



**Chege v Bell Motors (K) Limited (Civil Appeal E056 of 2023)
[2024] KEHC 5248 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E056 OF 2023
RE ABURILI, J
MAY 17, 2024**

BETWEEN

GLADWELL NJERI CHEGE APPELLANT

AND

BELL MOTORS (K) LIMITED RESPONDENT

(An appeal arising out of the judgment and decree of the Honourable C.N. Oruo in the Senior Principal Magistrate's Court at Winam delivered on the 24th March 2023 in Winam SPMCC No. E181 of 2021)

JUDGMENT

Introduction

1. The appellant, Gladwell Njeri Chege vide an amended plaint dated 6th June 2022 sought a permanent injunction restraining the respondent Bell Motors (K) Ltd from attaching/repossessing motor vehicle registration KDA 234F, a Toyota Town Ace, a declaration that the respondent's action throughout the proclamation process and in detaining the appellant's logbook were unlawful, an award for general and punitive damages for the unlawful action and a mandatory order directing the respondent to handover the logbook of the suit vehicle to the appellant.
2. It was the appellant's case that she had entered in a legally binding sale agreement over the suit motor vehicle at a consideration of Kshs 1,120,000 with a deposit of Kshs 570,000 being paid first then the balance of Kshs 550,000 being paid in 12 monthly instalments of Kshs 46,000.
3. The appellant averred that she had been paying the instalments faithfully until July when the business went down as a result of the Covid-19 pandemic and she was not able to meet her target. The appellant averred that her failure to comply was as a result of a force majeure and that she was entitled to be allowed time within which to comply with the contract.



4. The appellant averred that the respondent's insisting on enforcement of the contract exposed her to the possibility of great loss and damage for which she sought the court's protection. It was her case that she had paid the full consideration for the suit vehicle and was thus entitled to the logbook which was being retained by the respondent and this failure to surrender the logbook exposed her to loss and damage.
5. In response, the respondent filed an amended defence in which he agreed on the details of the contract as detailed by the appellant adding that at no time was the suit vehicle repossessed by the auctioneer and that the appellant only paid the balance of the purchase price upon compulsion by the court.
6. It was the respondent's defence that the delay in transferring the logbook to the appellant was similarly occasioned by the appellant who took long before initiating the process on the NTSA portal as required by the law.
7. In his judgement, the trial court noted that the appellant failed to prove that she merited grant of permanent injunction, neither did she demonstrate that the suit vehicle was repossessed or that there was a delay in processing the logbook. The trial court further noted that the appellant failed to demonstrate that there was any financial loss she endured during the time when the logbook was delayed as the suit vehicle was in her possession. The trial court proceeded to dismiss the appellant's suit.
8. Aggrieved by the judgment of the Trial Court, the appellant filed a Memorandum of Appeal dated 6th April 2023 raising the following grounds of appeal;
 - i. The learned trial magistrate erred in law in finding by totally and admittedly failing to consider the plaintiff's submission which had been filed in time and prior to the issuance of the impugned judgment.
 - ii. The learned trial magistrate erred in law in his finding by failing to properly analyze the exhibits produced before him, the evidence presented before him and the plaintiff's submissions and thereby arriving at the wrong judgement.
 - iii. The trial magistrate erred in law and fact in dismissing the plaintiff claim.
 - iv. The trial magistrate erred in law and fact by refusing to award the plaintiff appropriate award under the ambit of general damages for loss of user.
9. This appeal was canvassed by way of written submissions however there was no submissions on behalf of the respondents on record as at the time of writing this judgement.

The Appellant's Submissions

10. The appellants' counsel submitted that she filed her written submissions dated 2nd February 2023 in court on the 6th February 2023 but the same were ignored by the trial magistrate in its judgement delivered on the 24th March 2023 thus denying the appellant a right to present its analysis of the evidence and the law for consideration by the court.
11. It was submitted that despite receiving the full purchase price for the vehicle, the Respondent did not sign the transfer forms nor did it get into the NTSA portal to prompt/commence the transfer process and this prompted the Appellant to request it to transfer the vehicle but it ignored all these requests thereby prompting the Appellant to amend its Plaint on 6th June 2022 seeking for mandatory order to compel the Respondent to transfer the vehicle to it



12. The appellant submitted that by his admission that it had not commenced the transfer process of the vehicle, this was an admission by the respondent that it had breached the agreement between them more so because it was only the vendor (Respondent) who could initiate the transfer process and arising out of all these breaches by the respondent, she was entitled to damages.
13. The Appellant submitted that the court erred when it failed to find that there was indeed a breach of contract in this case and an award of damages however nominal ought to have been awarded to compensate her for her losses and inconvenience and hence the reason for the present appeal before this honourable court.

Analysis and Determination

14. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. The issue for determination is whether the trial court erred in dismissing the appellant’s suit.
16. The burden of proof lies on he who asserts. Section 107 of *Evidence Act* defines Burden of Proof as— of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
17. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
18. The appellant sought a permanent injunction against the respondent restraining the respondent from attaching/repossessing the suit vehicle. For avoidance of doubt, there was no claim for general damages for breach of contract, contrary to the submissions by the appellant’s counsel.
19. A permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. A Court has power to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Act* if it finds that the right of a Party has been fringed, violated and/or threatened to be violated, as the Court cannot just sit, wait and watch under these given circumstances.
20. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR the High Court sitting on appeal held that:

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against



the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

21. In the instant case, the evidence on record is that the plaintiff/ appellant herein was at all material times in possession of the suit motor vehicle and that in her own words, following the covid 19 pandemic outbreak, she was unable to raise the monthly instalment payments to complete the payments as agreed in the sale contract.
22. There is also evidence by way of affidavit during the hearing of an application for stay of execution pending this appeal that in fact, the appellant had long sold the suit motor vehicle and parted with possession and that she was therefore dishonest and cannot claim that she lost peaceful use of the motor vehicle. A sale agreement of motor vehicle between the appellant herein Gladwell Njeri and George M. Ndungu was exhibited showing that the vehicle KDA 234F Toyota was sold at Kshs 1,200,000 and on 5/10/2020 she was paid a deposit of Kshs 600,000 with the balance being paid monthly in instalments of Kshs 40,000 until 30/1/2022.
23. It follows that as at the time the appellant was instituting suit against the respondent, she had already sold the motor vehicle which had even been involved in an accident and the buyer had been sued jointly with the respondent herein as the registered owner thereof for damages following a fatal road accident in which one Kelvin Muchiri Thuo died.
24. The question therefore is, what possession and or unlawful acts on the part of the respondent was the appellant claiming about and what damages did she prove to have suffered as a result of alleged delayed handing over of the log book to her?
25. I am unable to find any evidence that the appellant lost any business opportunities as she had passed her equitable interest in the motor vehicle to a third party at a consideration at a consideration which she had already received.
26. On whether she lost opportunity to obtain a commercial loan that require a log book, again, having sold the motor vehicle, she could not take any loan on it as it was no longer her property.
27. Questions of apprehensions, insomnia over the status of the logbook and safety of ownership of the vehicle are baseless as the logbook is not the only evidence of ownership of a motor vehicle. It is prima facie evidence of ownership and that is why, even without the logbook, she sold the motor vehicle at a consideration. On this, and in view of the discovery that the appellant had long sold the vehicle to a third party and was only playing mind games on the respondent, by dramatizing her claim in court and seeking uncalled for attention from the court. I find no good faith on her part.
28. For the above reasons, I find the prayers for a permanent or even the mandatory injunction were not proved and therefore they were not available to her.
29. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a Mandatory



Injunction was correctly stated in Vol. 24 *Halsbury Laws of England* 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

30. It is also not disputed that the appellant owed the respondent balance of purchase price and as at the time that she was repaying the balances by instalments, as she was lamenting that covid 19 affected her income, she had already received consideration for the sale of the said motor vehicle and was receiving instalments from Mr George Ndungu yet she could not repay the respondent what she owed. Some monies which were the balance for payment of the suit motor vehicle.
31. From the trial court record, the appellant had initially filed an application seeking the same orders of injunction and the court granted her temporary injunctive orders against the respondent and ordered her to pay the balance of purchase price failure of which the court would grant the respondent the authority to repossess the vehicle. That is all that exists on record.
32. The appellant also pleaded that the respondent's action throughout the proclamation process and in detaining the appellant's logbook were unlawful. However, there was no evidence to prove that the respondent repossessed the suit vehicle through an auctioneer or that the same was proclaimed to warrant damages for loss of user or for breach of contract. It is evident that the suit vehicle was always in the possession of the appellant and the trial court upon application by the appellant, ordered the appellant to pay the balance of the purchase price.
33. Regarding the issue of the detaining the logbook, I find that this issue did not arise and neither can be said to have been a breach of any contract for the reasons that it was agreed in clause 4 of the agreement that the logbook would be given to the buyer only after transfer of ownership of the motor vehicle in her name. There is no evidence that the appellant was to be given possession of the logbook before completion of payment of the purchase price.
34. The appellant argued in her submissions that once she completed the purchase price, the respondent still delayed in processing the logbook to her detriment and thus exposed her to loss. However, there was no evidence to support this claim as presented by the appellant. It was upon the appellant to prove the delay by the respondent in processing the logbook and specifically that she was exposed to loss in light of the respondent's rebuttal that the delay in transferring the logbook to the appellant was similarly occasioned by the appellant who took long before initiating the process on the NTSA portal as required by the law. It is also not lost to this court that the appellant herself pleaded that owing to Corona pandemic, she was unable to meet her obligations of completing the payment of purchase price in time as agreed hence the further delay in processing the transfer, not forgetting the fact that she sold the motor vehicle to a third party before she completed payment of purchase price.
35. On the last order sought by the appellant of general and punitive damages, I agree with the trial magistrate that having failed to prove financial or any other imagined loss allegedly suffered, the plaintiff was not entitled to any damages.
36. The appellant has also raised, as a ground of appeal, the fact that the trial court allegedly failed to consider her submissions and thus denied her right to present its analysis of the evidence and the law for consideration by the court.



37. I reiterate that submissions, with due respect, do not amount to evidence. Once the case is closed a court may well proceed to give its judgment. There are many cases especially where parties act in person where submissions are not filed or made. Even some counsel may opt not to submit. Therefore, submissions are not evidence to support the case of a party to a suit. See the case of *Erastus Wade Opande v Kenya Revenue Authority & another* Kisumu HCCA No 46 of 2007 and *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No 36 of 1993.
38. In the case of *Ng'ang'a & another v Owiti & another* [2008] 1KLR (EP) 749, the Court held that:
- “As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”
39. I thus find and hold that the absence of the appellant’s submissions at the trial court level did not prejudice the appellant or her case in anyway.
40. Taking all the above into consideration, it is evident that the appellant failed to prove her case on a balance of probabilities and that this appeal was a mere academic exercise.
41. The upshot of the above is that I find that this appeal lacks merit and I hereby dismiss it. As I did not find any submissions opposing the appeal, although I had also directed the parties to send word copies to a special submissions email for ease of access by the court, which was not done by the respondent, I order that each party bear their own costs of the appeal.
42. The lower court file to be returned together with copy of this judgment and order.
43. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MAY, 2024

R. EABURILI

JUDGE

