have a good title and he paid the purchase price on that understanding. Applying the law and the principles cited above in the present case, I find no difficulty concluding that the Appellant did not have a good title to pass to the Respondent and that he was in breach of the express and implied terms of the contract he entered into with the Respondent and that there is total failure of consideration and consequently the Respondent was entitled to rescind the contract and claim back the purchase price. Consequently my answer to issue number one is in the affirmative.

As for the second issue, that whether the plaintiffs plaint was incurably defective on grounds that it failed to plead the particulars of misrepresentation, fraud or breach of trust as provided for under Order 2 Rule 10, I have carefully studied the plaint and I am persuaded that the Respondents claim in the lower court was premised on breach of express and or implied warranties under the Sale of Goods Act. The plaint in my view discloses a cause of action based on breach of contract and in particular breach of implied and express terms of a contract. I find the plaint as drawn brings out a claim both under the Sale of Goods Act and under the common law implied conditions and warranties.

Further, I reinforce my position by citing the decision in the case of *Blue sky epz limited –vs- Natalia*

*Polyakova & Another**[8]*** where the court held that:-

> *"The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed....."*

I find that the learned magistrate correctly interpreted and applied the law and arrived and the correct finding, hence I uphold the findings of the lower court. The upshot is that this appeal fails and I hereby dismiss it with costs to the Respondent.

Orders accordingly.

Dated at **Nyeri** this **18th** day of **December** 2015

John M. Mativo

Judge

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[1] **Nyeri civil appeal no. 147 of 2002**

[2] Cap 31, Laws of Kenya

[3] Fifth Edition, London sweet Maxewell, at page 168

[4] Ibid at page 170, Para 4-006

[5] {1932} 2 K.B 500

[6] {1871} L.R. 6 Exch. 269

[7] [1942] A.C. 154 at 185.

[8] [2007] eKLR