



REPUBLIC OF KENYA



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**Ogongo v Kamau (Civil Appeal E002 of 2021)
[2024] KEHC 15598 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL APPEAL E002 OF 2021
F GIKONYO, J
DECEMBER 6, 2024**

BETWEEN

NYASAKA JULIUS OGONGO APPELLANT

AND

JOSEPH THIGAH KAMAU RESPONDENT

*(Being an appeal from the judgment of Hon. W.Kitur (SRM)
delivered on 23/03/2021 in Kilgoris CMCC No. 47 of 2017)*

JUDGMENT

Frustration and rescission of contract

1. This appeal revolves around frustration and rescission of contract which is said to be the basis of the decision by the trial court in the Chief Magistrate’s Court at Kilgoris in Civil Suit No. 47 of 2017 delivered on 23/03/2021 in which judgment for the respondent was entered against the appellant in the following terms: -
 - i. The appellant to refund the respondent Kshs. 198,000.00
 - ii. costs of the suit
 - iii. interest on (i) and (ii) above at court rates.
2. The memorandum of appeal dated 21/04/2021 cited seven (7) grounds of appeal as follows;
 - i. The learned trial magistrate erred in law and fact by finding the appellant in breach of the agreement without a notice of rescission of agreement served upon him by the respondent.
 - ii. The learned trial magistrate erred in law and fact by failing to order dismissal of the respondent’s suit for having been brought prematurely.



- iii. The learned trial magistrate erred in law and misdirected himself that the doctrine of frustration of contract was applicable in the case.
- iv. The learned trial magistrate erred in law and fact in construing the completion date in the agreement in a manner not intended by the parties.
- v. The learned trial magistrate's decision is against the weight of the evidence on record.
- vi. The learned trial magistrate erred in law and fact by failing to consider the appellant's defence of mutual oral agreement by the parties to rescind the agreement.
- vii. The learned trial magistrate erred in law and fact by failing to find that the respondent was in breach of the terms of the agreement hence had come to court with unclean hands.

Background

3. The appellant offered to sell to the respondent a Mitsubishi lorry registration number KBL 427A for Kshs. 1,850,000.00. The respondent paid a deposit of Kshs. 500,000.00. He was to pay a balance upon delivery of the lorry.
4. According to the respondent the lorry was never delivered to him. When he requested for a refund of the already paid purchase price, the appellant only refunded Kshs. 302,000 leaving a balance of Kshs. 198,000/= which the respondent demanded before the trial court.
5. The appellant denied owing the respondent any money and blamed him for frustrating their contract.

Directions of the court

6. The appeal was canvassed by way of written submission.

The Appellant's submissions

7. The appellant submitted that a contract can only be fully rescinded, there can never be such thing as a partial rescission of a contract. The moment the respondent received the refund the contract stood rescinded and could not form a basis for any claim in the suit before the subordinate court. Further, the respondent should have issued a rescission notice to the appellant before instituting the suit. This was not done therefore the suit was fatally defective.
8. The appellant submitted that the trial court erred in finding that the year of completion was 2014 which was against the weight of evidence on record and true intentions of the parties. The trial court should not rewrite the contract but construe the contract as to give the true meaning and intents of the parties where circumstances allow. There was no basis for the trial court to hold that the appellant frustrated the contract and should therefore refund the respondent a sum of Kshs. 198,000/=.

The respondent's submissions

9. The respondent submitted that the appellant frustrated the contract by not performing his obligations as a vendor and by returning the purchase price he rescinded the contract. Therefore, needed no further rescission notice from the respondent before instituting the suit.
10. The respondent submitted that having proved that the appellant breached the contract it is in the interest of justice that the respondent is paid the remaining Kshs. 198,000/= together with 70% of the total purchase price as agreed by parties in clause 7(a) of the agreement. The respondent contends that there was no tangible evidence on the verbal agreement to never refund the Kshs. 198,000/=no



independent witness was called to justify the verbal agreement. The appellant did not also prove the losses incurred during the period the lorry was not working as the transaction was being pursued. The respondent relied on section 51 of the *Sale of Goods Act*, clause 7(a) of the sale agreement, and In the High Court at Nairobi (Milimani Commercial Courts, Commercial and Tax Division), Civil Suit No. 136 of 2020, Dormakaba Limited V Architectural Supplies Kenya Limited.

Analysis And Determination

Duty of court

11. As first appellate court, will evaluate the evidence afresh and makes own conclusions albeit bearing in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123*.

Issues

12. On the one hand, the respondent claims that the appellant breached the contract in not delivering the lorry as agreed. And that, the appellant agreed to refund the deposit paid to him. Except, he refunded part of the deposit. He claims refund of the balance.
13. On the other hand, the appellant claims that the respondent breached the contract in not paying the purchase price within the time agreed. But, on cross-examination, the appellant stated that his advocate was informed by the respondent of the delay in paying the balance and the respondent finally paid after three months. He added that they entered into a verbal agreement to rescind the agreement and the terms of the rescission; the amount the appellant was to refund to the respondent, and retain Kshs. 198,000 as his lorry was not at work when the transaction was being pursued.
14. The subsequent agreement is the issue; its nature, terms thereof and effect.
15. The appellant contends that the respondent breached the contract in not paying the balance of the purchase price as agreed, thereby, frustrating the contract.
16. The appellant nonetheless, submitted that, they subsequently agreed to rescind the contract on terms.
17. The respondent also blames the appellant for breach of contract in failing to deliver the lorry as had been agreed; and terms his refusal to receive the balance albeit paid late, frustrated the contract. But, the respondent also stated that they agreed to rescind the contract wherein the appellant was to refund the deposit. And, by refunding the deposit the contract was rescinded by the parties.
18. The issue, therefore, is whether the contract herein was frustrated or rescinded?

Claim of frustration

19. Was the failure of the respondent to pay the full purchase price frustration of the contract?
20. It is not disputed that the appellant and the respondent entered into a contract for the sale of motor vehicle registration number KBL 427A a Mitsubishi lorry on 12/02/2014. It is also not in dispute that the respondent made a down payment of Kshs. 500,000/= and was refunded Kshs. 302,000/=.
21. Clauses 4 and 6 of the agreement sets the terms of payment of the purchase price as well as obligations for the appellant. The respondent paid the balance but outside the period agreed. However, the appellant stated that the delay was communicated to his advocate. The respondent sought to make the final payment of Kshs. 1,000,000, but the appellant refused to receive the final payment.



22. According to Lord Radcliff in the case of Davis Contractors Ltd vs Fareham U.D.C. (1956) AC 696: -
- “...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. “Non haec in foederi veni” It was not what I promised to do...There... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for.”
23. And, in Davis Contractors Ltd vs Fareham U.D.C. (ibid): -
- “The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced.”
24. In Howard & Company (Africa) Ltd vs Burton [1964] EA 157 this Court concurred with Lord Sumner in Bank Line Ltd vs Arthur Capel & Company (26) [1919] AC p. 425 who stated,
- “It is now well established that the doctrine of frustration cannot apply where the event is alleged to have frustrated the contract arises from the “act or self-election of the party” who seeks to invoke it. Reliance cannot be based on a self-induced frustration”.
25. In the circumstances, the delay in completing the purchase price was not an act which would in law frustrate the contract.
26. On his part, the appellant refused to accept the late repayment of the balance of the purchase price. The appellant did not also perform his part of the bargain in clauses 4 and 6 of the agreement. His actions too are the so called ‘self-induced frustration’; estoppel arises here. Maritime National Fish vs Ocean Trawlers [1935] AC 524, Taylor vs Caldwell (1863) 3 B & S 826.
27. There was no frustration of the contract.
28. Factors touted by the parties as being responsible for ‘frustration of the contract’ are the basis for the subsequent agreement for refund of the deposit; except, the nature and terms of the said agreement are hotly contested as shall be seen below.

Rescission of contract

29. Rescission is a legal remedy. It permits parties to a contract to, upon mutual agreement, undo or terminate the contract, for whatever valid legal grounds. Rescission of contract nullifies the contract as if it never existed and restores the parties to their pre-contractual positions.
30. Nullification of the contract has been emphasized. For a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting. MORRIS -VS- BARON & CO. [1918] A.C. 1, 19 Lord Haldane.
31. A rescission depends upon the extent to which it alters the terms of the original contract. Nevertheless, parties in this case agree on one thing; that, by mutual agreement, they rescinded the contract. The decision was prompted by failures by the parties to meet the terms of the contract and their intention was clear that, they do not wish to continue with the contract whatsoever. The only sticky issue being; the terms of the verbal mutual agreement which rescinded the contract.



32. The appellant stated that they agreed that he refunds a sum of Kshs. 302,000 and retains Kshs. 198,000 out of the deposit paid by the respondent. He gave his reasons; his lorry was not working during the subsistence of the contract.
33. The respondent denies there was any agreement for the appellant to keep some of the deposit paid. He insisted that the agreement was that he be refunded the full amount of the deposit he made to the appellant.
34. It bears repeating that, rescission nullifies the contract as if it never existed. Therefore, no party may lay claim on the rescinded contract. From the evidence, the parties rescinded the contract by mutual agreement, and therefore, no party herein should lay claim based on the rescinded contract. The court so finds.
35. Be that as it may, the appellant did not establish that they agreed that he keeps part of the deposit paid to him- to be precise, Kshs. 198,000- as compensation for his lorry was not engaged in any gainful activities during the subsistence of the contract. Restoring the parties to their pre-contractual positions. Which is; the appellant to make full refund of the deposit to the respondent.
36. In the circumstances, the appropriate orders to make which are hereby made are that:
 - i. The appeal is dismissed
 - ii. The appellant shall refund a sum of Kshs. 198,000/= to the respondent
 - iii. The respondent will have costs of the primary suit.
 - iv. But, the respondent will not get any interest on the principal sum or costs given the finding of the court that he too is to blame for the situation the parties found themselves into.
 - v. For the same reason, each party shall bear own costs of the appeal.
37. Orders accordingly

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH THE TEAMS APPLICATION,
THIS 6TH DAY OF DECEMBER, 2024.**

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**F. GIKONYO M
JUDGE**

In the presence of: -

1. Ombachi for appellant
2. Ojala for respondent
3. Nyangaresi C/A

