



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL APPEAL NO. 141 OF 2010

PETER WAIKWA NJAGIAPPELLANT

-VERSUS -

OMAR ALI SHAHBALRESPONDENT

(Being an appeal from the Ruling of Senior Resident Magistrate Mr. Kizito dated 8th July, 2010 in Civil Case No. 848 of 2010 at Mombasa Law Courts)

JUDGMENT

The plaintiff/respondent had moved the Senior Resident Magistrate's Court with an application by Chamber Summons dated **6th April, 2010**, the outstanding prayer of which was as follows:

“That mandatory injunctions do issue restraining the defendant by himself, servants, workmen or agents, or otherwise howsoever, from selling, transferring and/or taking possession of Motor Vehicle [Reg. No.] KBE 012M, Mitsubishi Fuso Fighter Lorry from the plaintiff using unorthodox and unlawful means and to stop interfering with the plaintiff's possession of the suit [motor] vehicle pending the hearing and determination of this suit”.

The learned Magistrate thus recorded his findings and determination:

“I have carefully considered the application together with the affidavits and the annexures. I have also considered the written submissions filed herein by the learned [counsel] for the parties.....It is not in dispute that the plaintiff/applicant has already paid the defendant/respondent a sum of Kshs. 1,050,000/= for the said motor vehicle. It is also not in dispute that the balance of the purchase price for the said motor vehicle which is outstanding and due from the plaintiff/applicant to the defendant/respondent is Kshs. 350,000/=. It is also clear from the plaintiff's annexure ‘OAS – 1’ which is also the defendant's annexure ‘PWN – 2’ that no repossession clause was inserted in it. The fact that no repossession clause was inserted.....implies that the defendant's intention was to let the plaintiff enjoy quiet possession of the said motor vehicle without any threat of repossession. My view is that parties are bound by the agreements that they make or enter into. The defendant's action in repossessing the said motor vehicle from the plaintiff.....was therefore.....unlawful. I, therefore, find that the plaintiff....has shown that he has a prima facie case with [a] probability of success against the defendant....There is also no evidence on record to show that the defendant....can pay damages to the

plaintiff.....[if the plaintiff's] suit succeeds against him. I [am] also of the view that the balance of convenience is in favour of the plaintiff..... as [no] hardship would be occasioned to the defendant.....if an order of injunction issues herein since the plaintiff.....is ready and willing to settle the balance of the purchase price for the said motor vehicle [which] now stands at Kshs.350,000/=.

“From the foregoing, it is clear that the plaintiff...has satisfied the conditions required for the grant of an interlocutory injunction. The application must, therefore, succeed.”

The defendant, who was aggrieved, promptly filed a memorandum of appeal, on the basis of the following grounds:

- (i) *the suit property was beyond the Court's pecuniary jurisdiction;*
- (ii) *the learned Magistrate erred in law and fact in finding that the respondent had made a case with a probability of success;*
- (iii) *the learned Magistrate erred in law and fact, in finding that the appellant would not be in a position to compensate the plaintiff by paying damages;*
- (iv) *the learned Magistrate erred in law and fact, “in attempting to redraw an agreement between the appellant and the respondent”;*
- (v) *the learned Magistrate erred in law and fact in failing to note that “the suit motor vehicle belongs to the appellant and that, until the appellant executes a transfer over the same, it was his property and [he]cannot be forced to part with it”;*
- (vi) *the learned Magistrate erred in law and fact in ignoring the express provision of the agreement that the property in the motor vehicle shall not pass till payment in full.*

Learned counsel, **Mr. Magolo** argued, as the nub of the appeal case, that “the effect of the Magistrate's Court's Order is to deprive the appellant of his property and place it in the hands of the respondent who may vandalise it, misuse it, cause an accident with it or lose it altogether [and that] is clearly a demonstration of substantial loss likely to be suffered”.

Raised, however, only as a second-rank grievance – and this is surprising – is the question of **jurisdiction**. The contention is that the jurisdictional question had been the first issue placed before the trial Magistrate; and that the matter was raised in these terms:

“The suit property is the motor vehicle registration number KBE 012M whose value is agreed...to be kshs. 1.4 million.

“This, we submit, is the value that should determine jurisdiction, and not Kshs. 350,000/= which is simply said to be the unpaid balance. In fact the orders sought are with regard to the whole [motor] vehicle and nothing else”.

Counsel submitted that there was an agreement for the sale of the subject motor vehicle, but the respondent has not complied with the terms of the agreement – and so the appellant has “moved to take his vehicle back”. It was counsel's contention that the respondent's plea before the trial Magistrate amounts to asking the Court to change the terms of the agreement between the parties. Counsel invoked the terms of clause 6 of the agreement, which reads:

“(a) The property in the vehicle sold shall pass to the purchaser upon payment of the full purchase price.

“(b) The Vendor shall release the original log book to the purchaser upon payment of the full purchase price”.

On that basis, **Mr. Magolo** urged that “the intention of the parties was therefore very clear, that ***until it is paid for in full the motor vehicle shall be the property of the Appellant***”.

Although counsel does not refer to any express authority allowing the appellant to **repossess**, he suggests that repossession was **implied**; he urges: “*The respondent is therefore mistaken when he argues that there did not exist a repossession clause*”.

Counsel suggests, besides, that such a construction which imports a repossession clause, is what will give justice in the instant case; he contends: “To assist a party who has unilaterally decided not to pay for a property is unjust”. Counsel confines the respondent’s deserts to “*[choosing] to seek a refund of the part-payment made*”.

But learned counsel, **Mr. Malombo** for the respondent, perceived these issues differently.

Relying on the terms of Order **XLI**, rule 4(1), counsel submitted that the appellant ought to satisfy the Court that he will suffer substantial loss if stay of execution of the trial Court’s orders is not granted – but that this requirement had not been fulfilled, and even in the affidavit evidence, the appellant nowhere deponed that he would suffer substantial loss. Counsel urged that the appellant had also not provided any security against such loss as the respondent stood to suffer if stay of execution of the Court orders was granted.

Counsel submitted that the appellant’s application by Notice of Motion of **9th July, 2010** which was lodged at the same time as the appeal, relied on Order **XLI**, rules 4 and 6 as the basis for the main prayer: “**THAT** this Court be pleased to order stay of execution of the Ruling and Order of the Senior Resident Magistrate given on **8th [July], 2010** pending the determination of this appeal”. Counsel submitted that the case law did not favour the appellant’s position; in **Barclays Bank of Kenya Limited v. Sayani and Another** [1997] LLR96 (CCK), **Otieno, J** (as he then was) held:

“The main legal requirement to be considered at this juncture is whether the applicant before one will suffer substantial loss if the execution proceeds. Of course I have also to consider whether the appeal to be preferred.....stands overwhelming chances of success.....”

Another relevant case is **Zablon Mwaluma Kadori v. National Cereals and Produce Board**, Mombasa HCCC No. 152 of 1997, in which **Njagi, J** thus stated:

“I therefore find that the applicants have not complied with O. XLI, rule 4(2) and that alone is fatal to their application. The applicants have also not satisfied the requirements of O. XLI 4(2)(c) as to security.....The application for stay of execution is accordingly dismissed with costs.”

Counsel contested the appellant’s grievance based on jurisdiction; s.16 of the Civil Procedure Act (Cap. 21, Laws of Kenya) makes provisions regarding objections to jurisdiction, as follows:

“No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice”.

Although that provision is concerned with “place of suing”, rather than with the Court of filing suit, as it stands in the hierarchy, **Mr. Malombo** submitted that the appellant not allowed to raise the point.

It is not disputed that the parties herein entered into an agreement on **3rd February, 2010** for the sale to the respondent of the lorry, Mitsubishi Fuso Fighter Registration No. KBE 012M, and that, under that agreement, the respondent has paid the entire price but Kshs. 350,000, out of the agreed total of Kshs. 1,400,000/=. Thus, what was owing when the respondent herein filed his suit of **6th April, 2010** was only the sum of **Kshs. 350,000/=**. By that suit, the respondent herein sought a declaration that he was the beneficial owner of the subject motor vehicle; and sought injunctions against the appellant attempting to repossess the same; these are the very prayers that were reflected in the plaintiff’s application of **6th**

April, 2010 which has led to the instant appeal.

Is the learned Magistrate's ruling correct, in point of law, and is it to be sustained?

First, there is the jurisdictional point: did the Court have jurisdiction to entertain this matter, which was about one lorry, and a lorry which, treated as a unit for all purposes, had a value of Kshs 1.4 million?

The differing positions of counsel on this question, if viewed in the proper context, must, in my opinion, lead to an acknowledgment that the real dispute is in respect of **Kshs. 350,000/=**. The appellant has not contended that the learned Magistrate lacked jurisdiction in respect of that amount of money.

The agreement of **3rd February, 2010** was a normal commercial agreement in respect of **a sale item**, namely the subject lorry, Mitsubishi Fuso Fighter Reg. No. KBE 012M. I have not heard it claimed that the said lorry was by any chance a unique artistic contraption with peculiar sentimental value; all the appellant wanted for it was **money**, the overwhelming bulk of which, it is common cause, had already been paid by the respondent herein.

It is not a correct argument in law, therefore, that the **full value** of the lorry was still owing and that, this is what should determine the trial Court's **jurisdiction**.

From that very fact, it follows that a right of repossession cannot be **inferred** from an agreement that did not provide expressly for it.

The task of the Court, in all situations in which parties come along who are bound by agreement, is to give fulfilment to the **intent of the parties**, so far as this can be read from the terms of the contract: and I hold that this intent was to hand over possession of the subject lorry to the respondent herein; the respondent paid the bulk of the purchase price; the respondent became the **beneficial owner**; the respondent became the **possessory owner**.

Possessory ownership is a **de facto** status of great significance in law. To the innocent by-stander, the possessor **is** the owner; and therefore, in the absence of an unambiguous contractual provision to the contrary, the Court has an obligation, firstly under the principle of **legitimate expectations**, and secondly under the notion of **decency in the public view**, to uphold the possessory status.

These fundamental principles inevitably lead to a rejection of all the grounds of appeal herein; and to an upholding of the decision and orders of the learned Magistrate rendered on **8th July, 2010**.

The appeal is dismissed with costs to the respondent.

Decree accordingly.

DATED and DELIVERED at MOMBASA this 13th day of May, 2011.

.....
J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellant: *Mr. Magolo*

For the Respondent: *Mr. Malombo*