



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCC APPEAL NO. 50 OF 2015

WILSON KAMOTY CHESIRE.....APPELLANT

VERSUS

JOSEPH KAMANDE GIOCHE.....RESPONDENT

(Being an appeal from the judgment and decree of the principal magistrate's court at Nakuru

civil case 69 of 2015 by Hon. M. N. Nyakundi delivered on 9th September 2015)

JUDGEMENT

BACKGROUND

1. This appeal arises from suit filed by the appellant in the lower court through plaint dated **19th January 2015** for the following orders: -
 - a. **Specific performance and special damages at Kshs. 1,015,700/=.**
 - b. **Damages for breach of duty at Kshs 800,000/= being 20% of the purchase price.**
 - c. **Interests on a and b.**
 - d. **Costs of the suit.**
2. In the plaint, the plaintiff stated that on or about 27th June 2014, the plaintiff and the defendant entered into a contract for the sale of motor vehicle registration No. KBH 645Y and trailer registration No. ZC4295 at a price of Kshs. 4,000,000/=; that the defendant secured a loan of Kshs 3,150,000/= and entered into a further agreement with the plaintiff for the balance of the purchase price.
3. That the defendant paid the plaintiff a sum of Kshs 2,984,300/= on 13th October 2014 leaving a balance of Kshs. 1,015,700/= which the defendant has ignored, and failed to pay.
4. The plaintiff itemized the particulars of the breach as: -
 - a. *Failing to pay the balance of the purchase price of Kshs. 1,015,700.*
 - b. *Being in possession of motor vehicle registration no. KBH 654Y and trailer ZC 4295 without completion of payment of the purchase price.*
 - c. *Taking possession of the motor vehicle without permission and knowledge of the plaintiff.*
 - d. *Transferring ownership of the vehicle to himself and the bank against the terms of the contract.*
5. The defendant entered a memo of appearance on 14th April 2015 but failed to file a defence.
6. Interlocutory judgment was entered on..... and the matter proceed for formal proof on 15th July 2015. PW1 gave sworn evidence. He

testified that he did an agreement on the sale of the motor vehicle KBH 645Y – ZC 429J on 27th June 2014 at the price of 4 million and the defendant was to get financing from Faulu Bank. He testified that the defendant paid a sum of Kshs 2,984,300 on 13th October 2014 and the balance of Kshs. 1,015,700/= which remains unpaid. He testified that he had not consented to the defendant having the lorry.

7. After the hearing, the trial Court delivered judgment on 9th September 2015, dismissing the suit with no orders as to costs. The trial court stated as follows: -

“...the contract entered into was vague and not clear in terms of the completion date as to when the purchase price was to be cleared and as such no breach was committed.”

8. Aggrieved by the said judgment, the appellant filed this appeal on the following grounds: -

a. The learned trial magistrate erred in law and fact by failing to note that the property had not passed to the respondent as indicated in the agreement.

b. The learned trial magistrate erred in law and in fact in failing to take into account the cognizance of the agreement entered into between the appellant and the respondent to wit when possession would change.

c. The learned trial magistrate erred in law and in fact in failing to understand the purport and import of the agreement between the appellant and the respondent.

d. The learned trial magistrate erred in law and fact by failing to note that the respondent did not at all dispute the appellant's claim.

e. The learned trial magistrate erred in law and fact in her assessment of the evidence on the record and misapprehended straight facts of the case.

f. The learned trial magistrate erred in law and fact by dismissing the appellant's case yet the respondent did not file any defence indicating biasness or ulterior motives.

g. The learned trial magistrate erred in law and in fact when she failed to understand that upon change of title and transfer of possession the defendant met his part of the bargain within a reasonable time.

h. The court has given the defendant a lorry for free which is not the intention of the parties.

i. That he learned magistrate failed to exercise her discretion judiciously.

9. The appellant urged this Court to set aside the trial court's judgment and decree and allow the appeal.

10. This appeal was admitted for hearing on 3rd December 2020, and on 17th May 2021, directions were given that the appeal be canvassed by way of written submission.

APPELLANT'S SUBMISSION

11. The appellant submitted that the respondent breached the terms of the agreement as the completion documents were ready but he failed to pay the full purchase price, and is therefore liable to the penalty of 20% of the purchase price as per clause 7 of the agreement.

12. Further, the parties were not coerced to enter into the agreement and were therefore bound by the terms of the agreement. The appellant submitted that the Court failed to take into account the conduct of the respondent who did not deny liability and the breach of the agreement.

13. The appellant submitted that Court re-wrote the agreement by indicating that there was no time limit for the completion which in turn allowed the respondent to take possession of the motor vehicle without completing the payment. That the trial court ought to have taken note of the correspondences between the parties indicating the time of the agreement.

14. The Appellant further submitted that the trial court created a defense for the respondent by holding that the agreement was vague and not clear in terms of the completion date yet the respondent failed to discharge his duty as per Section 109 and 112 of the Evidence Act; that the Court misapprehended itself by defending the respondent when justifying his failure to abide by the terms of the agreement. He urged to find there was a breach of the contract and proceed to order the respondent to repay the balance of the purchase price.

RESPONDENT'S SUBMISSIONS

15. The respondent submitted that this appeal is an exercise in futility and the same should be dismissed; that the agreement entered herein does not give clear timeline for the completion of the payment of the purchase price and the respondent is still not in breach of the agreement for sale.

16. Further, the letter sent on 19th November 2014, was a demand letter and not a completion notice which failed to bind the respondent to

complete the payment but was meant to notify him of the intention to sue him. Respondent Cited the case of **Chitty on Contracts 27th Edition Volume 1 general Principles, Sweet & Maxwell 1994 at page 1030** where it was stated as follows: -

“The time is of the essence where the parties have expressly stipulated in their contract that time fixed for performance must be exactly complied with, or that time is to be “of the essence. Once notice has been given both parties are bound by it so that, if the party giving the notice is not read to perform on the expiry of the notice, the other party may be entitled to terminate.”

17. The respondent submitted that the appellant's conduct of signing the transfer document intended the ownership and possession of the motor vehicles to pass to the respondent and he is therefore estopped by his conduct from asserting that the respondent is in breach of the agreement; that the appellant is bound by the terms of the agreement and he is estopped from denying the respondent the ownership of the motor vehicles. He urged this court to dismiss the appeal and award costs to the respondent.

ANALYSIS AND DETERMINATION

18. This being the first Appellate Court, the Court is invited to re-evaluate the evidence presented before the trial court and arrive at an independent conclusion. This position was held in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123** where the Court stated as follows: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence.”

19. In view of the above, I have perused the record of appeal and wish to consider whether the appellant proved his claim against the respondent on a balance of probabilities.

20. I note that clause 2 of the agreement dated 27th June 2014 indicate that the purchaser was to take possession of the vehicle upon completion of payment, but it was the plaintiff's testimony that the defendant (purchaser) took possession immediately upon payment of the 1st installment to enable him (defendant/purchaser) access credit facility from Faulu Bank.

21. The appellant testified that when the respondent delayed in payment, he sent out a notice of completion to the respondent. I however note what was sent out was a demand letter dated 19th November 2014, with its title reading “**demand for Kshs 1,815, 700 of motor vehicle registration number KBH 645Y and trailer registration number ZC 4295**”.the letter gave the respondent 14 days within which to pay the amount of Kshs. 1,815, 701 being the balance of the purchase price for the vehicle.

22. The sale agreement did not provide for the issuance of notice of either party should one default. My understanding, therefore, is that the Law Society Conditions apply. **Clause 7(b) of the Law Society Conditions of Sale** provide that: -

“*If sale shall not be completed on the completion date either party (being then himself ready, able and willing to complete may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed ready and willing to complete.*”

Further Clause 7 (c) states that: -

“*Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract*”

23. In my view, even if the demand issued cannot strictly be interpreted to mean completion notice, the appellant showed his wish to complete the sale by issuing a demand notice to the respondent. I note the agreement was entered into in December 2014 a period over six years since the parties signed the agreement. Even if a completion date was not indicated, it is unlikely that the parties would have wished to take that long before payment of the balance of purchase price is made.

24. The respondent has not adduced evidence of payment of the balance and is still in possession of the motor vehicle. Clause 2 stipulates possession was to take effect after payment of the purchase price and not part payment. It was not the intention of the parties to transfer ownership before full payment but ownership was transferred to enable the respondent acquire funds from the bank to pay for the balance of the purchase price. The respondent obtained the funds but failed to clear the entire purchase price and instead resorted to use technicality to deny the appellant balance of the purchase price.

25. In my view, it is unfair and unjust to allow the respondent to enjoy the balance of the purchase price as well possession of the motor vehicle at the detriment of the appellant.

26. In light of the above, I find the appeal is merited and I allow the same. I enter judgment for the appellant against the respondent for a sum of kshs 1,015,700 plus costs and interest from the time of filing suit in the lower court.

27. FINAL ORDER

1) I hereby enter judgment for the appellant against the defendant for kshs 1,015,700.

2) Interest on 1 above at court's rate from the time of filing suit in the lower court.

3) Costs of the lower court and appeal to be paid by the appellant to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 14TH DAY OF OCTOBER 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

..... for Plaintiff

.....for Defendant