



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. E040 OF 2020

JACKLINE NJERI KARIUKI.....APPELLANT

VERSUS

MOSES NJUNG'E NJAU.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. P.N. Gesora (Mr), Chief Magistrate at the Chief Magistrate's Court at Milimani Commercial Court, Nairobi delivered on the 25th day of February, 2020 and Issued on the 6th day of March, 2020 in Milimani CMCC 2052 of 2018)

JUDGEMENT

The Appeal

1. The instant appeal is with respect to the judgment by Hon. P. N. Gesora CM dated the 25th day of February, 2020 and delivered by Hon. I. Orange on behalf of Hon. P. Gesora on the 6th day of March, 2020 in ***Magistrate's Court at Milimani Commercial Court, Nairobi CMCC No. 2052 of 2018 Moses Njunge Njau Versus Jackline Njeri Kariuki*** where the trial court allowed the found in favour of the Plaintiff/Respondent in terms of prayers (a) (b) (d) (e) and (f) of the Plaint dated 18/03/2018 and dismissed the Appellant's counterclaim with costs in which said counterclaim the Applicant herein sought against the Respondent payment of the balance of Kshs. 390,000.00, payment of penalty in the amount of Kshs. 520, 000. 00 for breach of contract and costs of the suit.

Background

2. The Respondent's claim against the Appellant in the subordinate cause was anchored on an agreement for sale of motor vehicle registration number KBX 870G (*hereinafter referred to as "the motor vehicle"*) entered into on 24th May, 2017 between the Appellant as the seller/vendor and the Respondent as the purchaser.

3. That pursuant to the said sale agreement, the motor vehicle was to be purchased by the Respondent at a sum of Kshs. 2,600,000.00 in three installments. The 1st installment of Kshs. 825,000.00 was payable upon execution of the sale agreement, the 2nd installment of Kshs. 1,075,000.00 was to be paid by 27th May, 2017 and the balance of Kshs. 350,000.00 be paid to NIC Bank to offset the seller's/Appellant's loan by the 10th day of September, 2017.

4. The Respondent caused to pay the Appellant to a tune of Kshs. 1,900,000.00 and further caused payment of Kshs. 350,000.00 as agreed to NIC Bank before the 10th day of September, 2017.

5. The Plaintiff took possession of the motor vehicle on the 6th day of June, 2017 upon payment of two installments to the Appellant pursuant to clause 2 of the said agreement which provided that:

"The Vendor shall allow the Purchaser to use the said motor vehicle after maturity of the cheques which shall be issued on the 27th May, 2017 after payment of Kshs. 1,075,000.00 but the transfer shall be done after clearance of the full balance".

6. The motor vehicle was repossessed by Ms. Leaky's Auctioneers on the 30th day of June, 2017 on account of instructions by NIC Bank upon which the Respondent entered into an agreement and/or understanding on payment of the sums due and the motor vehicle was released to him.

7. On 10th September, 2017 the Respondent was notified of existing warrants against the said motor vehicle which said warrants arose from

Baricho Pmcc 190 of 2015 and on the 21st day of September, 2017 the motor vehicle was proclaimed by Big Steps Auctioneers and subsequently advertised for sale.

8. The advertisement prompted the Respondent to proceed and filed Objection proceedings being **Baricho Cmcc no 174 of 2017** which was decided in his favour and the motor vehicle was released to him upon payment of the Auctioneer's charges.

9. The Respondent averred that his failure to settle the balance of Kshs. 350,000.00 so as to secure the transfer of the motor vehicle was due to the Appellant's breach which had led to him incurring colossal expenses.

10. The Respondent averred that it was the Appellant who had breached the contract and was subject to the 20% penalty.

11. The Appellant on the other hand vide its pleadings and testimony averred that the Respondent was in breach for having failed to pay in full the purchase price as and was no party to the proceedings at Baricho Law Courts thus was not liable to indemnify the Respondent as per Clause 7 of the Sale Agreement that stated:

“The vender shall indemnify the purchaser from any claims that may arise and/or has arisen out of her ownership and/or possession of the said motor vehicle.”

12. The Trial Court upon rendering itself to the pleadings, evidence and submissions by the parties found in favour of the Respondent as against the Appellant. The Learned Trial Magistrate held that it was right for the Respondent to have withheld the remittance of the balance of the purchase price following the events as established and had proved his case of breach on a balance of probability against the Appellant.

13. The judgment was delivered on 6th March 2020 in favour of the Respondent whereby the Learned Trial Magistrate held that:

- a. The Appellant to pay Special damages of Kshs. 529, 526/=
- b. A declaration that the Appellant is liable to pay the penalty for breach of contract of Kshs. 520,000/=.
- c. An order compelling the Appellant to execute the transfer of ownership of the motor vehicle KBX 870G to the Plaintiff
- d. Cost of the suit
- e. Interest at court rates on(a) and (b) above.

14. The appellant being dissatisfied filed this appeal and put forward the following grounds:

- i. The Honourable Learned Magistrate erred in Law and in fact in failing to consider the merits of the material issues placed before by the Appellant which raised issues pivotal to the determination as to whether indeed the Respondent suffered loss of use of motor vehicle use.
- ii. The Honourable Learned Magistrate erred in Law and in Fact in failing to interpret the terms of the contract for the sale of motor vehicle as agreed between and written by parties but instead re-wrote the sale agreement dated the 24th day of May, 2017.
- iii. The Honourable Learned Magistrate erred in Law and in fact by adjudicating over issues that were not before him and acting outside of the scope of his pivotal duties as a neutral arbiter.
- iv. The Honourable Learned Magistrate erred in Law and in fact in failing to give any reasons for the dismissal of the Appellant's counter claim.

15. By Consent, parties agreed to have the Appeal disposed of by way of written submissions.

Submissions

16. The Applicant submitted that the duty of this honourable court as the first appellate court is to subject the evidence to a fresh and exhaustive testimony as in the case of **China Zhongxing Construction Company Ltd v Ann Akuru Sophia [2020] eKLR** where the court stated:

“As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.”

17. The Appellant submits that it did not breach the terms of the agreement and faults the Respondent to have breached the same thus reiterating its position that the Learned Trial Magistrate erred in findings and law in holding her liable for breach.

14. It was the submission of the Appellant that the Respondent having prayed for special damages for loss of user, legal expenses, additional loan expenses and auctioneer charges, the same were subject to being proven by the Respondent and could not be awarded as a discretion of the Honourable Trial Court. The Appellant relied on and cited **Summer Limited Meru vs Moses Kithinji Nkanata [2006] eKLR High Court**

Civil Appeal No. 89 of 2004, where Lenaola J (as he then was) held that:

“ the amount of earnings from a business is not a matter that can be left to judicial discretion or reason since it is a special damage that must be specifically proved. Without such proof, it cannot be awarded.

15. The Appellant went ahead to invite the Honourable Court to the sentiments in Ndugu Transport Company Limited & another v Daniel Mwangi Waitthaka Leteipa [2018] eKLR it was held that:

“a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, “do the best it can” and make an award on a claim that was neither pleaded nor proved-see David Bagaine vs Martin Bundi [1997] eKLR.

16. It is the submission of the Appellant that the Honourable Trial Court rewrote the contract for the parties an issue which has been extensively been adjudicated on by the courts and invited the Honourable Court to consider the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR wherein the honourable court of appeal held thus:

“Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

17. The Appellant submitted on the issue of legal fees awarded under the special damages for the alleged proceedings *inter alia* in Baricho CMCC 174 of 2015 and Milimani Cmcc No. 7614 without there being certificate of costs and/or proof the expenses incurred amounted to the Learned Trial Magistrate rendering himself on that were not before him and consequently the Learned Magistrate adjudicated over issues that were not before him and consequently acted outside the scope of his pivotal duties as a neutral arbiter.

18. In support of the above submitted issue, the Appellant cited the case of Zachariah Wagunza & Another Vs Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR where the court held that:

“Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by:”

(i) an outright refusal to consider the relevant matter;

(ii) a misdirection on a point of law;

(iii) taking into account some wholly irrelevant or extraneous consideration; and

(iv) wholly omitting to take into account a relevant consideration.”

19. It is the submission of the Appellant that in dismissing its counterclaim, the court was obligated to provide reasons pursuant to the provisions of Order 21 Rule 4 which provides;

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

20. It is on the foregoing basis that the Appellant prays that the court proceeds to find the Appeal merited and be allowed.

21. The Respondent in opposition to the instant appeal filed submissions dated the 28th day of May, 2021.

22. The Respondent submitted that it had proved its claim for special damages as prayed in its paragraph 9 of the Plaint and as per the documents adduced during trial and having offset the remainder on the balance of the purchase price, it settled on the amount that was consequently awarded by the court.

23. It further submitted that the judgments in Baricho Law courts were well within the knowledge of the Appellant and that she indicated that the insurance was to settle the same. This came out during the cross examination.

24. The Respondent further averred that the Respondent being knowledgeable of the obligations to NIC Bank, failed to incorporate the timelines for payments of the sums due to the prejudice of the Respondent. Further, the amount purported to be owed was more than what was captured in the sale agreement.

25. The Respondent on the issue of legal costs submitted that despite not having produced the receipts for payment of fees and/or certificate of costs in the said proceedings, they were well provided for under Schedule 7 of the Advocates Remuneration Order, 2014 and were

ascertainable. The Respondent further submitted that not every claim for special damage has to be proved by way of receipt.

26. The Respondent further submitted that it was not in dispute that the motor vehicle was attached on 04/ 10/2017 and released to the Respondent on 22/ 12/2017 a period of 80 days and claimed loss of user/business at Kshs. 9,000.00 per day and produced worksheets from Rukagina Sacco showing the income and expenditure of the vehicle and net incomes of Kshs 6,850 (04/08/2017) Kshs 2,600 (19/07/2017) and Kshs 7,650 (04/07 / 2017). In the same breath, the Respondent indicated that the Appellant had admitted to be earning approximately Kshs. 6,000.00 per day from the transport business prior to selling it to the Respondent.

27. The Respondent submits that it had proved on a balance of probability that it suffered loss of use at a reasonable approximate of Kshs. 6,000.00 per day.

28. The Respondent further submitted that its quite possession was on various instances interrupted on basis of the claims in Baricho Law Courts and the dues at NIC Bank.

29. It was further submitted by the Respondent that the Appellant having breached the terms of the agreement, the Respondent was right to withhold payment as per Clause 7 of the agreement which entitled him to indemnification.

30. The Respondent prayed that the appeal lacked merit and ought to be dismissed.

Analysis and Determination

31. This being a first appeal this court is by law mandated and obligated to proceed by way of a retrial. In doing so the court has the duty to re-examine and reappraise all the facts on record and the law applicable and find for itself a conclusion without the need to be bound by the findings of the trial court. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See ***Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968)E.A 123; Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.***

32. I note that parties entered into a consent before the trial court to compromised the Appellant's Application for stay dated the 2nd day of June, 2020 on condition that the Kshs. 520,000.00 be deposited in a joint interest earning account which said consent was adopted as an order of the court on the 22nd day of September. 2020. The application therein was filed by the Appellant herein.

33. Having taken into consideration the evidence adduced and written rival submissions of both parties the following are the issues that this court has framed for determination;

- (i) Whether it was the Appellant or the Respondent who breached the Sale Agreement;
- (ii) Who then is entitled to be paid the damages?

Who breached the Sale Agreement

34. The motor vehicle sale agreement provided, *inter alia*, in clause 2 that:

“The vendor shall allow the purchaser to use the said motor vehicle after maturity of the cheque which shall be issued on the 27th May, 2017 after payment of Kshs. 1,075,000.00 but the transfer shall be done after clearance of the full balance.”

35. In view of the foregoing clause, and the uncontested fact that the motor vehicle was released to the Respondent as supported by the addendum and/or acknowledgement and/or notice dated the 6th day of June, 2017, I find that the Respondent would have reasonably expected to enjoy quiet possession.

36. The afore mentioned document which the buyer and the seller executed, provided that the seller was liable and/or responsible for claims/damages that had arisen before that said date while the buyer would be liable for incidental damages/ claims.

37. From the proceedings and the evidence of the parties at the trial court, whilst the parties to the sale agreement dated 26th May, 2017 were the Appellant as the vendor and the Respondent as the purchaser, the said motor vehicle was jointly registered in the names of NIC Bank Limited and George Njoroge Mugwima. The Appellant during cross examination identified Mr. George Njoroge Mugwima as his husband. She further stated that she was aware of the judgments in Baricho Law Courts and that there were claims.

38. Further, the Appellant in addition to not being the registered owner of the suit motor vehicle was fully aware of the facility that was pending at NIC Bank on which grounds she informed the Respondent that only a sum of Kshs. 350,000.00 was owing to the Bank in full and final payment. There is no further reference to further particulars of the said facility in terms of when it was due and the necessary measures the Respondent would have taken to ensure that it avoided interferences from the Bank with its possession.

39. The said motor vehicle was repossessed by the Leakeys' Auctioneers at the instance of the Bank on accounts on the 30th day of June, 2017. It was barely weeks since the Respondent had taken possession. Indeed, the Respondent proceeded to make a payment of Kshs. 145,000.00 towards the said facility at the Bank on the 13th June, 2017, a week after taking possession of the motor vehicle. On the 30th June, 2017 when the said motor vehicle was repossessed, the Respondent proceeded to pay the Bank Kshs. 35,400.00 as well as the Auctioneer's fees amounting to Kshs. 20,296.00 upon which the motor vehicle was released to him.

40. Notably, the facility the Respondent was serving at the Bank was in the joint names of the Appellant and the Mr. George Mugwima. It is a reasonable conclusion to say that the two debtors were aware of notices of default which would have created a reasonable apprehension that the motor vehicle would be repossessed. In as much as the Appellant faults the Respondent for having failed to clear the said loan leading to the repossession, it is clear she (Appellant) was dishonest in not disclosing the material information regarding the loan facility and for the said reasons the Respondent's quiet possession was interfered with forcing him to incur other charges.

41. The loan facility which was advanced to the Appellant and Mr. George Mugwima is a liability and/or responsibility with regard to the suit motor vehicle which arose prior to the Respondent's possession. Additionally, the proceedings and/or judgments before Baricho Law Courts arose before the Respondents possession and/or control of the subject motor vehicle.

42. Section 14 of the Sale of Goods Act, Cap 31, Laws of Kenya, provides that:

“14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.”

43. No doubt the Appellant breached the foregoing provisions of the law by selling a good which she had no proper title, subjected the Respondent to interference thus the Respondent did not have and enjoy quiet possession. Having failed to disclose the claims by third parties from Judgments in Baricho Law Courts that were well within the knowledge of the Appellant at the time of the contract, there was a material non-disclosure on her part.

44. *The non-disclosure of critical facts by the Appellant in my view amounted to fraudulent misrepresentation as defined by Black's Law Dictionary (Eighth edition) as:-*

“A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it”.

45. *In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing. The Appellant failed to ensure quiet possession of the motor vehicle by the Respondent and in so doing breached the terms of the contract.*

46. Be that as it may, the Respondent as at the time of the commencement of the claim was yet to clear the balance of the purchase due of Kshs. 390,000. It was on the said basis that the Appellant claimed he had breached the contract. The Respondent proved that indeed there was interference with his possession of the vehicle by third parties which subjected him to extra expenses. The said motor vehicle that was used for carrying fare paying passengers was at one point impounded for approximately 80 days on the claims arising from Baricho Law Courts. It is on the foregoing basis that the Respondent aver that it was unable to perform its obligations under the contract. On the other hand, the Appellant holds the same to be breach of contract.

47. It is my strong belief that the omissions and/or commissions of the Respondent with respect to the payment of the balance of the purchase price in one way or the other was linked to the additional expenses incurred by him over time.

48. The upshot of the foregoing analysis is that the Appellant was the first to breach the contract and having done so was subject to pay the Kshs. 520,000.00 as provided for by the contract being 20% of the total purchase price.

Who is entitled to damages?

49. Having made the foregoing observations, I find that the Respondent was entitled to damages as the breach was committed by the Appellant. As such, the Appellant's claim for the amounts in penalties is unfounded.

50. In respect to the Respondent's claim in legal fees and travel expenses incurred in the suits for release of the suit motor vehicle upon attachment and for seeking orders of injunction against its repossession, I am convinced upon rendering myself to the evidence that they have not been established thus the Honourable Trial Magistrate misdirected himself in awarding the same as claimed. The foregoing claims were special in nature and it is trite law that other than being specifically pleaded, they have to be proved.

51. The Respondent in his under loss of user claim produced three worksheets for the motor vehicle so as to establish that it relied on it for earnings. It is not contested that the same having been used for commercial purposes, inter alia, ferrying fare paying passengers. I am in agreement with the Respondent that he suffered loss of user for the period of approximately 80 days when the motor vehicle was impounded between 4th October, 2017 and 22nd December, 2017.

52. The net incomes as per the three worksheets vary between approximately Kshs. 2600.00 and Kshs. 7650. As much as I agree with the Respondent that indeed it suffered loss of user, I am in disagreement with the findings of the learned trial magistrate in awarding the same at Kshs. 720,000.00 as prayed by the Respondent.

53. In so finding, I find solace from the Court of Appeal in **Civil Appeal no. 283 of 1996, (David Bagine versus Martin Bundi)** which stated that damages which are claimed under the title **"loss of user"** are special damages which must be proved. The Court stated as follows:-

"We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

54. The Appellant however during cross examination admitted that she used the vehicle to carry fare paying passengers and earned about Kshs. 6000.00 a day. The Respondent equally used the said motor vehicle for the same commercial endeavors. There is a great disparity in terms of the earnings and the Respondent would have adduced more evidence with respect to the earnings as he was in custody of the motor vehicle for weeks prior to attachment by the Bank's Auctioneers and months prior to attachment for claims arising from Baricho Law Courts, which said attachment was done in the month of October, 2017.

55. In the instant case, I find that the Respondent did not prove loss of user and was therefore not entitled to the same as directed by the learned trial magistrate.

56. The upshot of the foregoing analysis is that the Respondent under special damages was entitled to the charges by the Leakeys' Auctioneers to whom he made payments amounting to Kshs. 20,296.00 and Kshs. 93,960 paid to Big Step Auctioneer Enterprises on the 22nd December, 2017 totaling to Kshs. 114,256.00.

57. The Respondent is also entitled as properly ordered by the learned trial magistrate to be paid the penalty of breach in the sum of Kshs.520,000.00 by the Appellant.

Deposition

58. For all the foregoing reasons, I find that:

a) The Appellant has partially succeeded in so far as the special damages and the award of Kshs. 529,526.00 is hereby substituted with an award for Kshs. 114,256.00 to be paid to the Respondent by the Appellant.

b) I uphold the decision of the learned magistrate declaring the Appellant to be in breach of contract and ordering that the Appellant pays the Respondent a sum of Kshs. 520,000.00 as penalty for breach of the said contract.

c) I hold that the learned trial magistrate erred in ordering the Appellant to execute transfer documents of the motor vehicle registration KBX 870G to the Respondent as she had no capacity to do so.

d) I uphold the decision of the learned magistrate ordering the Appellant to pay costs at the lower court.

e) The interests on (a) shall be paid as at from the date of this judgment at court rates.

f) The interests on (b) and (d) shall be paid at court rates from the date of institution of the suit at the lower court.

g) I direct that the security of Kshs. 520,000.00 deposited pursuant to the consent order of the 22nd day of September, 2020 be released forthwith to the Respondent.

h) Each party shall bear its costs of Appeal.

59. Orders Accordingly.

DATED AND DELIVERED THIS 22nd DAY OF JULY, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ogara h/b for Mr. Githinji for the Respondent

2. Ms. Githongori for the Appellant.