Onsongo v Njagi & 2 others (Civil Appeal E008 of 2022)
[2024] KEHC 3648 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E008 OF 2022

AK NDUNG'U, J

APRIL 17, 2024

BETWEEN

MICHAEL MOSIERE ONSONGO ..... APPELLANT

AND

TIMOTHY MUTEMBEI NJAGI ..... 1ST RESPONDENT

EXECUTIVE SUPER RIDES LIMITED ..... 2ND RESPONDENT

JAMES NG'ANG'A KARONGO T/A THE ALE AUCTIONEERS .... 3RD RESPONDENT

(Appeal from original Decree passed on 01/12/2022 in Nanyuki CM Civil Case No. 100 of 2019-A.R Kithinji)

JUDGMENT

1. By a plaint dated 03/10/2019, the Appellant sued the Respondents claiming an amount of Kshs.1,600,000/- with interest from 12/06/2019 and costs of the suit. The Appellant's case was that he entered into an agreement with the 1st Respondent for the sale of motor vehicle registration number KBW 921R Volkswagen Touareg, (herein referred as 'the motor vehicle') for the sum of Kshs.310,000/- which he paid in full. That the 1st Respondent made a representation that the motor vehicle was free from any encumbrances.

2. That upon purchasing the motor vehicle, he took it for repair incurring a sum of about Kshs.993,000/- and he expected to resell the motor vehicle at Kshs.1,600,000/-. However, on 12/06/2019, the motor vehicle was repossessed by the 3rd Respondent under the instructions of the 2nd Respondent. It is averred that the 2nd Respondent ought to have sued the 1st Respondent for the balance of the purchase price instead of pursuing him being an innocent purchaser for value. By the action of the Respondents,

he lost the motor vehicle, the money used for purchasing and renovating the same due to breach of contract and fraud on the part of the Respondents.

3. In response, the 2nd and 3rd Respondents filed a statement of defence dated 16/12/2019 and averred that the 1st Respondent had no capacity to sell the subject motor vehicle as he had no title that he could confer to the Appellant and the Appellant was not a bona fide purchaser for value and therefore, repossession was in exercise of proprietary rights of unpaid seller as the Appellant did not have lawful possession of the vehicle. Further, the Appellant could not acquire any rights to title from the 1st Respondent hence the agreement between them was a nullity ab initio. That the 1st Respondent having admitted owing Kshs.1,503,000/-, no cause of action could accrue against the 2nd and 3rd Respondent. That the 2nd Respondent was the lawful owner of the motor vehicle and in exercise of its rights as an unpaid seller pursuant to sale agreement dated 12/02/2018, it had a right to repossess founded in law and contract.

4. The matter proceeded for hearing with each party calling one witness.

5. At the conclusion of the matter, the trial court held that the Appellant had proved his case against the 1st Respondent but dismissed the case against the 2nd and 3rd Respondents. In doing so, the court held that there was no privity of contract between the Appellant and the 2nd and 3rd Respondents. That even though they repossessed the motor vehicle and sold the same, the Appellant could not maintain an action against the 2nd and 3rd Respondents being third parties. They did not have any rights under the contracts which he could lawfully enforce. That obligation on clause 9 of the contract imposed an obligation on part of the 1st Respondent and since the 1st Respondent had breached the clause, he had to indemnify the Appellant from the amount claimed. The learned magistrate entered judgement in favour of the Appellant for an amount of Kshs.1,600,000/- as against the 1st Respondent.

6. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 05/07/2022 raising 6 grounds of appeal challenging the trial magistrate's findings. The appeal was filed on the following grounds;

    i. The learned magistrate erred by failing to make a finding that the 2nd and 3rd Defendants could not legally repossess motor vehicle registration number KBW 921R that did not belong to them.

    ii. The trial magistrate erred by failing to make a finding that the 2nd Defendant did not prove that it had authority from Victor Mbithi the registered owner of motor vehicle registration no. KBW 921R to sell the same.

    iii. The learned magistrate erred by failing to make a finding that only Victor Mbithi would have lawful authority to repossess motor vehicle registration number KBW 921R.

    iv. The learned magistrate erred by failing to make a finding that the repossession of motor vehicle registration number KBW 921R by the 3rd Respondent under the instructions of the 2nd Respondent was fraudulent.

    v. The learned magistrate erred by dismissing the Appellant's suit despite the weight of evidence and the authorities cited by the Appellant.

    vi. The learned magistrate erred by failing to make a finding that interest on the amount claimed in the plaint should run from the date of filing suit being a liquidated claim.

7. The appeal was canvassed by way of written submissions. The Appellant's counsel argued that the motor vehicle did not belong to the 2nd Respondent and therefore, it had no basis to repossess or

instruct the 3rd Respondent. The 2nd Respondent could not have legally repossessed the motor vehicle without authority from the registered owner Victor Mbithi. The Respondent called one witness DW1 who adopted a statement by Anthony Wambugu and it was not clear on what basis a witness would adopt a witness statement by another person. However, Wambugu's statement was to the effect that the Appellant could not have acquired a valid title of the vehicle since it belonged to the 2nd Respondent but it was evidence that the subject motor vehicle did not belong to the 2nd Respondent.

8. According to DW1, the registered owner of the vehicle was Victor Mbithi at the time of repossession and the 2nd Respondent was a dealer and had authority to sell. DW1 did not know whether the agreement was oral or written. The 2nd Respondent had a legal burden to demonstrate that Victor Mbithi had sold the vehicle to it or it had the authority to sell as alleged. The 2nd Respondent had no title to the vehicle and could not purport to repossess or instruct the 3rd Respondent to repossess the same.

9. It is urged that the trial court holding that there was no privity of contract between the Appellant and the 2nd and 3rd Respondents was wrong since the claim against the 2nd and 3rd Respondents was on illegal repossession of the vehicle and not breach of contract. The 2nd and 3rd Respondents were supposed to justify the repossession which they failed to do. Further, if the 2nd Respondent had acquired any rights over the vehicle, it could only sue the 1st Respondent for the balance of the purchase price according to section 49 of the Sale of Good Act. According to the sale agreement produced during trial, the 1st Respondent indicated that he was the proprietor of the vehicle which was free from any encumbrances and the 1st Respondent made it clear that the vehicle had been registered in his name and therefore, the Appellant obtained a good title from the 1st Respondent as he was not aware of any defect in the title. Reliance was placed on the case of Weston Gitonga & Others vs Peter Rugu Gikanga & Another Civil Appeal 291 of 2013 and Diamond Trust Bank(K) Ltd vs Said Hamad Shamisi & Others Civil Appeal 36 of 2014.

10. On the issue of interest, he submitted that interest on a liquidated claim ought to run from the date the suit was filed and not the date of delivery of the judgement as per the provisions of section 26(1) of the *Civil Procedure Act*. Since his claim was a liquidated claim, the court erred by ordering interest to run from the date of judgment instead the date of filing the suit. Reliance was placed on the case of Jane Wanjiku Wambu vs Anthony Kigamba Hato & Ors Civil Appeal No. 32 of 2016. He thus urged this court to set aside the trial court judgment and hold the three Respondents jointly and severally liable for the sum pleaded in the plaint.

11. In rejoinder, the Respondents' counsel submitted that the Appellant is faulting the trial court for placing the burden of satisfying the decree issued on the party that was privy to the contract he entered into and wants strangers to the said contract to pay for the faults of the 1st Respondent. The learned magistrate was not satisfied that the Appellant had discharged the burden of proof as he purchased the vehicle without carrying out a search to ascertain ownership prior to purchase. The Appellant in this appeal has departed from his pleadings by claiming that the owner was one Victor Mbithi and therefore if that is correct, no liability could attach to the 2nd and 3rd Respondents.

12. That a contract cannot confer rights or impose obligations on any person other than the contracting parties, it cannot be enforced by or against a third party. In the absence of a collateral contract or statutory obligation, 2nd and 3rd Respondents could not be forced to settle a decretal debt against the Appellant since they were strangers to the illegal transaction that occurred between the Appellant and the 1st Respondent. Reliance was placed on the case of Mark Otanga Otiende vs Dennis Oduor Aduol (2021) eKLR whereby the court held that there was no privity of contract between the Appellant and the respondent and therefore the respondent had no locus standi in the suit. Therefore, there was no cause of action before the trial court against 2nd and 3rd Respondents as they were, and still are, strangers

to the contract between the Appellant and the 1st Respondent, and the Appellant had no locus standi to sue them on the said contract.

13. That the trial magistrate exercised his discretion rightly and this court should not interfere with that discretion unless the same was exercised wrongly in principle or perversely on the face of the case. The trial court acted on the principle that parties to a contract are bound by the terms and conditions thereof and it is not the business of courts to rewrite contracts and clause 9 of the contract imposed an obligation on the 1st Respondent which he breached and therefore, the trial court indemnified the Appellant by entering a judgment against the 1st Respondent. The Appellant has been reinstated back to the position in which he would have been if the contract was performed and he cannot purport to choose strangers to pay him for an obligation of another. Therefore, the Appellant's appeal is devoid of merit and should be dismissed.

14. I have considered the written submissions by the Appellant and the Respondents including the cases cited. This being the first appellate court, I am mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at my own independent judgment on whether or not to allow the appeal. The applicable legal principle is that a first appellate court is ought to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others {1968} EA 123 and in Peters v Sunday Post Limited {1958} E.A. page 424.

15. The evidence before the trial court was as follows; PW1, the Appellant adopted his statement and produced the plaintiff's document as Exhibits 1-4. He testified on cross examination that he bought the motor vehicle from the 1st Defendant, he did not do a motor vehicle search and he was not aware that the motor vehicle was owned by the 2nd Defendant. He was not given the log book and he was not aware that the 1st Defendant had not completed paying for the vehicle. He testified that he had sued the Defendants for repossessing the vehicle.

16. DW1, Peter Kamau adopted his statement and adopted the statement of Anthony Wambugu. He produced the defence exhibits as Dexhibit 1-10. He testified on cross examination that he was present when the 2nd Defendant sold the motor vehicle to the 1st Defendant. The 2nd Defendant instructed the 3rd Defendant to repossess the motor vehicle and the same was subsequently sold. At the time of repossession, the registered owner was Victor Mbithi and the 2nd Respondents were the dealers and they had the authority to sell. That he was not aware that the Plaintiff repaired the motor vehicle after he bought it from the 1st Defendant. He testified on re-examination that Victor Mbithi had given the 2nd Defendant authority to sell the motor vehicle. That the vehicle could not be transferred to 1st Defendant since he had not paid. The 1st Defendant had not paid Victor Mbithi.

17. That was the totality of the evidence before the trial court. The Appellant's claim is that he was an innocent purchaser for value as he purchased the motor vehicle upon the representation by the 1st Respondent that he was the owner thereof. Further, the 2nd Respondent could not have repossessed the motor vehicle as they were not registered owner and did not produce any authority to sell from the registered owner. They were entitled to sue the 1st Respondent as the rights of unpaid seller.

18. The Respondents position on the other hand is that they could not be forced to settle a decretal debt against the Appellant since they were strangers to the illegal transaction that occurred between the Appellant and the 1st Respondent.

19. The main issue for determination is whether the Appellant acquired a good title in goods or whether he was a bona fide purchaser for value. The court of appeal in Weston Gitonga & 10 others vs Peter Rugu Gikanga & another [2017] eKLR, held as follows as regards a bona fide purchaser:

> " Black's law Dictionary 8th Edition defines "bona fide purchaser" as:
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> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
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> In the Ugandan case of Katende v. Haridar & Company Limited [2008] 2 E.A.173 it was held:-
>
> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: a. he holds a certificate of title; b. he purchased the property in good faith; c. he had no knowledge of the fraud; d. he purchased for valuable consideration; e. the vendors had apparent valid title; f. he purchased without notice of any fraud; g. he was not party to any fraud.

20. In the instant case, the Appellant entered into an agreement for the sale of motor vehicle with the 1st Respondent. He paid the purchase price and he took possession of the motor vehicle. According to the agreement, the 1st Respondent represented that the motor vehicle was free from any encumbrances. It was a further term of the agreement that the ownership documents were to be released to him upon full payment of the purchase price which he paid in full. He however testified on cross examination that he did not do a motor vehicle search and he was not aware that the motor vehicle was owned by the 2nd Respondent. He was not given the log book and he was not aware that the 1st Respondent had not completed paying for the vehicle.

21. The 2nd Respondent produced an agreement between them and the 1st Respondent for the sale of the motor vehicle dated 12/02/2018. It was stated in the agreement that they were registered motor vehicle importer and dealer and authorized seller of the subject motor vehicle. The 1st Respondent did not fully pay for the motor vehicle and he had a balance of Kshs.827,500/- which was to be paid in six months. It was a term of the agreement that the 2nd Respondent will release the ownership documents to the 1st Respondent upon full payment of the purchase price. It was further a term of the agreement that the motor vehicle was to remain as the property of the 2nd Respondent until fully paid.

22. The 1st Respondent defaulted in payment prompting the 2nd Respondent to instruct auctioneers to repossess the motor vehicle vide a letter dated 01/11/2018. This letter was sent before the Appellant entered into an agreement with the 1st Respondent. This was followed by another repossession letter dated 03/06/2019.

23. The totality of the evidence confirms that during performance of the terms of contract between the Appellant and the 1st Respondent, the 1st Respondent did not have a good title to transfer to the Appellant as he had no title/logbook himself or transfer form signed by seller to him as purchaser of the said vehicle. The 1st Respondent did not have a good/clean title to pass to the Appellant.

24. It therefore follows that the title to the motor vehicle did not pass to him. I therefore find him not to be a bona fide purchaser for value for want of passage of title and for want of due diligence. In my view

the Appellant ought to have done much better in his quest to find out the rightful owners of the motor vehicle. He did not do a background check to ascertain the true ownership of the same. From where I sit, and on the basis of the very clear facts, it is obvious the Appellant did not exercise due diligence prior to proceeding with the sale transaction.

25. The court in Weston Gitonga case (supra) held thus;

> " We have re examined the evidence on record ourselves and it is clear that only eight of the appellants were said to have purchased although there were no written agreements made. According to Hellen, these were people displaced in tribal clashes who were seeking relocation and who simply came to her, paid what she asked for and she showed them where to settle. Only one of them had a title. In sum, none of them proved the elements stated in the Katende case (supra) that he/she "holds a certificate of title; purchased the property in good faith; had no knowledge of the fraud; purchased for valuable consideration; the vendor had apparent valid title; purchased without notice of any fraud; was not party to any fraud." Like the learned Judge, it is our view that there ought to have been evidence on knowledge and good faith from the appellants. No one else could enter into their psyches and testify to that. Without it, it would not matter that Hellen authorized them to occupy the disputed land. She had no legal or other interest to pass to them. We think in those circumstances, the learned Judge had a proper basis in law to make the findings he did and we therefore reject the second ground of appeal."

26. Moreover, the 1st Respondent was barred from the private law principle of nemo dat quod non habet from selling the motor vehicle since he did not hold the title to the motor vehicle and therefore could not sell it. In Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR the Honourable Court pronounced itself as follows:

> " The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract."

27. The Appellant could not benefit from the exceptions above since he did not prove that he carried out a background check to verify the ownership of the motor vehicle or he exercised due diligence. There was no transfer forms signed and he was not given the log book.

28. The Appellant in his submissions before this court and submissions before the trial court stated that the 2nd Respondent had no capacity to repossess and sell the motor vehicle since they were not the registered owner of the said vehicle. The registered owner was one Victor Mbithi. DW1 testified that Mbithi had given them authority to sell the motor vehicle but did not produce the written authority.

29. It is to be noted that in the agreement entered between the 1st Respondent and the 2nd Respondent, the 2nd Respondent did not claim ownership of the motor vehicle. It was stated in the agreement as earlier seen that they were dealer and they were authorized seller of the motor vehicle. Further, the Appellant in his plaint did not challenge the issue of ownership. This only came up during the defence hearing and the trial court did not address itself on this issue. The court of appeal in Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR held thus;

> "..As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance..."

30. That said the claim by the Appellant that the subject vehicle belonged to one Mbithi is self -defeatist and the final straw to his appeal. This, for reasons that the admission confirms that the 1st Respondent had no title to pass to the Appellant. The argument that the 2nd respondent had no authority to order repossession of the vehicle since the vehicle was owned by Mbithi is not helpful to the Appellant. The Appellant transacted with the 1st Respondent who had no good title to pass and the Appellant cannot assume the responsibilities to fight Mbithi's wars. It is only Mbithi who can clarify the relationship between him and the 2nd Respondent.

31. On the issue of interest, it is urged that interest on a liquidated claim ought to run from the date the suit was filed and not the date of delivery of the judgement as per the provisions of section 26(1) of the *Civil Procedure Act*. That since his claim was a liquidated claim, the court erred by ordering interest to run from the date of judgment instead the date of filing the suit.

32. Section 26 (1) of the *Civil Procedure Act* states that;

> "Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

33. In Ajay Indravadan Shah v Guilders International Bank Ltd [2002] 1 EA 269, this Court stated that:

> "under section 26 (1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interest to cover three stages, namely:
>
> i. The period before the suit;
>
> i. The period from the date of the suit is filed to the date when the Court gives its judgment; and
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> i. From the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix."

34. It has been held severally that the award of interest is a matter of discretion of the trial court. The court of appeal in Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR stated that;

> " this section was judicially considered in New Tyres Enterprises v Kenya Alliance Insurance [1988] KLR 380 wherein it was held that:
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> "the court, under section 26 (1) of the *Civil Procedure Act* has a wide measure of discretion on the question of interest."
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> The award of interest is therefore a matter that is left to the discretion of the trial judge, and generally, an appellate court is enjoined to treat the decision of a trial court with respect, and refrain from interfering with the decision unless it is convinced that the trial judge based the award on some erroneous principal or was plainly wrong."

35. The principle on when the award of interest ought to run from were enunciated in Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 where it was sated thus;

> " The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment."

36. In his judgement the trial magistrate in allowing prayer (b) of the plaint stated;

‘’ The plaintiff is entitled to interest at the court rates on (a) above from the date of this judgement until payment in full".

37. Following the dictum in Mukisa Biscuits Manufacturing Company Limited v West End Distributors (supra), the claim here being a liquidated one and the Appellant having been deprived of his money through the wrongful Act of the 1st Respondent, he was entitled to interest from the date of filing suit. To that extent, am satisfied that the trial court based its finding on interest on a wrong principle thus falling into error, and good ground exists for this court to interfere with the discretion thereof.

38. With the result that the appeal herein fails and is dismissed save to the extent stated above in regard to interest. The judgement and order of the trial court on interest is set aside and substituted thereof with an order that the Appellant is awarded interest on the judgement sum from the date of filing suit till payment in full. The 2nd and 3rd Respondents shall have the costs of this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2024.

A.K. NDUNG'U

JUDGE