REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 174 OF 2018

(Being an appeal from the judgment and decree of the Hon.TM Mwangi,

Senior Principal Magistrate, in Kakamega CMCCC No. 203 of 2015,

delivered on 28th November 2018)

LUCAS AHULA OCHEYO.....1ST APPELLANT

BENSON ABUNGU OTIENO.....2ND APPELLANT

VERSUS

AL-HYDER TRADING COMPANY LIMITED.....1ST RESPONDENT

YASSER NASIR.....2ND RESPONDENT

JUDGEMENT

1. This appeal arises from the judgment of Hon. TM Mwangi, Senior Principal Magistrate, which was delivered on 28th November 2018, in Kakamega CMCCC No. 203 of 2015. The appellants herein were the plaintiffs and the respondents were the defendants, in the matter before the trial court. The judgment was with respect to a suit filed by the appellants, where they sought that the respondents be ordered to hand over to them a registration certificate, logbook, with respect to a motor vehicle registration mark and number KBP 892H in their names.

2. The salient facts may be briefly stated, that on the 6th day of July 2011, the appellants jointly purchased motor vehicle registration mark and number KBP 892 H, Toyota Pro-Box, white in colour, from the 1st respondent. Upon execution of the agreement, a down payment of Kshs. 500,000.00 was made to the 1st respondent, with the understanding that the balance of Kshs. 250,000.00 would be paid through monthly installments of Kshs 31,250.00, via MPesa, by depositing the same into a telephone number registered in the name of the 2nd respondent. On 14th day of April 2015, the appellants made the final payment of the balance of the consideration, but on inquiring about the logbook of the motor vehicle, the 1st respondent informed them that they still owed it a balance of Kshs. 130,000.00. The 1st respondent then threatened to seize the motor vehicle, if the amount of Kshs 130,000.00 had not been paid by 20th May 2015.

3. The respondent herein denied the allegations by the appellants in their plaint, and the case then proceeded for full trial. The same was dismissed on grounds that the appellants had failed to prove their case on a balance of probability.

4. It is from the said outcome that the appellants filed the instant appeal, advancing the four grounds in their memorandum of appeal, dated 24th December 2018, which are to the effect that the trial court based its decision entirely on conjecture and speculation as opposed to the evidence on record, arrived at an erroneous finding that the appellants were in breach of the agreement entered into with the respondents, erroneously found that the sum of Kshs. 130, 000.00 demanded by the respondents was a penalty for breach of the agreement and erred in observing that the respondents were justified in not transferring the logbook of the motor vehicle in the names of the appellants before receiving the payment of Kshs. 130, 000.00.

5. No directions were ever given on the disposal of the appeal, but the appellants filed written submissions, and the court appeared , its orders of 13th September 2019, to hold the view that the appeal could be disposed of in that manner. It would appear that only the appellants filed written submissions. The respondents did not file any, despite having been served, as evidenced by the affidavit of service on record, sworn on 5th October 2019, and filed in court on 22nd November 2019.

6. In their written submissions, the appellants stated that the only outstanding issue was whether, from the evidence on record, they were in breach of the agreement between them and the respondents. They further submitted that the trial court made a finding that, as the appellants completed paying the balance of Kshs. 250,000.00 in a period of 3 years as opposed to the contractual period of 8 months, they were, therefore, in breach of the agreement and the respondents were justified to impose a penalty of Kshs. 130,000.00 for the breach. The appellants held that the trial court fell in error when it failed to appreciate that by the respondents continuing to receive payments after the contractual period of 8 months, they had in fact waived their rights under the contract. The appellants support their position by urging the court to put into consideration the persuasive precedent in *Mary Ndegwa vs. Wandemi Developers Limited* [2018] eKLR , where the court stated:

> *"Though the agreement stated that the balance of the purchase price was to be paid within 90 days from 19th June 2007, it is clear that the balance was cleared outside that period. The defendant agreed to accept payment outside the stipulated 90 days. He is therefore stopped from raising payment outside the three months shows that they had waived their rights under the agreement of 19th June 2017.*
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> *In the case of Prisca Kemboi & 2 others vs. Kenya Post Office Savings Bank [2014] eKLR, Justice Ndolo quoted from the case of Sita Mills Ltd vs. Jubilee Insurance Company Ltd [2007] eKLR where the court states as follows:-*
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> *"A waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention then to waive it may be inferred from conduct or acts putting one off ones guard and leading one to believe that the other has waived his rights."*
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> *In the case of Prisca Kemboi (supra) quoted from the case of Serah Njeri Warobi vs. John Kimani Njoroge [2013] eKLR, where it was stated as follows:*
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> *"The doctrine of estoppel operates as a principle of law which precludes a person from .asserting something contrary to what is implied by a previous action or statement of that person."*
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> *The principles of waive and estoppels stated in the two cases hereinabove clearly apply to the present case. The defendant having accepted payment outside the 90days period agreed to waive his right to that clause and is therefore estopped from raising it now to show that payment was not made in accordance with the agreement."*

7. The appellants submitted that the respondents never raised the issue of breach nor the amount of Kshs. 130,000.00, being a penalty for such breach in their pleadings, and neither did they lead evidence in support of the issue. They submitted that the trial court was not justified to rely on facts which did not form part of the evidence. They relied on *Shaneebal Limited vs. County Government of Machakos* (2018) eKLR, to make the point that failure by the respondents to lead evidence rendered their statement of defence to be a mere statement and their evidence to be unsubstantiated.

8. I have considered the pleadings filed at the trial court, the evidence on record and the submissions filed. I shall proceed to determine the issues that are raised in the memorandum of appeal.

9. On whether the trial court erred in basing its decisions entirely on conjecture and speculation as opposed to the evidence on record, I have considered the consequences of a party failing to adduce evidence, as stated in *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* [2009] eKLR**,** where the court cited *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 (unreported), where it had been said that:

> *"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence must fail."*

10. The same decision was cited with approval in *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others* [2009] eKLR, where the court stated that:

> *"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleading. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."*

11. Similarly, in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 (unreported), the court citing the decision in *Edward Muriga through Stanley Muriga vs Nathaniel D. Schulter & another* [1997] eKLR , stated that:

> *"In this matter, apart from filing its statement of defense the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defense therefore remains mere allegations…Section 107 and 108 of the evidence Act are clear that he who asserts or pleads must support the same by way of evidence."*

12. It would appear trite that where a party merely files responses to a suit, by way of defence or otherwise, but fails to offer evidence, at the oral hearing of the matter, to support the contentions made in the filings, then it shall follow that the case presented by the plaintiff, or equivalent party, shall stand uncontroverted, while that stated by the defendant, or equivalent party, in their filings, shall remain

unsubstantiated.

13. On whether the trial court erred by arriving at a finding that the appellants were in breach of the agreement entered into with the respondents, I find that clause 5 of the agreement was clear that the balance of Kshs. 250, 000.00 was to be paid for 8 months through monthly instalments of Kshs.31, 250.00. The appellants were supposed to have completed payment of the amount of Kshs. 250,000.00 by April 2012, when the 8 months for repayment were lapsing. If the appellants could be believed that they completed payment on 14th April 2015, it is clear that they were years behind schedule on repayment.

14. Paragraph 9 of the agreement provided that the respondents were to hand over the logbook to the appellants after registering it under their names. Transfer fees were to be borne by appellant. PW1 stated that the defendants handed over the logbook to the appellants but the appellants names had not been transferred to the logbook as owners of the motor vehicle. PW1 further stated that the defendants were demanding for a further payment of Kshs.130, 000.00, in default of which they had threatened to repossess the motor vehicle.

15. The appellants rely on the said agreement to advance the cause that under it they had bought the motor-vehicle in question, and paid for it in full, and it was on the basis of the agreement that they demand for the logbook. However, going by the same agreement, it is clear that the appellants breached the agreement by completing payment way outside the contract period. I do not believe that they can use the principle of waiver and estoppel to claim that the respondent herein sat on his right to cancel the contract.

16. What amounts to a waiver was discussed by the court in *Banning vs. Wright* (1972) 2 All ER 987, page 998 , in the following terms:

> *"The primary meaning of the waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or the provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver – waiver by conduct."*

17. That position was echoed by the court in the local case of *748 Air Services Ltd vs. Munyi* [2014] eKLR **,** citing *Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Ltd* [2007] eKLR, where the court stated:

> *"A waiver may arise where a person has pursed such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off ones guard and leading one to believe that the other has waived his right."*

18. In the case at hand, the appellants did not point at any action or step taken by the respondents, demonstrative of the fact that they had waived their rights to recover the property in default of payment. The appellants are, no doubt, using the doctrine to defend themselves since it is clear that they breached the contract.

19. On whether the trial court had erred in stating that the sum of Kshs. 130, 000.00 demanded by the respondent was a penalty for breach of the agreement, clause 28 of the contract provided for a penalty of 30% on failure or default. It would appear that the sum of Kshs. 130,000.00 was the 30% that was supposed to be paid by the purchaser on default. I agree with the trial court that the appellants did not provide any evidence that the Kshs. 130,000.00 was an illegal levy. I, therefore, find it from, the evidence provided by the appellants themselves, that it was a penalty for breach of contract as it had been written into the contract that they were relying on to advance their case.

20. On whether the trial court erred in observing that the respondents were justified in not transferring the log book for the subject vehicle into the names of the appellants, before receiving the payment of Kshs. 130, 000.00, I find from all the evidence on record that the respondent was right in not transferring the logbook to the names of appellants since there was a clear breach of contract on their side.

21. It would appear that the appellants are relying on clause 11 of the agreement, on repossession as the consequence of default. But there is also clause 25, which provides for a penalty of 30% in the event of default. It would also appear that the repossession was not intended to be absolute remedy, for clause 31 states that in the event of "any repossession the purchaser shall be required to clear the whole remaining balance." Taking all these clauses into account it cannot be said that waiver was an option, for repossession upon default was not really an absolute clause or the only remedy available to the respondents.

22. Overall, after analyzing the case before me, I find that the appellants failed to prove their case on a balance of probability, and I am not persuaded that the trial court fell into any error. I find that there is there no basis to set aside the findings and judgment of the trial court. The appeal is for dismissal, and I hereby dismiss the same. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in

open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE