



**Wasamba v Rensas Investment Limited (Civil Appeal E119 of 2022)
[2023] KEHC 4031 (KLR) (Civ) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E119 OF 2022

A MABEYA, J

MAY 5, 2023

BETWEEN

PETER A.O. WASAMBA APPELLANT

AND

RENSAS INVESTMENT LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. S. Aswani RM/Adjudicator delivered on 8/8/2022 in SCCC/E1234/2022 at the Small Claims Court, Milimani)

JUDGMENT

1. *Vide* a statement of claim dated 23/5/2022, the Appellant filed Claim No. 1234 of 2022 at the Small Claims Court. He sought to invalidate a sale agreement between him and the respondent dated 20/1/2022 for the purchase of a Boxer BM Reg motorcycle. No. KMFX 183L (“the motorcycle”) from the respondent for a sum of Kshs. 162,690/=.
2. His case was that the respondent’s agent, one Mr. Nelson Esiroyo, had represented to him that the motorcycle belonged to the respondent and would be transferred to him within three weeks. That a tracking device will be fitted on the motorcycle and he had presided over that exercise.
3. However, on 3/4/2022 the motorcycle was stolen and when the claimant attempted to register a caveat over it at NTSA, he was informed that the same was not possible as the motorcycle was not registered either in his name or the respondent. That it was legally owned by Auto-Industries Limited. The claimant thus filed the claim to recover the purchase price.
4. The respondent’s case on the other hand was that the motorcycle was sold ‘as-is’ as per the agreement including without the title documents which were to be transferred to the claimant in an unspecified future. That the respondent was a mercantile agent thus exempted from the *nemo dat quod non habet*



principle as it was a franchise and mercantile agent of Auto-industries Limited. That it had authority and consent to sell the motorcycle and passed a good implied title to the appellant.

5. That eventually, the respondent transferred the logbook to its name after facing procedural technicalities from NTSA, and commenced the transfer process to the appellant. That the appellant always enjoyed possession of the motorcycle without any adverse claims over its ownership and the respondent was not liable for its loss. That the agreement to install a tracker was done without the respondent's involvement or authority and payment was made directly to Nelson and not to the respondent.
6. In a judgment made on 25/8/2022, the trial court found that the respondent was indeed a mercantile agent of Auto-Industries Limited, the assembler of motorcycles, with the respondent being its franchise. It was thus found that the respondent was exempt from the *nemo dat* principle and the agreement between the parties was valid.
7. That the theft of the motorcycle could not be attributed to the respondent as possession had been transferred to the appellant who even had a tracking device though the same was installed in a separate agreement from the sale agreement. The claim was therefore disallowed with costs to the respondent.
8. Aggrieved thereby, the appellant filed the memorandum of appeal dated 29/8/2022. It was based on six grounds including that the trial court erred by; failing to address the issues raised by the appellant in the proceedings; holding that the *nemo dat* principle did not apply, holding that the respondent had transferred title to him, and holding that an undisclosed principal could be held accountable for the acts of an agent.
9. The appeal was canvassed by way of written submissions. The appellant's submissions were dated 31/10/2022 while those of the respondent were dated 20/11/2022. This Court has considered the entire record. The main issue for determination is whether the lower court's judgment was flawed such that it should be set aside.
10. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses.
11. This duty is captured by section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court to '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' See the decision of the Court of Appeal *Peter M. Kariuki v Attorney General* [2014] eKLR.
12. The appellant's case was that the trial court erred in finding that the respondent was a mercantile agent for Auto-Industries Limited and operated as its franchise thus had authority to sell the motorcycle to him.
13. In *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina* [2019] eKLR, the court held: -

“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. This principle was applied in the case of *Haul Mart Kenya limited v Tata Africa Kenya limited* [2017] eKLR and *Katana Kalume v Municipal Council of Mombasa* [2019] eKLR.”

14. From the foregoing, it is clear that the nemo dat principle seeks to protect the owner of the property. Whether or not good title passes to the purchaser depends on whether or not the legal owner has authorized the transaction.
15. In *Republic v The Registrar of Titles, Mombasa & 2 others ex parte Emfil Limited* [2012] eKLR, the court explained the principle thus: -

“Moreover, the private law principle of *nemo dat quod non habet* (see Brown's Legal Maxims, [1939] 10th at p. 546) is only a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller and it has important exceptions including sale by apparent owner of the goods and usage of the market and the buyer acquires good title if he buys in a market overt, in good faith and without notice of defect or want of title of the part of the seller.”
16. In this case, the respondent was able to demonstrate that its customary practice was to acquire motorcycles assembled by Auto-Industries Limited who were the registered owners, and would later on transfer the motorcycles to themselves and finally to a purchaser after payment of the purchase price. The sale agreement did not specify the time frame under which the transfer was to be effected after purchase of the motorcycle, thus the respondent was not bound to do so within a certain time-frame.
17. There was nothing before the trial court or even this Court to demonstrate that the respondent did not have authority from Auto-Industries to sell the motorcycle. Indeed, the appellant enjoyed peaceful possession thereof between the time of purchase and the time the motorcycle was stolen. The theft of the motorcycle occurred whilst it was in the appellant's possession.
18. There was no adverse claim of ownership from Auto-Industries or from any other person, and the suit was only triggered by the theft of the motorcycle. The appellant admitted that he was not blaming the respondent for the theft thus liability did not arise on the part of the respondent.
19. Further, in the pendency of the case before the trial court, Auto-Industries transferred the motorcycle to the respondent, a further indication that there was no dispute over consent to sell the same. The respondent was in authorized possession of the motorcycle and had authority to sell the same any third party, the appellant included.
20. In this regard, this Court upholds the finding that the sale agreement was valid, and the respondent passed a good title to the appellant under the exemption of ‘mercantile agent.’
21. Though the appellant claimed that he lacked notice of the agency relationship, he did not demonstrate that he had carried out due diligence before purchasing the motorcycle. He was given an opportunity to inspect it, and did not perform a search at NTSA to confirm ownership. In any case, the respondent had already begun the transfer process to the appellant during the pendency of the suit.
22. It is quite unfortunate that the motorcycle was stolen. Though this Court sympathizes with the appellant, it cannot invalidate an otherwise valid contract due to theft or loss of the goods in



circumstances that are not related to the contract. It is trite that risk passes with possession. At the time of the theft, the appellant had both possession and control of the motorcycle. The risk lay with the appellant upon taking possession of the motorcycle, and the consequential loss through theft could not be attributed to the respondent.

23. Though the appellant cried foul because the tracking system installed on the motorcycle later on failed, there was enough evidence to demonstrate that the appellant entered into a separate agreement with a third party not privy to the contract between himself and the respondent. The appellant did not demonstrate that installation of a tracking system was a term of the agreement. This was offered by a third party and there was unrebutted evidence that the payment for installation was not done to the respondent. Failure of the tracking system could not be attributed to the respondent.
24. In the circumstances, this Court finds no justification to interfere with the trial court's finding.
25. Accordingly, the appeal lacks merit and is dismissed with costs. The amount of Kshs. 40,000/= held in a joint account being the costs awarded by the trial court to be forthwith released to the respondent.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

