



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU Civil Appeal 55 of 2008

NEMESIONS NGECHU MWAI.....APPELLANT
VERSUS

JULIUS NJARAMBA IRUNGU.....RESPONDENT

R U L I N G

On 13.06.05, the parties herein entered into an agreement of sale in respect of motor vehicle Reg. No. KNP 455. The sale price was 45,000/=. Forty Thousand was paid upon execution of the said sale agreement. The balance of KShs.5,000 was paid and acknowledged later on 14.03.06 by the Respondent who was the seller.

According to the information contained in the agreement of sale which was produced before the trial court as exhibit, the Chassis No. of the motor vehicle was B310-009759.

Engine No. was 308729D.

The colour was BLUE.

The log book was not available but was supposed to be availed on or before 28.02.06. According to a further agreement dated 9.12.05 (PEXh3) failure by the Respondent herein to produce the log book would result in the Respondent refunding the purchase price plus interest which was to be paid at the rate of 50% plus any cost incurred on repairing the motor vehicle. The log book was not availed to the Appellant as per this agreement but on 14.03.06, the parties added an addendum to their agreement of 9.12.05 whereby the Appellant received 10,000Sh. from the Respondent which money was to be used to process the duplicate log book. The addendum also stated that ***“The agreement of 9th December 2005 on the above is null and void”***.

This, as correctly interpreted by the learned trial magistrate meant that the earlier agreement of 9.12.05 was nullified by both parties.

It is not difficult to understand their intentions to that effect because the agreement of 9.12.05 was based purely on the condition that the Respondent was to avail the log book to the Appellant on a given day. The penalty of 50% interest was pegged on the eventuality of the Respondent failing to procure the log book. Now that the Appellant took over the responsibility of procuring the duplicate log book and was facilitated to do so with the 10,000 Sh., the default clauses would not arise.

The Appellant went ahead and procured the duplicate log book and the transaction appears to have been completed. On 2.07.06 however the said motor vehicle was impounded by the police for reasons that the chassis in the motor vehicle had been stolen from another motor vehicle registration No. KDZ 647. The same was therefore taken away from the Appellant. These are the circumstances that caused

him to file the suit before the Resident Magistrate at Wanguru Court claiming a refund of the purchase price, 50,000 Sh. incurred in repairing the motor vehicle, legal costs of 2,800 Sh. and the interest of 50% per annum as provided in the agreement dated 9.12.05.

In his statement of defence dated 21.08.06 the defendant/Respondent admitted the transaction of sale. He nonetheless in paragraph 7 of the defence reiterated that the subsequent agreement of 9.12.05 had been nullified by the agreement of 14.03.06. He further stated that the motor vehicle was impounded while in the hands of the plaintiff/Appellant and he was not therefore responsible for it. He urged the court to dismiss the suit with costs.

After hearing the parties, the learned trial magistrate rendered his judgment on 13.05.08 dismissing the suit with costs. Being aggrieved by the said dismissal, the plaintiff filed this Appeal. He proffered 6 grounds as hereunder.

- 1. The trial magistrate erred in law and fact in failing to appreciate that the Respondent herein did not have good title to motor vehicle registration Number KNP 455 Datsun Saloon, capable of being transferred to the Appellant vide sale agreement dated 13.06.2005 and the subsequent agreement thereof.***
- 2. The trial magistrate erred in law and act in holding that the sale agreement dated the 13.06.2005 was nullified by subsequent agreement yet it was the basis the contract between the plaintiff and the defendant.***
- 3. The trial magistrate erred in law and fact in failing to appreciate that ownership of motor vehicle registration number KNP 455 Datsun Saloon was the subject of criminal investigations and another civil suit between third parties.***
- 4. The trial magistrate erred in law and fact in failing to appreciate that the defendant did not have a log book for motor vehicle registration number KNP 455 Datsun Saloon and that the said motor vehicle was sold when titled with a stolen chassis.***
- 5. The trial magistrate erred in law and facts in not awarding the plaintiff refund of the purchase price and repair costs as prayed for in the plaint dated 31.07.2006.***
- 6. The trial magistrate erred in law and facts in considering extraneous factors and totally disregarding the issues in dispute particularly the defendant's ownership of motor vehicle registration number KNP 455 Datsun Saloon.***

He has asked the court to set aside the lower court's judgment and in its place enter judgment in favour of the plaintiff as prayed in the plaint. The appeal proceeded by way of written submissions. Counsel for the Appellant filed his submissions on 12.11.09 but in spite of several adjournments, counsel for the Respondent did not file his submissions.

I have carefully considered the evidence adduced before the trial court as expected of me as a 1st Appellate court. I have also considered the grounds of appeal herein and the said submissions. To start with, it is not disputed that the particulars of the motor vehicle which is the subject of this Appeal as indicated in the Sale Agreement were different from the ones in the log book. Although it was indicated that the Appellant was given a photocopy of the logbook, the said photocopy was never availed as exhibit in the trial court to confirm if indeed it had the same details as the duplicate. It could have been different because if it was the same, then this would have raised the Appellant's suspicions that all was not right.

The sale agreement was the basis of the transaction. The assumption would be that the details indicated on that document would be same ones as those in the log book. In this case, they were not. No explanation was given before the trial court or by way of submissions in this Appeal as to why these particulars did not tally.

It was the seller's responsibility to ensure that he had a clean title to the property he was selling to the buyer. In this case, the Respondent did not avail the log book to the Appellant as at the time of the sale to enable him confirm that the details on the motor vehicle were the same. There is no clause in the said agreement indicating that the sale of the motor vehicle was on "AS IS" basis. If that were the case, the Respondent would have been absolved of the responsibility to ensure that the details of the motor vehicle were backed up by the log book.

It is clear to me that even as at the time the Respondent sold the motor vehicle to the Appellant, he knew very well that the engine number and chassis number on the log book were different from those in the motor vehicle itself. He cannot be allowed to get away with it just because the Appellant had already taken possession of the motor vehicle by the time it was impounded. He took the Appellants money but he sold him a motor vehicle which turned out to have some components which were stolen. He cannot wriggle himself out of that responsibility.

The fact that the parties rescinded or nullified the Agreement of 9.12.05 had nothing to do with the original sale agreement. All they nullified were the terms on payment of the 2,800 legal fees, the deadline for the production of the log book and also the terms stipulating that the failure to avail the log book would attract a penalty of 50% interest on the purchase price.

That nullification could not and did not affect the sale itself and the implied or constructive condition that the seller had good Title to pass to the buyer. That is an implicit condition in any sale agreement basically because one cannot pass Title to another if he has no title to the property in question in the first place.

The learned trial magistrate did therefore err in law and fact when he made the finding that the parties had nullified the sale agreement.

Grounds 1, 2, 4, and 5 of the Appeal have been proved and they must therefore carry the day. The judgment of the learned trial magistrate amounted to a miscarriage of justice which this court has the responsibility to mend.

This Appeal must therefore succeed. The same is hereby allowed. The judgment of the learned trial magistrate dated 13.05.08 is hereby set aside. In its place, the court enters judgment for the plaintiff/Appellant as against the defendant/Respondent for refund the Sh.45,000 purchase price which was acknowledged in the original Agreement dated 3.06.05 with interest thereon at court rates. The Appellant is also awarded the costs of the suit in the subordinate court and in this court plus interest thereon at court rates. It is so ordered.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 21st day of July 2010.

In presence of:- Mr. Gachugi for Mr. Kiama for Appellant and the Appellant.