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Miron v Owunda (Civil Appeal 22 of 2020)
[2024] KEHC 15618 (KLR) (6 December 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 22 OF 2020

DK KEMEI, J

DECEMBER 6, 2024

BETWEEN

TOBIAS ODHIAMBO MIRON .... APPELLANT

AND

BENSON OWUNDA .... RESPONDENT

(Being an appeal against the judgment and decree in Bungoma Chief Magistrate's Court Civil Case No.227 of 2014 (Hon. G. P. Omondi (SRM) dated 15th January, 2020)

JUDGMENT

1. The Appellant herein was the Defendant in a suit filed on 30/5/2014 by the Respondent in the magistrate's Court for a sum of Kshs. 591,000/=, costs of the suit and interest on both the sum claimed and the costs.

2. Both the Plaintiff and the Defendant were described in the Plaint dated 20th May, 2014 as adults of sound mind. Vide paragraphs 3-6 of that Plaint, the Respondent's claim against the Appellant was expressed as follows: -

> " 3. The Plaintiff avers that on or about the 24th August 2012, the Plaintiff sought to purchase from the Defendant and the Defendant agreed to sell to the Plaintiff, a motor vehicle namely TOYOTA NZE SALOON. The purchase price was agreed at 750,000/=.
>
> 4. The Plaintiff avers that he did pay the Defendant a sum of Kshs. 401,000/=and upon this said payment the Defendant delivered a motor vehicle to him, which motor vehicle the Plaintiff took possession of.

5. The Plaintiff avers that on allegation that he had failed to pay the balance of the purchase price within the agreed time, the defendant delivered unrightfully repossessed the motor vehicle and sold it to a third party.

6. The Plaintiff avers that after the foresaid unrightful (sic) repossession and in an attempt to reclaim the motor vehicle i.e KAX 301 P, he made further payment of Kshs. 190,000/= to the Defendant bringing the cumulative sum paid to Kshs. 591,000/="

3. The Plaintiff averred that on 16th December 2013, he entered into a memorandum of understanding with the Defendant which stipulated as follows: -

" i. That the Defendant should scout for, obtain and deliver to the Plaintiff an alternative motor vehicle of a similar description namely Toyota Nze Saloon.

ii. That the Defendant was to deliver the motor vehicle to the Plaintiff within 120 days of the memorandum of understanding.

The Plaintiff to pay a balance of Kshs. 165,000/= upon delivery of the said motor vehicle."

4. According to the Plaintiff, the Defendant was in breach of the stipulated terms and conditions of the memorandum of understanding as he failed and/or neglected to deliver the alternative motor vehicle.

5. In his statement of defence, the Defendant concurred with the averments of paragraph 3 and 6 of the Plaintiff's Plaint. He contended that the Plaintiff was in breach of their agreement as he failed to pay the balance of the purchase price on the agreed date prompting him to reposses the suit motor vehicle.

6. According to him, the parties herein entered into a memorandum of understanding on 24th May 2014 and not 15th December 2013 as alleged by the Plaintiff. He averred that he proceeded to execute the memorandum of understanding and that he was not in breach of anything as the period for the delivery of the alternative motor vehicle had not expired making the Plaintiff's suit premature and an abuse of the Court process.

7. At the conclusion of the trial, the learned magistrate found for the Plaintiff and entered judgment against the Defendant as prayed. In his rather brief judgment, the learned magistrate held: -

" ....The Defendant adduced no evidence at all of delivery of the motor vehicle to the Plaintiff and therefore, I find that the Plaintiff proved that the Defendant did not deliver to him the alternative motor vehicle.................

The memorandum of understanding produced in Court bears the date of 16/12/2013. There is no other memorandum of understanding on 24/05/2014. On a balance of probability, I find that the memorandum of understanding was entered on 16/12/2013.

Following the above, I therefore enter judgement for the Plaintiff against the Defendant as follows:

1. The Defendant to pay the Plaintiff Kshs. 591,000/= as claimed in the Plaint.

2. The Plaintiff is awarded interest to be charged on (1) above at Court rate from the date of filing the suit.

3. The Plaintiff is also awarded costs of this suit and interest on cost, if any."

8. The Defendant appealed against this decision and in his memorandum of appeal filed dated 13th February 2020, wherein he faulted the learned magistrate on the following grounds: -

   i. The learned magistrate erred in law and/or fact when he held that the Plaintiff/Respondent had proved his case on the balance of probabilities,

   ii. The learned magistrate erred in law and fact when he failed to hold that the suit was premature and strike it out with costs.

   iii. The learned magistrate erred in law and fact when he totally disregarded the cogent evidence adduced by the defence.

   iv. The learned magistrate erred in law and fact when he failed to hold that the agreement dated D-Exhibit 2 is fake and doctored.

   v. The learned magistrate erred in law and fact when he failed to dismiss the Plaintiff's/ Respondent's suit.

   vi. The learned magistrate erred in law and fact when he allowed the Plaintiff's claim with costs.

9. The Appellant asked this Court to allow the appeal and dismiss the Respondent's suit against him. He also asked for costs of the suit and the appeal.

10. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial Court, unlike the appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. The duty of this Court, being the first Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and Another Vs Associated Motor Board Company and Others [1968] EA 123, where the law lords in their usual gusto, held as follows;-

> " ..this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. One of the Plaintiff's witnesses at the trial was Benson Owonda (PW1) who was the Plaintiff. He told the Court that he was well versed with the Defendant as he had approached him in 2012 telling him that he supplies motor vehicles. According to him, on 24th August 2012, they agreed verbally that he supplies him with a motor vehicle costing not more than Kshs. 600,000/= leading to his purchase of motor vehicle registration number KAX 301P Toyota NZE. He made the 1st payment of Kshs. 250,000/= on 24th August 2012 vide Barclays Bank; the 2nd payment of Kshs. 20,500/= was effected on 20th September 2015 vide Barclays Bank; the 3rd payment of Kshs. 150, 500/= was made on 4th October 2012 vide Barclays Bank and a further payment of Kshs. 190,000/= was made on 2nd September 2013. He availed the respective receipts in Court as PEXH. 1(a) (b) (c) and (d).

13. It was his evidence that he took possession of the said motor vehicle but was never given a logbook as per the sale agreement. He made a payment of Kshs. 421,000/= but the purchase price was Kshs. 600,000/=. He told the Court that the Defendant in the company of DCI officer repossessed the motor

vehicle alleging that he had refused to pay him the balance of Kshs. 180,000/=. He eventually paid the Kshs. 180,000/= but that the Defendant became dodgy as his attempts to get his motor vehicle back were not successful.

14. He told the Court that on 16th December 2013, they signed a memorandum of understanding wherein the Defendant admitted that he owed the Plaintiff Kshs. 586,000/= at the law firm of Mango & Co. Advocates. It was his testimony that they later agreed that the Defendant will supply him with another motor vehicle which he never did even at the point of him instituting the lower Court suit.

    On cross-examination, he told the Court that their agreement was never in writing and that they verbally agreed the purchase price would be Kshs. 600,000/= but he ended up making a payment of Kshs. 611,000/=. He refuted the claim by the Defendant that he was expected to pay Kshs. 750,000/=.

    On re-examination, he told the Court that it was the Defendant who repossessed the motor vehicle and who was in the company of police officers. He told the Court that the memorandum of understanding was executed on 16th December 2013 meaning that the grace period of 120 days to deliver another motor vehicle to the Appellant was to expire on 30th May 2014, but up to the point of the suit, the same had not been done.

15. On 20th September 2016, by consent the memorandum of understanding was produced in Court as PEXH. 2

16. The Defendant in his evidence admitted that he entered into a sale agreement with the Plaintiff for motor vehicle registration number KAX 301P, but that the agreed amount was not paid in full. According to him, the Plaintiff only made a payment of Kshs. 556,000/= and after his failure to complete the payment, the Defendant approached the law firm of Oketch & Co. Advocates who proceeded to draft and serve the Plaintiff with a demand letter instructing him to complete payment for the motor vehicle. He produced in Court a demand letter marked as DEXH.3

17. It was his testimony that it was agreed that the Plaintiff was not to move the motor vehicle out of Kakamega but that he did the contrary by moving the same to Bungoma without his consent and when he found out, he reported the same to the police and the motor vehicle was impounded. He told the Court that the motor vehicle was not in a good condition prompting him to tow it from Bungoma to Kakamega and eventually to Nairobi. He proceeded to make the necessary repairs and demanded the repair costs and incurred from the Plaintiff. He told the Court that on 30th July 2013, a demand letter was addressed to the Plaintiff for Kshs. 250,000/= and that the Plaintiff paid Kshs. 190,000/= for the repair charges. He produced the demand letter dated 30th July 2013 in Court and which was marked as DEX4.

18. He told the Court that they eventually entered into a memorandum of understanding wherein he consented to give the Plaintiff the same motor vehicle or an alternative within 120 days from the day of execution.

    On cross-examination, he told the Court that he received Kshs. 556,000/= from the Plaintiff and that he did not avail any documentation proving that he repaired the motor vehicle as alleged in the sum of Kshs., 250,000/=. He also told the Court that he had nothing to show for the tow charges as allegedly incurred.

19. As regards the memorandum of understanding, he told the Court that he was to get a motor vehicle with similar features as the one he repossessed and ensure that it did not cost more than Kshs. 750,000/=.

On re-examination, he told the Court that the date on the memorandum of understanding was backdated.

20. Derrick Mango (DW2) testified that on 24th May 2014, the Defendant and Plaintiff visited his office wishing to prepare an agreement. The same was duly done and that the Plaintiff was advised to share the same with his Counsel prior to his signing. According to him, the agreement was shared with Counsel for the Plaintiff, Mr. Owinyi for his perusal and execution by the Plaintiff but that he never got them back from him. He told the Court that on reaching out to Mr. Owinyi, he notified him that the Plaintiff never showed up with the documents.

21. He told the Court that it was only in 2016 that the Defendant showed him the memorandum of understanding that was allegedly prepared in his office and on scrutiny he established that the same was not prepared in his office. He told the Court that the memorandum of understanding shows that it was executed on 16th December 2013 and he insisted that the parties only appeared before him on 24th May 2014 when he prepared the agreement and he issued a joint receipt. He produced the receipt in Court marked as DEX-1 and the memorandum of understanding as DEXH-2.

    On cross-examination, referring to PEXH-2, he told the Court that the memorandum of understanding was executed on 16th December 2013 but that the same did not originate from his office.

22. That is the farthest the testimony of both the Plaintiff and the Defendant and their respective witnesses went.

23. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.

24. I have considered the record of appeal and the submissions herein. I find the issues for determination are as follows:-

    a. Whether there was an agreement between the Respondent and the Appellant.

    b. Whether the property in goods passed to the Respondent within the agreed 120 days.

    c. Whether the Respondent had proved his case against the Appellant on balance of probabilities.

25. On the first question, it is clear from the Court record that the memorandum of understanding as availed in Court indicated the date as 16th December 2013 and that there is none showing any document bearing the alleged date of 24th May 2014. The Appellant alluded to the memorandum of understanding as availed before the lower Court to be fake and doctored but failed to avail any cogent and admissible evidence to substantiate the claims. The principles in law under Section 107 indicate that:

    (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

    Section 108 states that: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    Section 109 states that: The burden of proof as to any particular fact lies in the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.

26. From the foregoing, it is clear that except for mere allegations, a careful consideration of the lower Court's proceedings evinces no credible evidence that the Appellant had proved his case against the Respondent that the availed memorandum of understanding was fake and doctored. The memorandum of understanding dated 24th August 2014 as alluded to by DW2 was not availed in Court. It is clear that a memorandum of understanding was executed by the parties on 16th December 2013.

27. On the second issue, answers are found in the *Sale of Goods Act*, Chapter 33 Laws of Kenya; curiously, despite this law having been at the heart of the dispute between the parties, none of its provisions was ever referred to by either of the parties or the lower Court itself.

28. It is clear that the Respondent purchased motor vehicle registration number KAX 301P from the Appellant herein and that he made a total payment of Kshs. 591,000/=. On paragraph 6 of the Plaint, which the Appellant concurred with, the Appellant did repossess the motor vehicle after the Respondent failed to complete payment. The parties did record a memorandum of understanding dated 16th December 2013, wherein the Appellant committed to deliver the same repossessed motor vehicle or an alternative not exceeding the purchase price of Kshs. 751,000/= within 120 days. Also, the cumulative amount of Kshs. 586,000/= as earlier received by the Appellant be considered as partial payment for the alternative vehicle.

29. It was the evidence of the Respondent that at the time of filing the suit, he was still not in receipt of the motor vehicle. The Appellant herein availed no evidence of delivery of the said motor vehicle to the Respondent and proceeded to argue that the 120 days were yet to lapse. It is imperative to note that the said memorandum of understanding was executed on 16th December 2013 and that the said Plaint was instituted on 30th May 2014.

30. 'Delivery' as known in law is defined under Section 2(1) of the *Sale of Goods Act* (Cap. 33) as follows:-

> " Delivery" means voluntary transfer of possession from one person to another;"

31. Going by this definition, it is obvious from the evidence presented that the alternative motor vehicle was never delivered to the Respondent. The Respondent was categorical in his pleadings that he was not in possession of the alternative motor vehicle. The Appellant on the other hand averred that the 120 days were yet to lapse and that the Respondent's suit was premature. This simply means that the motor vehicle was never delivered to the Respondent.

32. Under Section 19 of the *Sale of Goods Act*, the property in the goods pass at the time parties agree. In this case, the property was to pass together with the risk at the end of the 120 days and payment of Kshs. 165,000/= upon delivery of the said motor vehicle to the Respondent by the Appellant together with the logbook and all requisite transfer forms duly executed. The section provides as follows: -

    1. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

    2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

33. Further, until transferred, the goods remain the seller's property. Section 22 of the sale of goods provides as follows: -

> " 22. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred

to the buyer the goods are at the buyer's risk whether delivery has been made or not: Provided that— (i) where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for that fault; (ii) nothing in this section shall affect the duties or liabilities of either seller or buyer as a Bailee or custodian of the goods of the other party."

34. As regards the last issue and from the foregoing, it is clear that the Respondent proved his case on a balance of probability of an existence of a memorandum of understanding dated 16th December 2023, and the fact that the Appellant was in breach of the said agreement when he failed to deliver the said alternative motor vehicle within the stipulated 120 days.

35. The claim remaining was for money had and received by the appellant for a sum of Kshs. 591,000/=. There is no pleading that this money was returned. There must be a specific claim and pleading on not only payment or refund of this money but how it was refunded. Order 2 Rule 4 of the Civil Procedure Rules, which supports this position, posits as hereunder: -

" 4. Matters which must be specifically pleaded

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

36. Without such a pleading, there is nothing the defence could stand on. There is no pleading indicating that they have refunded or that the motor vehicle was delivered. I hold and find, that the Kshs 591,000/ = was received by the Appellant and that the said money has not been refunded. Even purely on justice and good conscience, the Appellant cannot keep both the money and the motor vehicle. The Appellant took the Respondent on a wild goose chase and that no such vehicle was delivered or the monies refunded. This is the nadir of dishonest dealing and that the Court below was correct in finding the Appellant liable.

37. The upshot of the foregoing is that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

N/A Tobias Odhiambo Miron........... Appellant

N/A Omagwa...........................for Respondent

Kizito/Ogendo.........................Court Assistant