REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 74 OF 2000

GEOFFREY MUNYUA ……..……... APPELLANT

VERSUS

MOMBASA CENTRE COMPLEX

JOHN FELIX KARIUKI ……..……...RESPONDENTS

J U D G M E N T

This appeal arises from the judgment and decree issued by the Senior Principal Magistrate Hon. Charles O. Kanyangi (as he then was) in **Milimani NRB CMCC 124 of 1996**, pursuant to leave to appeal out of time granted on 17th February 2000 by **Hon. Justice Githinji** vide **NRB HC MISC APP No. 1637 of 1999.**

The memorandum of appeal filed by Geoffrey Munyua dated 23rd February 2000 and filed on 18th May 2000 sets out 8 grounds of appeal challenging the said judgment and decree that:

1. The learned magistrate erred in law and fact in nor appreciating that there had been a total failure or consideration on the part of the defendants.
2. The learned magistrate erred in law and fact in finding that the defendant stopped payment of the cheque on finding the car which was the subject of the agreement to be faulty and or unsatisfactory.
3. The learned magistrate erred in law and fact in not finding that:

a. The defendant cleared the motor vehicle as he had been given all the original documents required by the plaintiff.
b. That the defendant moved the motor vehicle which is the subject of this suit from the port.
c. That the defendant removed hubcaps and radio cassette of the motor vehicle and transported the same from Mombasa to Nairobi.
d. The defendant had been supplied with all the documents that he required to clear the motor vehicle.
e. That the property in the motor vehicle had already passed to the defendant and he had a duty to pay for the same.

4. The learned magistrate erred in law and in fact in not finding that the defendant had converted the motor vehicle to his own use and was thus guilty of enrichment.
5. That the learned magistrate erred in law and fact in placing the reliance on the evidence of the

defendant that a certain relative of the plaintiff had assisted him despite clear evidence to the contrary.

6. That the learned magistrate erred in law and in fact is not finding that:-

a. The motor vehicle in question was of the quality desired and a clean report of finding he had been issued in respect of the same by an international pre-shipment inspection company.
b. The second defendant issued the payment cheque after carrying out an inspection of motor vehicle and satisfy himself as to its condition.
c. There were no warranties given written or oral as to the state of the motor vehicle at the time of sale.
d. That the defendant took possession of the motor vehicle.

7. The learned magistrate erred both in law and fact in not appreciating that there wasn't breach f a condition or warranty on the part of the plaintiff.

The appellant prayed for orders allowing this appeal, setting aside of judgment of the subordinate Court dated 2nd August 1999; that judgment be entered in favour of the plaintiff as prayed in the plaint; and costs of the appeal.

The parties to this appeal agreed to dispose of the appeal by way of written submissions and such leave was granted pursuant to the provisions of Order 51 Rule 16 of the Civil Procedure Rules.

The respondents supported the findings of the Subordinate Court and urged this Court to dismiss the appeal with costs. The appellant reiterates his grounds of appeal, urging this Court to allow the appeal with costs.

This being the first appeal, this Court's duty under Section 78 of the Civil Procedure Act is to evaluate and consider the evidence and the law, and exercise as nearly as possible, the powers and duties of the Court of original jurisdiction.

I am also guided by the decision in the case of **SELLE – VS – ASSOCIATED MOTOR BOAT COMP [1968] EA 123**; to evaluate, and analyze the trial court's evidence, and come to my own conclusion but in so doing, I must give allowance of the fact that I neither saw nor heard the witnesses testify.

In addition, as was held in the case of **MKUBE – VS – NYAMURO [1983] KLR, 403-415**, as an appellate Court, I can only interfere with the findings of the trial Court if it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. Per: **Law JA, Kneller** and **Hannox Ag JJA**.

However, this Court is not bound to follow the trial Court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

The evidence in the Court below in support of the plaintiff's plaint dated 6th March 199 and as amended was that the plaintiff entered into a written agreement with the defendants on 1st December 1995 for sale of a motor vehicle Toyota Carina 1.8 cc saloon, which motor vehicle had been shipped from Dubai and lying at Mombasa Port, at an agreed purchase price of Ksh. 316,754 exclusive of excise duty and value added tax.

The agreement executed by only the plaintiff and defendants and produced in evidence as PEX 1 shows that the appellant was upon signing of the said agreement, to hand over and he did hand over to the respondents/defendants the original invoices showing details of the motor vehicle, bill of lading and customs clean report of findings. It was agreed that the purchaser was to take total responsibility over the said original documents and to meet all payments towards the clearing and registration of the vehicle in Kenya.

Following the signing of the said agreement, the purchaser/respondent issued to the appellant/seller herein with a post-dated cheque for Ksh. 319,800 dated 12th December 1995 produced in evidence as PEX 2.

As the appellant waited to clear the cheque a maturity, he received a letter from the respondents on 19th December 1995. It is dated 18th December 1995, informing him that the respondent, upon inspection of the motor vehicle, found that it had apparent defects and had therefore decided to stop the cheque payment.

The appellant protested the respondent's act of stopping payment and purporting to revoke the sale agreement, and demanded that the respondents make good the cheque, which, according to the appellant, had become due and payable on 12th December 1995 and therefore the deal was sealed on the due date of the cheques, accusing the respondents of breach of the sale agreement without good reason.

The respondents filed defence denying the appellant's claim stating that there was no consideration or possession of the motor vehicle in question and that the vehicle was found to be unfit for the purpose for which it was to be purchased, some parts were removed and that the cheque was stopped after discovering that they had been deceived by the appellant. They prayed for dismissal of the suit. The trial magistrate after considering the evidence tendered by both parties and the filed written submissions, found that the appellant had not discharged the burden of proving his case against the respondents on required standard and dismissed the same with costs on 2nd August 1999.

According to the learned magistrate, the respondents were buying the car for a purpose and having given a post dated cheque, the sale could not be considered to be complete before the 2nd respondent inspected the car and expressed satisfaction with its condition. In his view, therefore the said sale agreement was not finalized and the property in the car could not be said to have passed to the 2nd respondent in the circumstances. He also disbelieved the appellant's contention that the 2nd respondent moved the car to an unknown place because without the car having been cleared it could not have been moved out of the port of Mombasa to any place unknown to the appellant. He believed the 2nd respondent's testimony that the appellant had instructed a relative of his to go and help him access that motor vehicle.

I have carefully considered the pleadings, the evidence, oral and documentary produced by the parties in the lower court, the written submissions by their advocates both in the lower court and the judgment of the trial court. I have also considered the appellant's 7 grounds of appeal and the rival submissions filed by their advocates in support of and against this appeal.

The issues for my determination as derived from therein are:

Whether there was an agreement or agreement for sale between the parties herein.

This fact is undisputed by exhibit 1 produced by the appellant in the lower Court. The respondents submit that there was an agreement for sale and not an agreement between the parties. They submitted that the 1st defendant was wrongly sued as it is an incorporated company under the Companies Act and no seal was appended to demonstrate that they were a party to that sale agreement which was merely drawn in the first person hence, a document made by the plaintiff/appellant of his intention to enter into a contract with the 1st respondent.

He also contended that the 1st respondent did not tender any payments and that the appellant failed to join Citizen Cinema Corporation Ltd who drew its cheque for the alleged sale price which it later stopped. The law applicable to the sale of goods and hence the dispute herein is the Sale of Goods Act Cap 31 Laws of Kenya. It is an Act of Parliament to regulate the sale of goods containing elaborate provisions. Section 2 thereof defines a contract for sale to include an agreement to sale as well as a sale. I therefore find no substance in the respondent's contention that this was an agreement for sale and not an agreement and reject the argument.

In my view, this was a simple contract between parties whose subject matter was motor vehivle Toyota Carina saloon model 1991 engine No. 4S -07 54116 signed by the appellant Geoffrey Munyua and John Felix Kariuki, the executive chairman of the 1st defendant company.

On the argument that the 1st defendant was wrongly sued, the agreement for sale as produced is clear, that the sale was between Geoffrey N.Munyua and M/s Mombasa Centre Complex Ltd as the purchaser and the same signed by the 2nd defendant/respondent.

It has not been denied that the 1st defendant had the necessary capacity to enter into a sale agreement. The only contention is that in order for that agreement to be valid, the 1st defendant/respondent seal ought to have been placed or affixed on the agreement.

I have examined the defence filed by the 1st defendant/respondent on 16th April 1996 and I find no pleading that denies the capacity of the 2nd defendant to transact or sign agreement on behalf of the 1st defendant/respondent and or challenge to the suit below on account of a missing company seal. In addition, paragraph 4 of the said defence states that the 1st respondent stopped payment of the cheque after discovering that it had been deceived by the plaintiff/appellant. In the defence filed by the 2nd defendant dated 11th April 1997, he stated that he was acting as an agent of the 1st defendant/respondent who is a limited liability duly incorporated company therefore capable of being sued and suing. I am fortified by Section 38 of the Companies Act that,

> ***"a document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal."***

It is not denied that the 2nd defendant/respondent was an authorized officer of the 1st respondent company. He signed the sale agreement as the Executive Chairman and identified himself in exhibits 3 and 5 as the Managing Director thereof. With those facts, the defendant/respondents cannot be heard to turn around and claim that they were not parties to the material agreement merely because the company seal was not affixed.

On the argument that the appellant having failed to join Citizen Cinema Corporation Ltd who drew the dishonoured cheque in consideration for the alleged sale price, I am inclined to reject this contention on the ground that the non joinder thereof does not defeat suit by virtue of the provisions of Order 1 Rule 9 of the Civil Procedure Rules and the Court is entitled to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In addition, Order 1 Rule six (6) gives the plaintiff an option to join as parties to the same suit all or any of the persons severally or jointly and severally liable, on any one contract, including parties to bills of exchange and promissory notes. There is therefore no mandatory requirement that a drawer of the cheque must be made a party to the proceedings and I reject that argument as well for having no basis.

Furthermore, the 1st respondent at paragraph 4 of their defence admitted having stopped the cheque hence, there was no legitimate expectation for the appellant to go on a fishing expedition to establish who this Citizen Cinema Corporation Ltd was and or why the cheque was issued by them and the 1st defendant/respondent. In addition, the 2nd respondent testified and by his letter dated 18th December 1995 that he stopped the cheque upon discovery that he had been deceived and that the drawer was a company where he was one of the directors. I find no fault in the fact of the respondents paying for the car using a cheque drawn by another company which the 2nd respondent avers was a loan advanced to them. In addition, Section 35 of the Companies Act Cap 486 Laws of Kenya permits any person acting under the authority or a company to make a bill of exchange.

Having found that there was an agreement and therefore an agreement for sale of the car described in Exhibit 1, the next and second question for determination is what were the terms of the said agreement and hence an agreement for sale between the disputing parties herein.

From exhbit 1, the conditions therein are the payment of Sh. 376,754, the purchaser taking possession of the original documents to facilitate clearing of the motor vehicle and meeting all payments towards clearing and registration of the vehicle in Kenya. It should however be noted that at the bottom of the said agreement, the 2nd respondent noted that *"at the time of signing of this agreement there is no payment made to the seller until the deal is completed"* signed 1st December 1995.

In the appellant's own testimony, upon producing this same agreement, an indication that the note was done in his presence and knowledge as there was no evidence of protest, he told the Court as follows, *"he was to make the payment after inspecting the car."* He added that, *"he inspected the car and then gave me a cheque of Sh. 319,800 which was not honoured by the bank."*

The issue here is whether the cheque was issued after or before inspection of the car. The learned magistrate found that "there was no way the sale could be considered complete before the 2nd defendant inspected the car and expressed satisfaction with its condition." The 2nd defendant/respondent's letter dated 18th December 1995 was clear that he cancelled the cheque after inspecting the car and therefore stopped the cheque payment. Assuming the appellant's claim that the 2nd respondent inspected the car before issuing the cheque and therefore cancellation of the deal was in bad faith, the appellant's own exhibit 4, a letter written on 19th December 1995 after receiving the 2nd respondent's letter dated 18th December 2014 states as follows:

"I had accepted the cheque in good faith and you dated it after considering your schedule covering inspection of the vehicle … you had not informed me about the outcome of your inspection of the vehicle of the question of payment or the cheque being stopped … between 1st December and 12th December." Signed G.N. Munyua.

From the above stated letter, it is clear that the cheque was given as a post dated cheque, and before inspection of the motor vehicle. In addition, the appellant was not even aware when the inspection took place so he could not be saying the truth in court when he testified that the 2nd respondent gave the cheque after inspecting the car. I am inclined to accept the learned magistrate's finding that the 2nd respondent was only to make payments after inspecting the car, as this statement came from the appellant's own testimony in chief, and his later statement that the 2nd respondent inspected the car and then gave the cheque was inconsistent with all other relevant facts.

The questions that flows from the above two issues are whether there was consideration and whether the property in the car passed to the respondents. Noting that the 2nd respondent was only expected to effect payment for the car after inspecting it and satisfying himself with its condition, and therefore the cheque having been stopped after inspection of the car and upon finding that the car was not in a good condition, it cannot be said that there was consideration which passed to the appellant from the respondents.

Under Section 3 (1) of the Sale of Goods Act Cap 31 Laws of Kenya,

> ***"a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called a price."***

Pursuant to Section 1a (1) of the said Act,

> ***"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."***

Section 19 (2) of the Act provides that

> ***"for the purposes of ascertaining the intention of the parties regard shall be heard to the terms of the contract, the conduct of the parties and the circumstances of the case."***

The Court's duty is not to redraft contracts for the parties but to enforce the terms as agreed by the parties either expressly or by construing their intentions implied from the contract. In this case, it is clear from the agreement, the correspondences exchanged and the parties testimonies in Court that the deal would be completed only after the 2nd respondent had inspected the car and not otherwise, as that is when, upon satisfying himself with the condition of the car which he had not seen as at the time of signing the agreement, that he would clear the payment of the cheque.

Although the cheque was dated 12th December 1995, it was not presented to the bank until 18th December 1995, the same day that the 2nd respondent wrote a letter to the appellant informing him of his displeasure with the condition of the car. The property in the car would be transferred to the respondents at such time as the parties to the contract intended it to be transferred and that time is after inspection of the car by the respondents and satisfying themselves as to its condition Section 28 of the Sale of Goods Act outlines the duties of seller and buyer. The Act obliges the seller to deliver goods and the buyer to accept and pay for them, in accordance with terms of the contract of sale.

As I have stated earlier, the buyer/respondents could only have been expected to accept the goods after seeing them and inspecting the same, to ascertain their condition. In as much as there were no warranties on the state of the motor vehicle, the fact that the respondents had not seen or even ascertained the condition of the car, and from the appellant's own testimony that payment was to be made after inspecting the car, it is clear that it was expected that the goods would be in a state that the buyer would under the contract be bound to take delivery of them as provided for under Section 6(3) of the Sale of Goods Act. In this case, the respondents could not be expected to take delivery of what they had not seen in the first instance. Albeit there were no warranties in the agreement for sale, it would not be legitimate to expect that the respondents would be compelled to accept delivery of a motor vehicle which they had not seen, with or without any faults. In any event, it should be appreciated that acceptance and delivery go hand in hand in the sense that delivery as defined, under the Act is a voluntary transfer or possession from one person to another. It is not a forceful transfer.

I add that although the quality of goods or the car in question was not provided as a warranty in the sale agreement, nevertheless, it was the respondent's legitimate expectation that they were buying a motor vehicle which had no defects. It has been submitted that the respondent having signed the agreement and accepted the original documents thereof to facilitate clearance, which documents included customs clean report of findings as shown by exhibit No. 6. However, at the bottom of the said *"clean report,"* there is an exclusion clause that:

> ***"the opinion contained in this report of findings does not relieve the importer of responsibility …"***

In addition, at the top of the said report, it is clearly indicated that the document is exclusively for use of Kenyan authorities but does not affect negotiability of the clean report of findings for banking purposes where applicable. In my view, that exhibit was only prima facie evidence that the motor vehicle as exported from its port of origin or shipment UAE to port of discharge and clearance – Mombasa port had been inspected. It was not an absolute proof that the car had no defects and that is the reason for the exclusion clauses, indicating that the clean report of findings were still negotiable for banking purposes. Further, the document does not disclose the condition of the car other than stating the inspection level as 01, its value and other charges. The bill of lading attached thereto is also clear that the car as *"laden on board was in apparent good order and condition unless otherwise stated."* As the appellant had not seen this car himself at the port of Mombasa other than the documents, he had carried from Dubai, he could not state with precision that the car was in good order and condition. This "<u>good order and condition</u>" was not even stated in the agreement for sale. For that reason, the appellant cannot allege that the car had no defects and neither can he compel the respondents to take possession thereof. Under Section 36 of the Sale of Goods Act, the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

In this case, it was clear from the intention of the parties that the buyer never intimated to the seller that he had accepted the car between 1st December and 18th December 1995; for reasons that he had to first inspect it – as admitted by the appellant. Secondly, it is on record that the buyer travelled to Mombasa and spend 4 days trailing at Mombasa port, inspecting the car and moving it to a safe area in the company of a clearing agent introduced to him by the appellant. The 2nd respondent clarified that the car was only moved to the safe area in the company of a clearing agent introduced to him by the appellant, and further clarified that the car was only moved by the said agent from the open yard to the customs yard and this cannot be construed to mean that he had taken possession of the car and or that he had converted it to his own use and enrichment. I therefore reject that assertion by the appellant.

Assuming the 2nd respondent's travel days to Mombasa which fact was not controverted by the appellant, exclusive of the travel days to and from Nairobi, and as we are not told when the respondent travelled to Mombasa upon signing the sale agreement on 1st December, it is this court's view that there was no evidence of any act done to the car by the 2nd respondent that was inconsistent with the ownership of the seller – the appellant; and neither was the period which the buyer took to travel to Mombasa and inspect the vehicle and return unreasonable as to be construed to mean that they had retained the vehicle for their own use. By the very fact that the 2nd respondent stopped the cheque after inspecting the car and finding it unsatisfactory and writing to the appellant formally communicating the rejection thereof within a period of two weeks, in my humble view, was not inordinate and or unreasonable.

I am fortified on this proposition by **Halsbury's Laws of England 4th Edition 2005, Volume 41, paragraph 201**, where, in determining whether what is reasonable time for the rejection of the goods by the buyer, regard is to be heard, it was observed, to the conduct of the seller, as, for example, where he has induced the buyer to prolong the trial of the goods, or has by his silence acquiesced in a further trial, or has threatened the buyer that any rejection will be treated as a breach of contract. Regard is also to be had to the buyer's reasonable attempts to put the goods sold into working order and whether he had had a reasonable opportunity of examining the goods. In the case of **Photo Production Ltd – Vs – Securicor Transport Ltd [1980] AC 827** and **[1980], ALL ER 556** the **House of Lords** held that

> ***"The right of rejection was not lost by retaining a machine for several months while trying to placate the neighbours to whom it was a nuisance."***

The appellant's submissions therefore, that the trial magistrate's findings on the respondent's failure to accept the car was erroneous has in my view, no legal basis. No single law or authority was cited in support of that blank submission. To have expected the respondents to procure an inspection report to prove the defects on the car would amount to shifting the burden of proof contrary to Section 107 and 108 of the Evidence Act that he who alleges must prove. It was the appellant who alleged that there were no defects to the car warranting rejection by the buyer. He relied on documents which he had which include a bill of lading and clean report of findings which I have carefully examined and discounted on the basis that the two documents were not certificates of inspection and as they had exclusion clauses on the condition of the car.

It was therefore incumbent upon the appellant who was aggrieved by the respondent's rejection of the car to provide a fresh certificate of inspection to prove that there were no such mentioned defects warranting a rejection. In as much as there no warranties or exclusion clauses in the written agreement touching on the precise condition of the car, which agreement was not drafted by legal experts, from the conduct and intention of the parties as shown by their testimonies in court and the subsequent correspondences produced, it can be inferred that they intended to have the car's condition determined before the sale is sealed. This is also witnessed by the footnote on exhibit 1 produced the appellant herein. There is no indication from the conduct and intention of the parties that payment was to be effected first before inspection and acceptance of the car irrespective of its condition. In **Perians – Vs – Bell [1893]19B 193CA**, reported in **Halsbury's Laws of England, 4th Edition Vol 41** from paragraph 196, it was held that,

> ***"the question whether the buyer has accepted the goods arises only where the buyer was a***

right to reject the said goods."

Thus, unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request, to afford the buyer a reasonable opportunity of examining the goods for purposes of ascertaining whether they are in conformity with the contract or the intention of the parties as can be implied from the contract of by their conduct.

On the contention that the buyers had taken possession and since they were still in possession of the car, they were liable to pay for it, it is worth noting that under Section 37 of the Sale of Goods Act, the buyer of goods is not bound to return rejected goods. It is sufficient if he intimates to the seller that he refuses to accept them. The respondent herein having notified the appellant that after inspection of the car, they found it unsatisfactory and that they had rejected it and went further to stop payment of the cheque, was sufficient notification. And even if they were in possession thereof which argument I have rejected, as I have stated before, possession thereof is not acceptance. I am further enjoined to accept the holding by **Hon. Justice G.V. Odunga** in **Sylvester Momanyi Mambe – Vs – Gulzar Ahmed Motors and Another [2012] eKLR** that property in goods passes when a contract is made unless the contract is conditional or unless a contrary intention is manifested by the parties to the contract. In this case, the contrary intention is manifested in the evidence adduced in Court, the documents produced and the conduct of the parties that the sale would be deemed completed only after the car is inspected by the buyers.

Section 35 (1) of the Sale of Goods Act provides that:

> ***"where goods are delivered to the buyer which he has not previously examined – then, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."***

In this case, the appellant having stated that payment was to be made after inspection, and noting that the respondents were not the importers of the car, and even if they were, in **Bragg – Vs – Villanova (1923) 4 TLR 154, DC**, it was held that in an full on board contract, the buyer does not lose his right of rejection because he does not inspect the goods until the arrival of the ship at its destination.

I am persuaded that the above cited decisions are good law and therefore applicable in the circumstances of this case and consequently, I hold that the appellant cannot be allowed to rely on the clean report of findings and bill of lading to allege that the motor vehicle was free from any defects and that therefore the rejection thereof by the respondent was not in goods faith.

It is my finding that the trial magistrate was therefore right/correct in finding and holding that the property in the car did not pass to the respondent before inspection and acceptance thereof.

On when the payment was due to the appellant, it is undisputed fact that the respondents issued the appellant with a post-dated cheque for 12th December 1995. The contract was signed on 1st December 1995. The said cheque was however not mentioned in the sale agreement. The Court is therefore left asking the question ;- how would "*the deal be deemed to be complete when the two parties append their respective signatures to the agreement on the date shown against the signatures,*" without mentioning payment which had not even been effected by then? This is not to say that the post-dated cheque is not payment. It is to say that as at that time, no payment had been made and there was not even any reference to any future payment.

Section 12 (1) of the Sale of Goods Act stipulates that the time of payment stipulations are not deemed to be of essence on a contract of sale. In addition, Section 13 (1) of the Bills of Exchange Act Cap 27 Laws of Kenya stipulates that a bill is not invalid by reason only that it is ante-dated or post dated or it bears a date on Sunday. However, Section 12(1) of the Sale of Goods Act has to be read with Section 18 thereof which provides that no property passes in the agreement for sale of unascertained goods or are transferred to the buyer until the goods are ascertained.

Further, the import of Section 29 of the sale of Goods Act is that as a general rule, unless it is otherwise agreed, the price of the goods is not payable unless and until the property in them has passed to the buyer. And where the delivery of the goods is part of the consideration for, or a condition precedent to, payment, they must have been delivered unless delivery has been exercised. The condition concurrent under Section 29 is in my view, also a promise.

This is not to say that the price may not be made payable before delivery and acceptance in which case refund or damages may be sought. It is that the conduct of the parties to the dispute herein and their intentions point to the fact that the payment would only be effected after inspection and acceptance of the condition of the car by the buyer- respondent. It cannot; therefore, be inconsistently construed by the appellant that the deal was finalized from the date the cheque became due and payable when the agreement itself states that the deal was completed on 1st December 1995 upon the parties appending their signatures on the agreement! Since the price had been fixed by the parties, what remained was the payment.

And where no time or mode of payment is provided for by the contract like in this instant case, the course of dealings negatives the implication of law that payment and delivery are concurrent.

The upshot of all the above analysis and evaluation is that I find no merit in the appeal herein and I accordingly dismiss the same on all the 7 grounds field with costs to the respondents. I uphold the learned magistrate's findings and decision dismissing the appellant's suit in the lower Court with costs. The respondent shall have both costs of the Subordinate Court and of this appeal.

Dated, signed and delivered at Nairobi this 21st Day of October, 2014.

R.E. ABURILI

JUDGE