



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 23 of 2002

DAVID MUNYUA NGOTHO.....APPELLANT

VERSUS

WILSON OCHIENG' ONGWACH.....RESPONDENT

(An appeal from the Judgment of the Kapsabet Principal magistrate Mr. F. Mabele in Civil Case No. 99 of 2001)

JUDGMENT

Though a Plaintiff presented to the Principal Magistrates court at Kapsabet the Appellant sued the Respondent for a sum of Kshs. 80,000/= being the balance of purchase price of motor vehicle KAH 954A. The Respondent filed a Defence denying liability and contending that the Appellant had no documents of title to the motor vehicle and further that Kenya Revenue Authority had impounded the vehicle and that he could not complete because the Appellant was not in a position to complete the sale. The case was heard before Honourable Magistrate F .A. Mabele who in a judgment delivered on 7th March 2002 dismissed the Appellant's suit. This prompted the Appellant to file a Memorandum of Appeal on 26th March 2002 and an Amended Memorandum dated 22nd October 2002. The Appellant contends that:

- 1. The learned Principal Magistrate erred in law and in fact by dismissing the Appellant's suit despite overwhelming evidence against the Respondent.**
- 2. The learned Principal Magistrate erred in law and in fact in arriving at a judgment which was not conclusive as to the ownership of the subject motor vehicle and the balance of the purchase consideration.**
- 3. The learned Principal Magistrate erred in law and in fact in shifting the blame of breaching the contract to the Appellant.**
- 4. The learned Principal Magistrate erred in fact and in law by believing the evidence of the Respondent yet it is him who frustrated the contract.**
- 5. The learned Principal Magistrate erred in law and in fact in not taking into account the background information in his judgment.**
- 6. The learned Principal Magistrate erred in law and in fact in arriving at the decision that the learned counsel for the Respondent had a valid practicing certificate as at the date of signing the Defence and conducting the suit.**

The Appellant prayed for the judgment of the trial court to be set aside and be substituted with judgment in his favour for the sum of Kshs. 80,000/= together with costs.

The appeal was orally prosecuted before me by counsel for the Appellant on 24th July 2007. The date had been fixed by consent and counsel for the Respondent did not attend neither did the Respondent. The gist of the Appellant's grounds 1 to 5 was that the trial magistrate misapprehended the evidence and reached wrong conclusions on the merits of the Appellants claim. That the Respondent had admitted that the sum was owing. That the trial magistrate misdirected himself by holding that the Appellant had no clean title. It was argued that the advocate who signed the Defence did not have practicing certificate. That this was fatal.

I have considered the submissions of counsel the evidence and pleadings. The claim of the Appellant was in respect of Sale of Goods. The Appellant had sold a motor vehicle KAH 954A. to the Respondent for a sum of Kshs. 330,000/=. The Respondent paid a deposit of Kshs. 250,000/= in cash and the balance was to be paid at the end of May 2000. The Respondent's testimony was that on 26/4/2000 the motor vehicle was impounded by KRA people at Kisumu. Currently the motor vehicle is at Ugunja Police station. He cannot have the motor vehicle retrieved because it was still in the Appellant's name. Exhibit 3 authorized the motor vehicle to be released to the Appellant and not anyone else. The Appellant had not made any attempt to retrieve the motor vehicle from Ugunja. The Appellant in his testimony stated that he had the log book when he was selling but he did not give it to the Respondent because the Respondent had not cleared the purchase price. On cross examination he stated that the log book was taken by Customs people. He does not have the log book. The clearance letter from KRA that he got was not after two weeks. He confirmed that he letter of clearance was addressed to him and it required him to go to Ugunja to collect the motor vehicle upon proper identification. He has not gone to collect it because it was not his. That he sold it to the Respondent. That he bought the motor vehicle from Japan. The papers were not before court. That he has many vehicles still with Customs.

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, Cap 36 Laws of Kenya 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 quite 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 before or at the time when the Contract is made.**

Section 19 on the 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 the 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.**

From the evidence on record I am satisfied that the trial magistrate was right in concluding that the Appellant had no clean title to the motor vehicle. The Appellant admitted that he did not have the log book; the log book was with Customs. Why would Customs detain his log book if at all he had cleared

