

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 40 of 2004

SAMWEL MAREWA MUNYI APPELLANT

Versus

PAUL WACHIRA NJACHI RESPONDENT

(Being an appeal from the judgment of J. N. NYAGA,

***Senior Resident Magistrate in the Senior Resident Magistrate's Civil Case No.152 of 2003
at KARATINA)***

JUDGMENT

The respondent in the lower court filed a plaint for the payment of the balance of purchase price of motor vehicle registration number KRN 198 being kshs. 29,000. The respondent pleaded in the plaint that they had agreed that he would sell and the appellant would buy that motor vehicle for kshs. 38,000. That the appellant paid a deposit of kshs. 9,000 leaving a balance of kshs. 29,000 to be paid by 19th February 1998. In his defence the appellant pleaded that the respondent had repossessed the motor vehicle and had refunded to him kshs. 9,000. He therefore denied the claim. At the hearing before the lower court only the appellant and the respondent gave evidence in support of their case. Their said evidence supported their pleadings. The respondent denied in evidence having repossessed the motor vehicle or refunding kshs. 9,000 to the appellant. He stated that he was unaware of the whereabouts of the motor vehicle. In the considered judgment of the learned magistrate, the magistrate found for the respondent and ordered the appellant to pay kshs. 29,000 plus costs and interest. The learned magistrate who had the benefit of hearing first hand and observing the parties stated:-

“I do not believe the defendant (appellant) is telling the truth. He is not a credible witness.”

The appellant being aggrieved by that judgment filed the following grounds of appeal;

- 1. The Learned Magistrate erred in law when delivering judgment in civil Case No. 152/03 when he ordered the appellant herein to pay the balance of kshs. 29,000 to the respondent.*
- 2. That the trial Magistrate erred in that he failed to record the full statement and evidence of the appellant and his exhibits which the appellant tendered to the court.*
- 3. That the trial magistrate erred in not following the natural justice of the law of contract and the law of Hire Purchase agreement.*
- 4. That the trial magistrate erred in that he failed to appreciate that the respondent was in the possession of the vehicle even before the institution of the said suit.*
- 5. That the trial magistrate failed to appreciate that the agreement between the parties is not contractual and the Respondent claim is time barred.*

As I begin to consider those grounds it is important to bear in mind that I did not have the advantage of hearing the witnesses as they gave evidence. A case in mind is OGOL v MURITHI (1985)KLR where it was held:-

“The Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial judge who saw and heard the witnesses and that judge was in a better position to assess the significance of what was said and equally important what was not said”.

Ground No. 2 and 3 in my view is not capable of being considered particularly because the appellant does not state what evidence or what document were not submitted in the hearing. Further it is not clear how the lower court failed to follow natural justice in respect of contract and hire purchase. In respect of ground No. 1 the appellant is of the view that the learned magistrate erred in ordering him to pay kshs.29,000. Having re-examined the pleadings and the evidence submitted before court and having observed that the learned magistrate was of the view that the appellant was not a credible witness I find that this ground is not proved. In respect of ground No. 4 again the learned magistrate having had the benefit of hearing evidence chose to believe the respondent that motor vehicle was in possession of the appellant. There is no reason shown why this court should interfere with the finding of the lower court in that respect. That ground is rejected. In ground No. 5 the appellant stated that the respondent’s claim in the lower court was time barred. The agreement between the parties was entered into in 1998. The payment for which the respondent sued was due to be paid by 19th February 1998. The claim was filed by the plaintiff in November 2003. The six years period provided for a claim to be filed under contract in cap 22 had not expired. I therefore find that the respondent’s claim was not time barred. The appellant’s counsel in submission in support of this appeal stated that the lower court failed to find that the respondent not being the registered owner of the motor vehicle could not pass a title to the appellant. Having re-examined the pleadings before the lower court I find that the issue of title was not raised. That being the case the appellant cannot raise the issue at this appeal. Having considered in totality the appellant’s appeal I find that the same fails and is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE