REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 99 OF 2014

RONALD AMBULWA.....APPELLANT

VERSUS

RODGERS WANJALA MATERE.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. C Kendagor, Acting Senior Resident Magistrate (Ag SRM), in Kakamega CMCCC No. 459 of 2010 of 12th August 2014)

JUDGMENT

1. The suit at the primary court was initiated by the appellant herein against the respondent for recovery of a sum of Kshs. 43, 000.00, that he had paid to the respondent as a down payment for purchase of a motor vehicle registration mark and number KAD 599H, and Kshs 28, 500.00 special damages, being money that he spent on repair of the said motor vehicle at the time he was using it before it was repossessed. The respondent filed a defence in which he denied liability, and accused the appellant of failing in his obligations under their contract.

2. At the trial, only the appellant testified. He stated that he had entered into a sale agreement with the respondent to buy his vehicle for a sum of Kshs. 140, 000.00, he took possession for some months after paying sums totaling Kshs. 43, 000.00. The car was in a poor mechanical condition, so he spent Kshs. 28, 000.00 repairing it. It was subsequently repossessed. He was asking for refund of the money that he paid and the expenses he incurred on maintaining the vehicle.

3. Three documents were put in evidence as exhibits. Exhibit 1 is an acknowledgement of payment, dated 10th August 2009, of a sum of Kshs. 8, 000.00 by the respondent from the appellant, as part-payment for KAD 549H, which left a balance of Kshs. 132, 000.00 to be paid on 22nd August 2009. Exhibit 2 is dated 3rd November 2009. It acknowledges receipt of Kshs. 35, 000.00 by the respondent from the appellant. The balance of Kshs. 105, 000.00 was to be paid in two installments. Kshs. 50, 000.00 was to be paid on 20th December of a year that is not indicated, while payment of Kshs. 55,000.00 was to be made subject to discussions that were to follow upon payment of the Kshs. 50, 000.00 on 20th December. At that point the car was still with the respondent, the car was to be processed only after payment of Kshs. 50, 000.00. It is not clear what was meant by that, but upon default the penalty was to be that the moneys already paid or received would not be subject to refund. Exhibit 3 is a bundle of receipts to support the case that the appellant incurred costs on repair.

4. At the close of the oral hearing, the parties were directed to file and exchange written submissions. They complied. At the end of it, the trial court found that the appellant had not established his case against the respondent, and that it was in fact the appellant who was in breach. The suit was dismissed.

5. The appellant was aggrieved by the determination, and lodged this appeal. In the appeal he raises three grounds of appeal:

(a) The trial court failed to appreciate that the respondent did not prove his case as he did not testify at the trial;

(b) The trial court treated the respondent's pleadings as evidence when in fact the respondent did not testify; and

(c) The judgement was against the weight of the evidence tendered.

6. What was before the trial court was a fairly straightforward contractual dispute. The parties hereto had entered into a sale agreement, where one was to sell to the other a motor vehicle for a sum of Kshs. 140, 000.00. It would appear that the transaction was entered into in August 2009. The document that formed the basis of the contract is Exhibit 1. It shows that the appellant paid a sum of Kshs. 8,000.00 on 10th August 2009, and was to settle the balance of Kshs. 132, 000.00 by 22nd August 2009. It would appear that the sum of Kshs. 132, 000.00 was not paid on 22nd August 2009 as agreed, and the next payment was not made until 3rd November 2009, when the appellant paid Kshs. 35, 000.00, according to Exhibit 2. Exhibit 2 is the second document that forms the basis of the contract. It imposed two terms. One, that the car would remain in the hands of the respondent owner until the appellant made the third payment of a sum of Kshs. 50, 000.00, which was scheduled for 20th December. Two, that in the event of default of the terms of the contract as spelt out in Exhibit 2, there would be no refund.

7. It is true that the respondent did not testify at the trial, but the appellant placed before the court the documents that formed the basis of the contract between him and the respondent, and which documents he was relying on to urge his case for a refund. I am talking of Exhibits 1 and 2. I note from the judgment that the trial court based its conclusions on these two documents that the appellant placed on record.

8. According to the contract documents, the appellant had, on 10th August 2009, agreed to buy the motor vehicle for Kshs. 140, 000.00. He paid a paltry Kshs. 8, 000.00 on 10th August 2009, on the understanding that he would clear the balance of Kshs. 132, 000.00 by 22nd August 2009. He did not honour the agreement of 10th August 2009, for he did not pay the balance by 22nd August 2009 as agreed. Nothing more was paid until 3rd November 2009, when the parties had to revisit the agreement of 10th August 2009, which was fairly open-ended, by inserting new terms.

9. It is not clear from Exhibit 1 when the appellant was entitled to have possession of the motor vehicle. When he gave evidence on 28th June 2012, he did not state when he took possession, but he did say that the vehicle was taken away from him in September 2009. That would suggest that he might have taken possession as soon as he paid the sum of Kshs. 8, 000.00 on 10th August 2009. It would appear that the respondent re-took possession after the appellant failed to honour the terms of the agreement dated 10th August 2009, by paying the balance on 22nd August 2009. When he testified he stated that he had had the vehicle for three to four months. It would appear that the agreement of 3rd November 2009 was entered into after the respondent recovered possession of the motor vehicle from the appellant. It is noteworthy that the appellant was allowed to have possession of a vehicle worth Kshs. 140, 000.00, for three to four months, according to him, after paying a sum of Kshs. 8, 000.00. He continued to have possession even when he was in breach of the terms of the agreement of 10th August 2009. The respondent was supposed to surrender his vehicle to the appellant in exchange for Kshs. 140, 000.00 by 22nd August 2009. He surrendered possession of the said vehicle after being paid a paltry Kshs. 8, 000 on 10th August 2009, and he did not have the balance by 22nd August 2009 as agreed. That was, no doubt, a raw deal. He was justified to recover possession of his vehicle for the appellant was in breach of the agreement. He was literally having the vehicle and the money, leaving the respondent holding literally nothing.

10. The appellant's suit was for recovery of the money that he had paid. The documents that he placed on record before the trial court, being Exhibits 1 and 2, clearly show that the respondent received a total of Kshs. 43, 000,00, being the Kshs. 8, 000.00 paid on 10th August 2009 and the Kshs. 35, 000.00 paid on 3rd November 2009. Is he entitled to a refund of that money? I do not think so. According to his own documents, Exhibit No. 2 in particular, the agreement was that upon default the money received as purchase price was not going to be refundable. The appellant was in breach, there was no doubt about that. The agreement signed on 10th August 2009, was that the full purchase price, of Kshs. 140, 000.00, was to be paid by 22nd August 2009. That did not happen, by then he had only paid Kshs. 8, 000.00, and by the time the default clause was being introduced into the contract on 3rd November 2009, he had only paid Kshs. 43, 000.00. The agreement of 3rd November 2009 gave him more time to clear the balance, he did not honour that agreement. That being the case, the default clause kicked in, meaning that he was not entitled to a dime in refund. In any event, he had possession of the vehicle since 10th August 2009 after paying just Kshs. 8, 000.00, and he used it, according to his own testimony of 28th June 2012. Any reasonable person would not expect a refund in circumstances where he takes possession of another's vehicle uses it for four months after paying a paltry Kshs. 8, 000.00. It would be unreasonable to expect that upon repossession for default he would be entitled to a refund of what he had paid. It is what the English call having your own cake and eating it.

11. He claimed reimbursement for what he called expenses he incurred in repairing the vehicle. I have seen the receipts put in evidence. They cover a period from 11th August 2009 to 5th September 2009. That was when he had possession and use of the vehicle. The expenses appear to relate to minor repairs arising from usual wear and tear, and routine service, rather than overhaul of the vehicle. He did not argue that he improved the vehicle so that it was of a higher value than when he got possession of it. Since he was using it, it was only right that he bore the cost of service and repair, and that cost could not, naturally, be passed on to someone else. In any case, as noted by the trial court, there was no clause in the contract that entitled him to recoup any costs incurred by him from the respondent in the event the motor vehicle was repossessed.

12. The appellant made a lot of play about the fact that the respondent did not testify, and, therefore, his case was uncontroverted, and should have been allowed. The mere fact that the other party does not testify, does not, of itself, mean that the case for the plaintiff should be allowed as presented. The trial court is still bound to look at the evidence placed on record by the plaintiff, and assess whether or not he succeeded in what he had set out to do, to establish that he had a case against the defendant. That is what the trial court did in this case, and found that the appellant had failed to prove his case, despite the respondent not showing up at the trial.

13. Overall, I do not find any merit in the appeal. I do not find anything that suggests that the trial court made any error in its analysis of the facts before it, nor in the application of the law. The appellant was bound by the terms of the contract that he had entered into with the respondent. He breached it and he could not possibly get out of it unscathed. The appeal is for dismissal. I hereby dismiss it. The respondent shall have the costs. Any party aggrieved by the orders made in this judgment has twenty-eight (28) days to move the Court of Appeal appropriately.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF FEBRUARY, 2020

W. MUSYOKA

JUDGE