



**Nzioka v Muthiani (Civil Appeal 76 of 2019)  
[2024] KEHC 3101 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 76 OF 2019**

**MW MUIGAI, J  
MARCH 7, 2024**

**BETWEEN**

**PRESTONE MBONZO NZIOKA ..... APPELLANT**

**AND**

**TITUS PATRICK MUTHIANI ..... RESPONDENT**

*(Header text from original document Shape1 REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT MACHAKOS CIVIL APPEAL NO. 76 OF 2019 PRESTONE MBONZO NZIOKA..... APPELLANT VERSUS TITUS PATRICK MUTHIANI..... RESPONDENT Nzioka v Muthiani (Civil Appeal 76 of 2019) [2024] KEHC 3101 (KLR) (7 M (Appeal from the Judgment of the Honorable Lorot Principle Magistrate in CMCC NO. 376 OF 2009 Prestone Mbonzo nzioka Vs Titus Patrick Muthiani delivered on 29/4/2019))*

**JUDGMENT**

**Background**

**Proceedings in the Trial court**

**The Plaintiff**

PARA 1.

\_\_\_\_\_

In the court record is a further amended plaint dated 12<sup>th</sup> July,2017 and filed in trial court on 25<sup>th</sup> July,2017 by leave of the trial court granted on 6<sup>th</sup> July,2017 against the Respondent/Defendant wherein the Appellant/Plaintiff claimed that he is the registered owner of motor vehicle registration number KXE 844 make Datsun Pickup.



2. Contending that by agreement dated 17/12/2008, the Appellant/Plaintiff agreed to sell his Motor vehicle to the Respondent/Defendant at a purchase price of Kshs. 130,000/-.
3. Averring that the Respondent/Defendant paid Kshs. 115,000/- on 17/12/2008 being part of the purchase price leaving a balance of Kshs. 15,000/- which the Respondent/Defendant was to pay on 30/1/2009 under the terms of agreement hence time was of the essence of the contract. Opining that in breach of the terms of the agreement the Respondent/Defendant failed to pay the balance of the purchase price on 30/1/2009 and the Appellant/Plaintiff was entitled to rescind the said contract since time was of essence of the contract, amounting to Kshs. 15,000/- which amount the Appellant/Plaintiff prayed from the Respondent/Defendant with interest since 30/1/2009 at court rates.
4. Contending that due to the said breach of contract, he paid Kshs. 9,600/- parking charges and Kshs. 20,000/- as towing charges for the said motor vehicle which amounts he claimed from the Respondent/Defendant.
5. Appellant/Plaintiff prayed for judgment and/or orders to be entered against the Respondent/Defendant for: -
  - a. Kshs. 15,000/- with interest since 30/1/2009 at court rates.
  - b. General damages for breach of the contract to be set off from the Kshs. 115,000/- paid by the Respondent/Defendant as part of Purchase price.
  - c. Payment of Kshs. 29,600 being storage and towing charges.
  - d. Costs of the suit.
  - e. Interest on b, a and c above at court rates.
  - f. Any other and/or further relief as this Honorable Court deems fair and just to grant.

## **The Defence**

### **The 3<sup>rd</sup> Amended Statement of Defence & Counterclaim**

6. The Respondent/Defendant in his defence dated 20<sup>th</sup> July,2017 and filed in court on 21<sup>st</sup> July,2017 contended that he is the rightful and lawful owner of motor vehicle Registration No. KXE 884.
7. Further it was the Respondent/Defendant's contention that in denial to paragraph 5 of the plaint, he paid to the Appellant/Plaintiff Kshs. 5,390/= to facilitate transfer of the said motor vehicle from its previous owner to the plaintiff.
8. The Respondent/Defendant denied the content of Paragraph 6 of the Plaint and contended that both parties mutually agreed that the Balance of Kshs. 9,610/= was to be paid to the Appellant/Plaintiff upon transfer of the said motor vehicle in favour of the Respondent/Defendant.
9. Respondent/Defendant denied service of the demand or intention to sue on him.

### **The Counter claim**

10. In the counter claim, the Respondent/Defendant averred that upon execution of the sale agreement he took possession of the subject motor vehicle and repaired the same at a cost of Kshs. 84,000/= and he claimed the refund of the sum of Kshs. 84,000/=



11. He contended that he placed the said motor vehicle into commercial use and the same generated average income of Kshs. 2,000/= per day. Averring that on 20/3/2009 the Appellant/Plaintiff unlawfully repossessed the said motor vehicle and consequently subjected the defendant to loss of income.
12. Averring that he had paid to the Appellant/Plaintiff the total sum of Kshs. 120,390/= pursuant to the agreement made on 17/12/2008 and which agreement the plaintiff breached by repossessing the subject motor vehicle. He claimed the refund of sum of Kshs. 120,390/=
13. The Respondent/Defendant prayed that the Appellant/Plaintiff's Suit be dismissed with costs and judgment be made in favour of the defendant against the Appellant/Plaintiff for: -
  - a. General damages for loss of use of motor vehicle registration No. KXE 884 from 20/3/2009 at the rate of KSHS. 2,000/= per day until determination of the suit.
  - b. Refund of Kshs. 120,360/= with interest.
  - c. Costs of the main suit and counter claim plus interest.

#### **Answer to 3<sup>rd</sup> Amended Defence and Defence to counter claim**

14. The Appellant/Plaintiff in his answer to the 3rd Amended Defence and Defence to counter claim dated 15<sup>th</sup> September, 2017 wherein he denied paragraph 4 of the 3<sup>rd</sup> amended defence and denied any money was paid to him or at all and denied receipt of Kshs. 5,390/-. He further denied the allegation that the parties mutually agreed that the alleged balance which was denied was to be paid after transfer of the alleged motor vehicle.

#### **Defence to Counter claim**

15. In answer to the counter claim, the Appellant/Plaintiff averred that the Respondent/Defendant abandoned the Motor vehicle at Kenol Petrol Station and made a report to the police that the Appellant/Plaintiff had stolen the motor vehicle and he forced to tow the subject motor vehicle at Machakos Police Station by DCIO after he demanded for completion of the Respondent/Defendant's part of bargain and therefore the allegation that he repaired the Motor vehicle is false.
16. He denied repossessing the subject motor vehicle and placed the plaintiff into strict prove thereof. Contending that it is the plaintiff defendant who breached the agreement by failing to pay the consideration of the sale.
17. He denied that the plaintiff is entitled to refund of any money himself having breached the sale agreement by failing to pay the agreed consideration. Averring that the defendant's counter claim amended is bad in law and incompetent for having been filed out of statutory time limit and shall at the earliest opportunity raise a preliminary objection on a point of law the Plaintiff's suit be dismissed with costs.
18. He prayed that the amended counter claim be dismissed with costs to the Plaintiff and Judgment be entered for the Defendant as prayed in the plaint.

#### **Hearing in the trial court**

19. PW1 was Prestone Mbunzo Nzioka. He testified that he sold his motor vehicle Registration No. KXE 884 Datsun Pickup T200 on 17/12/2008 to one Titus Patrick Muthiani, the Defendant at Price of Kshs. 130,000/= the Defendant paid Kshs. 115,000/-. Testifying that the balance of Kshs 15,000/- to be paid by 30/1/2009. He claimed to have the sale agreement PEXHIBIT 1. He told the trial court



that he released the motor vehicle to the Defendant. In default of balance, there was no clause for want of breach and the balance has yet to be paid. PW1 was to transfer after completion of payment and kept reminding of payment but he remained silent. Testifying that he filed a case in court to rescind the contract which was filed on 27/3/2009 and Patrick was served on 31/3/2009. He went to Machakos Police Station and reported that his vehicle parked at Kenol Fuel station was missing. He declined to pay the balance. That time he had towed the motor vehicle to his place. It was his testimony that the police had demanded the removal of the motor vehicle parked at Kenol Petrol Station. claiming that the Defendant had abandoned the motor vehicle at Kenol Petrol Station from 1/2/2009 to the date he towed it on 20/3/2009.

20. He told the trial court the management of Kenol called him because they knew the police had discovered guns in a parked vehicle for use by thugs. That they directed all vehicles be removed. The Defendant was informed he called him and told him to take charge of the situation. PW1 towed the vehicle to his residence. His report was captured an OB 39 of 1/4/2009 at 5:15 Pm he produced the OB extract of the same. He told the trial court that he paid the storage charges which amounted to 48 days at Kshs 9,600/-. They could not release without payment. He paid on 20/3/2009 he produced the receipt (PEXHIBIT 5) he towed the vehicle she did not have the keys as it did not have a battery he towed it Kshs. 10,000/- for a distance of 10Kms (PEXHIBIT 6). He claimed that he did not breach the agreement as he played his role in full and he gave their physical possession and was ready to transfer, he did not pay the balance. He told the trial court witnesses signed the agreement. Testifying that the Defendant claimed loss of use when no one used the vehicle as it was parked all the time at the police yard at his own request. PW1 did not understand the demand of Kshs. 120,390/- He was the author of the misfortune that befell him. He has no vehicle to give PW1 back and still owes PW1. PW1 prayed for damages for breach of contract, storage charges, towing and costs of the suit. And that the counter-claim is unsupported and should be dismissed.
21. In cross-examination. He told the trial court that the Agreement was dated 17/12/2008. He had seen the vehicle. The transfer was already signed in his favour by the previous owner Simon Gicharu. Testifying that he gave immediate possession on 17/12/2008 when he paid Kshs. 115,000/- and the agreement shows balance to be paid on or before 30/1/2009. That on 17/12/2008 he received Kshs. 115,000/- that was around 89% roughly. According to PW1, log was registered in his name in February,2009. PW1 would not have transferred unless the balance was paid. The Defendant never paid any money for the transfer. He repossessed the motor vehicle on 20/3/2009. He took the vehicle at Kenol Petrol Station called him. He told the trial court it was not a repossession. PW1 spoke to Muthiani verbally several times. PW1 was instructed to remove the vehicle where the Defendant had abandoned it. PW1 discussed with the Defendant and he went to PW1 place of work. The Defendant refused to pay the charges and the balance. The motor vehicle was burnt at the police station on 24/3/16 he wished to be allowed to rescind the contract and he recovers his costs. According to PW1 the Defendant had the vehicle for unlimited time as it had not passed to the Defendant. The vehicle is still under the Defendant's possession.
22. In re-examination, he told trial court that the only one he thought as implied is of 30/1/2009 for completion of performance. The transfer was also implied. According to PW1, the log book was signed on 12/2/2009. Testifying that the transfer process was initiated as of 19/12/2008. The Defendant picked the documents in good faith. He never facilitated. PW1 got the log book letter. He made several demands to the Defendant. They were verbal as they were friends. His statement was a skeleton of his full story. PW1 had no business to value the shell. That the Defendant filed an application. The Defendant withdrew it by himself.



## The Defence

23. DW1 was Charles Makenzi Ndola. He testified that he witnessed the sale Agreement dated 17/12/2008 and that the Plaintiff Mbonzo is son to his uncle. Testifying that a down payment of Kshs. 115,000/= was to Mbonzo and he released the car to Muthiani and the deal was already done.
24. In cross-examination, it was his testimony while referring to the sale that there were 2 witnesses and that the agreement does not show Charles Ndola was for Mbonzo. He told trial court that the motor vehicle was sold at Kshs. 115,000/=-, and handed over to Muthiani, the balance was to be paid at an agreed time between the two. According to DW1, the balance was Kshs. 15,000/- to be paid by 30/1/2009. He further told trial court that the vehicle was not in Mbonzo's name; they agreed verbally that the buyer was to pay for the transfer using the balance. Mbonzo was then to release the log book to Muthiani. DWI testified that the balance from his statement was to be paid on 30/1/2009.
25. In re-examination, DW1 told the trial court that he did not draw the agreement he only signed and that there was a verbal agreement as well.
26. DW2 was Philip Wambua David. He told the trial court that he recorded a statement dated 21/2/17 and filed on 22/3/17 and wished to rely on it. Referring to the agreement (Pexhibit 1), he testified that the agreement was drawn and he could not recall by who. DW2 was a witness for Muthiani his cousin and Charles Ndolo was a witness for Mbonzo. Testifying that there was no other evidence other than what they signed up for. lamenting further that Preston Mbonzo was his teacher when he was in primary school. According to DW2 Mbonzo had first gone to look for a buyer for his vehicle. Opining that Muthiani had once asked him to look out for vehicle for him. DW2 was aware there was a dispute. According to him, Muthiani paid Kshs. 115,000/=-, balance was Kshs. 15,000/-. DW2 was aware Mbonzo repossessed the motor vehicle and he never called DW2 to arbitrate.
27. In cross-examination, DW2 testified that the motor vehicle was handed over to the buyer and he is aware Mbonzo repossessed as he was the one keeping the car. DW2 claimed that he was handed over the vehicle to do transport business. Testifying that the car was kept at Kenol Petrol Station. DW2 was to repair it. It stayed with him for almost a month; he was preparing it.
28. In further cross-examination, DW2 told the trial court while referring to PEXHIBIT-1 that there were no additional writings after the signatures as he did not witness the handwritten portion. Testifying further that the motor vehicle was parked at Kenol Petrol Station and there was no report that the vehicle was not where it was parked. According to him, he was not aware there had been a vehicle parked there was used by thugs. Claiming that the loss of this motor vehicle was reported by Titus Muthiani. DW2 is aware the police towed the motor vehicle to the station and that there was a balance of Kshs. 15.000/=-. According to DW2, the deal did not materialize, the car had problems. He told the trial court that he is not aware of other verbal agreements on transfer fees at all.
29. In re-examination, it was his testimony that the management of Kenol Petrol Station were aware that the car was parked there for long as he would park it, make repairs and return it there. DW2 was not made aware the vehicle would be towed prior.
30. DW3 was Titus Patrick Muthiani. He testified that he recorded his statement on 21/3/17 and filed in court on 22/3/17 which bears his signature, he adopted it as his evidence. Testifying that he produced motor vehicle registration no KXE 884 MAKE Datsun Pickup from the Plaintiff. From the log book it was in the name of Simon Gicharu Maina. That when they made the agreement, the same did not capture the name of the owner in the log book. As per DW3 the plaintiff is the one who drew the agreement. DW3 paid Mbonzo Preston Kshs. 115,000/= on the same day, 17/12/2008 and the balance



was to be paid on 30/1/2009. He testified further that there was no default cause indicated in the agreement.

31. He got the log book and the Plaintiff gave him a signed transfer form. DW3 agreed to clear the balance after he had transferred the log book from Simon Gicharu to his name and then to his. DW3 paid some Kshs. 500/- for renewal of the log book. He then paid on his behalf Kshs. 1,890/- to have the transfer from his name to DW3's name (Receipts- for Kshs. 500/= - Dexhibit -1 and for Kshs. 1,890/- Dexhibit). According to DW3 they agreed verbally, in a gentlemen's understanding and he gave the Plaintiff Kshs. 2,000/= that was on 30/12/2008. DW3 gave him Kshs. 1,000/= on 12/1/2009. It was DW3, s testimony that as at 12/1/2009 he had paid a total of Kshs. 120,390/= towards completion of purchase. They met on 30/1/2008. They were together at KRA office. there was no way it could be transferred to DW3 because the transfer form was executed between him and Simon Gicheru. He needed to leave it transferred to himself then DW3. They agreed that as soon as he gets the log book, he will transfer to DW3. When DW3 took the vehicle, it needed some repairs, paint work and fixes. DW3 took it to the garage. He claimed that it costed DW3 Kshs. 84,000/-. He claimed that it was being parked at Kenol Petrol Station to be hired out for transport of goods. He told the trial court that they would make Kshs. 2,000/= for each trip. As per DW3, this case was filed on 27/3/2009 seven days of repossession. That once served with summons, his lawyer applied to have the vehicle released to him. It was dated 23/4/2009. Mbonzo made a response to the application sworn on 6/5/2009 at paragraph 6, Mbonzo say the log book is in his name and therefore his property. DW3 testified that he had looked at the Further Amended Plaintiff filed by Mbonzo where he is seeking in his prayers, Kshs. 15,000/= with interest from 30/1/2009 and general damages and set off of the purchase price. DW3 stated that he had not used the motor vehicle; it was repossessed. He heard it burnt. No one had given him the details. Dw3 prayed for the refund of full amount paid, court fees, repairs he incurred and interests. He produced the sale agreement with the tabulated payments Dexhibit- 3.
32. In cross-examination, he testified that he had the balance of Kshs. 15,000/- payable as at 30/1/2009. DW3 paid some amounts. There was a balance of Kshs. 9,610 (reference to Dexhibit- 3) that the handwritten portions are part of the verbal agreements they dealt. According to DW3, the Plaintiff did not append his signature on it. The Plaintiff gave him a log book and signed transfer form. It was in the names of some other persons. They went to KRA with Preston and they paid to the name of Preston Mbonzo Nzioki. The payment was by himself. It was his money. That the sale agreement was silent on who was to pay for the transfer. They were in the agreement as gentlemen and it cannot be true that he paid for the transfer. According to DW3, the Plaintiff had to transfer the log book from Simon Gicharu to himself and then subsequently transfer to him. He learnt that he had obtained the log book. Plaintiff was now to transfer to him but he did not. DW3 could not pay the whole amount until he transfers the vehicle to him. He told trial court that this was a very sketchy agreement that Defendant mostly as gentlemen's agreement and conduct to good faith. DW3 reported to Machakos Police station as he did not know where the vehicle was. testifying that the police were to recover the motor vehicle from wherever it was. He suspected Plaintiff had taken it. DW3 was not paying the parking fees his agent was. DW3 was not aware that the management had levied a daily parking fee on the vehicle. DW3 did not see a tag on the receipt of parking of the motor vehicle. DW3 saw that Preston Mbonzo paid some money to better Masaku Petrol Station. testifying that his vehicle got lost at Kenol Petrol Station and that he still has the ignition key. May be Mbonzo had a duplicate. The vehicle was running when the Plaintiff sold it to him. DW3 later heard that the motor vehicle got burnt and that he was waiting for the transfer to be effected in his favour. DW3 claimed that he cannot have been in breach. He paid all the money and the balance was minimal. DW3 testified that he cannot pay the balance as he no longer has a vehicle. It was his testimony that he reported that his vehicle was stolen and that the police kept the vehicle at the behest of the "owner of the motor vehicle" "the plaintiff." DW3 paid the Plaintiff Kshs.



2,000/- and Kshs. 1,000/=. He took the money; they did not sign as they had no issues. According to DW3, the police recovered the vehicle from the plaintiff. He had repossessed. When the Plaintiff obtained a log book in his name, he found means to retain the motor vehicle. DW3 is the one who prayed for refund. He failed to transfer the vehicle to DW3. That the plaintiff is the one in breach as he handed over the vehicle to DW3 but failed to surrender the new log book to himself. The plaintiff got the money, had the log book transferred to himself with DW's money and repossessed the motor vehicle. Plaintiff then rushed to file suit.

33. In re-examination, it was testified by DW3 that Plaintiff had the vehicle towed from the Plaintiff's home to the police station. That Plaintiff also claim to have towed the motor vehicle from Kenol Station to Kathekakai home. testifying that the log book is the only instrument that would pass ownership and that the receipts were to assist Mbonzo renew the log book. It was an old log book and payment to change the ownership for Gicharu to Preston Mbonzo. DW3 paid the substantial price over 95%. The vehicle was parked at the Petrol Station at the behest of DW3's agent and management and Mbonzo.
34. The matter was canvassed vide written submissions.

### **The Trial Court Judgment**

35. The Trial Court in its judgment dated 29<sup>th</sup> April,2018 found that the counter claim for the sum of Kshs 120,390/= was proved on a balance of probabilities. Judgment was entered for the Defendant as against the Plaintiff in the sum of Kshs. 120,390/= with costs and interests calculated thereon from the date of filing suit at court rates, till payment in full. The plaintiff will also pay costs to the Defendant for defending the Plaintiff's suit, now dismissed.

### **The Appeal**

36. Dissatisfied by the judgment of the trial court, the Plaintiff/Appellant vide his Memorandum of Appeal dated 29<sup>th</sup> May,2019 wherein the Appellant sought orders that:
- a. This appeal be allowed and the judgment of Hon. Lorot be set aside and judgment be entered in favour of the appellant as prayed in the plaint.
  - b. Costs of the appeal.
37. The Appeal was premised on the following grounds that:
1. The Learned Magistrate erred both in law and fact when he dismissed the plaintiff claim.
  2. The Learned Magistrate erred both in law and fact by deciding that the appellant should pay the Respondent a sum of Kshs. 120,390/-.
  3. The Learned Magistrate erred both in law and fact by failing to appreciate it is the Respondent who breached the terms of the sale agreement.
38. The appeal was canvassed by written submissions.

### **Submissions**

#### **The Appellant's submissions**

39. The Appellant in his submissions dated 7<sup>th</sup> July,2023 and filed in court on 10<sup>th</sup> July,2023 wherein the counsel for the Appellant joined all the three grounds of appeal and submitted on the sequentially.
40. As to Whether the learned Trial Magistrate erred both in law and fact by dismissing the Plaintiff's claim, counsel argued that the Appellant is entitled to the prayers as per his further amended Plaintiff



filed on 25/7/2017 where he sought; general damages for breach of contract, outstanding balance of the purchase price amounting to Kshs. 15,000/= with interest since 30/1/2009 and payment of storage and towing charges amounting to Kshs. 29,600/- reference was made to page 38-40 of the Record of Appeal.

41. Reliance was made on Section 107 (1) of the Evidence Act Cap 80 to buttress his position on the burden of proof, and argued that the Appellant's submissions that he proved his case to the required standard of proof. He relied on Section 3 (1) of the Law of Contract Act Cap 23.
42. It was submitted that the agreement expressly stated that the Purchase Price for the vehicle is Kshs. 130,000/= and what is documented as paid is Kshs. 115,000/= leaving a balance of Kshs. 15,000/= which the Respondent was to pay by 30/1/2009. That the stated terms were binding upon the parties, however, the Respondent failed to honour his part of the bargaining despite several reminders by the Appellant. Contending further that the Appellant held on to his motor vehicle as a condition for payment of the outstanding balance by the Respondent, which prompted the Respondent to report to the police station that his car was missing with the Appellant being the main suspect.
43. It was averred that despite the Respondent paying a substantial amount he still breached a fundamental clause of the agreement on the payment of the balance thus the Appellant was entitled to rescind the contract. Credence was placed on the case Jackline Njeri Kariuki Vs Moses Njung'e Nairobi HCCA No. E040/2020 [2021] eKLR to support his point on the breach of contract.
44. As to whether the learned trial magistrate erred both in law and fact by deciding that the Appellant should pay the Respondent a sum of Kshs. 120,390/-, counsel submitted that the learned trial magistrate erred in law and in fact by condemning the Appellant to pay the Respondent the sum of Kshs. 120,390/= as he failed to take into account that it was the Respondent who breached the terms of the contract by failing to pay the outstanding balance as agreed. Secondly, the Respondent did not adequately prove his claim for the sum of Kshs. 120,390/=. Averring that the Respondent claimed to have paid Kshs. 500 for renewal of the log book and Kshs. 1890/= for transfer form yet the receipts produced are in the name of the Appellant herein and there is no proof to show that he gave the money to the Appellant as such they remain mere allegations.
45. Further, it was the Appellant's case that the Respondent claims to have a verbal agreement with the Appellant and gave him a sum of Kshs. 3,000/= as at 12/1/2009 towards completion of the purchase price totaling to Kshs. 120,390/=. The said sums were handwritten as an additional clause below the testimonies in the sale agreement the Respondent brought to court and which on re-exam he stated that the same had been agreed orally but he went ahead and put in writing.
46. On whether the learned Magistrate erred both in law and fact by failing to appreciate it is the Respondent who breached the terms of the sale Agreement, counsel submitted that from the evidence tendered in court, it is clear that it is the Respondent who breached the terms of the Agreement by failing to pay the outstanding balance of Kshs. 15,000/- on the agreed date thus prompted the Appellant to repossess his motor vehicle. Opining that the Appellant after the execution of the agreement, in good faith gave the Respondent exclusive possession of the vehicle, however the Appellant still had an interest in the vehicle being Kshs. 15,000/= and thus was entitled to enforce his Right of lien by repossessing the vehicle and retaining possession until payment in full.
47. Contending that the Respondent to claim that he never got any vehicle from the Appellant and that the vehicle burned while in possession of the Appellant is quite farfetched as he is solely the author of this misfortune. To buttress this point reliance was placed on the cases of NCBA Bank PLC Vs Cyrus Ndung'u Njeri t/a Digital Tours and Logistics [2021] eKLR and National Bank of Kenya Ltd Vs



Pipeplastic Sankolit (k) Ltd & Anor [2001] eklr, and submitted that parties are bound by the terms of a contract.

48. The Appellant prayed that this appeal be allowed with costs to the Appellant.

### **Respondent's submissions**

49. The Respondent in his submissions dated and filed in court on 12<sup>th</sup> June,2023, wherein counsel for the Respondent in ground 1, 2 and 3 submitted that from the pleadings and evidence presented, it is not in doubt that the sum of Kshs. 120,390/= was paid by the Respondent to the Appellant. Contending that it was agreed verbally that the balance of Kshs. 9,610/= will be paid after transfer of the vehicle to the Respondent.
50. It was submitted that the Appellant herein instead of transferring the motor vehicle herein to the Respondent repossessed the same 23<sup>rd</sup> March,2009. Contending that the agreement did not give the Appellant herein powers to repossess the said motor vehicle. Further that the Appellant in his amended plaint has sought the sum of Kshs. 29,600/- being towing and storage charges for the illegal repossession of the suit motor vehicle which is an admission that he illegally and unlawfully and without any justification in law repossessed the suit motor vehicle.
51. It was the position of the Respondent that the Appellant never filed any document in court to prove that he had transferred and/or had commenced the process of transfer of the suit motor vehicle to the Respondent. Reliance was placed on Sections 107 (1), 109 and 112 of the Evidence Act to cement the position on the burden of proof. Counsel argued it was incumbent on the Appellant to show how the Respondent had breached the agreement for the court to enforce the same. Submitting that the Appellant had come to court with unclean hands. Prior to the filing of the suit, he had already repossessed the suit motor vehicle in blatant disregard to the sale agreement and the law. That the suit in lower was filed on the 27<sup>th</sup> March,2009 a period of 7 days after the Appellant had repossessed the suit motor vehicle was according to the Respondent done to sanitize the illegal activities.
52. It was submitted that the Appellant cannot therefore come on appeal and state that the learned magistrate erred in dismissing his claim when the same had been brought in bad faith and was aimed at sanctioning his illegal activities. That it is clear from the pleadings filed at the lower court that it is the Appellant who breached the sale agreement.
53. It was averred that the learned magistrate did not err in law and fact in dismissing the Appellant's claim and holding that the Appellant had breached the contract for sale of motor vehicle registration number KXE 844. Counsel relied on the cases of Board of Trustees Anglican Church of Kenya Diocese of Marsabit Vs THW (Suing through her father and guardian ad litem HWG) [2019] eklr and Shabani Vs City Counsel of Nairobi (1985) KLR, 516, to buttress the point what the appellate will consider to disturb an award of damages of the lower court.
54. It was submitted that the burden of proof on whether the learned magistrate proceeded on the wrong principle of the law and/or the award is inordinately high or law lies with the Appellants. Hence according to Respondent the learned magistrate did not proceed on the wrong principle of the law nor did he arrive at misconceived estimates and that the judgment sum is not inordinately high to represent an entirely erroneous estimate based on some principle or misapprehension of the evidence.
55. Respondent urged the court to be guided the appeal is not merited and proceed to dismiss it with costs to the Respondent.



## Determination/analysis

56. The Court considered the Appellant's appeal, pleadings filed and written submissions filed by parties through respective Counsel.
57. The issue for consideration in this appeal is that the judgment entered for the Defendant against the Plaintiff/Appellant be set aside and judgment is entered for the Appellant for payment of the balance of Ksh 15,000/- of the purchase price of the vehicle and parking and towing charges totaling 19,600/-
58. PW1 testified that he sold his motor vehicle Registration No. KXE 884 Datsun Pickup T200 on 17/12/2008 to one Titus Patrick Muthiani, the Defendant at Price of Kshs. 130,000/= the Defendant paid Kshs. 115,000/-. Testifying that the balance of Kshs 15,000/- to be paid by 30/1/2009. He claimed to have the sale agreement PEXHIBIT 1.
59. The Respondent/defendant stated there was both written contract and oral agreement. He signed the Sale Agreement and paid Ksh 115,000/- of the Purchase price and the vehicle was handed over. He was to pay the balance of Ksh 15,000/- the following year 2009 but the vehicle was towed before then. He paid Ksh 5,390/- to the Appellant to facilitate registration of the vehicle and hence claimed refund of Ksh 115,000/- and Ksh 5390/- for registration as the vehicle was confiscated.
60. The *Sale of Goods Act* provides sale of goods is preceded by a contract of sale of goods the binds the parties as follows;
3. Sale and agreement to sell (1)A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. (2) There may be a contract of sale between one part owner and another. (3) A contract of sale may be absolute or conditional.(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
61. In Pius Kimaiyo Langat vs Cooperative Bank of Kenya [2017]eKLR Court held;
- We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
- In Galaxy Paints Company Limited V. Falcon Guards Limited Court of Appeal Case Number 219 OF 1998, the Court of Appeal stated that
- “issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.”
61. The Appellant and Respondent concede/concur they entered into a contract for sale of Registration No. KXE 884 Datsun Pickup T200 on 17/12/2008 which on payment of Ksh 115,000/- by the Respondent the vehicle was released to him on condition the balance of Ksh 15,000/- was to be paid and time was of the essence.
62. On breach of non-payment of the balance of the vehicle purchase price Ksh 15,000/- the Appellant repossessed the vehicle the respondent reported vehicle missing and it was towed to the Machakos



police Station as the Appellant/Plaintiff filed the suit in the Trial Court for declaration, breach of contract and damages.

63. The Trial court entered judgment for the Defendant /Respondent for refund of Ksh 115,000/- paid and Ksh 5,390 advanced for registration.
64. The fate of the motor vehicle was sealed as while at the police station a fire broke out and razed vehicles among them the motor vehicle KXE 884 Datsun Pickup which was burnt and was not salvaged.
65. Therefore, although the Trial Court found the repossession of the vehicle by the Appellant a brazen act, and dismissed the Appellant's claim for balance of purchase price towing and storage fees and damages for breach of contract, entering judgment for refund of the part payment by the Respondent was also not fair and just because, the parties freely contracted the terms of the contract and executed the sale agreement. The terms of the contract could/cannot be rewritten by the Court.
66. The defendant had possession and use of the vehicle upon payment of 89% of the purchase price and did not pay the balance of Ksh 15,000/-. The vehicle the subject-matter of the contract was destroyed by fire. Therefore, the judgment by Trial Court for Appellant to refund Ksh 115,000/- & Ksh 5390/- for registration would not be fair and just as the Appellant would not get his vehicle. In breach of contract having been destroyed parties are to revert to status quo ante, the Defendant would have received the Part payment he made back and the vehicle released to the Appellant. Since the contract was frustrated, therefore the destruction of the motor vehicle, loss ought to be shared by both parties.

### **Disposition**

1. The judgment of payment of Ksh 120,390 is set aside and each party to bear their own loss as the subject-matter of the contract was destroyed.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 7/3/2024 (VIRTUAL/PHYSICAL CONFERENCE).

\*\*\*\*

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. MASIKA - FOR THE APPELLANT**

**NO APPERANCE - FOR THE RESPONDENT**

**GEOFFREY/PATRICK - COURT ASSITANT(S)**

**(JUDGE BEREAVED)**

**JUDGMENT RELEASED TO REGISTRY ON 26/3/2024.**

**M.W.MUIGAI**

**JUDGE**

HIGH COURT CIVIL APPEAL 76 OF 2019 FINAL MARCH 2024 MHC	0
--	---

