Kana v Mwangi (Civil Appeal E006 of 2020)
[2023] KEHC 19019 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E006 OF 2020

WM MUSYOKA, J

JUNE 19, 2023

BETWEEN

NADEEM A KANA ..... APPELLANT

AND

LUCY WAMBUI MWANGI ..... RESPONDENT

(Appeal from judgment and decree of Hon. SO Temu, Principal Magistrate, PM, in Busia PMCCC No. 4 of 2010, of 13th March 2020)

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for a permanent injunction, with respect to disposal of her motor vehicle repossessed allegedly illegally by the appellant, a refund of Kshs 580, 000.00, interests, loss and costs. The appellant filed a defence, justifying the repossession, and counter-claimed for a sum of Kshs 461, 000.90, plus interests and costs. A trial was conducted. Both sides called 1 witness each. In the end, the trial court held that the repossession of the motor-vehicle was wrongful, for no notice had been given, and awarded the respondent Kshs 580, 000. The counterclaim was disallowed, for lack of evidence.

2. The appellant was aggrieved, hence the instant appeal. The appeal has faulted the trial court on several grounds: for not properly evaluating the evidence; for finding that the appellant was contractually bound to notify the respondent before selling the repossessed motor vehicle; holding that the respondent was entitled to a refund of the purchase price; finding that the motor vehicle was sold before the temporary injunction was vacated; for holding that the appellant was under a duty not to sell the vehicle before and even after the interim injunction; for dismissing the counterclaim of the appellant; and for misapplying the principles of contract law. The appellant asks that the judgment be quashed, and substituted with an order dismissing the plaint, allowing the counterclaim, and release of the money held by the court as deposit.

3. The appeal was canvassed by way of written submissions.

4. The appellant reduced his case to 2 grounds: on the matter of the refund and dismissal of his counterclaim. On the first ground, he submits that he had disclosed the date when he repossessed the motor vehicle, and at that time there were no restraining orders. He further submits that there was no mandatory order which would have required him to release the motor vehicle. He cites *Khunaif Trading Company Limited v Equity Bank Limited & another* [2015] eKLR (Kasango, J), to submit that the fact that the subject vehicle had mechanical and other difficulties, did not absolve the respondent from her obligations under the contract, and it did not take away the appellant's rights to repossess. He cites *Lalji Karsan Rabadia & 2 others v Commercial Bank of Africa Limited* [2015] eKLR (Waki, Nambuye & Maraga, JJA), to submit that the courts ought not decide what the parties ought to do as prudent business people. He also cited *Mwatech Enterprises Ltd v Equatorial Commercial Bank Limited* [2021] eKLR (C Kariuki, J), for the submission that parties who are in default ought not be rewarded. He argues that the order awarding the respondent a refund of the purchase price was unfounded. On the second ground, it is submitted that the appellant was entitled to the sum of Kshs 306, 000.00, as it was based on the terms of the contract.

5. On her part, the respondent submits that she was entitled to restitution, for the wrongful actions by the appellant, and cites *Samuel Kamau Macharia v Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited* [2003] eKLR (Kuloba, J) and *Chase International Investment Corporation & another v Laxman Keshra & 3 other* [1978] eKLR (Madan, Wambuzi & Law, JJA).

6. The issues are whether the court should have awarded the respondent the sum of Kshs 580, 000.00, and whether the case by the appellant should have been allowed for Kshs 306, 000.00.

7. On damages, the case for the respondent was premised on a breach of contract, that upon the respondent falling in arrears, the appellant repossessed the motor-vehicle without being sensitive to the terms of the contract. There is ample caselaw establishing that general damages are not awardable for breach of contract. See *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR (Ouko, Kiage & Murgor, JJA). Of course, what the trial court awarded was not general damages, but a specific amount of money as restitution, being refund of Kshs 580, 000.00, being monies that the respondent had paid to the appellant.

8. The appropriate remedy for breach of contract is an award of special damages, to recoup the losses flowing from the alleged breach of contract. The principle governing special damages is that the same must be specifically pleaded, and specifically proved. The respondent pleaded that she had paid to the appellant a sum of Kshs 580, 000.00, which she stood to lose following the repossession of the motor vehicle. The trial court ordered a refund of the payments made, on the basis that the respondent was not given time to redeem the motor vehicle, and that she had become entitled to the refund as a result.

9. For avoidance of doubt, the trial court ruled:

> " The motor vehicle was repossessed a few months after the purchase and the plaintiff having not been granted a chance to redeem it she is entitled to a refund of the amount she had paid of Kshs 580, 000, and he is thus entitled for the same.
>
> I thus do enter judgment as prayed for in the plaint in favour of the plaintiff for Kshs 580, 000 with costs and interest at court rate from the date of judgment. The defendants counterclaim fails with costs to the plaintiff."

10. Contracts are brought to an end in various forms, by either performance, breach, agreement, frustration or merger. The problems in the instant contract began with the repossession of the motor vehicle by the appellant. The respondent initially treated the contract as still subsisting, hence the suit, as initially filed, was seeking an injunction to stop the repossession, which she had interpreted as a potential cause of the end of the contract by way of breach. When that failed to work, she amended her plaint, where she treated the contract as at an end, on grounds of breach, hence her prayer for restitution.

11. The contract herein was not performed, for performance was predicated on payment of the 12 monthly instalments in full. That did not happen, as there was non-payment of an instalment or instalments, which triggered the repossession. There was breach of contract, and the respondent conceded to defaulting on the terms of the contract, by not paying instalments when they fell due. She alleged breach on the part of the appellant, for repossessing the motor vehicle, instead of allowing her to use it to raise funds for repayment. There was no agreement to discharge the contract. Neither was there discharge by frustration or merger. Whatever happened, with respect to the breakdown of the motor vehicle, did not amount to frustration, within the context of contract law.

12. Both sides accuse each other of breach of contract. So, who was in breach of the contract? Parties are bound by the terms of their contract. In the instant case, the contract was in writing, and that should be what ought to guide the court to assign responsibility for the collapse of the contract. The terms and conditions of sale are set out in the motor vehicle sale agreement that the respondent placed on record, and was produced as P. Exhibit No 1. The terms were that the motor vehicle was sold for Kshs 1, 020, 000.00, with the initial deposit being Kshs 400, 000.00. The balance of Kshs 620, 000.00 was to be settled in 12 monthly instalments.

13. There are further terms and conditions of the sale detailed in the agreement, which I hereby produce verbatim:

> " It is further agreed between the buyer & the seller that:
>
> 1. The aforesaid motor vehicle is sold on the basis of "as-is-where-is" and the buyer shall take possession upon signing this agreement and being satisfied that the vehicle is in proper and sound mechanical condition.
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> 2. The seller does not give any guarantee whatsoever to the buyer as to the worthiness of the motor vehicle and no claim on this account shall be entertained.
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> 3. The deposit paid therein by the buyer shall not be refundable.
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> 4. The seller shall be at liberty to re-possess the aforesaid motor vehicle without any further notice in the event the buyer defaults in paying any one installment as agreed and in such a case the buyer shall meet all the re-possession and incidental charges incurred as a result.
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> 5. On repossession of the motor vehicle, the total outstanding balance shall fall due and owing and same shall have to be paid in full within 14 days from the date of such re-possession. Failure to which the seller shall have the right to sell the motor vehicle to recover the outstanding balance.

6. The buyer shall not sell the motor vehicle to a third party before paying the seller in full/or renew/change the road licence(s) or route without permission or prior notification of the seller.

7. The seller has a right to call off the loan facilitate of Kshs..... & re-possess the motor vehicle without giving notice to the buyer if it comes to the seller's knowledge that the buyer has sold the same.

8. Upon possession of the motor vehicle, the buyer shall be responsible for taking out the insurance cover for the same at an insurance company of its/his/her choice preferably comprehensive.

9. Should the motor vehicle be involved in an accident/stolen/burned or any other natural calamity, it shall be the sole responsibility of the buyer, notwithstanding the fact that the motor vehicle has not been formally transferred into it/his/her name.

10. The logbook together with a duly signed transfer form plus other relevant certificate(s) to facilitate transfer of the motor vehicle shall be handed over to the buyer immediately upon payment of the agreed purchase price in full/ payment of the last instalment.

11. The buyer is solely responsible for transfer of the ownership to his/her name immediately; in case of any accident or any calamity, he/she is responsible for any claim that arise there from.

12. Notwithstanding, the provisions of clause Nos 4 & 5 above, the parties hereby agree that in case Buyer defaults in paying the installments as agreed, it/he/ she shall pay a further sum equivalent to 30% of the purchase price as agreed as penalty for the default. Furthermore, in case the buyer "cancels the deal/ agreement, the buyer shall pay a sum equivalent to 35% of the purchase price."

14. The appellant and the respondent executed the sale agreement, bearing the terms and conditions, in paragraph 13, foregoing of this judgment, on March 20, 2009. By so doing, they both committed themselves to be governed by the said terms and conditions. I shall proceed to consider what happened after execution of the agreement, in light of the terms and conditions set out above.

15. By executing the agreement, the respondent signified that she understood the terms and conditions, and that she was willing to be bound by them. It is not disputed that she paid the deposit of Kshs 400, 000.00, for it was on the basis of the deposit that the motor vehicle was released to her. It should be underscored that that deposit of Kshs 400, 000.00 was subject to clause 3 of the agreement, that the same was not refundable. The exact words are: "The deposit paid therein by the buyer shall not be refundable." Clause 3 of the agreement was very clear, therefore, that the amount of Kshs 400, 000.00 was not refundable. It was a term or condition of the contract that the respondent freely executed. By executing that agreement, the respondent brought herself within that term, and there was no basis for her to ask the court to make an order in her favour, for a refund of Kshs 400, 000.00. I have scrupulously gone through the judgment of March 13, 2020, and I have not come across any reference to clause 3 by the court. Had the trial court considered that clause, it would not have entertained the claim by the respondent for a refund of the Kshs 400, 000.00 deposit paid by the respondent to the appellant.

16. The respondent claimed a refund of a total of Kshs 580, 000.00. That represented the deposit of Kshs 400, 000.00, and other alleged payments thereafter, which amounted to Kshs 180, 000.00. I have dealt

with Kshs 400, 000.00 above. It was subject to clause 3, and it was, therefore, not refundable. That leaves us with Kshs 180, 000.00. Was this latter sum refundable?

17. There are several aspects to this. The first is that the terms and conditions of the contract, that the respondent signed to, and which I have reproduced verbatim in paragraph 13 of this judgment, do not provide for any sort of refund, whether of the deposit or any other payment made by the respondent to the appellant. Of course, that is not to rule out reimbursements for payments made erroneously, but the case by the respondent was not based on such. Secondly, no proof was presented by the respondent that she paid Kshs 180, 000.00 to the appellant, subsequent to the initial deposit of Kshs 400, 000.00. Although at the oral hearing she testified that she paid 2 months instalments before the motor vehicle broke down, she provided no proof of the same. I, therefore, do not find any basis for the order by the trial court to have the appellant refund to the respondent the sum of Kshs 180, 000.00, over and above the Kshs 400, 000.00, without proof that the amount had been received by the appellant in the first place. A person can only refund what they had received in the first place. The appellant did not concede to receiving Kshs 180, 000.00 from the respondent, and the statement he placed on record indicated that the respondent did not pay any other moneys after the deposit of the Kshs 400, 000.00.

18. The case by the appellant was for refund, and without foundation for a refund under the contract of March 20, 2009, there was no justification to order refund in the judgment of March 13, 2020.

19. The respondent has argued that the sum of Kshs 580, 000.00 was restitution. Damages is the remedy available for breach of contract. Again, there are 2 considerations here. Was there a breach of contract in this case, and, if so, by who? Secondly, if there was breach by the appellant, what would be the quantum of damages?

20. Both sides allege breach by the other. The respondent moved to the trial court, on grounds that the repossession of the motor vehicle by the appellant was in breach of contract. The appellant argues that the repossession was triggered by a breach on the part of the respondent, when she defaulted in payment of instalments. This should take us back to the written contract. The default in paying the monthly instalments and the repossession of the motor vehicle go together, according to clause 4 of the agreement. The default would trigger the repossession. The appellant was entitled to payment of the purchase price, in the agreed instalments, and in default, he had a right to repossess the motor vehicle. He claims that such a default happened, hence he exercised his right to repossess. It is common ground that the respondent was in default. She conceded as much at the oral hearing, and admitted that that gave the appellant a right to repossess the vehicle. So, between the appellant and the respondent, it was the respondent who breached the contract, and not the appellant. The appellant merely exercised his right to repossession, upon the respondent breaching the contract, by not paying instalments. He did not act in any way in breach of the contract in repossessing the subject vehicle. To that extent then, and in keeping with contract law, it was the appellant who was entitled to restitution, and not the respondent. The party guilty of breach of contract cannot and should not expect compensation out of that breach. See *Khunaif Trading Company Limited v Equity Bank Limited & another* [2015] eKLR (Kasango, J).

21. Did the appellant act properly in the manner that he exercised his right to repossess the vehicle? It is common ground that he was entitled to repossess. It is also common ground that that right had accrued in this case. As underscored above, he was not in breach of the contract in repossessing the vehicle, for it was within his right. If he went about exercising that right in a manner that violated due process, that did not mean that the exercise of his right in that manner somewhat translated to a breach of the contract itself, and sort of righted the wrong or breach committed by the respondent, which had triggered the repossession process in the first place. The respondent remained the guilty party. The repossession was not wrongful, for it had crystalized. The manner in which it was carried out, that is the

mode of repossession, whether there was notice or none, did not make it a breach of the contract. The discharge of the sale agreement was not caused by the repossession, but by the default in the payment of the monthly instalments. The respondent was not entitled to claim any form of damages from the appellant, for she was the one guilty of breach of contract. See *Mwatech Enterprises Ltd v Equatorial Commercial Bank Limited* [2021] eKLR (C Kariuki, J). Repossession would only have been wrongful, and in breach of contract, if carried out after the respondent had completed paying the purchase price in full. That is not the case here. She had not completed paying in full, and she was in default as at the date the repossession happened. Whether the vehicle was sold at a "throwaway" price did not diminish his right to repossess. It did not translate to a breach of the contract. If the sale was below the market price, that did not affect the contract, but it entitled the respondent to get the balance between the sale price and the market price. However, besides the allegations, no evidence was provided that the vehicle was sold below the market price.

22. On whether the claim by the appellant, for Kshs 306, 000.00, should have been allowed, I have been pointed to clause 12 of the contract, which entitled the appellant to charge a penalty of 30% of the contract price, over and above exercising the right to repossess the motor vehicle. The payment of the penalty of 30% is independent of the repossession. Was the appellant entitled to that 30%? The trigger of clause 12 was default in paying any of the instalments as agreed. Was there such default? Yes, there was. The respondent conceded to it. The trial court noted it. A portion of the judgment notes, "... clauses 4 and 5 of the agreement was placed on the witness and he agreed that indeed they had defaulted in the loan repayment and the defendant was at liberty to repossess the said motor vehicle." Going by that, clause 12 had kicked in, and the appellant was entitled to payment of the 30% value of the contract price. I note that the trial court did not address its mind to that provision in the contract. Having found that the respondent was in default, the trial court should have gone on to apply clause 12 of the contract.

23. There were claims of unjust enrichment by the appellant. I have closely perused the papers filed herein, inclusive of the oral evidence recorded. I have noted that the parties had between them a written contract. Default on the part of the respondent was conceded, and it was conceded too that the right to repossess had accrued. I note that the claims made by the appellant were all founded on the terms of the written contract that the respondent signed. I am talking about the cost of the repossession and incidental charges, including the auctioneer's charges. These were covered under clause 4 of the contract, the issue of unjust enrichment should, therefore, not arise. The said expenses or costs would arise or flow naturally from the breach by the respondent, so that were it not for the breach by the respondent, the appellant would not incur the expenses. If anything, it would be the respondent unjustly benefitting from her own breach of the contract. After she paid the deposit, the vehicle was released to her, it was in her possession for some time, broke down while she was using it, and was even stolen. All these pointed to diminution in the value of the motor vehicle. For the respondent to walk away with a refund of whatever monies she had paid to the appellant, without taking into account diminution in value of the vehicle during the period when it was in her possession, amounted to unjustly enriching her. It cannot be that she got the benefit of using the vehicle for some time, whether profitably or not, and upon default she is allowed to recover whatever moneys she had paid to the appellant.

24. There were submissions that the appellant sold a defective vehicle to the respondent, and that that contributed to the difficulties she had with making the instalments. The contract document was specific that the appellant was not giving any guarantees as to the condition of the vehicle. This is stated in pages 2 and 3 of the agreement, and more particularly at clauses 1 and 2. At page 2 it is stated, "... the vehicle is sold without guarantee and as it condition the buyer has seen himself/herself instead, approved and agreed before signing this agreement. Deposit is not refundable once agreement is signed.

Insurance is managed by the buyer and on delivery or collection of the vehicle, the company will no longer be responsible for any occurrence...” I have already set out clauses 1 and 2 at paragraph 13 hereabove, and there will be no need to reproduce them here. The issue that the vehicle was defective is, therefore, a non-issue.

25. The trial court ruled that the appellant ought to have delayed his action, to repossess, after it was informed of the defect and the respondent having requested for a chance to repair the vehicle, to enable her go back to business. In the opinion of the trial court, the appellant, as a prudent businessman, should have acceded to the request. With respect, the role of the court is to interpret the contract and decide based on the terms of that contract. The court should never rewrite the contract for the parties, nor determine what would have been the responsible conduct of the parties in the event of any difficulties. Parties are bound by their contracts, and they should act as per the terms of their contract, and the court should decide based on that, and should not consider what would have been prudent in the opinion of the court.

26. For avoidance of doubt, the trial court ruled:

> “ With the above reasons I do find that the defendants actions were arbitrary and having been informed by the plaintiff about the defect and the plaintiff having requested for a chance to repair the motor vehicle and go back to business to enable him continue making payment as he always did, the defendant as a prudent business should have held his action to repossess and sale of the subject motor vehicle as the plaintiff could have paid penalty for the delayed payments.”

27. Overall, I find merit in the appeal herein, and I hereby allow it. The final orders, made in the judgment of the trial court, on March 13, 2020, in Busia PMCCC No 4 of 2010, are hereby set aside, and substituted with orders that the plaint by the respondent is hereby dismissed, and the counterclaim by the appellant allowed, to the extent of grant of Kshs 306, 000.00, being the 30% penalty for default in payment of the instalments as per the contract. The appellant shall have the costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS..... 19TH.....DAY OF.....JUNE.....2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Kongere, instructed by Muriu Mungai & Company, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.