Tolgos v Transport & Lifting Services Limited & another (Civil Appeal E187 of 2022) [2025] KEHC 2937 (KLR) (Civ) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E187 OF 2022

RC RUTTO, J

MARCH 7, 2025

BETWEEN

ALEX TANUI TOLGOS ..... APPELLANT

AND

TRANSPORT & LIFTING SERVICES LIMITED ..... 1ST RESPONDENT

CFC STANBIC BANK ..... 2ND RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (E. Kagoni, PM.) delivered on 31stOctober 2022 in CMCC No. 5280 of 2013)

JUDGMENT

1. The claim in the plaint was one for specific performance. The 1st respondent's case was that the appellant failed to honor its financial obligations pursuant to an agreement dated 10th September 2012 for the sale of a truck registration number KBT 315E. For this reason, the 1st respondent sought judgment against the appellant for Kshs.3,300,000.00 together with costs of the suit.

2. In the plaint dated 20th August 2013, the 1st respondent averred that the appellant was its customer pursuant to an agreement for the sale of a truck chassis serial number WMAH24ZZ55G177xxx and engine number 50509610680xxx. It was inter alia agreed that the purchase price was Kshs.3,300,000.00, the appellant paid a deposit of Kshs.140,000.00 and was to seek financing for the balance of Kshs.3,160,000.00. The 1st respondent proceeded to register the truck in the name of the appellant together with his financier, the 2nd respondent on the basis of what it termed as mutual trust.

3. The 1st respondent's case was that the appellant failed to honor its financial obligations by paying the full purchase price. For this reason, the 1st respondent sought judgment against the appellant for Kshs.3,300,000.00 together with costs of the suit.

4. In its judgment dated 31st October 2022, the trial magistrate summarized the testimonies of the various parties. In the end, he found that the 1st respondent had proved its case on a balance of probabilities. Consequently, judgment was entered in the terms set out in the plaint against the appellant as follows; "specific performance for amount of Kshs.3,160,000/= which is less the deposit paid merited and is hereby allowed as prayed with costs. The amount will accrue interest at court rate from the date of filing suit until payment in full. The costs of the third party will be borne by the Defendant."

5. It is those findings that have precipitated the filing of the present appeal through a memorandum of appeal dated 29th November 2022. The Memorandum of appeal raises a prolix 18 grounds disputing the findings of the trial court.

6. The grounds of appeal are summarized as follows; that the learned magistrate erred in holding that the appellant failed to notify the 1st respondent of the decision of the third party in recalling the undertaking; no undertaking was issued to the 1st respondent over settlement of the balance as a basis for joint registration of the truck in the names of the appellant and the 2nd respondent; since no undertaking was issued by the appellant, and confirmed by the third party witness, to the 1st respondent, then the trial court erred in holding that the 1st respondent succeeded in its claim; it was an improper finding that he was in breach of the contract dated 10th September 2022 when it was conditional on bank financing; the trial court ignored the issues for determination as framed by the 1st respondent; the three letters of offer dated 30th March 2012, 23rd May 2012 and 23rd August 2012 were not binding on the 1st respondent to register the truck in the names of the appellant and the 2nd respondent jointly; no binding agreement was entered following the lapse of the letters of offer dated 30th March 2012 and 30th June 2012; the trial court erred in holding that the sale agreement was legally binding and enforceable on the strength of the letter of offer dated 30th March 2012 and the cheque dated 18th May 2012 for the sum of Kshs. 140,000.00; the trial court ought not to have awarded the reliefs sought since the truck was in the possession of the 1st respondent; that the 1st respondent was the author of his own misfortune when he transferred the truck in the names of the appellant and the 2nd respondent; and the trial court erred in failing to consider the forensic report on the merits.

7. Though the grounds were espoused in the memorandum of appeal, the appellant sought no reliefs. That being said, the appeal was disposed of on the basis of the parties' written submissions. The appellant relied on his written submissions dated 18th December 2023. The respondents respectively filed their separate written submissions both dated 18th March 2024.

8. I have considered the memorandum of appeal and the respondent's written submissions, examined the record of appeal and analyzed the law. As a first appellate court, my primary role is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR].

9. The facts as captured in the record are as follows: the 1st respondent's human resource manager David Kingori testified as PW1. He stated that the 1st respondent was in the business of selling motor vehicles including truck lorries. On 10th September 2012, the 1st respondent entered into an agreement (PExh.1) for the appellant's purchase of a truck motor vehicle registration number KBT 315E chassis number WMAH24ZZ55GI77xxx engine number 50509610680xxx. It was agreed inter alia that the purchase price was Kshs.3,300,000.00 and the appellant would seek financing in the sum of Kshs.3,160,000.00 as the sum of Kshs. 40,000.00 would be met by the appellant. That amount would be paid via cheque dated 18th May 2012.

10. Based on mutual trust, and on the strength of that agreement, the 1st respondent caused the vehicle to be registered in the name of the appellant and the 2nd respondent jointly in spite of not receiving any undertaking from the bank. It relied on the transfer application form dated 14th September 2012 marked PExh.2 and the motor vehicle search dated 25th July 2013 marked PExh.3. This was after it was confirmed that the deposit had been paid. PW1 contended that regrettably, the appellant failed to honor the rest of his obligations. He also learnt that the 2nd respondent withdrew from the offer.

11. The 1st respondent demanded for specific performance in its letter dated 10th January 2013 marked PExh.4. However, the appellant failed to make good the demand hence the suit

12. The 1st respondent also called its sales manager, PW2, Peter Mutua, as a witness. He corroborated the evidence of PW1 save to add that he was the one that executed the sale agreement on behalf of the 1st respondent. He testified that the proforma invoice dated 16th March 2012 was presented to the 2nd respondent by the appellant to help him process the financing. He clarified that the bank gave an undertaking. That the deposit was paid on 18th May 2012. That the suit vehicle was registered in the names of the appellant and the 2nd respondent since the 2nd respondent had guaranteed to the pay the balance by giving an undertaking. It was the agreement of the appellant and the 1st respondent that the suit vehicle be registered in the names of the appellant and the 2nd respondent.

13. The appellant called three witnesses. As DW1, the appellant adopted his witness statement dated 28th September 2021 as his evidence in chief to testify that in March 2012, he approached the 2nd respondent seeking financing of a Mercedes Benz Actros truck. He was issued with a letter of offer dated 30th March 2012. Upon execution, the appellant fulfilled the requirements of the agreement including a down payment cheque in the sum of Kshs.140,000.00 (DExh.3) dated 18th May 2012. He also executed a sale agreement with the 1st respondent.

14. However, DW1 stated that upon securing the financed sum, the suit vehicle had been sold by the 1st respondent to a third party. He acknowledged that he had entered into several agreements with the 1st respondent previously. It was then in May 2012 that the 1st respondent obtained a subsequent vehicle that the appellant preferred. Consequently, on 23rd May 2012, the 2nd respondent issued him with a letter of offer (DExh.1) for the purchase of a used unit man truck. He stated, that he did not settle for the man truck (the suit vehicle herein) indicated in the offer letter, had no agreement with the 1st respondent and did not sign the offer letter. That the 2nd respondent declined to approve this letter of offer as his bank statements did not support his bid to obtain financing.

15. DW1 added that he was not aware of the letter of offer dated 11th October 2012 (DExh.2) and the sale agreement of 10th September 2012 and denied executing any of them. In any event, he was no longer interested in securing the chattel. On account of his failure to execute the 2nd and 3rd letters of offer, the appellant stated that their validity thus expired. He further denied sanctioning or issuing a written or verbal undertaking for the registration of the suit vehicle. He was of the view that the same was fraudulent.

16. Finally, DW1 denied receiving any letter of demand. He suggested that the 1st respondent ought to have repudiated the contract or demanded the specific performance from the 2nd respondent and not on him. He adduced a profoma invoice in the sum of Kshs. 4,800,000.00 dated 16th March 2012 (DExh.4) of the Mercedes Benz Actros, a document examiner's report dated 2nd November 2021 (DExh.5) and the letter of instructions to the document examiner dated 1st October 2021 marked (DExh.6).

17. DW2 Washington Chemilil was also called as a witness for the 1st respondent. His evidence was that in May 2012, he was involved in the purchase of a motor vehicle truck registration number WX05 KYF

which cost Kshs.4,500,000.00. He paid a deposit of Kshs.140,000.00 with the balance being financed by the 2nd respondent in the sum of Kshs.3,150,000.00. He was therefore not aware of the purchase of a motor vehicle in the sum of Kshs.3,300,000.00. He testified that though the facility was approved, it was not granted. He therefore could not understand why the 1st respondent proceeded to register the vehicle in the names of the appellant and the 2nd respondent. He urged this court to dismiss the suit because the 1st respondent ought to have joined the 2nd respondent as a defendant and it ought to have repudiated the contract instead of seeking specific performance. He also stated that he was purchasing the suit vehicle on behalf of the appellant and that he was the author of the cheque in question.

18. The 2nd respondent's witness Ruth Wangui Mwangiexplained the procedure for loan approval, asset financing and registration of a truck in the joint names of the parties. She confirmed to the court that issuance of a written letter of undertaking was mandatory and no such undertaking was issued by the bank to the 1st Respondent. She also confirmed that the Appellant never fulfilled the obligations as stated in the letters of offer, and therefore, no amounts were disbursed. That it would be improbable for it to issue an undertaking without having received the signed letter of offer together with all documentation requested on the letter of offer.

19. The 1st respondent sought specific performance on the appellant to compel the appellant to settle the full amount of the suit vehicle namely a man truck registration number KBT 315E chassis serial number WMAH24ZZ55G177xxx and engine number 50509610680xxx in the sum of Kshs. 3,300,000.00. The law on specific performance is well settled. In Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited [2006] eKLR, Justice Maraga (as he then was) held:

> "Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

20. In Amina Abdulkadir Hawa vs. Rabinder Nath Anand& Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors have stated as follows:

> "Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance

which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."

21. According to PW1 and PW2, the 1st respondent entered into a sale agreement with the appellant on 10th September 2012 for the purchase and sale of a man truck motor vehicle registration number KBT 315E chassis number WMAH24ZZ55GI77xxx engine number 50509610680xxx. That agreement was adduced in evidence. However, the appellant vehemently opposed this status countermanding that he in fact never entered into any agreement with the 1st respondent. In support of this contention, the appellant called a document examiner DW3 who compared the signatures embedded in the copies of the sale agreement and the cheque on one part with the appellant's samples.

22. It is trite law that the evidence of an expert needs to be carefully scrutinized. It needs to be assessed alongside other evidence for the court to determine whether the evidence is deliberate as to its truth and is reliability. Examining the entire evidence in totality, I am in agreement with the holding of the learned magistrate when he concluded that DW3 ought to have interrogated originals of the appellant's signatures as to enable him make an informed finding. He ought to have sought for the appellant's cheque book and examined that original document alongside the sale agreement and the cheque drawn in this case. The absence of this crucial step makes the evidence of DW3 unreliable and therefore lacking probative value.

23. When he appellant testified in court, the learned magistrate made the following observations: "I saw the defendant testify and he impressed the court as an astute businessman who would not want to pay for any services and/or goods he had not procured." It is instructive to remember that the trial court had the advantage of seeing the demeanour of the witnesses including the appellant during trial and I can only rely on what's on record.

24. Based on the balance of probabilities, I conclude that the appellant voluntarily entered into this agreement. The appellant cannot now claim otherwise. Furthermore, as the trial court correctly noted, the appellant, in paragraph 4 of his statement of defence effectively admitted that the agreement was contingent on him obtaining financing. It is therefore my finding that the appellant is attempting to attempting to approbate and reprobate the agreement to suit his position. However, in the end he remains bound by the contract he willingly entered into.

25. Among the terms of engagement, the purchase price was agreed at Kshs.3,300,000.00 to be paid as follows: financing in the sum of Kshs.3,160,000.00 as the sum of Kshs.140,000.00 would be met by the appellant. That amount would be paid via cheque. Whether this cheque was paid by the appellant or not was a contested issue. The appellant denied executing the cheque but no cogent evidence supported this assertion. Instead, he bound himself to the agreement upon making payment of Kshs.140,000.00 in favor of the 1st respondent. DW2 in his testimony admitted to having drawn a cheque for Kshs.140,000.00 on behalf of the appellant.

26. It is my finding that the appellant's actions suggest an attempt to evade his contractual obligations. His admission that he was no longer interested in securing the chattels indicates an effort to withdraw from his otherwise agreed responsibilities. This intent was further reflected in his testimony, where he urged that the validity of the 2nd and 3rd letters of offer had expired due to his failure to execute them while also raising unsubstantiates allegations of fraud. Additionally, he contends that the 1st respondent should have either repudiated the contract or sought specific performance from the 2nd respondent instead.

27. Concerning the aspect of financing, parties agreed that the appellant would obtain financing from the 2nd respondent. It is for this reason that the 2nd respondent issued the appellant with a letter of offer

dated 23rd May 2012. Thereafter, the appellant was issued with a letter of offer dated 11th October 2012 approving the loan. It inter alia, stated that it superseded the letter of offer dated 23rd May 2012. In it, the 2nd respondent offered to finance Kshs. 3,150,000.00 with a disclaimer that the loan amount would be disbursed to the seller only upon submissions of all the required documents duly filled, signed and completed as well as upon compliance with all the terms and conditions mentioned above herein.

28. It is apparent that the appellant did not to comply with those terms and conditions as requested by the 2nd respondent, and the reason for the non-compliance has not been advanced. As a consequence, the 2nd respondent subsequently withdrew the offer letter. The appellant's failure to comply with the terms and conditions set out in the offer letter was in breach of the terms of agreement as between the appellant and the 1st respondent bearing in mind that it was on the strength of mutual trust and the developments that emerged after the execution of the sale agreement that the 1st respondent registered the motor vehicle in the names of the appellant and the 2nd respondent. I am also in agreement with the findings of the trial court when it held as follows:

> "In seeking financing, the third-party witness told the court that a customer had to present among other documents the agreement for the goods they wish to be financed. In proceeding to do the offer letters they did the bank must have seen and been satisfied that there was an agreement for purchase of a truck and for which deposit had been paid for by the customer. This is what informed the bank to assent to the joint registration of the truck in the joint names of the defendant and itself. It is also on the strength of what the bank was given by its customer that it asked for the logbook of the truck which it still holds as its witness told the court."

29. Lastly, regarding the third party notice, on 12th March 2015, the appellant was granted leave to join the 2nd respondent who was also granted leave to file its defence. Thereafter on 21st September 2016, the court directed:

> "I note that directions was (sic) not given as concur (sic) determination of liability between defendant and 3rd party. I do direct that liability between defendant and 3rd party be determined after hearing all the parties herein..."

30. Having found that the appellant was the author of the misfortune that arose, I find that he cannot benefit from his own wrongs. The appellant ought to have complied with the requirements set out by the bank in order to secure financing but failed to do so. He exemplified lack of interest in pursuing the financing and never followed up to establish the cause of withdrawal by the 2nd respondent. In any event, the doctrine of privity of contract necessitated that the 2nd respondent could not be held liable for a contract it was not a party to. This is in reference to the sale agreement executed by the appellant and the 1st respondent.

31. At any rate, on the other hand, the appellant had applied for financing from the 2nd respondent on the strength of the sale agreement already entered into between him and the 1st respondent. The financing was based on separate terms which the appellant entered into with the 2nd respondent. The 2nd respondent testified that the 2nd respondent could not proceed with the financing arrangement, the appellant having failed to honour its terms. Whether the 2nd respondent in whose favour registration of the suit vehicle had been jointly made sold the vehicle to a third party or not is in my view beyond the scope of the 1st respondent's claim. What remains inescapable is that the 1st respondent had sold the suit vehicle to the appellant, and was entitled to the entire sale proceeds from the appellant. I therefore find

no culpability on the part of the 2nd respondent so long as the appellant failed to meet the mandatory obligations set out in the sale agreement between him and the 1st respondent.

32. The upshot of my above findings is that the appeal herein lacks merit the trial court's decision is upheld. The appeal is dismissed with costs to the respondents.

33. It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF MARCH, 2025.

In the presence of;

..... For Applicant

..... For Respondent

..... Court Assistant