REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 130 OF 2014

DAVID MUYODI.....APPELLANT

-VERSUS-

ROBERT WAMBOGO OMBAYO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Tom Olando, Resident Magistrate, in Eldoret CMCC No. 181 of 2013 dated 29 October 2014)

JUDGMENT

[1] By his Plaint dated **20 December 2012**, which was filed before the lower court on **25 March 2013**, the appellant, **David Muyodi**, sued the respondent, **Robert Wambogo Ombayo,** seeking the payment of a sum of **Kshs. 310,000/=** said to be the balance of the consideration for the sale of **Motor Vehicle Registration Number KAN 692V**, Mitsubishi FH. Upon hearing the parties, the lower court found in favour of the appellant in the sum aforestated, but ordered that a sum of **Kshs. 250,450/=** that was allegedly spent by the respondent in repairing the subject motor vehicle, be set off therefrom. Thus, Judgment was entered for the appellant in the sum of **Kshs. 59,550/=** only. The learned magistrate further ordered each party to bear their own costs of the suit.

[2] Being aggrieved by the decision of the lower court, the appellant filed this appeal on **3 October 2014** on the following grounds:

> **[a]** That the learned trial magistrate erred in law and fact in finding and holding that the respondent was entitled to set off **Kshs. 250,450/=** in total disregard of the law and evidence before him.
>
> **[b]** That the learned trial magistrate erred in law and fact in failing to properly and diligently frame issues that fell for determination with regard to the appellant's claim of **Kshs. 310,000/=** and breach of contract.
>
> **[c]** That the learned trial magistrate erred in law and fact in raising, considering and determining issues that were not before him.
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> **[d]** That the learned trial magistrate erred in law and fact in arriving at a decision that flew in the face of the evidence before him.
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> **[e]** That the learned trial magistrate erred in law and fact in arriving at a decision which amounted to altering and re-writing the terms of the contract for the parties herein.
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> **[f]** That the learned trial magistrate erred in law and fact in failing to find that the respondent did not have a counterclaim to the appellant's claim that would entitle him to a set-off.
>
> **[g]** That the learned trial magistrate erred in fact and law in failing to award the appellant costs of the suit and interest.

[3] Consequently, the appellant prayed that his appeal be allowed with costs; and that the Judgment and Decree of the learned trial magistrate be set aside and be substituted with an order allowing the appellant's claim with costs and interest. The appeal was canvassed by way of written submissions pursuant to the directions given herein on **25 October 2016**. The appellant's written submissions were re-filed herein on **16 February 2017** while the respondent's written submissions were filed on 6 May 2020. The main issue raised by counsel for the appellant was that the question whether a set off could properly arise when the respondent did not file a counterclaim before the lower court. He submitted that parties are bound by their pleadings, and that the only prayer in the respondent's defence was for the dismissal of the appellant's suit and nothing else. According to him the lower court erred in awarding a relief that was never sought by the respondent.

[4] It was also the submission of counsel for the appellant that, since the dispute arose out of the agreement dated **12 September 2011**, the trial court erred in importing certain provisions of the revoked agreement to give meaning to the agreement dated **12 September 2011**. He

likewise urged the Court to note that the respondent did not plead mistake, fraud or undue influence against the appellant, and therefore that the respondent could not be heard to say that the appellant concealed from him the true condition of the motor vehicle. He added that, since the parties co-owned the motor vehicle and therefore had equal access to it, the question of the respondent's being misled as to its mechanical condition could not arise.

[5] Counsel for the appellant relied on **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another** [2002] 2 EA 495 and **Meru HCCA No. 78 of 2006: Gitobu M. Karatho vs. Christopher M. Kubai** to support his submission that the duty of the lower court was limited to interpreting and giving effect to the contract made by the parties on **12 September 2011** and that it had no business re-writing the agreement for the parties by importing terms from the agreement that had been revoked by the 2nd agreement. According to counsel, having bought out the appellant, the respondent assumed full ownership of the motor vehicle as it was; and therefore had every right to improve its mechanical condition to his liking thereafter without the involvement of the appellant. As such, there was no basis for those expenses to be passed on to the appellant.

[6] Counsel also questioned the probative value of the respondent's receipts upon which the set off was made by the lower court, pointing out that they bore no revenue stamps and were therefore admitted in evidence in contravention of **Section 19(1)** of the **Stamp Duty Act, Chapter 480** of the **Laws of Kenya**. He relied on **Nakuru HCCA No. 105 of 2008: SDV Transami K. Ltd vs. Scholastic Nyambura**. He also took the position that those receipts were not only of dubious authenticity, but also that the amounts stated thereon did not add up to **Kshs. 250,450/=.** Thus, it was the submission of counsel that the lower court erred in setting off the sum of **Kshs. 250,450/=** from the sum due to the appellant from the respondent.

[7] With regard to costs, counsel cited **Section 27(1)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, in faulting the lower court for denying the appellant costs. He stressed the point that, as the appellant was the successful party, there was no reason for the lower court to deny him costs. Counsel relied on **Cecilia Karuru Nyayu vs. Barclays Bank of Kenya Ltd** [2016] eKLR and **Stanley Kaunga Nkarichia vs. Meru Teachers College & Another** [2016] eKLR for the proposition that a party can only be denied costs if it is shown that his conduct either prior to or during the course of the suit has made the litigation unavoidable. Counsel also pointed out that there was no proof that the parties were friends or that they went to court consensually as was held by the lower court; and therefore that the lower court ought to have applied the rule that costs follow the event. He prayed that the appeal be allowed with costs; and that the costs of the lower court be calculated from the date the suit was filed.

[8] On behalf of the respondent, the submission of **Mr. Mwinamo**, **Advocate**, was that from the evidence tendered by the respondent, the motor vehicle was defective as at the time the parties entered into the sale agreement; and that the respondent was forced to spend further expenses in repairing it. He urged the Court to take into consideration the receipts at pages 70 - 76 of the Record of Appeal, as proof that the respondent spent much more than **Kshs. 250,450/=** on repairs with a view of bringing it back to a good working condition. Counsel further submitted that the respondent proved, to the satisfaction of the lower court, that the appellant defrauded him by concealing the defects in the motor vehicle as at the date of the agreement. He pointed out that, according to the 1st agreement, it was the duty of the appellant to repair the motor vehicle, and therefore that the repair expenses incurred by the respondent were recoverable; and were correctly set off by the lower court from what was due to the appellant.

[9] On the issue of costs, it was the submission of counsel for the respondent that, having partly succeeded, the trial court's order that each party bears own costs was proper in every respect. He therefore prayed for the dismissal of the appeal with costs.

[10] As this is a first appeal, this Court is enjoined by law to re-evaluate the evidence on record with a view of coming to its own conclusions and findings, while giving allowance for the fact that this Court did not have the opportunity of seeing or hearing the witnesses (see **Selle vs. Associated Motor Boat Company Limited** [1968] EA 123). In this regard, I have carefully perused and considered the record of the lower court. The appellant, a doctor then working at **Ampath Eldoret**, gave his evidence on **4 October 2013** as **PW1**. His testimony was that, jointly with the respondent, they purchased the subject motor vehicle, **Registration Number KAN 692V** for **Kshs. 1.1 million** in **October 2008** for business purposes. Thereafter, on **5 August 2010**, they entered into an agreement with the respondent whereby he purchased the respondent's interest in the motor vehicle. He was therefore to refund to the respondent **Kshs. 580,000/=,** being the respondent's investment in the motor vehicle, in instalments of **Kshs. 80,000/=** per month. The appellant produced the said agreement before the lower court as his **Exhibit 1.**

[11] The appellant further conceded before the lower court that he refunded the respondent only **Kshs. 290,000/=,** and was therefore indebted to the respondent in the sum of **Kshs. 290,000/=** by **12 September 2011** when they entered into another agreement for the respondent to buy out his interest in the sum of **Kshs. 1,000,000/=,** which they mutually agreed to be the value of the lorry at the time. Thus, upon paying the appellant **Kshs. 310,000/=,** the respondent would assume full ownership of the lorry. The appellant produced the 2nd agreement before the lower court and it was marked the **Plaintiff's Exhibit 2.**

[12] It was therefore the evidence of the appellant that it was because the respondent failed to pay him the aforestated amount of **Kshs. 310,000/=** that he opted to seek legal advice from the firm of **Chepkitway & Co. Advocates.** He pointed out that that before the lower court suit was filed, his advocates referred them to **Mr. Kalya, Advocate,** for arbitration, but that **Mr. Kalya** subsequently withdrew from the matter upon realizing that he was acquainted with both of them. He produced their arbitration agreement, **Mr. Kalya's** letter inviting them for the first arbitral meeting and the Order of Withdrawal as exhibits before the lower court (marked the **Plaintiff's Exhibit 3, 4 and 5,** respectively). According to the appellant, the motor vehicle was in good general condition and therefore that he was under no obligation to meet the repair charges that the respondent, of his own volition, opted to carry out on the motor vehicle.

[13] The respondent conceded that he entered into an agreement with the appellant for the purchase of the subject motor vehicle; and that they later agreed that he would buy off the appellant's interest by paying him **Kshs. 580,000/=** but that this did not work out. He further testified that thereafter, on **12 September 2011** they entered into another agreement by which the appellant would give him full ownership of the motor vehicle whose agreed value at the time was **Kshs. 1,000,000/=**. Thus, it was his evidence that he paid the appellant **Kshs. 400,000/=,** and that out of the total sum due of **Kshs. 600,000/=** as well as the amount of **Kshs. 290,000/=** that the appellant owed him; they agreed that he would pay the balance of **Kshs. 310,000/=** in **March 2012**, depending on the condition of the motor vehicle.

[14] According to the respondent, he was unable to pay the balance because, soon thereafter, the motor vehicle broke down and he had to spend **Kshs. 510,000/=** towards its repair, which included the purchase of a new differential at a cost of **Kshs. 250,000/=.** He produced a letter dated **26 November 2011** that he wrote to the appellant notifying him of these developments, as well as receipts to support his assertions. The respondent concluded his evidence before the lower court by stating that the appellant defrauded him by not telling him the exact condition of the motor vehicle; and therefore that he was under no obligation to pay him the aforementioned sum of **Kshs. 310,000/=.** Instead, he prayed that the appellant be ordered to set off from the aforesaid sum, the amount he spent on repairing the suit motor vehicle.

[15] It is therefore manifest from the foregoing that the parties hereto were business partners and that in that capacity they jointly purchased **Motor Vehicle Registration No. KAN 692V,** Mitsubishi FH lorry, in the month of **October 2008**. Thereafter, the parties entered into an agreement dated **5 August 2010** (hereinafter, the 1st Agreement) whereby the they acknowledged their respective contributions towards the purchase of the subject motor vehicle. Hence they acknowledged that the appellant paid **Kshs. 1,100,000/=** while the respondent contributed **Kshs. 580,000/=.** The 1st Agreement is also explicit that its purpose was to enable the appellant buy out the respondent's interest in the motor vehicle by refunding his **Kshs. 580,000/=** in monthly instalments of **Kshs. 80,000/=** for seven months with effect from **6 September 2010.** It was further agreed that, during that period, the maintenance expenses would be borne by the appellant; and that in the event of a dispute, the parties would refer their dispute for arbitration through the firm of **Chepkitway & Co. Advocates.**

[16] The evidence adduced before the lower court further shows that the 1st Agreement was subsequently revoked and in place thereof, another agreement dated **12 September 2011** (the 2nd agreement) was negotiated and signed by the parties. By the 2nd agreement, the respondent was to refund to the appellant the value of his interest in the motor vehicle, in the agreed sum of **Kshs. 1,000,000/=.** That sum was to be paid as follows:

> **[a] Kshs. 690,000/=** upon the signing of the agreement, which was duly acknowledged;
>
> **[b]** The balance of **Kshs. 310,000/=** was to be paid on or before **30 March 2012.**

[17] There is therefore no dispute that, as at **25 March 2013** when the lower court suit was filed, the respondent had not paid the balance of **Kshs. 310,000/=** to the appellant. The same was acknowledged by the respondent in his Statement of Defence dated **15 April 2013**, in paragraph 5 wherein the respondent averred that:

> **"…The Defendant shall therefore seek that the sums of Kshs. 250,450 incurred in repairing the motor vehicle KAN 692V Mitsubishi FH be offset from the outstanding amount of Kshs. 310,000/= leaving Kshs. 59,550."** (emphasis added)

[18] Thus, having carefully considered the pleadings and evidence adduced by the parties in support thereof, as well as the written submissions filed herein by counsel and the authorities relied on by them, the twin issues for my re-evaluation are as follows:

> **[a]** Whether or not the learned trial magistrate erred in law and fact by offsetting the repair charges of **Kshs. 250,450/=** against the balance of **Kshs. 310,000/=** that was due to the appellant.
>
> **[b]** Whether it was justifiable, in the circumstances, to deny the appellant the costs of the suit.

[19] Having reduced the terms of their engagement to writing, it is to those documents that the Court must resort to determine the rights and obligations of the parties at the different stages of their relationship. It is a cardinal principle that it is the formal contract that records the bargain and, therefore, reveals the true intentions of the parties thereto. Hence, in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another** [2001] KLR 112, the Court of Appeal held that:

> **"…The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved…"**

[20] It is abundantly clear from the 2nd agreement that the 1st agreement was revoked by the parties; for the 2nd agreement provided thus in Clause 4 thereof:

> **"This is a revocation agreement to a sale agreement date 5th August 2010 and stands null and void."**

[21] It is manifest therefore that from **12 September 2011** and henceforth, the reigning document was solely the 2nd agreement. Other than providing that the respondent was to be given possession of the motor vehicle upon execution of the agreement, it did not make provision as to the mechanical state of the motor vehicle or place any obligation on the appellant to carry out any repairs. Moreover, no warranties were given, and therefore, the presumption is that the motor vehicle was to be handed over on an **"as is"** basis. In **RTS Flexible Systems Ltd vs. Molkerei Alois Müller GmbH & Co KG (UK Production)** [2010] UKSC14, [45] it was held thus:

> **"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."**

[22] Likewise, in **Nakana Trading Co. Ltd vs. Coffee Marketing Board** [1990-1994] EA 448, it was held that:

> **"…since the contract between the parties was reduced into writing, the duty of the court is to look at the document itself and determine whether it applies to the existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous…"**

[23] The same point was made in **John Onyancha Zurwe vs. Oreti Atinde, Civil Appeal No. 217 of 2003** where the following passage from **Halsbury's Laws of England 4th edition Vol. 12** was quoted with approval:

> ***"Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document."***

[24] Lastly, in **Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another** (supra), the following excerpt from **Odgers' Construction of Deeds and Statutes** (5th edn.) at p.106, was adopted:

> **"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence. As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein…"**

[25] In the light of the foregoing, it was therefore not open for the trial magistrate to resort to a document that had been expressly revoked by the parties in favour of a fresh agreement to ascertain the rights and obligations of the parties, as he did. It was therefore a misdirection on the part of the learned trial magistrate when he held that:

> **"…In this case there are several agreements not one and I have singled out the two agreements as being the main agreements. The two agreements must be considered together and we cannot single out only a part of one agreement. To be able to arrive at a conclusion both agreements must be considered…"**

[26] The learned trial magistrate further misdirected himself by purporting to presume what the parties had in mind when they made the 2nd agreement. Here is what he had to say in this regard:

> **"Looking at the 2nd agreement it is titled "Revocation agreement" reading the agreement one finds that the title itself is misleading since what proceeded thereafter is a totally new agreement.**
>
> **Because of the ambiguities in the agreements, the courts must give effect to the intention of the parties by reading through all the agreements…"**

[27] It is now well settled that a court of law cannot re-write a contract for the parties or come to the aid of a party to escape the effects of a bad bargain except in cases where fraud, coercion or undue influence is proved. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (supra)**, the point was succinctly made by the Court of Appeal thus:

> **"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.**
>
> **As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):**
>
> **"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".**

[28] Accordingly, on the basis of the evidence before it, there was no justification at all for the lower court to hold the appellant liable for the repair charges which were incurred after **12 September 2011.** Had the respondent deemed the mechanical condition of the motor vehicle pertinent, he would have insisted on a clause to that effect being inserted in their 2nd agreement. Indeed, it was the evidence of the appellant that the motor vehicle was tested before the 2nd agreement was drawn and that the respondent was satisfied with its condition. Moreover, there is no indication that the respondent attempted to reach out to the appellant for a meeting of minds on the repairs before he embarked on the repairs.

[29] There is another reason why the repair charges were not recoverable. They are premised on the allegation that the appellant acted fraudulently in concealing material information from the respondent, yet no Counterclaim or set-off was made by the respondent against the appellant. Accordingly, no particulars of fraud were pleaded, and certainly no particulars of the repair expenses were furnished by the respondent upfront. Indeed, the only prayer in the Defence was for the dismissal of the appellant's suit with costs.

[30] According to **Black's Law Dictionary, Tenth Edition**, a set-off is defined thus:

> **"A debtor's right to reduce the amount of debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor…"**

[31] Hence in **Order 7 Rule 3** of the **Civil Procedure Rules**, it is provided that:

> **"A defendant in a suit <u>may set-off, or set-up by way of counterclaim</u> against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."** (emphasis supplied)

[32] To the extent therefore that the respondent did not file a Counterclaim and formally pray for set-off, the trial magistrate fell into error in allowing a set off to the tune of **Kshs. 250,450/=** against the appellant. It is a cardinal principle that a court of law can only give relief that accords with the prayers sought by the parties. Hence, *in **<u>Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others</u>** [2016] eKLR, the Court of Appeal, in discussing this point cited with approval, the following excerpt from an article by* **Sir Jack Jacob** entitled ***"The Present Importance of Pleadings"*** *published in [1960]* ***Current Legal problems****, at page174:*

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

[33] In the light of the foregoing, I find it superfluous to interrogate the probative value of the evidence adduced in support of the set-off as to whether the receipts added up to the amount set off or the effect of **Section 19** of the **Stamp Duty Act** on that evidence.

[34] On the issue of costs, the proviso to **Section 27(1)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** is explicit that costs follow the event. Hence, given my findings aforementioned it, I need not belabor the issue. The result is that the appeal has merit and it is hereby allowed with costs. The Judgment and Decree of the lower court is hereby set aside and substituted with Judgment in favour of the appellant in the sum of **Kshs. 310,000/=** together with interest thereon at court rates and costs. I note that the appellant prayed for interest from **12 September 2011,** which was the date of the 2nd agreement. However, according to that agreement the amount fell due on **30 March 2012**. Hence, it is hereby ordered that interest shall accrue on the sum of **Kshs. 310.000/=** from **30 March 2012** when the amount fell due for payment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE, 2020

OLGA SEWE

<u>JUDGE</u>