REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL NO. 332 OF 2001

SAMUEL NJIRI KIMANI ……..APPELLANT

VERSUS

MOSES NDUNGU NJOROGE ……..RESPONDENT

J U D G M E N T

On 7th May 1999 the plaintiff – respondent filed a suit in the Court of the Chief Magistrate at Thika to claim from the defendant – appellant a sum of Kshs.106,666/= being overpayment of the loan owed by the appellant to Messrs Jamnadas Finance (K) Limited who financed purchase of motor vehicle registration number KYA 302 by the said appellant.

The appellant decided to sell the said motor vehicle to the respondent who, according to the agreement entered into by and between the two parties, was supposed to pay off the balance of the loan to the financer at Kshs.164,000/=.

However, when the respondent went to pay off the loan the amount owed was found to be more by Kshs.106,666/= which the respondent claimed from the appellant in the suit abovementioned.

In a defence filed to the case by the appellant on 18th May 1999 the appellant stated that the respondent was only supposed to pay Kshs.164,000/= to the financer and not Kshs.270,666/= and put the respondent to the strict proof.

The case was heard by T.W.C Wamae (Mrs) – Resident Magistrate, on 23rd February 2000 and 31st May 2000 when parties and their witnesses testified and submissions made.

Judgement was delivered on 15th May, 2000 when the Magistrate found the appellant liable to pay to the respondent a sum of Kshs.106,666/=; hence the appeal filed herein on 6th July,2002. The memorandum of appeal listed 4 grounds of appeal. They were:-

That the learned Magistrate erred in law and fact in holding that the appellant misrepresented to the respondent that the debt owing to Messrs Jamnadas Finance Company Ltd was Kshs.164,000/= instead of Kshs.270,666/= while the respondent did not plead or allege any misrepresentation/fraud on the part of the appellant in the plaint nor led any evidence to prove such misrepresentation or fraud; that she erred in holding that the appellant was liable to refund Kshs.106,666/= to the respondent while the agreement of

sale between the parties did not provide for this; that she erred in altering or varying the terms of the agreement dated 17th July 1996 and that she erred in failing to take into account; interpret and/or give effect to the sale agreement dated 17th July 1996 between the parties. The appeal was fixed for hearing before this court on 22nd October 2002 when counsel for the parties appeared to submit either for or against the same.

Counsel for the appellant submitted that it was wrong for the learned Magistrate to base her decision on misrepresentation when this was not pleaded in the plaint or particulars of such fraud and/or misrepresentation stated therein and that she went outside the written agreement which contained the terms each of the parties was to perform.

Counsel stated that the amount the respondent was supposed to pay to the financer was Kshs.164,000/= and no more and that the lower court erred in ordering the appellant to pay to the respondent the amount not provided for under the contract. That when the respondent went to the financer and found the amount owing was more than that provided for under the agreement, he had the option to have return the motor vehicle and ask for refund of the amount paid and that if no refund was made then the respondent would have had recourse to the court. That since the respondent had knowledge of the increased amount before making the initial payment to the financer he should blame himself for the risk he took.Counsel prayed that this appeal be dismissed with costs. Counsel for the respondent opposed the appeal and stated that this appeal was filed as a result of an afterthought when the respondent asked the appellant to pay auctioneers charges amounting to Kshs.19,493/= otherwise the matter had been settled with the appellant having paid the full decretal sum.

That the appellant had sold his motor vehicle to the respondent on certain terms which included that a sum of Kshs.164,000/= be paid to the financer who had financed the purchase of the same to the said appellant but that when the respondent went to check the balance with the financer he found it was more than Kshs.164,000/= by Kshs.106,666/=. That on discovery of this excess amount, the respondent went to discuss the matter with the appellant who agreed to refund the excess sum.

That the respondent went on to pay the whole amount trusting that the appellant, who was a Pastor, would honour hisword and it is when he renegated on his promise that the respondent brought him to court. According to counsel for the respondent, the respondent did not know the balance owing to the financer at the time of making the agreement and that by this time the appellant had already been paid part of the purchase price. That since the appellant agreed that if the respondent had not paid the debt to the financer he himself would have paid it, he was in fact agreeing that the respondent had paid for him the debt but that he did not wish to refund it. That the appellant wanted to take advantage of absence of an agreement in writing to deny the respondent of his just entitlement. Counsel termed this appeal dishonest and prayed that it be dismissed with costs. These are submissions made before this court for consideration and decisionA sum of Kshs.106,666/= is not small money by any standards. The agreement entered into by the parties is on this record of appeal. By paragraph 4 thereof, the appellant agreed to and did sell his motor vehicle registration number KYJ 302 Toyota to the respondent at Kshs.324,000/=. Out of this money, the respondent was to pay to the appellant Kshs.160,000/= while the balance of Kshs.164,000/= was to be paid to the financer, Messrs Jamnadas Finance Company Limited.

Surely the impression this arrangement created in the respondent’s mind was that the balance standing and owing to the financer by the appellant was Kshs.164,000/= he, the said appellant being the person to whom monthly accounts statements were delivered. But what did the respondent discover when he went to get the actual balance? The debt owed was Kshs.270,666/=; a much

bigger amount than the 164,000/= the appellant believed he was owing the financer.

The excess amount was too big and this is why the respondent testified in the lower court that he went to discuss it with the appellant. And I think this is what would happen normally. No person, however rich would easily accept to assume a responsibility to pay Kshs.106,666/= when this had not been provided for in the agreement stipulated above without raising a query about it.

I am sure, and I am certain the lower court was too, that if the appellant did not want anything more to do with the motor vehicle on discovery of this new facts, he would have rescinded the agreement, or if he went to the appellant and was told to go it alone, he would most certainty have rescinded this contract. But when the respondent said he discussed the matter with the appellant who told him to pay the excess money which he would refund, any reasonable court would be bound to believe

this evidence as a normal course of events in the circumstances of a case of this nature.

The contract entered into by the parties was not meant to give the appellant a leeway to only burden the respondent with financial obligations he had not made the latter aware of. The respondent did not base his claim against the appellant on either fraud or misrepresentation, hence the question of the incidents of such fraud or misrepresentation being pleaded or particularized in the plaint could not arise. Even if the respondent had based his claim on fraud or misrepresentation he could, as well, have made a point because the appellant, who was in possession of full information and facts about his financial dealings with the financier, did not avail all such information to the respondent at the time when the agreement was made on 17th July 1996. The learned magistrates reference to the term misrepresentation was by the way considering the evidence of this transaction before her.

In the magistrate's view, she must have accepted and believed the evidence of the respondent which the appellant did not deny, anyway, that the two parties met after the respondent discovered the excess amount from that agreed in the contract and that the appellant agreed to refund it. The magistrate saw and heard witnesses testify and she was in a better position to assess their credibility. She believed the evidence of the respondent as true and by implication rejected that of the appellant as false, which she was entitled to do. In the circumstances of this case, it would have been futile to rescind the agreement after the appellant had already received his Kshs.160,000/= as the latter, might as well, not have refunded it until matters were sorted out in the court of law.

As the first appellate court I agree with counsel for the respondent that this was a simple debt claim but that the appellant would wish to raise irrelevant issues to complicate the matter so as to deny the respondent, his just entitlement.

But I do not think courts should be used to perpetuate such frauds.

To allow the appellant to get away with this claim would amount to day light robbery against the respondent.

This appeal has no merit and it is dismissed with costs.

Delivered and dated this 31st day of October, 2002.

D.K.S. AGANYANYA

JUDGE