



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 83 OF 2018

MASCOR KENYA LIMITED.....APPELLANT

VERSUS

SAMUEL ODONGO OGINGARESPONDENT

[Appeal from the Judgment and Decree of the Chief Magistrate, Kisumu in

KISUMU CMCC NO. 96 OF 2018 delivered on the 31/08/2018]

JUDGMENT

This appeal arises from the Judgment delivered on 31st August 2018, when the learned trial magistrate ordered the Appellant to refund to the Respondent the sum of Kshs 2,600,000/=.

1. The learned trial magistrate also ordered the Appellant to pay General Damages of Kshs 400,000/=, for breach of contract.
2. The Appellant was ordered to pay the costs of the suit.
3. Finally, the learned trial magistrate ordered the Appellant to pay interest on the Purchase Price (of Kshs 2,600,000/=) and on the General Damages (of Kshs 400,000/=), at the Court rates.
4. Being dissatisfied with the Judgment of the trial court, the Appellant lodged an appeal, setting out eleven grounds for challenging the said Judgment.
5. When the appeal came up for hearing, the Appellant consolidated the eleven grounds of appeal into the following six grounds;

“(a) Whether there was an agreement to sell entered into by the parties herein, and if so, which form of agreement did it take?

(b) Whether the agreement to sell entered into by the parties was varied?

(c) Whether the Appellant delayed and/or failed to register the tractor in the name of the Respondent?

(d) Whether the tractor chassis number PY5503E006663 was unroadworthy, old and in bad condition?

(e) Whether the Respondent has a cause of action against the Appellant?

(f) Whether the Respondent was entitled to the awards given by the trial court?”

6. It was the Appellant’s contention that the agreement between the parties herein was an Agreement to Sell pursuant to **Section 3 (4)** of the **Sale of Goods Act**.

7. On the other hand, the Respondent submitted that the contract between the 2 parties was a Purchase Agreement.

8. It is common ground that the subject matter of the contract was;

(a) John Deere Tractor, Model 5503;

Chassis Number PY5503E006673; and

(b) 3 disc John Deere reversible plough.

9. It is further common ground that the purchase price for the tractor was Kshs 2,600,000, whilst the purchase price for the plough was Kshs 510,000/=.
10. Both parties confirmed that the Respondent first paid the sum of Kshs 2,000,000/= towards the purchase of the tractor.
11. According to the testimony of **KEITANY KIPROTICH**, (who was the Appellant's Sales Agent), it was agreed that the Respondent would pay the balance of the purchase price within 12 months.
12. It was the Appellant's case that the tractor would only be delivered to the Respondent after the Respondent had paid the balance of the purchase price.
13. On the other hand, the Respondent insisted that the tractor was to be delivered to him immediately after he had paid the sum of Kshs 2,000,000/=.
14. On his part, the Respondent produced an undated Agreement to support his claim. The said "Agreement" was also unsigned.
15. Therefore, that document does not qualify to be termed as an agreement.
16. On the other hand, the Appellant produced a "Vehicle Order Form" dated 23rd March 2016, as proof of the Agreement.
17. The said Form, No. **K 0079**, was signed by both parties, and it specified that the Respondent was buying a "**JOHN DEERE 5503 4WD**", which was Green in colour, and whose Chassis was No. **PY5503E006673**. It was also specified that the purchase price was Kshs 2,600,000/=.
18. On the face of the said Form, the Respondent appended his signature below the statement which read as follows;

"I have read the conditions printed on the back hereof and agree to them as a part of this offer, as if the same were printed above my signature."
19. Following the signing of that document, I find that it constituted the contract between the parties.
20. In effect, the contract between the parties herein was in writing.
21. In the said contract there was neither a provision requiring the Appellant to immediately deliver the tractor after receipt of Kshs 2,000,000/=, nor a provision that the tractor would only be released upon payment of the balance.
22. The two parties herein are talking at cross-purposes, on the question regarding the time when the Appellant was under an obligation to deliver the tractor. Each of them has called to his aid, their respective memories.
23. When re-evaluating the evidence on record, as is required of a first appellate court, I remind myself that I did not have the benefit of observing the witnesses when they were giving their evidence. Therefore, I am unable to determine who, between the Respondent and the Appellant's sale person, had a more accurate recollection of what was agreed upon during their discussions.
24. In the case of **WILLIAM KAZUNGU KARISA Vs COSMAS ANGORE CHANZERA (2006) eKLR**, which was quoted in **THRIFT HOMES LIMITED Vs KAYS INVESTMENT LIMITED HCCC NO. 1512 OF 1998**, it was emphasized that;

"The basic rule of the law of contract is that parties must perform their respective obligations in accordance with the terms of the contract executed by them."
25. To my mind, that meant that the Appellant was under an obligation to provide the Respondent with the tractor Chassis number **PY5503E006673**, provided that the Respondent had paid the purchase price.
26. However, the Appellant submitted that the contract between the parties was varied.
27. It was the evidence of **KEITANY KIPROTICH (DW1)** that he gave to the Plaintiff, **SAMUEL ODONGO OGINGA (PW1)**, a Demo Tractor for a period of 14 days.
28. It is common ground that the said "Demo Tractor" was delivered to the Plaintiff's yard at Bondo, on 23rd August 2016.
29. In effect, the said tractor was delivered exactly five (5) months after the contract was executed and also after the Respondent had paid Kshs 2,000,000/=.

30. At the time of delivery the Appellant was clear in its mind, that the “*Demo Tractor*” was not the subject matter of the contract between the parties.

31. In the case of **B.M.P. BULK MEDICINES & PHARMACEUTICALS GMBH Vs BAKELS EAST AFRICA LIMITED, HCCC NO. 252 OF 2010**, Kimondo J. noted that;

“..... from the evidence (that) the defendant ordered and the plaintiff supplied to it the goods the subject matter of the contract.”

32. Thereafter, the Defendant, not only kept the products, but it utilized 13 tonnes of the 25 tonnes which the Plaintiff had supplied.

33. In those circumstances, the learned Judge held that consideration had passed and a binding contract had come into force. Accordingly, it was held that the Defendant could not resale from the contract.

34. In the case before me, the Appellant did not supply the tractor which was the subject matter of the contract. It supplied a Demo Tractor.

35. In the contract dated 23rd March 2016, there was no provision for the supply of a Demo Tractor.

36. If, as the Appellant submitted, it was not obliged to deliver the tractor that the Respondent was purchasing until the Respondent had remitted payment of the full purchase price, it is not clear why the Appellant decided to deliver a Demo Tractor, some 5 months after the Respondent paid the sum of Kshs 2,000,000/=.

37. The sudden delivery of the Demo Tractor was more consistent with the Respondent’s evidence, that after he had paid Kshs 2,000,000/=, he consistently pestered the Appellant to deliver the tractor which the Respondent was buying.

38. I further find that Appellant’s contention, that the Respondent was required to return the Demo tractor within 14 days of receipt, is not contained in the contract.

39. If the Appellant was not under an obligation to deliver the new tractor which the Respondent was purchasing, until after it had been paid for in full, why would the Appellant suddenly deliver a different tractor, which was allegedly new.

40. The conduct of the Appellant is consistent with the Respondent’s contention, that the tractor he was purchasing was not available at the Appellant’s premises at the material time.

41. I so find because it would otherwise defy logic for the Appellant to deliver a Demo Tractor;

“..... which was exactly the same model and specification of tractor chassis number PY5503E006673”,

which it could not deliver until it had been paid for in full.

42. In any event, **DW1** conceded that there was no written agreement, that the Plaintiff was to use the Demo tractor only for 14 days.

43. But the Appellant submitted that;

“The Respondent retained the Demo tractor, which ceased being a demo tractor from the date of acceptance, that is from 23/08/2016 to 2/02/2018, which is over 1 year 5 months.”

44. As far as the Appellant was concerned, there had now arisen a contract of sale of the tractor chassis number **PY5503E006673** and 3 disc reversible plough.

45. It was the understanding of the Appellant that that contract satisfied the provisions of **Section 5** of the **Sale of Goods Act**, pursuant to which a contract of sale may be in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

46. The Appellant believes that because the Respondent continued to make payments to the Appellant, until September 2017, and because the Respondent had not intimated to the Appellant that he had rejected the “*Demo tractor*”, he is deemed to have accepted that tractor.

47. It is correct that a contract of sale may be partly in writing and partly by word of mouth, or it can be implied from the conduct of the parties.

48. However, in this instance, the contract dated 23rd March 2016 explicitly stipulated thus;

“GENERAL

(i) No variation of the terms and conditions on the face and reverse hereof shall be of any force or effect unless reduced in

writing and signed by the director or manager of the Seller.”

49. The Appellant has not produced evidence of a variation to the contract dated 23rd March 2016, which had been signed by the director or by a manager of the Appellant.
50. I so find because the Vehicle Order Form Number **K 0381**, dated 10th May 2017, does not make any reference to the original contract dated 23rd March 2016.
51. It appears to be a new contract, for the purchase of a John Deere tractor, whose chassis Number is **PY5503E006673**.
52. The Purchase Price cited on that Form is Kshs 2,580,000/=.
53. The Appellant has acknowledged receipt of Kshs 2,600,000/=. That sum was in respect to the tractor which is the subject matter of the contract dated 23rd March 2016.
54. In the case of **THRIFT HOMES LIMITED Vs KAYS INVESTMENT LIMITED HCCC NO. 1512 OF 1998**, the Court quoted the following words from **Chitty on Contract 29th Edition – General Principles 12.096**:
- “It is often said to be a rule of law that if there be a contract which has been reduced in writing, verbal evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify the written contract*
- The rule is usually known as the ‘parole evidence’ rule. Its operation is not confined to oral evidence; it has been taken to exclude extrinsic matters in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of the written proof; the finality intended by the parties in recording their contract in written form; and eliminates great inconvenience and troublesome litigation in many instances.”*
55. I therefore place a premium on the written contract, as it provides certainty of that which was agreed upon by the parties.
56. By choosing the written contract, **AND** by expressly stipulating therein that any variation would only have legal force or effect if it was in writing, the parties must be deemed to have consciously chosen to exclude the route of oral terms, that could be added to the contract.
57. The Respondent has made payment for the tractor which he contracted to buy. He is therefore entitled to either receive it or otherwise he should be refunded the money he paid for it.
58. Meanwhile, it cannot be ignored that the Respondent received the Demo tractor on 23rd August 2016.
59. The Respondent alleged that he did not use the said tractor because it had no log book and no registration number.
60. I find that because the Respondent sought and the Appellant made available mechanical staff who repaired the Demo tractor several times, is more consistent with the Appellant’s contention that the Respondent put to use the said Demo tractor. The said tractor cannot have required mechanical repairs unless it was being utilized by the Respondent.
61. By a letter dated 14th February 2018, the Appellant’s advocates responded to the Demand Notice dated 7th February 2018, and indicated that if the Respondent made good his threat of instituting legal proceedings, the Appellant would mount a counter-claim.
62. However, the Appellant did not lodge any counter-claim.
63. In my considered view, the Appellant may have lost the opportunity to lodge a claim in respect to the Demo tractor, which the Respondent had retained for a considerable period of time.
64. The Appellant collected the Demo tractor from the Respondent on 2nd February 2018.
65. Consequently, the Appellant has both the tractor which was the subject matter of the contract dated 23rd March 2016, as well as the Demo tractor.
66. The Respondent does not have any tractor, although he has paid Kshs 2,600,000/= which was the agreed Purchase Price for the tractor chassis number **PY55003E006673**.
67. Having re-evaluated the evidence on record, I find that the learned trial magistrate was right to have ordered the Appellant to refund the purchase price.
68. However, there is absolutely no legal or factual basis for the award of General Damages of Kshs 400,000/= or at all.
69. Even though there was a delay in making available the tractor, the Appellant provided the Respondent with a Demo tractor, in the meantime.

70. Accordingly, the General Damages awarded is hereby set aside. Save for that, I uphold the Judgment of the trial court.

71. As the appeal has been partially successful, and partially unsuccessful, I order that each party will meet his own costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 22nd day of January 2020

FRED A. OCHIENG

JUDGE