REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 223 OF 2017

BETWEEN

ROBERT W MAINA t/a

ANTIQUE AUCTIONS LIMITED..... APPELLANTS

AND

POWERGEN TECHNOLOGIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Nairobi by Hon. A.M. Obura (Mrs.) SPM dated 23rd March 2017 in Civil Case No. 5366 of 2013)

JUDGEMENT

1. The subject of this appeal is a Bedford 41 motor vehicle registration No. 11KH42 which was initially owned by the British Army Training Unit. The vehicle was one of the goods to be sold by the appellant by public auction on 24th January 2013.

2. In the case before the lower court, the respondent claimed that it had placed a bid on the vehicle and was declared the highest bidder at the price of Kshs. 1,200,000/=. The respondent paid the purchase price and was issued with an invoice by the appellant which indicated that the price of the vehicle was Kshs. 800,000/= and stated that it was entitled to a refund of Kshs. 400,000/=. After attempts were made to recover the sums, the respondent instituted the suit before the trial court claiming as against the appellant, a refund of the sum of Kshs. 400,000/=; an order for release of the title documents of the vehicle or in the alternative orders vesting the vehicle in the respondent.

3. The appellant denied the claim that the respondent's agent who bid with catalogue No. 203 had been the highest bidder. He claimed that the bidder with catalogue No. 327 had been the highest bidder of the vehicle. He argued that no contractual obligation had arisen between him and the respondent's agent. It was the appellant's case that bidder No. 327 had instructed him to issue a receipt in the name of the respondent and deposit the balance of Kshs. 400,000/= into his account. He surmised that a deal had been struck between the respondent's agent and the bidder and he had no choice than to follow the instructions of bidder No. 327 with whom he had a contract.

4. This being a first appeal, I am mindful of the role of a first appellate court which is to re-assess the record and determine whether the conclusions reached by the learned trial court are to stand or not and give reasons either way.

5. The only witness who testified before the trial court was the respondent's managing director, Wilson Gichuki (PW 1). He adopted his witness statement and list of documents as his exhibits and testified that he learnt about the car from a newspaper advertisement for sale of motor vehicle spare parts. He inspected the vehicle before the sale and purchased it at the price of Kshs. 1,200,000/=. When he collected the invoice, he noted that the purchase price was indicated as Kshs. 800,000/= and there was a refund of Kshs. 400,000/=. He testified that they got the lorry but did not get the refund. The vehicle was stored away as they lacked proof of ownership to facilitate registration which was not issued.

6. The trial court was persuaded by the respondent's case and entered judgment in its favour. Being aggrieved by that decision, the appellant lodged the memorandum of appeal dated 1st September 2017 whose grounds he canvassed by way of written submissions. He raises the following three issues for determination;

a. Whether the appellant had a good defence with triable issues worthy of the court's determination;

b. Whether the learned trial magistrate erred in law and fact in relying on evidence marred with an incurable procedural technicality, hence arriving at a wrong decision; and

c. Whether the judgment and decree of the trial court was clear.

7. On the first issue, the appellant contends that it raised triable issues in its defence and the trial court erred in failing to give him an opportunity to testify due to his advocate's failure to place his statement on record. He submits that one of the issues he would have raised was the fact that there was no contractual obligation between the appellant and the respondent.

8. The respondent's counsel on his part contends that the appellant did not have a proper defence on record as the only one filed by the appellant was irregular and no proper defence was filed thereafter. He submits that the appellant having been given a chance to comply with order 11 and failed to do so, he could not claim that he was prevented from being heard due to a technicality.

9. Looking at the record before the trial court, it is apparent that the statement of defence filed by the appellant on 29th January 2014 was irregular. The record shows that when he failed to file his defence within the stipulated time, an interlocutory judgment was entered against him. The appellant then filed an application to set aside the interlocutory judgment but failed to prosecute the application when it came up for hearing and the same was dismissed.

10. He then filed an application on 15th February 2016, seeking to re-instate the dismissed application which was allowed by consent. In addition, the trial court granted the defendant 30 days to comply with Order 11 of the Civil Procedure Rules. However, by the time the matter came up for hearing on 17th January 2017, the defendant still hadn't complied with Order 11 and had not refilled his statement of defence.

11. Be that as it may, the trial court was still required to take the defence into consideration and grant the respondent a chance to be heard. *In **Sebei District Administration vs Gasyali & Others (1968) E.A. 300***, the Court observed as follows:

> *In my view the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.*

12. In this case, the trial magistrate rejected the appellant's application for adjournment. She then proceeded to take the respondent's evidence and closed the appellant's case for failing to file his pleadings within the stipulated time. The question then is whether this court should set aside the trial court's decision and order a retrial.

13. The Court of Appeal in ***National Bank of Kenya v Thomas Owen Ondieki Civil Appeal No. 116 of 2012 [2016] eKLR*** found that since the rules do not specify the circumstances under which a retrial may be ordered, a court would decide whether to make the order based on the circumstances of each case.

14. I have analyzed the decision of the trial court in this case and have come to the conclusion that in as much the appellant's defence was irregular the court took it into account in making its decision. The trial court cannot be faulted for declining the appellant's application for adjournment as the appellant had had sufficient time to file his statement in the matter but failed to do so. His laxity in filing his documents within the stipulated time does not show a party keen on prosecuting his case.

15. The appellant also proceeded with the trial and did not appeal the trial court's order disallowing him from tendering evidence. I therefore find his claim that he was not given a chance to be heard untenable.

16. On the second issue, the appellant submitted that the evidence was marred with an incurable procedural technicality since no resolution had been passed by the respondent company to institute the suit against him in accordance with **Order 4 rule 1(4)** of the **Civil Procedure Rules**. The provision stipulates:

> *(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.*

17. This issue is however answered by the decisions of the Court of Appeal in ***Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others (being sued on behalf of themselves and on behalf of alleged 795 members) Civil Appeal No. 66 of 2015 [2017] eKLR*** and ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others[2015]eKLR*** which state that any director who is authorized to act on behalf of the company can instruct counsel to file proceedings in the name of the company.

18. In ***Arthi Highway Developers Limited (supra)*** the Court of Appeal held:

> *44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time;**Bugerere Coffee Growers Ltd v Sebaduka & Anor(1970) 1 EA 147.***
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> **…**
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> *45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April*

*2002, confirming that the principle enunciated in the **Bugerere cas**e has since been overruled by the Uganda Supreme court. The authority is **Tatu Naiga& Emporium vs. Virjee Brothers LtdCivil Appeal No 8 of 2000**.*

> *The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere case** was no longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.**The latter case restated the law as follows:-*
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> > *"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."*
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> *The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 Others [2014]eKLR.***

19. PW 1's assertion that he was the respondent's director and main shareholder was not challenged. It is therefore taken that he had the requisite authority to instruct counsel to file the suit.

20. Lastly, the appellant argued that the trial court's judgment was unclear as it did not specify whom between him and the British Army Training Unit which had been sued as the 1st defendant was to pay the sum of Kshs. 400,000/=. He therefore urges the court to set aside the trial court's decision and order that the matter be heard afresh or make orders as it deems fit.

21. The respondent in its plaint prayed for judgment against the defendants jointly and severally. This concept was explained by Odunga J. in the case of ***Republic Vs PS In charge of Internal Security Exparte Joshua Mutua Paul (2013)eKLR*** thus:

> *Clearly, therefore, where you have joint liability all the tortfeasor are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and /or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability.*
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> *Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.*

22. Having sued sought judgment against the defendants jointly and severally, the respondent can elect to seek compensation from either defendant or a portion of the decree from them. As put by the trial court, he could seek compensation from the 1st and / or the 2nd defendant.

23. In light of the foregoing, I find no reason to interfere with the trial court's judgment as the respondent proved his case on a balance of probabilities. He produced documentary evidence to show that he had purchased the vehicle and was entitled to a refund of Kshs. 400,000/=.

24. The upshot is that the appeal lacks merit and I proceed to dismiss it with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 20th day of January, 2020.

A. K. NDUNG'U

JUDGE