



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 6 OF 2000

GEORGE ONGEREAPPLICANT

VERSUS

ASSOCIATED MOTORS LTD.RESPONDENT

J U D G M E N T

The respondent, Associated Motors Limited, filed a suit in the court of the Resident Magistrate Nairobi on 15th February 1995 to claim from the appellant George Onzere Kshs.28,650/=, described as the balance of the agreed price of goods sold and delivered by the plaintiff to the defendant at the request of the defendant during 1990.

“Full particulars whereof are well known to the defendant ”.

A defence filed to this suit by the defendant (appellant) on 20th July 1995 denied owing the respondent any money and put it to the strict proof.

The case was heard by the Resident Magistrate (N. Matheka (Mrs) on 15th July 1999 who delivered her judgment on 2nd August 1999 where she awarded the respondent the sum of Kshs.28,650/=.

This decision was disputed by the appellant who filed an appeal in this court on 13th January 2000 in a memorandum of appeal which listed 9 grounds of appeal.

The appeal was fixed for hearing on 3rd December, 2002 wherein counsel for the parties appeared and either urged or opposed the same.

Counsel for the appellant submitted his client had entered into no contract with the respondent .

That though Hire Purchase Company was the owner of the motor vehicle, payments were made to the supplier thereof but that the hire purchase agreement was very clear on the mode of payment. That there was an unpaid cheque which was the cause of the claim subject to this appeal but that the claim against the appellant was not based on the dishonoured cheque but on contract which was not correct. Counsel prayed that the appeal be allowed with costs. Madan Miss for the respondent opposed the appeal and said the appellant had approached the respondent to purchase a motor vehicle at Kshs.508,610/=.

That out of this amount the hire purchase company financed Kshs.350,000/= while the balance of Kshs.158,650/= was to be paid by the appellant.

That a cheque for Kshs.48,650/= was issued by the appellant for the respondent being part payment of the Kshs.158,650/= but that this cheque was dishonoured.

However, the appellant made payment of Kshs.20,000/= to the respondent leaving Kshs.28,650/= unpaid, hence the suit subject to this appeal.

What I see the appellant saying in the memorandum of appeal and this court, in the main, is that there was no privity of contract between the appellant and the respondent and that the claim against the former by the latter was not well founded.

I see two parts in the agreement subject to this appeal. One relating to hire purchase terms involving Kshs.350,000/= which Regal Hire Purchase Limited arranged for the appellant. Another involving Kshs.158,650/= which the appellant was supposed to pay directly to the dealer; Associated Motors – the respondent herein.

When parties enter into hire purchase terms, hire purchase companies arrange terms for part of the purchase price and release their part to the sellers on assumption or are given the impression that the purchaser has paid his part directly to the seller by way of deposit.

This must have been the impression created here by the respondent to Regal Hire Purchase Limited; (see exhibit 2)

It appears to me this impression was not the correct one because separately the respondent had agreed with the appellant to settle his deposit by instalments, hence the situation we find ourselves in.

That being the position and as parties to this appeal were aware of this separate agreement through oral, it would have been a travesty of justice for the learned magistrate who saw and heard witnesses testify, to ignore the existence of the contract between the appellant and the respondent and to decide the case before her on the basis of the agreement between the appellant and Legal Hire Purchase Limited over the loan of Kshs.350,000/=.

It is true there was no written agreement between the appellant and the respondent over Kshs.158,650/= but this is reflected in paragraph 2(a) of exhibit 11 (schedule), exhibit 1 and exhibit 2 or even exhibit 8.

All these facts were within the knowledge of the appellant and it is a fraud for him to turn round and say there was no privity of contract between him and the respondent so as to deny the latter its rightful entitlement to Kshs.28,650/=.

The appellant is aware he issued a cheque for Kshs.48,650/= to the respondent in respect to his part of the payment (deposit) towards the purchase price of the motor vehicle which bounced. This is why he was visiting the respondents workshop to plead for time to pay – (see exhibit 8).

All this evidence go to show the appellant had a contractual obligation to complete paying the deposit to the respondent.

He cannot turn round at this late hour to say that he does not owe the respondent any money because of lack of a written of contract between them.

I dismiss this appeal with costs.

Delivered this 13th day of February, 2003.

D.K.S. AGANYANYA

JUDGE