



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 351 OF 2000

MOHAMED JUMA MPONDA..... PLAINTIFF

VERSUS

ANNE WACHERA NJONJO..... DEFENDANT

JUDGMENT

In a plaint dated 24th January, 2000 and filed on 28th February, 2000 the Plaintiff claims from the defendant specific performance of a contract of sale of motor vehicle registration number KAH 931 G and payment of a sum of Kshs. 160,000/= being balance of purchase price of the said motor vehicle. He also seeks punitive damages for breach of the said contract. There is a further claim for loss of use of the motor vehicle at the rate of Kshs.3,500/= per day with effect from 9th November, 1999 to the date of the plaint. Interest is sought on the sum claimed general damages and costs. On 17 May, 2002 Hewett J allowed an amendment to the prayer of interest to be interest at commercial rates.

On 17th March, 2000 the defendant filed defence and counter claimed for refund of Kshs.50,000/= plus accrued interest; Kshs.21,500/= plus interest being costs of repairs; storage charges at the rate Kshs.3,500/= per day from 9th November, 1999 up to the date of collection of the motor vehicle. The defendant also claimed damages for making the defendant enter into an agreement which the Plaintiff knew from the beginning could not be consummated. The Plaintiff filed Reply and Defence to counter claim and pleadings closed. The matter proceeded to hearing partly before Hewett J and partly before me. The Plaintiff testified and called no witness. The defendant testified and called one witness.

The Plaintiff told the court that he sold his matatu motor vehicle registration No KAH 931 E to the defendant whom he knew for Kshs. 180,000/= in October, 1999. On or about 27th October, 1999 the defendant paid him Kshs.20,000/=. He then released the said motor vehicle which the defendant took to her home. The agreement was reduced to writing. The same was produced as Exhibit 1. The Plaintiff further testified that the defendant was to pay in cash 2 or 3 times. The defendant paid him Kshs. 130,000/= by cheque which the defendant later stopped. The said cheque was produced as Exhibit 2. No further payments were made. The defendant however still held the vehicle. The Plaintiff further said that he had suffered some hardship for example he did not use the money, he lost an income of Kshs.3,500/=. The Plaintiff therefore prayed for judgment for the sum of Kshs. 160,000/= plus Kshs.3,500/= costs and interest.

In cross examination, the Plaintiff stated that they are neighbours and the sale agreement was drawn by Jivanjee Advocate. He denied that the defendant paid him Kshs. 10,000/= or Kshs.40,000/=. He maintained that the defendant paid him only Kshs.20,000/=. The Plaintiff in further cross examination

testified that on 9th November, 1999, they went to the office of the Registrar of Motor vehicles to transfer the motor vehicle. They went with one Isaack Juma and the defendant's husband. All the documents were signed. He maintained that he received Kshs.20,000/= on the day of the agreement. That left Kshs. 160,000/= to be paid. He denied there having been an argument or quarrel on 9th November, 1999.

The Defendant testified that she lived in South B - Nairobi and did little business of transport mainly. She said she knew the Plaintiff when she was working for Stanbic Bank. She wanted to buy a Nissan matatu and the Plaintiff had one for sale. Later the defendant, her husband and her son traveled to South B and saw the Nissan matatu which was not in working condition. They negotiated and agreed at Kshs. 180,000/= as purchase price for the Nissan matatu. On the day the negotiations took place no payment

was made. On 25 October, 1999 the defendant with her son went to the Plaintiff's home they paid the Plaintiff Kshs. 10,000/= in cash in the presence of the Plaintiff's children and one Juma. The defendant further stated that she would pay the balance sum of Kshs. 170,000/= later. She then gave to the Plaintiff a banker's cheque of Kshs. 170,000/= on 27th October, 1999. She produced a certified copy of the said cheque as Exhibit A. This was the balance of purchase price. The Plaintiff then suggested they engage a lawyer to draw up an Agreement of Sale. In the interim the defendant stated that she had towed the matatu to her house. On 28 October, 1999 while the defendant was in her office the Plaintiff went there and said he needed cash and not a cheque for his daughter who was going to Mombasa. The defendant then asked her boss to cancel the banker's cheque and gave the defendant cash. They then proceeded to the Plaintiff's lawyer Jivanjee. At the lawyer's office the Plaintiff claimed he needed Kshs.40,000/= for his daughter before completion of the agreement. The defendant gave the Kshs.40,000/= in the presence of Jivanjee's secretary and Juma. The total sum then paid to the Plaintiff was Kshs.50,000/= leaving a balance sum of Kshs. 130,000/=. The Plaintiff then left immediately saying that he was going to get the log book and would be back at 2.00 pm to sign the Agreement. When the Plaintiff came back he said the person with the log book had gone to Mombasa. The agreement was then signed and Jivanjee's secretary signed as a witness. She then went back to her office. The same afternoon Jivanjee called her. She took with her the Kshs. 130,000/= but found that the Plaintiff had not brought the log book and was insisting that the defendant leave the money with Jivanjee. The defendant said she refused to pay the money unless the log book was produced. She then kept the money in the bank safe. The defendant stated that her husband and Jivanjee advised her not to pay the money unless the log book was produced. On or about 2nd November, 1999, the Plaintiff brought a copy of the log book but refused to give the defendant a copy of the same. The defendant suggested that they go together to the Registrar of Motor Vehicle's office where she would pay the said balance. Later, it was agreed that the defendant's husband, Juma and the Plaintiff would go to the Registrar of Motor Vehicle's office and sign transfer form. The Plaintiff continued to ask for the balance of purchase price. The defendant then wrote a personal cheque which she later stopped because her husband told her that the file for the subject motor vehicle was not available at the Registrar of Motor Vehicle's Office. The defendant maintained that it was in court that she saw Exhibit 3 a copy of records from the Registrar of Motor Vehicles in respect of the subject motor vehicle and exhibit 4 a copy of the log book in respect of the same vehicle.

The defendant further testified that her advocate in February 2001 confirmed that the Plaintiff was indeed the owner of the said vehicle and attributed the delay in concluding the sale transaction to the Plaintiff's delay to produce the log book. The defendant continued to state that two gentlemen John Nyabuto and Robert Onduso went to her and claimed that they had brought the said vehicle. She did not talk to them.

In conclusion the defendant stated that the Plaintiff never did what he had to do to transfer the vehicle. She had no objection to paying the balance against a fresh transfer and the log book. She denied that she was in breach of the contract as she kept asking for the documents which the Plaintiff never produced. The defendant contended that she did not have to pay the Plaintiff anything else. On the day of her testimony in court on 17th May, 2001 the defendant said she was ready to give the Plaintiff the money the next day if the Plaintiff was to give the log book and a freshly signed transfer.

In cross examination the defendant agreed that there was no warranty as to the motor vehicle's condition or suitability. She further admitted that the price of Kshs. 180,000/= was to be paid on signing of the

agreement. She maintained that at the time of the agreement she had the full amount. She denied canceling the contract. In further cross examination the defendant stated that the issue was not failing to get the documents from the Plaintiff. She insisted that as at the time of her testimony in court, the money was still in the bank. The defendant further stated in cross examination that when she gave the Plaintiff the first Kshs. 10,000/= he did not acknowledge the payment in writing. She however, stated that when she paid Kshs. 40,000/= the lawyer's secretary was present. The defendant admitted that the transfer was received by the Registrar of Motor Vehicles on 9th November, 1999 and the cheque was stopped on 10th November, 1999 after presentation by the Plaintiff on 9th November, 1999.

In re-examination the defendant stated that she stopped the cheque for Kshs. 130,000/= because the Registrar did not have the file for the vehicle.

DW 2 Edward Gatu Mingoiru testified for the defendant and said that he was the defendant's husband. He stated further that the Plaintiff, the defendant and himself negotiated and agreed on Kshs. 180,000/= as the price of the said motor vehicle. The following day the defendant and her son took Kshs. 10,000/= to the Plaintiff. Later the defendant paid a further Kshs. 40,000/= at lawyer Jivanjee's office. Later at the defendant's office, the Plaintiff asked for balance of purchase price but the defendant and DW 2 refused until transfer of the vehicle. The Plaintiff however, refused to go to the Registrar of Motor Vehicle's office unless he was paid the balance whereupon the defendant issued a personal cheque to him on condition that he would come back for cash on transfer. At the registrar's office the relevant file could not be found and DW 2 said balance of purchase price would not be released. A quarrel ensued and DW 2 was slapped by the Plaintiff. Later the defendant stopped the cheque. At the registrar's office later DW 2 was told of fake log books and that he should not pay the balance without the file. DW 2 said he saw the log book for the first time in court on 8th November, 2000. It turned out that he had been in court during the evidence of the Plaintiff and the defendant.

In cross examination, DW 2 said that purchase price was to be paid immediately the agreement was signed on 28th October, 1999. He maintained that the relevant file of the subject motor vehicle could not be traced at the Registrar's office. He however did not have any letter from the Registrar that the file was missing. He further stated that the cheque for Kshs. 170,000/= issued by the defendant was stopped because the relevant file was not traced. He however did not know when the relevant file was traced. He however saw the documents for the vehicle on 11th November, 2000. He admitted that it was not a condition in the sale agreement that documents be made available before payment of purchase price. It was also not in the agreement that purchase price be paid after transfer.

In re-examination DW 2 stated that a cashier at the Registrar of Motor Vehicles office retained the documents because the relevant file was not available.

From the evidence availed, it is common ground that the Plaintiff sold motor vehicle registration No KAH 931 E to the defendant at Kshs. 180,000/=. It is also common ground that the transaction between the Plaintiff and the defendant was reduced into writing. It is further common ground that the sale agreement in respect of the said vehicle was executed by both the Plaintiff and the defendant. That sale agreement is exhibit 1. It is further not in dispute that the defendant took possession of the said motor vehicle some time towards the end of October 1999 and has kept the motor vehicle since.

The dispute is however on the amount owing by the defendant to the Plaintiff and when the same was to be paid. Exhibit 1; the Memorandum of Agreement for sale at clause 4 says:

"Price: Kshs. 180,000/= to be paid in cash by the purchaser to the vendor on the signing hereof."

Section 97 (1) of the Evidence Act Cap 8 provides:

"When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of

property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

Section 98 provides:

"When the terms of any contract or grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contracting, varying, adding to or subtracting from its terms."

The defendant gave inconsistent reasons for failing to pay balance of purchase price. First the defendant stated that she did not pay balance of purchase price because the Plaintiff did not have the log book. The second reason she gave for failure to pay balance of purchase price was that the file for the motor vehicle at the Registrar of Motor Vehicle's Office was not traced. The third reason she gave for failure to pay the purchase price was that the Plaintiff never did what he had to do to transfer the vehicle. Finally she said in court before Hewett J that she was ready to pay the money the next day if the Plaintiff gave the log book and freshly signed transfer.

The document headed "COPY OF RECORDS" issued by the Registrar of Motor Vehicles in respect of motor vehicle registration number KAH 931 E indicates that as at 9th March, 2000 the said vehicle was registered in the name of the Plaintiff. This document was produced as Exhibit 3 by the Plaintiff.

The Plaintiff also produced Exhibit 4 which is a copy of the Registration Book in respect of motor vehicle registration No KAH 931 E. This exhibit shows the Plaintiff as the owner of the said motor vehicle. The Registrar of Motor Vehicles has at page 2 thereof stamped the book.

I have also seen in the Defendant's list of documents a form headed "Transfer of Ownership of Motor Vehicle or Trailer." It shows it was signed by the Plaintiff on 27th October, 1999.

The defendant admitted that she was in possession of the subject motor vehicle.

In the light of the evidence on record, the reasons given by the defendant for failure to pay balance of purchase price cannot be believed. I therefore hold that the defendant is in breach of the agreement of sale dated 28th October, 1999.

I have now to determine the amount of purchase due from the defendant to the Plaintiff under the Memorandum of Agreement of Sale. The Plaintiff testified that the balance of purchase price was Kshs. 160,000/=. This is the amount he claimed at paragraph (a) of the prayers. The Plaintiff testified that the defendant paid Kshs. 20,000/= on the day he released the motor vehicle to the defendant. Later the defendant gave him a cheque for Kshs. 130,000/= being part payment of balance of purchase price. The cheque was stopped by the defendant. The Plaintiff as at the time of trial was still the holder of the said cheque. He produced it as exhibit 2. The cheque was written on 8 November, 1999. The Plaintiff maintained that no further payment was made by the defendant.

The defendant testified that she paid to the Plaintiff a total of Kshs. 50,000/= as deposit towards purchase price of the subject motor vehicle. She testified that the first payment was of Kshs. 10,000/= in the presence of the Plaintiff's children. The defendant further told the court she gave a banker's cheque for Kshs. 170,000/= on 27th October, 1999 which was refused by the Plaintiff as he wanted cash for his daughter who was going to Mombasa. She says she then paid to the Plaintiff Kshs. 40,000/= in the presence of Jivanjee's secretary and Juma. Later she gave the cheque for Kshs. 130,000/= referred to above. Juma and Jivanjee's secretary did not give evidence at the trial. The alleged payments of Kshs. 10,000/= and Kshs. 40,000/= therefore remained uncorroborated. The defendant may have been content with herevidence. But I am far from convinced that these payments were made. The defendant all along knew that the Plaintiff was not admitting these payments. I do not see why the defendant could not call Juma and Jivanjee's secretary to confirm her story. I entertain doubt as to whether or not the defendant indeed passed the alleged banker's cheque for Kshs. 170,000/= to the Plaintiff.

In the result I hold that the balance of purchase price due from the defendant to the Plaintiff was Kshs. 160,000/= and not Kshs. 130,000/= as alleged by the defendant.

As I have already held that the defendant was in breach of the agreement of sale of the subject motor vehicle, I now enter judgment for the sum of Kshs. 160,000/= as prayed at paragraph (a) of the prayers of the plaint.

The Plaintiff further claimed loss of use of motor vehicle at Kshs. 3,500/= per day with effect from 9th November, 1999 to the date of the plaint. This is a claim for special damages. It is now settled that such damages needed to be proved strictly. The Plaintiff in his testimony said: "I have suffered some hardship:

(i) *I did not have the money*

(ii) *I took the income of Kshs. 3,500/=*

This in my view could not and cannot amount to the damages having been strictly proved. The Plaintiff's claim to loss of use of the said motor vehicle is dismissed.

The Plaintiff also claimed damages for breach of contract. The effect of the order for payment of balance of purchase price is to specifically enforce the agreement between the Plaintiff and the defendant. The damages payable would be for loss arising from delay in the performance of the said contract.

The delay has been of about 4 years. The Plaintiff in his evidence gave no indication of the loss occasioned by the delayed performance. He is therefore only entitled to minimal damages. I award him Kshs. 20,000/=

On the prayer for interest at commercial rates, the same is not granted as the Plaintiff did not show that he was entitled to the same.

It is now obvious that having found for the Plaintiff the remaining claim of damages in the counter claim is dismissed. The defendant on 6th February, 2004 abandoned her claim under prayers (a), (b) and (c) of the counterclaim.

In summary judgment is hereby entered for the Plaintiff as follows:-

- (a) Kshs. 160,000/= being balance of purchase price of motor vehicle registration No KAH 931 F
- (b) Kshs. 20,000/= as general damages for delayed performance of the contract of sale
- (c) Interest on (a) above at court rates from the date of filing suit until payment in full.
- (d) Interest on (b) above at court rates from the date of this judgment until payment in full
- (e) Costs plus interest on costs as usual but the costs shall be on the subordinate court scale as this suit ought not to have been filed in the High Court.

Dated at Nairobi this 19th day of March, 2004.

F. AZANGALALA

JUDGE

19.3.2004