SIMON MUIRURI WANJOHI……..……..…...…APPELLANT

VERSUS

RESMA COMMERCIAL AGENCIES LTD…….1ST RESPONDENT

JOSEPH NGENO…….…….2ND RESPONDENT

JUDGMENT

The Appellant filed suit against the Respondents at the Chief Magistrate's Court, Nakuru seeking the orders of the court that motor vehicle registration number KYC 054, Toyota Hilux Pickup (hereinafter referred to as the said motor vehicle) which had been repossessed from him by the 1st Respondent and sold to the 2nd Respondent be restored to him. In the Plaint filed by the Appellant, he averred that he had entered into an agreement with the 1st Respondent whereby he had agreed to purchase the said motor vehicle for the purchase consideration of Kshs 480,000/-. The Appellant further averred that he paid the 1st Respondent the sum of Kshs 386,000/- leaving a balance of Kshs 94,000/- which the Appellant at the time of filing the plaint had not yet paid. The Appellant stated that on the 11th of May 1999 the said motor vehicle was repossessed by Mssrs Frekan Agencies & Auctioneers on instructions of the 1st Defendant. According to the Appellant the said motor vehicle was later sold to the 2nd Respondent on 19th of May 1999. The Appellant argued that the said motor vehicle was sold to the 2nd Respondent in breach of the agreement between the Appellant and the 1st Respondent and therefore the said motor vehicle should be restored to the Appellant. The 2nd Respondent filed a defence denying the Appellant's claim. The 2nd Respondent averred that he was a purchaser for value without notice of any defect in title of motor vehicle registration number KYC 054. The 2nd Respondent further stated that he had purchased the said motor vehicle on the 28th of May 1999 and took possession of the same. After hearing the evidence that was adduced in favour of the Appellant and in favour of the Respondents, the Chief Magistrate dismissed the Appellant's suit with cost to the Respondent. The Appellant was aggrieved by the said decision of the Chief Magistrate dismissing his case and has appealed to this court. The Appellant has raised nine grounds of appeal faulting the decision of the Chief Magistrate. The said grounds of appeal were argued as one by the Counsel for the Appellant.

Mr Nyangweso, Learned Counsel for the Appellant submitted that in the plaint, the Appellant had prayed that the motor vehicle repossessed from him by the 1st Respondent be restored to him. He submitted that the Plaintiff had paid 75% of the purchase consideration, that is Kshs 320,000/-. The balance of the purchase consideration that was yet to be paid was Kshs 94,000/-. It was the Appellants submission that the agreement between the Appellant and the 1st Respondent provided that in the event there was breach of the agreement, the aggrieved party was to be paid 10% of the value of the motor vehicle. It was contended on behalf of the Appellant that when the Appellant failed to pay the balance of the purchase consideration, the 1st Respondent repossessed the said motor vehicle and sold it after the expiry of fourteen days to the 2nd Respondent. The Appellant submitted that the repossession and the subsequent sale of the said motor vehicle to the 2nd Respondent was irregular as it was undertaken without any notice being issued to the Appellant. The Appellant complained that the lower court did not consider the overwhelming evidence that was adduced in favour of the Appellant's case. The Appellant was aggrieved that the trial magistrate had applied a higher standard of proof than that required in civil cases which is proof on a balance of probabilities. The Appellant submitted that the trial magistrate considered irrelevant and extraneous matters in determining the suit instead of considering relevant facts of the case. The Appellant was aggrieved that he was not given an opportunity to pay the balance of the purchase consideration of motor vehicle and instead was locked out entirely.

Mr Mbeche, Learned Counsel for the Respondents opposed the Appeal. He submitted that the question to be addressed by the court was what formed the basis of the issues in dispute. According to him, it was the agreement entered between the Appellant and the 1st Respondent. The Respondents submitted that the said agreement between the Appellant and the 1st Respondent provided a default clause at paragraph 8. The said default clause stated the consequences of default. The Respondents submitted that a loan had

been advanced to the Appellant through a financier to purchase the said motor vehicle. The Respondents submitted that the Appellant failed to disclose this fact in his suit. The 1st Respondent submitted that he was willing to refund the purchase consideration paid by the Appellant to him. The Respondents argued that the Appellant had notice when the said motor vehicle was repossessed and therefore was aware that the said motor vehicle would be sold if he failed to pay the balance of the purchase consideration within fourteen days. The Respondents contended that the Appellant had been given five months notice before the said motor vehicle was repossessed. The Respondents submitted that the grounds of appeal argued by the Appellant did not sufficiently address the real basis of the claim as was decided by the trial magistrate. The Respondents argued that the trial court could not have granted the prayers that the Appellant had not pleaded in his plaint. The Respondents urged the court to dismiss the appeal.

This is a first appeal. As the first Appellate Court in Civil Cases, the High Court is mandated to re-evaluate the evidence adduced by the witnesses before the trial magistrate and reach its own independent decision on the facts of the case. The court has to put in mind, when re-examining the evidence that it did not have an opportunity of seeing and hearing the witnesses as they testified. The Appellate court will interfere with the decision of the trial court if it establishes that the finding was based on no evidence or was based on misapprehension of the evidence or the trial court is shown to have demonstrably acted on the wrong principles of the law in reaching its finding (See Mwanasokoni –versus- Kenya Bus Services Ltd [1985] KLR 931, Peters –vs- Sunday Post Ltd [1958]E.A. 424).

In the instant appeal the facts of the case are not disputed. The Appellant purchased motor vehicle registration number KYC 054 make Toyota Hilux from the 1st Respondent on the 10th of September 1998. An agreement was entered into between the Appellant and the 1st Respondent. The agreed price for the said motor vehicle was Kshs 480,000/-. At the time the agreement was executed the Appellant paid the sum of Kshs 320,000/-. The balance of Kshs 160,000/- was paid by monthly instalments until the payment in full. The Appellant paid a further sum of Kshs 66,000/- but defaulted in paying the monthly instalment as agreed. The 1st Respondent invoked clause 6 and 7 of the agreement and repossessed the said motor vehicle on the 11th of May 1999. The 1st Respondent sold the said motor vehicle to the 2nd Respondent on the 28th of May 1999 for the sum of Kshs 450,000/=. The 1st Respondent did not refund the Appellant the amount that was paid as the purchase consideration.

The issue for determination by this court is whether on the facts of this case the agreement entered between the Appellant and the 1st Respondent entitled the 1st Respondent to repossess the motor vehicle without recourse to the courts of law. What does the said agreement provide?

Clause 6 states that:

“the vendor (Resma Commercial Agencies Ltd) have the right to repossess the motor vehicle if the amount balance is not paid per the agreement.”

Clause 7 provides that

“on repossession of the motor vehicle the outstanding balance shall fall due and the same shall have to be paid in full within 14 days from the date of such repossession. FAILURE to that the vendor shall have all the rights to sell the vehicle to recover the outstanding balance.”

On careful perusal of the said agreement I noted that the same was not a chattels agreement (or mortgage) which could enable the 1st Respondent to repossess the motor vehicle once the said chattels mortgage was registered. The said agreement was a contract between two parties. It did not in law amount to a chattels mortgage which would have given the 1st Respondent authority to repossess the said motor vehicle without recourse to the courts of law. The said agreement was not registered. On reevaluation of the evidence, it is the finding of this court that the 1st Respondent took the law into his own hands and unlawfully took possession of the said motor vehicle from the Appellant. In the event of breach of the said agreement, the 1st Respondent was required to seek the intervention of the law and not use the law of the jungle to take away the Appellant’s property. In the absence of a duly registered chattel’s mortgage, I do hold that the 1st Respondent action in repossessing the said motor vehicle was unlawful. The 1st

Respondent committed the tort of conversion. He also committed a crime. The 1st Respondent robbed the Appellant of his motor vehicle.

On further re-evaluation of the evidence on record, it is the finding of this court that the said motor vehicle ought to have been restored to the possession of the Appellant. However since the 1st Respondent had sold the said motor vehicle to the 2nd Respondent who had paid valuable consideration for the said motor vehicle, it would be unfair after a period of six years to order that the said motor vehicle be restored to the Appellant. This court takes judicial notice of the fact that the said motor vehicle could have been wasted. This court will however not sit helplessly and not do justice to the parties to this suit. I am aware that the Appellant in the suit before the lower court did not plead that he be refunded the purchase consideration if the court was unable to restore back to him the said repossessed motor vehicle. This court has however determined that the repossession of the said motor vehicle by the 1st Respondent was illegal and flowing from the said decision of this court, I will order that the Appellant be refunded the purchase consideration of Kshs 386,000/- by the 1st Respondent. The Respondent shall also pay interest on the said amount at the court rates from the 28th May 1999 when the Appellant filed the original suit in the Chief Magistrate's court. I further order that the 1st Respondent shall pay the costs of the suit, both in the Chief Magistrate's court and on appeal before this court.

The consequence of the above orders is that the appeal filed by the Appellant is allowed.

Orders accordingly.

DATED at NAKURU this 21st day of January 2005.

L. KIMARU

JUDGE