REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 21 of 2001

SYMON MAINA MUKIRI …….…….…… APPELLLANT

Versus

JOSEPH MATHENGE NDERITU …..……1ST RESPONDENT

WILSON GITHINJI ……..……..…2ND RESPONDENT

(Being an appeal from the judgment and orders of S. M. KIBUNJA, Senior Resident Magistrate in the Senior Resident Magistrate's Civil Case No. 79 of 1998 at NANYUKI)

JUDGMENT

At Senior Resident Magistrate's Court Nanyuki the first respondent filed an action against the appellant and the second respondent. The first respondent in this appeal was the plaintiff in the lower court. The second respondent was first defendant and the second defendant is now the appellant. The plaintiff sued the defendant for a sum of Kshs. 90,000. In the plaint he pleaded that he sold a motorvehicle registration number KAB 817C Nissan Urvan to the first defendant for Kshs. 300,000. First defendant paid 210,000 leaving a balance of Kshs. 90,000. When the plaintiff followed the issue of that balance it transpired that the vehicle had indeed been purchased by the 2nd defendant through the first defendant. When this was revealed an agreement was drawn dated 7th September 1998 whereby the first defendant undertook to pay the plaintiff Kshs. 40,000 and 2nd defendant undertook to pay Kshs. 50,000. Those payments were due to be made on 31st October 1998. It was pleaded that by the time the case was filed in the lower court neither of the defendants had made payments. The first defendant filed a defence denying indebtedness to the plaintiff. He alleged the agreement whereby they undertook to make payments was done under duress. The first defendant admitted owing the plaintiff Kshs. 50,000. When the case came for hearing the plaintiff stated that first defendant agreed to buy the vehicle for Kshs. 300,000. The agreement was captured in a written agreement dated 24th January 1997. The first defendant took to the plaintiff Kshs. 250,000 but requested to retain Kshs. 40,000. This was to enable him to buy tyres and insurance for the vehicle. It later transpired when the plaintiff demanded the balance of the purchase price that he realized the vehicle was purchased by the second defendant. The second defendant denied that he had authorized the first defendant to deduct Kshs. 40,000. The plaintiff acknowledged that the second agreement provided that the first defendant was to pay him Kshs. 40,000 and the second defendant Kshs. 50,000. In his defendant the first defendant stated that he had been requested by the 2nd defendant to buy for him the vehicle. The second defendant gave him Kshs. 250,000 but he only paid to the plaintiff Kshs. 210,000 the difference being used to buy tyres and insurance cover. He said that the second defendant did also request him to have the vehicle inspected. The first defendant said that he only signed the second

agreement under duress. That it was done at a police station and he was threatened that if he did not sign it he would be arrested. The second defendant said that he met the first defendant through a lady called Elizabeth Wambui. It was agreed that he would assist him to buy a vehicle. On 22nd January 1998 the plaintiff and the first defendant brought to him the subject motor vehicle which was mechanically sound. The price was agreed at Kshs. 300,000. He gave the first defendant Kshs. 250,000 to take to the plaintiff. The first defendant informed him that the payment was acceptable to the plaintiff and he gave him the log book. He thereafter took the vehicle and the first defendant assisted him to have the vehicle inspected but he made the payment for the inspection personally. The tyres of the vehicle were in good condition. He released the log book at a later stage to the first defendant who promised to have the vehicle admitted in the Nairobi route. Later the plaintiff threatened to transfer the vehicle to the first defendant. It was then that he reported the matter to the police. Following that report an agreement was entered into between the plaintiff, first defendant and himself. In that agreement he admitted owing the plaintiff kshs. 50,000. The learned magistrate in his considered judgment upheld the second agreement where the defendants had acknowledged their indebtedness to the plaintiff. The magistrate found that there was no evidence to support the first defendant's contention that he had the authority of the 2nd defendant to deduct Kshs. 40,000. In his judgment the magistrate stated thus:-

"1st defendant was to pay Kshs.40,000 and 2nd defendant Kshs.50,000 to the plaintiff under the agreement. The parties must be held by the express terms of their agreement which clearly shows both defendants are liable to the plaintiff to the tune of 90,000, costs and interest and the plaintiff prayer is against both defendants jointly and severally. I believe he phrased his prayer in that form as he took 1st defendant as an agent of the 2nd defendant which I wholly agree with.

I find the plaintiff has established his case against both defendant on a balance of probabilities and judgment is entered for plaintiff against both defendants jointly and severally for payment of sh.90,000 costs and interest."

The second defendant being dissatisfied with that judgment preferred this appeal. He brought forth the following grounds:-

1. That the learned Registrar erred in law and in fact in failing to apportion liability between the appellant and the said WILSON GITHINJI despite the pleadings and the evidence adduced in court.

2. The learned Registrar erred in fact and in law in concluding that the appellant and the said WILSON GITHINJI were jointly and severally liable to the plaintiff in the sum of kshs.90,000 despite clear evidence to the contrary.

3. That the learned trial magistrate erred in fact and law in finding that the said WILSON GITHINJI was an agent for the Appellant and further that the said WILSON GITHINJI had authority from the appellant to seek a refund of Kshs.40,000 which finding was not supported by the evidence.

4. The findings by the learned magistrate were against the weight of the evidence adduced.

The 1st and 2nd grounds can be considered together. The issue raised in to these grounds is whether the finding by the learned magistrate that the appellant and the 2nd respondent were jointly and severally liable was supported by the evidence. The appellant admitted in his pleading and in evidence that he owed the first respondent kshs. 50,000. He admitted making payment of kshs. 250,000 but denied that the second respondent had authority to deduct Kshs. 40,000. The learned magistrate quite rightly in this courts view found that the second respondent did not have authority to so deduct that amount. Indeed the lower court found that the appellant and the 2nd respondent were bound by the agreement dated 7th September 1998. In that agreement they both admitted owing the first respondent money. Having so found the lower court was not justified to pass judgment that the appellant and the 2nd respondent were liable jointly and severally to the first respondent for his claim for Kshs. 90,000. Joint and several liability is defined in *Black's Law Dictionary* as "***liability that may be apportioned either among two or more parties or to only one or a few select members of the group at adversary's discretion.***

Bearing in mind the evidence that was adduced at lower court the finding of this court is that that court should not have found the appellant and 2nd respondent to be jointly and severally liable to the first respondent's debt. The correct judgment should have been that the appellant was liable to pay Kshs. 50,000 while the 2nd respondent was liable to pay Kshs. 40,000. The 1st and 2nd grounds of appeal therefore succeeds. The first limb of the 3rd ground of appeal has merit. There was no evidence nor was it pleaded that the first defendant (2nd respondent) was an agent of the 2nd defendant the appellant. The lower court erred in making that finding. There was no such agency. The judgment of the lower court does not support the 2nd limb of the 3rd ground of appeal. The lower court to the contrary found that the 2nd respondent did not have authority to deduct Kshs. 40,000 from the appellant's money. This 2nd limb of the 3rd ground does fail. It was submitted by the 2nd respondent that even though the lower court entered judgment as it did jointly and severally against the appellant and 2nd respondent that the 2nd respondent had since paid to the first respondent kshs.40,000 plus of the lower court costs. It was argued that being so the only amount the first respondent would look to the appellant to pay is Kshs. 50,000 plus the other half of the lower court costs. That in effect was what the appellant sought by this appeal. That being so I find that the appellant is not entitled to the costs of this appeal. The judgment of this court is as follows:-

1. The lower court judgment in SRMCC No. 79 of 1998 dated 16th February 2001 is hereby set aside and judgment is entered for the first respondent in the following terms.

· ***That the second respondent shall pay to the first respondent Kshs. 40,000 plus half of the costs of SRMCC No. 79 of 1998.***

· ***The appellant shall pay to the first respondent Kshs. 50,000 plus half the cost of SRMCC No. 78 of 1998.***

2. Each party shall bear their own costs in this appeal.

Dated and delivered this 27th day of January 2009.

MARY KASANGO

JUDGE