



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 95 OF 2018**

**FAUD ABDALLA BREK.....APPELLANT**

**-VERSUS-**

**SAID SALIM NASSER.....RESPONDENT**

**(Being an appeal against the Judgment of the Honourable E.M.KAGONI, Senior Resident**

**Magistrate delivered on 24th May, 2018 in Chief Magistrate's Court Case NO.2198 of 2012)**

**JUDGMENT**

1. The Appellant sued the Respondent before the lower court vide Mombasa CMCC Suit No. 2198 of 2013 seeking for judgment against the Respondent for:

- a) Kshs.680,000/=
- b) Costs of the suit
- c) Interest at court rates from the 8<sup>th</sup> day of May, 2008 until payment in full
- d) Interest on (a) and (b) above

2. In his Amended Plaintiff filed on 16/01/2014, the Appellant's gravamen is that on 8/5/2008 he had displayed his motor vehicle registration No. KBB 213F Toyota Corolla for sale at a price of Kshs.680,000/= when the Respondent approached him with an offer stating that he (the defendant) had secured a potential buyer. They entered into an understanding and the Respondent then was handed the said motor vehicle to deliver it to the potential buyer. The Appellant averred that since then the Respondent has never given him the vehicle back or the money for the sale of the vehicle. The Appellant therefore claimed against the Respondent the selling price of the motor vehicle of Kshs.680,000/= together with the applicable interests.

3. In his statement of defence, the Respondent denied in toto the Plaintiff's claim. He denied ever approaching the Appellant concerning the sale of the motor vehicle. However, he averred that one Salim Galgalo sent him to collect the vehicle from the Appellant in Mombasa and deliver it to Azgar Sidi in Nairobi. That he did as requested and delivered the said motor vehicle to Azgar Sidi on 8/5/2008. He averred that he was informed by Azgar Sidi that the motor vehicle was stolen on 15/5/2008. He sought the court to dismiss the suit as there was no cause of action against him.

4. The Appellant called two witnesses in support of his case. The Appellant testified as PW1. He told the court that on 08/05/2008, he gave the defendant his motor vehicle registration No.KBB 213F after the Defendant had told him there was a client in Nairobi interested in buying the motor vehicle. The price for the Motor Vehicle was agreed at Kshs.680,000/=. The Defendant took the motor vehicle but failed to deliver the cash as agreed claiming that it had been stolen. He further testified that he had bought the Motor vehicle from an importer but was yet to transfer the vehicle to himself. The motor vehicle was still registered in the name of the importer.

5. On cross examination, the Plaintiff stated that he met the Defendant through a friend called Salim Galgalo who was present when the Appellant handed the Motor vehicle to the Respondent. He conceded that the Motor vehicle was registered in the name of Sird Enterprises and not his name. He admitted that he had no proof of purchase of the motor vehicle from Sird Enterprises though he alleged to have bought the motor vehicle at Kshs.620,000/=. He denied being aware that the report was made when the motor vehicle was stolen.

6. PW2 was Salim Awadh Swaleh and he told the court that he had known both the Appellant and the Respondent. He testified that he was there when the motor vehicle was handed to the Defendant. It was his testimony that he was later informed via a phone call that the vehicle had allegedly been stolen.

7. The Respondent/Defendant testified as DW1. He told the court that he met the Plaintiff via Salim Galgalo. That Salim Galgalo had requested him to drive the motor vehicle to Nairobi and delivered it to Azgar. He further told the court that he delivered the vehicle but a week later Mr. Azgar called to inform him that the vehicle had been stolen.

8. On cross examination, he reiterated that his role was only to deliver the motor vehicle which he did. DW1, further stated that it was Mr. Azgar who reported the theft to the police.

9. PC Patrick Musyoka testified as DW2. He was then attached to Industrial Area Police Station when ,on 25.7.2008, one Azgar Ali reported the theft of motor vehicle registration KBB 213F. According to DW2, Azgar Ali reported that he had parked the motor vehicle outside his house on 24.7.2008 but on waking up, he found the motor vehicle missing. He further stated that the motor vehicle belonged to Salim Galgalo and was directed to go and get the logbook but he did not come back to the station.

10. When cross examined, he told the court that he spoke to Salim Galgalo through phone and summoned him to the station but he never came.

11. After considering all the evidence and material presented before it, the trial court found that the Plaintiff had failed on a balance of probability to prove that he had the actual, possessionary or beneficial interest in the said motor vehicle to enable him pass any title to any buyer. The case was therefore dismissed on that ground with costs to the Defendant.

12. Aggrieved by the said decision, the Plaintiff/Appellant has appealed. Vide the memorandum of appeal dated 4/6/2018, the Appellant flaunts the impugned lower court Judgment on the the following grounds:

**a) That the learned magistrate erred in law and fact by failing to consider the Appellant was the actual and beneficial owner of motor vehicle registration number KBB 213F, the suit motor vehicle.**

**b) That the learned magistrate erred in law by only making a determination on the question of ownership of motor vehicle and failed to consider the other issues for determination raised on the Appellant's claim against the Respondent.**

**c) That the learned magistrate failed to determine whether there existed a contract between the Appellant and Respondent and whether the Respondent was in breach of the terms of the contract.**

**d) The learned magistrate erred in law by failing to give sufficient reasons for his decision.**

**e) That the learned magistrate erred in law by taking into account irrelevant factors.**

13. The appeal proceeded by way of written submissions. Parties filed their respective submissions on the 8<sup>th</sup> October, 2019 and 30<sup>th</sup> October, 2019 respectively.

14. It was the Appellant's submissions that he had bought the suit motor vehicle from the importer but had not effected transfer. He stated that he had been in possession of the said motor vehicle and enjoyed beneficial interest there from. According to him the trial magistrate erred by failing to consider that he was the actual and beneficial owner of the suit motor vehicle. He further submitted that albeit Section 8 of the Traffic Act Cap 403 Laws of Kenya states that 'the person in whose name the vehicle is registered, shall unless the contrary is proved be deemed to be the owner of the vehicle, the same cannot be deemed to be conclusive.' In support thereof, reliance was placed in the case of *Nancy Ayemba Maaira –vs- Abdi Ali (2010) eKLR*.

15. It is the Appellant's case that he had testified there was a contract between the parties for the respondent to sell the motor vehicle to an interested buyer and bring to the appellant the purchase price. However the trial magistrate failed to consider the same having found to the contrary with regard to the Appellant's ownership of the motor vehicle.

16. On the foregoing, it is submitted that there was a transaction between the parties which was partially executed but the Respondent refused to give the Appellant the proceeds of the sale. In closing his submissions, the Appellant argues that the Respondent was in breach of the contract between them hence the appeal should be allowed. He proceeded to make reference to the case of *Mamta Peeush Mahajan –vs- Yasawant Kumari Mahajani (2017) eKLR*.

17. The Respondent in his submissions in response thereto identified three issues for determination which are:

a) Whether the Appellant was the actual and beneficial owner of motor vehicle registration number KBB 213F.

b) Whether there existed a contract between the Appellant and Respondent and whether the Respondent was in breach of the contract

c) Whether the magistrate failed to give sufficient reason for his decision and took account irrelevant factors

18. On the first issue, it is submitted that from the documents annexed by the Appellant the log book is in the name of Sird Enterprises. Further that the transfer confirms that Sird Enterprises is the registered owner and the name of the transferee is not indicated. The Appellant has not shown how he is the beneficial owner of the suit motor vehicle. Although the Appellant alleged to have bought the vehicle at a consideration of Kshs.620,000/=but no evidence was adduced in support thereof. It is argued that the Appellant has not shown how he is exempted from Section 8 of the Traffic Act. In support of this argument, reliance is placed on the case of *Muhambi Koja –vs- Said Mbwana Abdi (2015) eKLR*.

19. On the second issue, the Respondent submits that there was no contractual relationship between himself and the Appellant. He reiterates that he was only tasked to drive the vehicle to Nairobi but not to sell it. It is argued that the Appellant did not call Salim Galgalo who was said to be present during the agreement as a witness. On the foregoing, it is submitted that there was no breach because the Appellant did not establish ownership and could not sell what he did not own. The Respondent did not contract to sell the motor vehicle but only to drive it to Nairobi. And, lastly there is no evidence that a sale took place but there is evidence that the vehicle was stolen vide O.B No. 5/25/7/20008.

It is further submitted that the Appellant has not shown that the intention of the parties was to have the motor vehicle sold by the Respondent and therefore the trial court properly evaluated the law and facts presented before it before making the Judgment. He sought the appeal to be dismissed for want of merit.

### **Analysis and Determination**

20. I have considered the appeal, the submissions filed by both the Appellant and the Respondent, the entire record and Judgment of the trial Magistrate's court together with the cited statute and case law.

21. This is a first appeal. As a first appellate court, this court is required to consider the evidence on record afresh and come to its own conclusion and inferences. See the case of **SELLE –VS- ASSOCIATED BOAT COMPANY LIMITED [1968] EA 122**.

22. This appeal has arisen from the Judgment delivered by the trial court on 24/5/2018 dismissing the Appellant's claim after finding that the Appellant had not proven his case on a balance of probability. This Court can, as an appellate court, interfere with the exercise of such discretion by an inferior court in certain limited circumstances. In **Mbogo and Another vs. Shah [1968] EA 93** the Court stated:

***“...That this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

23. The issues which stand out for determination in the instant appeal are as follows;

- a) ***Whether the Appellant was the actual and beneficial owner of the motor vehicle registration number KBB 213F.***
- b) ***Whether there existed a contract between the Appellant and Respondent and whether the Respondent was in breach of the contract***
- c) ***Whether the magistrate failed to give sufficient reason for his decision and took account irrelevant factors***
- d) ***Who should bear the costs***

24. On the first issue, the Appellant submitted that he had bought the motor vehicle from an importer though the transfers were yet to be registered in his name. He alleged that he purchased the vehicle at a consideration of Kshs.620,000/=. The Appellant further averred that he was in possession of the motor vehicle and had the beneficial ownership of the same.

25. Section 8 of the Traffic Act provides that, “The person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be owner of the vehicle”. In the case of **Muhambi Koja Vs Said Mbwana Abdi (2015) eKLR**, the Court of Appeal cited **Joel Muga Opija Vs East African Sea Food Limited**, Civil Appeal No. 309 of 2010 and held that:

***“We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is...”***

26. The copy of records produced in court by the Appellant in respect of the ownership of the motor vehicle is a log book and blank transfer form. The Appellant alleged that he owned the vehicle having bought it from the importer who gave him the said documents. The burden of proof was therefore upon the appellant to show that he owned the motor vehicle and not the party named in the log book. It is trite law that in evidence **‘ he who asserts must prove’** his case. There is no evidence which was adduced by the Appellant to show that he had bought the vehicle as he alleged. The Appellant's evidence fell short of this and he therefore did not discharge his burden of proof. In my view, the trial court was right in holding that the Appellant had failed on a balance of probability to prove ownership of the motor vehicle.

27. On the second issue, the Appellant submitted that there was an oral agreement between the parties wherein the Respondent undertook to sell the motor vehicle to any interested purchaser for a consideration of Kshs.680,000/=. The Appellant argued that the Respondent breached the agreement because he neither brought the vehicle back nor remitted the proceeds for the sale of the vehicle. The issue that this court will endeavour to determine is whether there was any agreement between the parties for the sale of the motor vehicle.

28. It is necessary to understand the nature of contract. According to Black's Law Dictionary, 8<sup>th</sup> Edition ;

**The term “contract” has been used indifferently to refer to three different things –**

- (i) The series of operative acts by the parties resulting in new legal relations;**

**(ii) The physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;**

**(iii) The legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called "obligation" William R. Anson – Principles of the Law of Contract"**

29. These attributes may be found in "oral contract", also called "simple contract", which is a contract or modification which is not in writing, or is only partially in writing and are enforceable as contracts. **Section 3(1) Law of Contract Act** does not make all contracts void and unenforceable if they are not reduced into writing.

30. I am of the opinion that oral agreements, supported by credible evidence can be and are enforceable. All that the law requires is that certain contracts can be in writing – **Section (3) (3) falls** short of that; it would be a traversery of justice as most people either knowingly or otherwise transact their businesses upon oral agreements.

31. The question which seeks an answer is whether the Appellant adduced any credible evidence to support the existence of an oral agreement for sale of the motor vehicle by the Respondent.

32. In his evidence in chief, the Appellant testified that he met the Plaintiff through one Salim Galgalo and that he handed over the vehicle to the Respondent in the presence of Salim Galgalo. The Respondent on the other hand, averred that he was contracted to drive the motor vehicle from Mombasa to Nairobi by Salim Galgalo but not to sell it. The only witness called by the Plaintiff was Salim Awadh Swaleh. He told the court he was not present when the parties negotiated and even when the vehicle was handed over but he was informed that the Vehicle had been stolen.

33. On the foregoing, there is not credible evidence on record to show that the Appellant handed over the motor vehicle to the Respondent for purposes of selling the vehicle to a prospective buyer and drive it to Nairobi. There would have been some glint to that controversy if Salim Galgalo had been called as a witness to affirm the Appellant's allegation. I am of the proposition that legal relations can only be presumed once the existence of a valid agreement is established but no valid agreement has been established in the instant case since there were too many factors which had not been established as agreed upon. In the premises the Appellant failed to discharge the burden of proving its case as is required by the law, namely, **Section 109 of the Evidence Act, Chapter 80 of the Laws of Kenya, in** which it is stipulated that:

**"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

34. I am further satisfied that the evidence on record fully supports the findings of the trial Msagistrate, hence he did not misdirect himself in any way in arriving at the impugned decision.

35. For the above reasons, I find no merit in the appeal, uphold the trial magistrate's Court Judgment and dismiss the Appeal herein. The costs of the Appeal shall be borne by the Appellant.

It is so ordered.

**Dated, Delivered and Signed This 20<sup>th</sup> Day of May, 2020.**

**D.O CHEPKWONY.**

**JUDGE.**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> 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