



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 126 of 2006

JESKA TAAKA WANYONYI.....APPELLANT

VERSUS

ESTHER OPONDO.....RESPONDENT

JUDGMENT

This appeal arose from the decision of T. Matheka, Senior Resident Magistrate delivered on 9th August 2006 when she ordered the appellant, Jesca Taaka Wanyonyi to restore motor vehicle registration No. KAT 250E make Toyota RAV 4 (*hereinafter referred to as the said motor vehicle*) to the respondent, Esther Opondo. The learned Senior Resident Magistrate delivered her ruling in Nakuru CMCCC No. 1204 of 2006 pursuant to an application for mandatory injunction which had been made by the appellant to have the said motor vehicle restored to her pending the hearing and determination of the said suit. There was another suit *i.e* Nakuru CMCCC No. 563 of 2006 which had been filed by the respondent, Esther Opondo against one Michael Derrick Mackenzie (*hereinafter referred to as the original vendor*) seeking orders of the court to have the said motor vehicle restored to her possession. The original vendor, having sold the said motor vehicle to the respondent, and having been paid part of the purchase consideration, appeared before the Senior Resident Magistrate at Winam (*vide Winam SRM Civil Misc. Appl. No. 58 of 2005*) and obtained a repossession order from the said court after the respondent had failed to pay the balance of the purchase consideration. After the original vendor obtained possession of the said motor vehicle, he sold the same to the appellant thus triggering the triangular dispute between the appellant, the respondent and the original vendor. It is when T. Matheka, Senior Resident Magistrate made an order restoring the said motor vehicle to the respondent that the appellant filed the present appeal.

In her memorandum of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in making an order that the said motor vehicle be restored back to the possession of the respondent. In summary, the appellant was aggrieved that the trial magistrate had exceeded her jurisdiction by making an order which was not subject to the application which was canvassed before her. She was aggrieved that the trial magistrate had ignored the fact there existed an order which had been issued in her favour in respect of the said motor vehicle and which orders had neither been vacated nor varied. She was further aggrieved that the trial magistrate had failed to consider the fact that the appellant had lawfully purchased the said motor vehicle and had in fact borrowed a sum of Kshs 1.5 million from Equity bank on security of the said motor vehicle. She was further aggrieved that the trial magistrate had failed to consider the fact that she had a superior title in respect of the said motor vehicle to that of the respondent due to the fact that she was the registered owner. The appellant therefore urged this court to allow the appeal and set aside the said order by the trial magistrate restoring possession of the

said motor vehicle to the respondent.

This court is aware of its duty as the first appellate court. The duty of a first appellate court was restated by the Court of Appeal in the recent case of **Joseph Mung'athia –vs- County Council of Meru & Another CA Civil Appeal No. 146 of 2002 (Nyeri) (unreported)**. At page 11 of its judgment, the court had this to say:

“In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of law. On facts, we are duty bound on first appeal to analyze the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing the witnesses and seeing their demeanour and making allowance for the same. In the case of Mwangi vs. Wambugu [1984] LR 453, at page 461, Kneller Ja (as he was then) stated;

“this is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making due allowance for this: Selle & Another vs. Associated Motor Boat Company Ltd. & Other [1968] EA 123, 126 (CA-Z) and Williamsons Diamonds Ltd. Vs. Brown [1970]EA 1, 12 CA-T”

At the hearing of the appeal, I heard the submissions made by Mr. Kariuki on behalf of the appellant and by Mr. Mongeri on behalf of the respondent. I have carefully considered the said rival arguments made by counsel on behalf of the parties to this appeal. I have also read the pleadings filed by the parties to this appeal in the subordinate court and re-evaluated the evidence adduced thereto. Before giving reasons for my decision, it is imperative that I set out the chronology of events that took place to the point when the trial magistrate made the order restoring the suit motor vehicle to the respondent.

On the 18th August 2005, the respondent, Esther Opondo entered into an agreement with the original vendor Michael Derek Mackenzie whereby she agreed to purchase motor vehicle registration number KAT 250E make Toyota RAV 4 Station Wagon. In the said agreement, it was stated that the year of manufacture of the motor vehicle was 1997. The purchase consideration for the said motor vehicle was Kshs 1,050,000/=. The respondent paid the original vendor the sum of Kshs 750,000/= as a deposit. It was agreed that she was to pay the balance of the purchase consideration in six monthly instalments of Kshs 50,000/= commencing from the 30th September 2005. The respondent took possession of the motor vehicle but the original vendor retained the ownership documents of the said motor vehicle. A pertinent clause of the said agreement stated as follows:

“Should the buyer default on any of these payments, the seller shall be entitled to repossess the motor vehicle and to retain it until the purchase price has been paid in full.”

From the plaint that was filed by the respondent, it is apparent that upon taking possession of the said motor vehicle, the respondent discovered that the year of manufacture of the said motor vehicle was actually 1995 and not 1997 as she was made to believe by the original vendor. She declined to pay the balance of the purchase consideration. I will desist from making any comments as regard whether or not the respondent was within her rights to refuse to pay the balance of the purchase consideration. This is because this is a matter that shall be dealt with by the trial court when hearing the case in a full trial.

It is important to note that it is the refusal by the respondent to pay the balance of the purchase consideration as agreed with the original vendor that made the original vendor seek to invoke the above quoted clause of the agreement. On the 14th December 2005, the original vendor instructed Msrsr Madume Traders, an auctioneering firm to repossess the said motor vehicle from the respondent. The letter of instruction was titled ‘*Repossession Order*’. The auctioneer, with the authority of the original vendor, made a miscellaneous civil application before the Senior Resident Magistrate at Winam seeking an order of the said court for the police to provide security to the said auctioneers to repossess the said motor vehicle. It is imperative at this juncture of this judgment to state that the original vendor had no legal authority to repossess the said motor vehicle. The original vendor did not possess a duly registered Chattels mortgage that would have given him authority to instruct the auctioneer to repossess the said

motor vehicle from the respondent without reference to the court as envisaged by The Chattels Transfer Act (Cap 28 Laws of Kenya

Senior Resident Magistrate at Winam did on the 15th December 2005 issue an order authorising the OCS Kisumu Police Station to give assistance to the said auctioneers to repossess the said motor vehicle. It is the view of this court that the learned Senior Resident Magistrate at Winam erred in law in issuing substantive orders of repossession of a chattel in a miscellaneous application. The learned Senior Resident Magistrate further erred when he granted the said application for repossession in an *ex-parte* application without the party to be affected being served. It is pursuant to the said order issued by the said Senior Resident Magistrate at Winam that the original vendor repossessed the motor vehicle from the respondent through Mssrs Madume Auctioneers. The said auctioneers repossessed the said motor vehicle from the possession of the respondent at Nakuru. It is apparent that the said Madume Auctioneers repossessed the said motor vehicle from Nakuru when they clearly did not have the territorial jurisdiction to do so. There is no evidence to suggest that the said Madume Auctioneers had obtained an order of the court to enable them execute a repossession order out of their area of operation. The said Madume Auctioneers therefore repossessed the said motor vehicle contrary to the provisions of the **Auctioneers Act** and the licence issued to them by the Auctioneers Licencing Board.

As stated earlier at the beginning of this ruling, in the event that the respondent was to default in paying the balance of the purchase consideration to the original vendor, the agreement provided that the original vendor would repossess the said motor vehicle and retain it until the full purchase consideration is stayed. If the original vendor was to abide by the terms of the agreement, then he was supposed to file suit before a court of law to enforce the provisions of the said agreement. The original vendor however took the law into his own hands and decided to repossess the said motor vehicle by issuing a 'Repossession Order'. To add insult to injury, instead of the original vendor retaining the said motor vehicle in his possession pending the payment of the balance of the purchase consideration by the respondent, the original vendor decided to sell the said motor vehicle to the appellant in this appeal for a purchase consideration of Kshs 850,000/=. This agreement was entered between the original vendor and the appellant on the 22nd March 2006 indicates that the appellant paid the full purchase consideration of Kshs 850,000/= on the signing of the agreement. The original vendor immediately transferred the said motor vehicle to the appellant and by the 19th April 2006, the said motor vehicle had been registered in the name of the appellant.

When the said motor vehicle was taken from possession of the respondent, she filed a civil suit at the Nakuru's Chief Magistrate's Court (*i.e. Nakuru CMCC No. 563 of 2006*) on the 28th March 2006. Contemporaneous with filing the suit, she made an application for injunction seeking to restrain the original vendor from selling the said motor vehicle. She further sought orders of the court to have the said motor vehicle restored to her possession. The trial magistrate granted the interim orders sought by the respondent and the said orders were served upon the original vendor on the 4th April 2006. It is therefore clear that at the time the original vendor transferred the said motor vehicle to the appellant, he was aware of the existence of the said court order. The learned magistrate at Nakuru had ordered the original vendor to restore the said motor vehicle to the possession of the respondent. This court is unable to reach a definitive finding whether the appellant was party to the machinations by the original vendor. This issue will have to be determined during the hearing of the case before the trial magistrate. This court will not prejudice the said trial by making adverse comments as to the part the appellant may or may not have played in the entire saga. What is however clear is that the appellant was a beneficiary of the fraud conduct by the original vendor that was perpetrated against the respondent.

The original vendor after being served with the court order, gave information to the appellant of the existence of the order. From the pleadings filed by the appellant in another suit filed at Nakuru on the 13th July 2006 (*i.e. Nakuru CMCC No. 1204 of 2006*), it is apparent that the said motor vehicle was to be repossessed from the respondent and restored to the possession of the appellant. The question that came to the mind of this court is why the appellant did not deem it necessary to seek orders of the court to be enjoined in the suit which had been filed by the respondent against the original vendor. Again, this is a question that will be answered by the court which will hear the suit to determine as to who is the real

owner of the said motor vehicle. However, for the purposes of this appeal, this court will state that when the appellant filed the subsequent suit, it not only resulted in the confusion of issues but it also led to the current state of affairs where two courts have issued conflicting orders as regard who is to have possession of the said motor vehicle.

Having given the background of what transpired in respect of the facts in dispute in this appeal prior to the argument of the application before T. Matheka Senior Resident Magistrate on the 1st August 2006 and the subsequent ruling given by the said learned magistrate on 9th August 2006, it is clear to this court that the issues in dispute between the appellant, the respondent and the original vendor as regard the ownership of the said motor vehicle can only be determined after a full hearing. It is the view of this court that the appellant and the respondent are both equally to blame for the state of affairs as it existed before the learned trial magistrate gave her ruling on the 9th August 2006. It is clear that the appellant and the respondent each sought to enforce the order that was issued in her particular favour as regard the possession of the said motor vehicle. Matters were not helped by the fact that the original vendor misled the Magistrate's Court at Winam into issuing him with an order of repossession which ought not to have been entertained in the first place. If the original vendor had not unlawfully obtained possession of the said motor vehicle, the appellant herein would not have been sucked into the dispute between the original vendor and respondent.

The learned Senior Resident Magistrate did on 9th August 2006 order the consolidation of Nakuru CMCC No. 563 of 2006 and Nakuru CMCC No. 1204 of 2006. The appellant and the respondent were not opposed to the said consolidation. It is the view of this court that the said consolidation of the two suits would enable the proper adjudication of the matters in dispute between the three parties concerned with the dispute over the ownership of the said motor vehicle. The parties to the said consolidated suit are advised to proceed with dispatch and have the said consolidated suit heard and determined on its merit. The issue that remains for determination by this court, and that is the issue that provoked this appeal, is who as between the appellant and the respondent should have possession of the said motor vehicle pending the hearing and determination of the suit.

The facts of this case dictates that *status quo ante* be restored pending the hearing and determination of the suit. As stated earlier in this judgment, the original vendor obtained possession of the said motor vehicle from the respondent by manipulating and abusing the due process of the court. The original vendor proceeded to sell the said motor vehicle to the appellant even after he became aware that there existed a court order that prevented him from adversely dealing with the said motor vehicle. Much as this court may sympathise with the position that the appellant finds herself in having purchased the said motor vehicle in the belief that she was entering into a genuine purchase agreement with the original vendor, this court will not countenance a situation whereby a seal of approval is given to a transaction whose antecedent is the fraudulent and illegal acts by the original vendor. The appellant could be an innocent purchaser for value without notice. That will have to be determined by the subordinate court that will hear the full trial of the case.

This court therefore orders that motor vehicle registration No. KAT 250E make Toyota RAV 4 green in colour which is currently retained at Central Police Station Nakuru to be restored to the possession of the respondent, Esther Opondo pending the hearing and determination of the suit. The logbook in respect of the said motor vehicle is hereby ordered deposited in court pending the hearing and determination of the suit. The respondent, Esther Opondo is hereby ordered to deposit the balance of the purchase consideration of Kshs 300,000/= in court within fourteen (14) days of today's date. The said sum shall remain deposited in court pending the hearing and determination of the suit. Since the appellant and the respondent are victims of circumstances which were brought about by the acts of the original vendor, I will make no orders as to costs on this appeal.

It is so ordered.

DATED at NAKURU this 11th day of May, 2007.

L. KIMARU

JUDGE