



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO 106 OF 2019**

**CALVIN OUMA MIGANDA.....APPELLANT**

**VERSUS**

**SAMMY TRADERS LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon A. Odawa (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 181 of 2017 on 4<sup>th</sup> September 2019)**

**JUDGMENT**

1. In her decision of 4<sup>th</sup> September 2019, the Learned Trial Magistrate, Hon A. Odawa, Senior Resident Magistrate dismissed the Appellant's suit with costs to the Respondent.
2. Being aggrieved by the said decision, on 17<sup>th</sup> September 2019, the Appellant filed a Memorandum of Appeal of even date. He relied on six (6) grounds of appeal.
3. His Written Submissions were dated 1<sup>st</sup> July 2021 and filed on 6<sup>th</sup> July 2021 while those of the Respondent were dated 26<sup>th</sup> July 2021 and filed on 27<sup>th</sup> July 2021. The Judgment is based on the said Written Submissions which both parties relied upon in their entirety.

**LEGAL ANALYSIS**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself 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 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...”**

6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in law and fact by holding that the Appellant had not proved his case on a balance of probability.
7. The Grounds of Appeal were all related. However, in view of the different arguments that had been advanced by the Appellant, the court dealt with the different Grounds of Appeal under distinct and separate heads.

**I. PROOF OF PURCHASE OF SUBJECT MOTOR VEHICLE**

8. Grounds of Appeal Nos 1, 2, 3 and 6 were dealt with under this head.
9. The Appellant submitted he paid the entire purchase price of Motor Vehicle Registration Number KCH 215H (hereinafter referred to as “the subject Motor Vehicle”) whose purchase price was Kshs 1,675,000/=. He averred that the Sale Agreement between him and the Respondent herein provided that the initial deposit was Kshs 500,000/= and that the balance was to be paid in eleven (11) equal monthly instalments of Kshs 98,000/= and twelve (12) monthly instalments of Kshs 97,000/= (sic). He added that it was also not disputed that at the time of signing the agreement, he had paid a deposit of Kshs 500,000/= and taken possession of the subject Motor Vehicle.

10. He averred that the Respondent issued him with receipts in acknowledgment of the purchase price and denied that the said receipts were a forgery as the Respondent had contended. He submitted that the Respondent did not prove that the receipts he adduced in evidence were a forgery. It was his submission that if indeed the receipt was a forgery, then he did not know that the same was a forgery and that the Respondent did not prove that he was the one who forged the receipt and/or that he was aware of the forgery and/or fraud.

11. In this respect, he relied on several cases amongst them being the cases of **RG Patel vs Lalji Makanji (1957) EA 314** and **Jennifer Nyambura Kamau vs Humphrey Nandi [2013] eKLR** where the common thread was that allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required.

12. He argued that as the Respondent paid the private document examiner to allegedly prove that the receipt it issued to him by them was a forgery, the result was already pre-determined as his copies had been marked "Client's copy" and "Sammy Trader's Copy". He was emphatic that the said document examiner was not given the receipt book from which the said receipts were said to have been issued and argued that this meant that there was a pre-determined outcome from instructions given by the Respondent.

13. He submitted that he was a *bona fide* purchaser for value. In this regard, he relied on the cases of **Weston Gitonga & 10 Others vs Peter Rugu Gikanga & Another [2017] eKLR** and **Katende vs Haridar & Company Limited [2008] 2 EA 173** where the courts therein observed that a *bona fide* purchaser must demonstrate that he purchased the property from a vendor who had an apparent valid title in good faith for valuable consideration without notice of prior adverse claims by another and/or without notice of any fraud and that he was not a party to any fraud.

14. It was his contention that he submitted all the required documents required for the transfer and a logbook in his name, was issued. He was categorical that the same was never challenged and that he purchased the said suit motor vehicle in good faith.

15. On the other hand, the Respondent submitted that he reported the loss of the logbook of the subject Motor Vehicle from its registered offices and a report of the loss was entered at Kisumu Police Headquarters as OB No OB40/25/3/2017. It submitted that the Appellant only paid a sum of Kshs 500,000/= leaving an outstanding sum of Kshs 1,175,000/= as a result of which it repossessed the said subject Motor Vehicle in accordance with the Sale Agreement. It set out its evidence to demonstrate that the receipt the Appellant had adduced in evidence was a forgery.

16. It argued that it was insufficient for the Appellant to have purported to impeach a report admitted in evidence and in respect of which he had the opportunity to challenge by way of a counter report but abstained from. In this regard, it placed reliance on the case of **Ali Mohamed Sunkar vs Diamond Trust Bank Ltd [2011]eKLR** quoted in the case of **John G Kamuyu & Another vs Safari 'M' Park Motors Nairobi ELC No 1013 of 1999** where the court stated that an expert report can only be challenged through a counter expert report.

17. It was its case that the Appellant's argument on a *bona fide* purchaser was entirely a new issue as he never brought it out during trial to give it an opportunity to respond as required by law. It submitted that it had met the threshold of proving fraud.

18. The terms of sale and purchase of the subject Motor Vehicle were not in dispute. What was in contention was whether or not the Appellant paid the balance of the purchase price.

19. In support of his contentions that he paid the entire purchase price for the subject Motor Vehicle, the Appellant stated that he was given a receipt from the Respondent's Accountant's office and a logbook registered in his name. On 27<sup>th</sup> March 2018, he had listed in his List of Documents a logbook, Car Hire Contracts, a receipt, a Notification of Sale and Demand letter. These were marked as PExh 1-4.

20. During his cross-examination, he testified that he did not show the court with the receipt he was issued by the Respondent for the acknowledgment of the sum of Kshs 500,000/=. He admitted that he did not pay the 1<sup>st</sup> and 2<sup>nd</sup> instalments that fell due on 1<sup>st</sup> August 2016 and 1<sup>st</sup> September 2016. He stated that the Respondent did not threaten or write to him over the same. He added that he paid the sum of Kshs 1,150,000/= on 24<sup>th</sup>. (**sic**) and was issued with a receipt by the Respondent's Accountant.

21. He further testified that his subject Motor Vehicle was repossessed. It was, however, not clear from his evidence if the said subject Motor Vehicle was repossessed after he had paid the entire sum and if he was given the logbook two (2) weeks after the repossession.

22. Be that as it may, when he was re-examined, he stated that he was to make the last payment on 1<sup>st</sup> July 2017 but the subject Motor Vehicle was repossessed on 10<sup>th</sup> March 2017. He added that he was never called to sign the Transfer documents.

23. Shahzad Ahmed Chaundry, a director of the Respondent (hereinafter referred to as "DW1") testified that Clause 5 of the Sale Agreement, produced as DExh2, gave the Respondent powers to repossess the suit motor vehicle in case of default. He was emphatic that the Respondent repossessed the subject Motor Vehicle after the Appellant defaulted in paying the instalments as had been agreed in the said Sale Agreement. He denied that the stamp, logo and signature on the receipt the Appellant tendered in evidence came from the Respondent's offices. He denied having signed any Transfer Form in respect of the subject Motor Vehicle.

24. He further testified that the Receipt No 504 was in respect of a tractor Registration Number KCT 254Q and was emphatic that the Respondent could not have two (2) receipts in the same financial year. The said original receipt was marked as DExb 4. He also adduced in evidence the Police Abstract showing that logbook for the subject Motor Vehicle had been stolen. The said Report was made on 25<sup>th</sup> March 2017.

25. Andrew Kibiwoot Kipkolei, the Respondent's Manager(hereinafter referred to as "DW 2") denied having received the sum of Kshs 1,175,000/= from the Appellant. He averred that the Appellant did not pay the instalments as a result of which the subject Motor Vehicle was

repossessed. He stated that he was the one who issued receipts and was emphatic that he did not issue the receipt the Appellant had relied upon. When he was cross-examined, he stated that he got to know that there were missing logbooks on 25<sup>th</sup> March 2017.

26. Anti Pasnegwa, a forensic document examiner (hereinafter referred to as “DW 3”) testified that he received written instructions from the Respondent to do a forensic analysis of the impugned receipt of Kshs 1,150,000/= and of serial no 504 in the name of the Appellant. He explained that his work was to establish the authenticity, similarity, validity and consistency of the disputed prints and stamp impressions as compared to the known receipts bearing stamp impressions of the Respondent.

27. He told the Trial Court further that on 17<sup>th</sup> January 2019, he examined and compared the disputed receipt for the Appellant with a known receipt for one Samson Okello Okumu but found no similarities between the two (2) documents. He stated that there were differences in character formation and logos, the one bearing the Appellant’s name had a full-stop after the word ‘Kisumu’ which was missing in to the Respondent’s receipt. He added that the characters of the words “Pin No” and “VAT No” in the Appellant’s receipt were in upper case compared to the Respondent’s receipt which were in lower case. He further stated that the type and size of line printed for “Kshs” in the two (2) receipts were different in type and length meaning the printing plate was different. He also averred that the stamp impressions were different. He said that he carried out a digital latent exam on both stamps but they were not fitting. He therefore concluded that the Appellant’s receipt was fake. He produced his Report on the same as DExh 6.

28. On being cross-examined, he stated that he was not given the bundle from where the Respondent’s receipt had been plucked out from but that they compared what is disputed and what is admitted.

29. This court carefully analysed the evidence that was adduced by the Appellant and the Respondent and agreed with the Respondent that it had demonstrated that the receipt the Appellant tendered in evidence was a forgery. This court had a cursory look at the features DW 3 pointed out and noted the differences in the Appellant’s and the Respondent’s receipts.

30. It was not necessary for the Respondent to have adduced in evidence the entire receipt book from where the Respondent’s receipt was plucked from as what was in contention was the Appellant’s and Respondent’s receipt No 504. It was also not necessary for the Respondent to have proven that the Appellant was the one who forged the said receipt. It was sufficient for the Respondent to demonstrate that the receipt was a forgery. Who forged it was immaterial.

31. This court fully associated itself with the holding in the case of **Ali Mohamed Sunkar vs Diamond Trust Bank Ltd** (Supra) where it was held that an expert report can only be challenged through a counter expert report. As the Respondent had already indicated in its Further List of Documents that it would be tendering the Forensic Document Examiner’s Report when it filed its Further List of Documents dated 22<sup>nd</sup> January 2019 on 25<sup>th</sup> January 2019, as evidence, the Appellant was put on notice on the need to call an expert witness to rebut that witness evidence. He did not do so. Although the said Report was filed after he had closed his case, he could still have applied to re-open his case as the expert witness had not been disclosed earlier.

32. This court also noted that he did not also object to the said production of the Report when DW 3 testified on 1<sup>st</sup> February 2019 leading to its been and tendered in evidence. He could therefore not purport to cast aspersions on the admissibility of DW 3’s evidence as a private document examiner for the reason that there is no legal requirement that a forensic document examiner must be a public official.

33. Further, the Appellant did not challenge and/or rebut the Respondent’s evidence that the loss of the logbook of the subject Motor Vehicle was reported to Kisumu Police Station on 25<sup>th</sup> March 2017. Notably, the Learned Trial Magistrate observed that the authenticity of the said logbook had not been challenged but questioned the process in which it was obtained, a position that this court fully agreed with.

34. Thus, it was the considered view of this court that the Respondent’s expert evidence was un rebutted and therefore watered down the Appellant’s allegations that he had paid the balance of the purchase price.

35. In the premises foregoing, Grounds of Appeal Nos 1, 2, 3 and 6 were not merited and the same be and are hereby dismissed.

## **II. LOSS OF BUSINESS AND RETURN OF SUBJECT MOTOR VEHICLE**

36. Ground of Appeal No 4 and 5 was dealt with under this head.

37. This court considered the respective parties’ Written Submissions regarding the aforesaid Grounds of Appeal. However, as it had already found and held that the receipt the Appellant produced was a forgery and he had therefore not paid the balance of the purchase prices, his claim for loss of business at the rate of Kshs 3,500/= per day from the date of seizure to the date of determination fell by the wayside.

38. The Learned Trial Magistrate did not misdirect himself when he failed to order that the Respondent return the subject Motor Vehicle to the Appellant. Indeed, the Respondent was entitled to repossess the subject Motor Vehicle when the Appellant defaulted in paying the instalments. He would only have been entitled to recover the said subject Motor Vehicle upon payment of the sum of Kshs 1,175,000/=, a sum that the Respondent had counter-claimed and which the Learned Trial Magistrate entered judgment in favour of the Respondent against him.

39. In the premises foregoing, Ground of Appeal No 4 and 5 was not merited and the same be and is hereby dismissed.

## **CONCLUSION**

40. It is trite law that he who alleges must prove. Section 107 of the Evidence Act states as follows:-

**“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

41. Further, Section 108 of the Evidence Act states as follows:-

**“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.”**

42. It was clear from the aforesaid analysis of the evidence that was adduced by both the Appellant and the Respondent that the Respondent filed a Counter-claim, called an expert witness to prove its case and proved the same to the required standard. On the other hand, the Appellant filed his claim but failed to adduce evidence to rebut the Respondent’s claims. He did not demonstrate that he had fully paid the purchase price for the said subject Motor Vehicle, which was central to his case.

43. This court was thus not persuaded that he had proved his case on a balance of probability as required by law. As the Learned Trial Magistrate had arrived at the correct conclusion, this court found no reason to interfere with his determination as the same was sound.

**DISPOSITION**

44. For the foregoing reasons, the upshot of this Court’s decision was that the Appellant’s Appeal lodged on 17<sup>th</sup> September 2019 was not merited and the same be and is hereby dismissed.

45. The Appellant will pay the Respondent’s costs of this Appeal.

46. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF DECEMBER 2021**

**J. KAMAU**

**JUDGE**