



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 76 OF 2009

JOSEPH WAMBUGU MURIITHI.....APPELLANT

Versus

NYERI MOTORS SERVICES LTD.....RESPONDENT

(appeal arising from the judgment of E.J. Osoro Senior

Resident Magistrate in Nyeri Civil Case No. 484 of 2007)

JUDGMENT

1. This is an appeal from the judgment of E.J. Osoro the Senior Resident Magistrate in Nyeri civil case no. 484 of 2007
2. The Appellant filed suit against the Respondent in the Chief Magistrate's court by a plaint dated 2nd August 2007 and for the purpose of this judgment pleaded as follows:
 9. *On or about the 28th October 2006 the plaintiff traded in the same motor vehicle reg. No. KAT 952Q with the Defendant at an agreed sum of Kshs. 3,9000,000/-*
 10. *The Defendant was to recover any amount under the agreement dated 30th September 2005 and hand over the balance to the plaintiff.*
 11. *The Defendant in consideration of earlier payment schedule gave the plaintiff a credit vide credit note of Ksh. 150,000/-*
 12. *The credit balance upon the buying back of the plaintiff truck by the Defendant was Ksh. 2,302,864 of which the plaintiff received Ksh. 2,000,000/- leaving a balance of Ksh. 302,864/-.*
1. The Respondent filed a defence wherein the same denied owing the Appellant the said sum of money.
2. Upon the said pleadings being closed the matter proceeded for hearing and the trial court found that there was no nexus between the claim herein and the credit note produced as Pex 5 since it had no reference to the transaction relating to motor vehicle Reg. No. KAT 952 Q she therefore entered judgment to the Appellant for Kshs. 152,864/- plus cost.
3. Being aggrieved by the said decision the Appellant filed the appeal and raised the following grounds of appeal.
 1. *That learned trial magistrate erred in fact and in law in failing to appreciate that the Respondent had given the Appellant a credit note of Kshs. 150,000/- on account of early repayment which sum ought to have been awarded as part of his claim as the same had not been*

paid to him or taken into account.

2. *That learned trial magistrate erred in fact and in law in making a finding that the Ksh. 150,000/- was not associated with the cause of action in this case.*
3. *The learned trial magistrate erred in fact and in law in failing to award interest from the date of filing the claim when the same was all along a liquidated claim.*
4. *The learned trial magistrate erred in law in failing to properly analyse the evidence therein thereby arriving at a wrong conclusion.*

1. Directions were given that this appeal be heard by way of written submissions which were subsequently filed and on 18th February 2013 the advocate for the parties appeared before me and highlighted the said submissions.
2. It was submitted by Mr. Nderi for the Appellant that it was agreed on 27th September 2006 that the Respondent will repossess (buy back) the motor vehicle at Ksh. 3.9 million and gave the Appellant credit note of Ksh. 150,000/- in respect of interest on earlier repayment.
3. It was submitted by Mr. Midikira for the Respondent that it is true the Appellant was given credit note of Ksh. 150,000/- and that on 28th October 2006 the purchase price of the motor vehicle was Ksh. 3.9 million and the amount outstanding to be paid was Ksh. 1747136/-.
4. It was submitted that the difference between the price of the motor vehicle and the outstanding balance was Ksh. 2,152,864 of which the Respondent paid Ksh. 2,000,000/- leaving a balance of Ksh. 152,864/- awarded by the court.
5. It was further submitted that with time the Appellant and the Respondent agreed to waive the interest which was Ksh. 150,000/- thus the credit note and that the outstanding amount of Ksh. 302,864 was to go towards fixing of the tipping system. The only issue for determination on this appeal is how to treat the credit note of Ksh. 150,000/-.
6. It was the Appellants evidence before the trial court that the Respondent agreed to buy the motor vehicle at Ksh. 3.9 million and they gave him credit note dated 28th October 2006 for the said amount. The Respondent also agreed to refund the interest for a period of 10 months from which he was given a credit note of Ksh. 150,000/- produced as Pex 5 after purchase of the said motor vehicle at Ksh 3.9 million he was paid Ksh. 2,000,000/- leaving a balance of Ksh. 1.9 million plus Ksh. 150,000/- credit note making a balance thereof of Ksh. 2050,000/-.
7. That at the same time he was owing Ksh.1,747,136 leaving a balance of Ksh. 308,864/-.
8. D.W.1 Ahmed Omar testified that the Appellant signed a chattel mortgage for Kshs. 3.264 million for the payment for the body and cabin plus the motor vehicle at Ksh. 2.7 million plus interest at 18% p.a. With payment of Kshs. 136,000/- per month for 24 months.
9. He further testified that as at 27th September 2006 the Appellant owed the Respondent 1,747,736 and the motor vehicle was purchased at Ksh. 3.9 million shillings and the Appellant paid Ksh. 2 million. He was given a credit note of Ksh. 150,000/- interest.
10. It is therefore clear to my mind based upon the evidence presented before the trial court that the Appellant was entitled to a credit note of Ksh. 150,000/- and therefore by failing to award the Appellant the said Ksh. 150,000/- the trial court fell into error.
11. I do not agree with submission by the Respondent that the credit note of Ksh. 150,000/= had been taken into account when the Appellant was being paid Ksh. 2,000,000/- as this is not supported by the Respondents evidence.
12. The Respondent under cross examination stated that:

“It is true I gave the plaintiff credit note of Ksh. 3.9 million pex A specifically identified. I also gave the plaintiff credit balance of Ksh. 150,000/- vide pex B which I duly signed.”

“as at 27th September 2006 the plaintiff owed Nyeri Motors Ksh. 1,747,736 we purchased the plaintiffs vehicle at 3.9 million shillings and paid him Ksh. 2,000,000/- million. He was given a credit note of Ksh. 150,000/- interest. The rest was utilized for the tipping system.”

13. I therefore find as a fact that the Ksh. 150,000/- credit note was to cover interest or earlier payments and the Appellant was therefore entitled to the same having proved the same during the trial. There was not evidence presented by the Respondent to support their submission that Ksh. 150,000 credit note was on account of tipping system.
14. On the issue of interest the sum being liquidated I hereby order that the Respondent pay interest on the same from the date of filing suit.
15. The Appellant shall also be entitled to the cost of this appeal.

Dated and delivered at Nyeri this 26th day of September 2013.

J. WAKIAGA

JUDGE

26/9/2013

Before Hon. Justice J. Wakiaga - Judge

Court clerk - Wanjohi

Mr. Mugo for Mr. Nderi for the Appellant

No appearance by the Respondent.

Court:

Judgment read in open court in the presence of the above named and in the absence of the respondent's advocate.

J. WAKIAGA

JUDGE