



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 6 OF 2018

LOWLAND SERVICE ORGANIZATION.....APPELLANT

=VRS=

ABRAHAM KIPTOO KIPTARUS.....RESPONDENT

Being an appeal against the Judgement of Hon. C. Obulutsa – CM Eldoret dated and delivered on the 25th day of January 2016 in the original Eldoret Chief Magistrate’s Court Civil Case No. 61 of 2016

JUDGEMENT

The appellant sued the respondent for a sum of Kshs. 2,350,000/= being the value of a motor vehicle which the respondent allegedly purchased on account of the organization but fraudulently converted to his own use. The appellant gave evidence that the respondent who was the chairman of the organization at the material time received a sum of 50,000 US Dollars from the appellant organization’s benefactors to purchase two vehicles. On 24th November 2012 he purchased the motor vehicle KBN 592G from one Anne Muthoni Waweru at a cost of Kshs. 2,350,000/= but instead of registering the vehicle in the organization’s name he registered it in his own name and later converted its use to a third party. It was the appellant’s contention that the respondent’s conduct being fraudulent the appellant was entitled to a refund of the sum claimed, interest and the costs of the suit.

The respondent while admitting that he purchased the vehicle from funds drawn from the appellant’s account stated the vehicle was gifted to him by a benefactor and that as such he had every right to dispose it as he did. He maintained that in any case the appellant’s claim was statutorily time barred as the same being based on a tort it should have been filed within three years yet it was filed after four years had lapsed. He contended that the cause of action arose and time started to run on 23rd April 2012 when it is alleged he purchased the vehicle.

After considering the evidence and submissions by both sides the trial Magistrate found it a fact that the respondent had acted fraudulently but struck out the suit for being time barred. He then ordered parties to bear their own costs.

This appeal was canvassed by way of written submissions and I have considered them fully. However, as an appeal is in the nature of a retrial, I have as is my duty, reconsidered and analysed the evidence in the lower court so as to arrive at my own independent conclusion while keeping in mind that I did not, unlike the trial Magistrate, see or hear the witnesses give evidence (**see *Selle & Another v Association Motor Boat Company Ltd* [1968] EA 123**)

The appellant through Mathew Chesaina (Pw1) testified that the organization was founded in the year 2012. He was its first Secretary and the respondent its first chairman. In a statement which was adopted as evidence at the trial he stated that in the year 2012 the appellant received funding to the tune of Kshs. 4,160,000/= from its parent organization based in the USA for purchase of two vehicles. He stated that on 24th April 2012 he and the respondent drew some of the money from the appellant’s account and travelled to Nairobi and they purchased motor vehicle KBN 592G from one Anne Waweru at a consideration of Kshs. 2,350,000/= which was paid in two instalments. He stated that the respondent however started using the vehicle to run his own errands and later when he ceased being chairman he disposed it to one Mercy Jebet. The witness produced several documents witnessing the registration of the organization, receipt of the donor funds, purchase of the vehicle and copies of records from the registrar of motor vehicles evidencing how they discovered that the respondent had fraudulently sold the vehicle. This evidence was in total contrast with the respondent’s evidence that the funds were intended for him to purchase the vehicle for his personal use. I find that if that was the case the funds would have been sent to him directly but not through the appellant’s bank account and he would not have required the presence of the organization’s secretary when he purchased the vehicle. I found the explanation by Pw1 that the vehicle was purchased in the respondent’s name because he was the chairman of the organization credible. The vehicle however belonged to the organization and he could not dispose of it as he pleased. The fact of his doing so without the consent and knowledge of the organization amounted to fraud.

The trial Magistrate came to the same conclusion but was persuaded by the submission of Learned Counsel for the respondent that the suit was time barred. I beg to differ. It is clear from the evidence that it only became clear to the appellant that the respondent had fraudulently disposed the vehicle when he ceased to be the chairman. It is at that time that they obtained a copy of records which revealed he had disposed the vehicle to one Jebet Mercy. That copy of records is dated 26th June 2015. Whereas **Section 4 (2) of the Limitation of Actions**

Act stipulates that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued that period was in this case extended by the provisions of **Section 26 of the Act (Cap 22 Laws of Kenya)** which states: -

“26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:.....” (Underlining mine).

It is my finding therefore that the claim was not time barred and the appellant having proved its against the respondent on a balance of probabilities it was entitled to judgement in the case. Accordingly, the judgement of the lower court is set aside and judgement is hereby entered for the appellant against the respondent for the sum of Kshs. 2,350,000/= together with interest from the date of filing suit in the court below. The appellant shall also get the costs of the case in the court below and those of this appeal. It is so ordered.

Signed and dated this 21st day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 5th day of February 2020.

H. A. OMONDI

JUDGE