



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 60 OF 2019

BERNARD KIBET KOECH NG'ENOH.....APPELLANT

VERSUS

JAMES MCTOUGH1ST RESPONDENT

SOVEREIGN CONSTRUCTION LIMITED.....2ND RESPONDENT

[Being an appeal arising from the Judgment of Hon. Rose Mugeni Ndombi (RM)

delivered in Kisumu CMCC NO. 515 OF 2017 on 26th March 2017]

JUDGMENT

The Appellant, **BENARD KIBET KOECH NG'ENOH** was the Plaintiff in the case which he had filed against the Respondents, **JAMES MCTOUGH** and **SOVEREIGN CONSTRUCTION LIMITED**.

1. The suit was based upon an Agreement dated 8th June 2012, which was between the Appellant and the 1st Respondent, **JAMES MCTOUGH**. The subject matter of the Agreement was a Range Rover Motor Vehicle Registration No. **KAZ 023R**.
2. It was a term of that agreement that the Appellant would buy the vehicle for the sum of Kshs 10,000,000/=.
3. The Plaintiff's case was that he paid a total of Kshs 1,720,000/= before he encountered business challenges, which made it difficult for him to pay the outstanding balance.
4. According to the Plaintiff, when he informed the Defendant about his situation, the Defendant agreed to refund the sums which the Plaintiff had remitted. However, the Defendant is said to have reneged on his promises.
5. The Plaintiff was of the view that it was grossly unfair for the 1st Defendant to retain the money, yet the Plaintiff did not get the vehicle.
6. The Plaintiff said that the refusal to refund his money was unjust and unconscionable. The Plaintiff asserted that the said retention of his money amounted to unjust enrichment on the part of the Defendant.
7. After the Plaintiff was served upon the Defendants, they filed a Defence and a Counter-claim.
8. At paragraph 3 the Defendants asserted that the 1st Defendant lacked legal capacity to enter into an agreement for the sale of the vehicle in issue. In the circumstances, the Defendants stated that the alleged agreement was a nullity.
9. However, if the agreement were to be held to be valid, the Defendants asserted that it was the Plaintiff who was in breach of the terms thereof.
10. The Defendants' counter-claim was for Specific Performance, to compel the Plaintiff to pay the balance of the Purchase Price.
11. At the trial, the witnesses were the Plaintiff and the 1st Defendant.

12. Being the first appellate court, I have the duty to re-evaluate all the evidence on record, and to draw my own conclusions. However, as I did not have the benefit of observing the witnesses when they were testifying, I have to make an allowance in respect to observations, if any, which the court made based on the demeanour of the witnesses.

13. The Sale Agreement dated 8th June 2012 was between **JAMES MCTOUGH**, (as the Seller) and **BERNARD KOECH KIBET** (as the Buyer).

14. The 2nd Defendant, **SOVEREIGN CONSTRUCTION LIMITED**, was not a party to the Sale Agreement.

15. However, pursuant to the terms of the Agreement, the buyer was required to pay the purchase price to a specified Bank Account which was in the name of the 2nd Defendant.

16. In his Witness Statement, the 1st Defendant made it clear that in June 2012, the motor vehicle in issue was registered in the name of the 2nd Defendant. He even added the following disclosure;

“No sale agreement was entered into between Sovereign Construction Ltd and the Plaintiff. In fact, at no point in time did the company resolve to sell the vehicle.”

17. In support of his contention regarding ownership, the 1st Defendant exhibited the copy of the Log Book, which confirmed that on 24th September 2007 the registered proprietor of the motor vehicle registration No. **KAZ 023R** was **SOVEREIGN CONSTRUCTION LIMITED**.

18. When he was testifying, the 1st Defendant (*hereinafter “James”*) expressly stated that;

“..... Sale agreement is between myself in person and plaintiff. I was not entering on behalf of the company.

I purchased the vehicle in 2007....

It was registered under Sovereign Construction Limited as at the time of agreement. A log book is conclusive ownership of motor vehicle. I do not own the vehicle in my personal name.”

19. James reiterated that there was no resolution passed by the Board of Directors of Sovereign Construction Limited, to sell the vehicle. He was therefore very clear in his mind about the fact that;

“The agreement has all terms binding me and Benard Kibet.”

20. In my considered opinion, the evidence tendered by James clearly shows that he had no legal capacity to enter into an Agreement to sell the vehicle which did not belong to him.

21. I therefore find that the Agreement dated 8th June 2012 was a nullity, as James had no legal capacity to transfer the ownership of the vehicle to the Plaintiff.

22. Therefore, as the Board of Directors of the company which owned the vehicle had never passed any resolution to sell the said vehicle, I find that there was no consideration flowing from the “*Seller*” cited in the Agreement.

24. If the 1st Defendant was permitted to retain the money he received from the Plaintiff, yet the 1st Defendant could never have passed title of the subject matter to the Plaintiff, that would amount to unjust enrichment.

25. Accordingly, the learned trial magistrate erred when she dismissed the Appellant’s case. I therefore allow the appeal, set aside the order dismissing the Plaintiff’s suit, and substituting with a find that the Plaintiff is entitled to the refund of the money he paid to the 1st Defendant.

25. As regards the quantum of the money to be refunded, I find that it is in the sum of Kshs 1,450,000/= which the Plaintiff remitted to the 1st Defendant.

26. I find that the money which was paid through M-Pesa, to one **PHOSA OMONDI**, has not been shown to have been paid to the 1st Defendant.

27. The 1st Respondent will pay interest at Court rates from 15th February 2013 until payment in full.

28. The costs of the appeal as well as the costs of the suit are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE