



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

Civil Appeal 90 of 2003

**GOSPEL ASSEMBLY CHURCH**

**ACADEMY OF MUSIC ..... 1ST APPELLANT**

**DR. ALOIS RUTIVI ..... 2ND APPELLANT**

**VERSUS**

**MUNENE NGOTHO ..... RESPONDENT**

**(An Appeal from the Judgment and Decree of R. Nyakundi, SPM  
in Milimani Commercial Courts Civil Suit No. 5531 of 2000  
delivered on 2nd September, 2002 and 14th October, 2002).**

**JUDGMENT**

By a Plaint dated 11th July, 2000, and amended on 3rd October, 2000, the Respondent (Plaintiff in the lower court) sought reimbursement of the sum of US \$4,420 and Kshs.98,000/- paid by him to the Appellants towards the purchase of a motor vehicle which was never delivered.

According to the Plaint, and the evidence tendered by the Respondent, he paid these amounts to Eunice Njue Njehia (hereinafter "Eunice"), the 2nd defendant in the lower court, and who is not a party to the appeal proceedings. At the material time, Eunice was an employee of the Appellants. She received the money from the Respondent and issued a receipt. In their Defence dated 27th January, 2000 there is no denial that Eunice was an employee of the Appellants, or of her authority to receive moneys, and issue receipts, on behalf of the Appellants. There is no claim that she acted fraudulently or unlawfully or without authority. After hearing all the evidence, the lower court found as a fact that indeed Eunice received the sum of US \$4,420 (but not Kshs.98,000/=); and issued a receipt for the same in respect of a transaction involving the sale of a motor vehicle to the Respondent. This is how the lower court delivered itself:

**"I have considered the evidence by the plaintiff. I find that it is not in dispute that the plaintiff paid US \$4,420 to the 2nd defendant. The plaintiff was issued with a receipt-dated 16th May, 1996. The receipt indicates that it was payment of Toyota Sprinter. The plaintiff has stated that they had agreed for purchase of the motor vehicle which had been imported but not registered. The receipt indicates that a stamp for the 1st defendant was affixed on the receipt. The inference to be drawn in absence of any other to rebut the same the 2nd defendant was acting as an agent of the 1st defendant.**

**There is evidence which has not been rebutted that plaintiff paid for the car.**

**The plaintiff never received the car even after making payment. On a balance of**

probabilities, I find that the plaintiff has established his claim against the defendants jointly and severally. I enter judgment for US \$4,420 against the defendants accordingly in favour of the plaintiff. As regards the claim of Kshs.98,000/= I find that the plaintiff has not established the claim against the defendant. I make no finding on the same.”

It is against that Judgment that the Appellants have preferred this appeal on the following rather needlessly wordy eleven grounds of appeal:

1. THAT the Senior Principal Magistrate erred in failing to find that the balance of probabilities was not in favour of the plaintiff.
2. THAT the learned magistrate erred in his finding that the 1st and 2nd defendants/applicants were jointly and severally liable together with the 2nd defendant/respondent and that the 2nd defendant was an agent of the 1st defendant.
3. THAT the learned magistrate erred in failing to reject the admission of evidence of a receipt dated 16th May, 1996 without calling its maker for production thereof and thereafter relied on the extraneous said document notwithstanding its protestations from the defendants/applicants advocate that such evidence was inadmissible contrary to section 19 of the Stamp duty Act for lack of a revenue stamp.
4. THAT the learned Senior Principal Magistrate erred in his finding that the 2nd defendant/2nd respondent was the agent of the 1st applicant at the time of accepting the purported sum of U S \$4,420 and/or for purposes of execution of the agreement to import a Toyota Sprinter motor vehicle from Japan which activities or objects are not set out in any Memorandum of Association of the 1st applicant. His Honour therefore took irrelevant evidence into account to hold that the 2nd defendant/2nd respondent was empowered or authorized to act as an agent or employee of the 1st defendant/1st applicant.
5. THAT the learned magistrate failed to take into account relevant factors in exercising his decision being:-
  - (a) The existence of the court of appeal decision in the case of *Sunderji Nanji Ltd vs Mohamedali Kassam Bhaloo* (1958) EA 762-764
  - (b) The situation of the 2nd defendant was such that she was never authorized to commit any illegality on behalf of the 1st or third defendants. The applicants herein cannot therefore be held vicariously liable for such commitment to honour as agreement to evade taxation by the government
  - (c) The plaintiff conceded that the receipt was issued to him without any revenue stamp and stated that he even returned to rescind the contract with the 2nd defendant which proves that no money was ever received by the 3rd defendant as it was purportedly sent to Japan by the 2nd defendant
  - (d) The applicant cannot be held liable to pay costs or interests jointly and severally with the 2nd defendant/2nd respondent (e) For the same reasons that payment of Kshs.98,000/= was rejected also payment of U S \$4,420 ought to be refused, as there is equally no basis for belief that these dollars were actually paid.
  - (f) The 3rd defendant ought to be heard on these aspects including how the amount of Kshs.479,336.70/= was arrived at in the decree.
6. THAT the learned magistrate failed to find on a balance of probability that the 1st and 3rd defendants were not liable for an illegality committed by the plaintiff and 2nd defendant and that no wrong can ever become right.

**7. THAT the omission to file and serve the submissions was occasioned by the advocate who was instructed to appear for the defendant on the hearing date and thereafter to tender written submissions and attend on the judgment day.**

**8. THAT the decision is not supported by the facts and the 1st defendant is not an entity in law, which fact was specifically denied in the defendant's and thus ought to have been proved and a decision on this issue ought to have been made.**

**9. THAT the decision is not supported by the facts and the 1st defendant is not an entity in law, which fact was specifically denied in the defendant's and thus ought to have been proved and a decision on the issue ought to have been made.**

**10. THAT the plaint clearly states that the plaintiff is Gospel Assembly Church of Academy of Music and yet the warrants of attachment and sale states that the warrants are to be executed against Gospel Assembly Church which is different from the plaintiff.**

**11. THAT a party cannot sue in foreign denomination or currency without explaining to the court why such foreign currency is being litigated in a local court and the learned magistrate erred in failing to reject the plaint.**

Ms Thiongo, Counsel for the Appellants, argued before this Court that the only evidence before the Court of the alleged transaction was that of the Plaintiff/Respondent whose testimony was not convincing because: (i) he said he went to the "Gospel Assembly Church" but had sued "Gospel Assembly Church Academy of Music"; that these were two separate entities; (ii) that Eunice was not the agent of the Appellants and had no authority to receive the funds; (iii) that Eunice issued a receipt without revenue stamp, hence the receipt was invalid; (iv) that there was no written agreement relating to the alleged transaction; (v) that the Respondent had never bothered to check if the Appellants were in the business of selling or importing cars; and (vi) that the Appellant's submissions had not been considered by the lower court.

On his part, Mr Onyancha, Counsel for the Respondent, submitted that the Respondent's case had been proved on a balance of probability. With regard to the Appellant's submissions, he argued that as admitted in paragraph 7 of the Memorandum of Appeal, it was the Appellant's advocates that had failed to file the submissions, and that this could not be blamed on the Court.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

There was only one witness before the lower court – the Respondent. His evidence was not controverted. Here is what he said:

***"I came to know the defendant I was led there by Kingori. He is outside in the USA. I was interested in purchasing a car. The friend of mine informed me where to get the car. It was at the Gospel Assembly Church near Arboretum. I accompanied him to the Gospel Assembly Church. I met the 2nd defendant who informed me that there was a car available imported for someone else the person from the All World Conference of Churches did not want the car. I agreed to pay the amount. I paid US \$4,420 dollars. It was about May 1996 when I paid the money. I was issued with original receipt for \$4,420 the model was Toyota Sprinter receipt exhibit 1."***

His testimony is clear. There is no dispute that Eunice received the money, and issued the receipt, on behalf of the Appellants. The receipt is P Exhibit 1, and is found on page 23 of the Record. It identifies

the Respondent, the amount of money received, and the purpose. It is signed by Eunice underneath the 1st Appellant's rubber stamp. None of this is controverted. So, what more proof did the lower court require to find in favour of the Respondent? None in my view. The Respondent was required to establish his case simply on a balance of probability. This he has done. The argument that the receipt does not bear a revenue stamp, is absurd. It was the Appellant's obligation to affix the stamp, and they cannot now attempt to take advantage of their own default. The doctrine of estoppel would prevent them from doing so. In any event, the receipt is evidence of the transaction that took place, a transaction that has not been disputed under oath.

The Appellant's argument which attempted to distinguish what Counsel said are two separate entities – "Gospel Assembly Church" and "Gospel Assembly Church Academy of Music" is simply a red herring. The Respondent clearly identified the office he went to; the receipt speaks for itself; and none of his evidence was controverted. The argument that Eunice was not an agent, and acted without authority, is a belated attempt to avoid liability. None of that was raised in the defence in the lower court; in fact, a common defence was filed for all the defendants including Eunice.

With regard to the other arguments advanced by the Appellants, I would say as follows:

A written agreement outlining the transaction of sale and purchase is not mandatory.

Here, the oral agreement was evidenced by the issue of a receipt. There was no obligation on the Respondent to "check" if the Appellants were in the business of selling or importing cars. That is quite immaterial. The only issue here is: was there a contract between these two parties? The answer is yes. The Appellant's complaint that their submissions were never taken into account is explained in their own memorandum of appeal where they admit that none were filed because of a mistake made by their advocate.

Finally, an issue raised in the memorandum of appeal, but not argued before this court, related to whether the 1st Appellant was an entity in law. If that is what the Appellants were alleging, it was for them to prove so. A receipt was issued in their name. The Respondent was entitled to recover his funds from them. They did not lead any evidence to the contrary.

Accordingly, and for reasons outlined, this Appeal has no merit and is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 26th day of May, 2005.

**ALNASHIR VISRAM**

**JUDGE**