



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCA 15 OF 2018

(CIVIL SUIT 3033 OF 2011)

PAUL N. NYOTA.....APPELLANT

-VERSUS-

DAVID MULI MUTUA.....RESPONDENT

JUDGMENT

APPEAL

The Appellant filed Memorandum of Appeal on 14th June 2018 against the judgment and decree of the SRM Hon. D.O. Mbeja of 11th June 2018 in **Milimani CMCC 3033 of 2011** on the following now condensed grounds of appeal;

- a. The Trial Court erred in law and fact by failing to appreciate that the Respondent's suit lacked merit and ought to have been dismissed.
- b. The Trial Court is alleged to have recorded extensively and preferred the testimony and submissions of the Respondent against the Appellant's. The Court misapprehended the issues raised and evidence leading to a judgment that was lopsided and biased in favour of the Respondent.
- c. The Trial Court erred in law and fact in holding that the Appellant did not acquire a good title from the auction and that the sale was irregular, null and void. This is against **Milimani Misc Application 480 of 2008** where a Vesting Order of a Court of competent jurisdiction was issued. The Trial Court found it irregular null and void yet it was an order by a court of concurrent jurisdiction.
- d. The Trial court erred in law and fact by holding that the Appellant had no capacity to sell the motor vehicle notwithstanding the fact that the Appellant had acquired a good title to the same.
- e. The Trial Court erred in law and fact in holding that there was material non-disclosure by the Appellant with respect to the logbook while the Sale agreement provided that remainder of the purchase price would be paid upon production of the logbook.
- f. The Trial court erred in law and fact by failing to consider the certificate of sale in the auction conducted by Zacharia Wakhungu Baraza T/A Siama Traders Auctioneers, the Motor Vehicle Sale Agreement and KRA Transfer of Ownership of Motor Vehicle Form dated 15th September 2008.
- g. The Trial court shifted the breach of contract to the Appellant, shifted Burden of Proof to Appellant by inferring negative inferences that the Appellant should have filed a Counterclaim and departed from the principle that the name on the logbook is not conclusive proof of ownership.

RESPONSE

The Respondent filed Replying Affidavit on 12th September 2018 and alluded to the following;

- a. The Trial Court on 11th June 2018, delivered judgment based on rule of law after consideration of testimonies and submissions of

both parties. It was based on all relevant legal provisions.

b. On 21st June 2018 the Appellant filed application for stay of execution and by the Trial Court's Ruling of 20th November 2018, the Trial court granted conditional stay that the decretal amount to be deposited in a joint interest account within 21 days. A copy of the said Ruling was annexed to the Response as **DMM1**.

c. The Appellant instead sought to have the decretal amount paid in instalments instead of paying into joint account. Letters with regard to both options were annexed as **DMM2 & 3** respectively.

d. On 4th February 2019 the Appellant paid vide a cheque Ksh 50,000/- through Respondent's Advocate. The Appellant on 1st March 2019 sent another cheque of Ksh 30,000/- all marked **DMM4**.

e. The Respondent should be allowed to enjoy the fruits of the judgment.

DETERMINATION

The parties through Counsel filed written submissions with regard to the appeal. The issue for determination is whether the appeal should be upheld or dismissed.

This is the 1st Appeal, by virtue of **Section 78 of Civil Procedure Act** which outlines appellate powers of the Court, this Court is enjoined to re-evaluate and re-analyse the evidence on Trial Court's record.

Parties pleaded and adduced evidence to confirm the following undisputed facts;

On 26th January 2010, the Plaintiff and Defendant entered into a Sale Agreement of **Motor Vehicle Registration No. KAN 365W** Toyota Saloon. The Plaintiff was to pay Ksh 290,000/- in exchange for the possession of the said motor vehicle and its logbook.

According to the Sale Agreement, the Plaintiff was to pay Ksh 280,000/- retain Ksh 10,000/- to be paid on receipt of the logbook.

On 28th April 2011, the Plaintiff was intercepted by **PW3** from Central Police Station who stopped him and impounded the vehicle. It turned out the motor vehicle was registered in the name of Mary Khaemba a fact which the Plaintiff did not know about.

The facts contested are as follows;

From the evidence on record, the Plaintiff on payment of the Purchase Price he was handed over the motor vehicle which was in his custody and use for about around 1 year and 4 months, before it was confiscated.

The Appellant's submission is that judgment ought not to be entered against him to pay the purchase price to the Plaintiff as refund as the motor vehicle he sold him was taken away. The claim is based on 2 positions pleaded in the Defence and in his statement/testimony in Court;

a. The Defendant bought the motor vehicle from Peninah Wanjiru Kihara where a vesting order was granted in **CMCC MISC APPL 480 of 2008**.

b. The Defendant stated that Peninah Wanjiru bought the motor vehicle from an auction pursuant to decree and orders in **CMCC 12731 of 2006**.

The Appellant asserted that from these 2 positions, he was a *bona fide* purchaser and had a good title which he transferred to the Respondent.

The Appellant also stated that the named owner in the motor vehicle's logbook Mary Khaemba was not legally conclusive as owner of the motor vehicle as the objection proceedings in **Milimani Civil Suit 12731 of 2006** were dismissed on 17th August 2009 annexed at Pg 15 of Record of Appeal.

The Appellant also stated that vide the Certificate of Sale by Siuma Traders attached at Pg14 of Record of Appeal confirmed sale of M/V KAN 365W Toyota Corolla 100 for Ksh 143,000/- to Peninah Wanjiru Kihara and the Vesting order of 21st November 2008 in **Misc application 480 of 2008** he had a good title to transfer in the sale to the Plaintiff/Appellant.

ANALYSIS

The Court finds from the evidence on record that the Appellant and Respondent entered into a binding contract on the sale of motor vehicle KAN 365 W Toyota for Ksh 290,000/-. The contract is evidenced by the Sale agreement housed at Pg 17 of Record of Appeal.

When it came to performance of the contract, the Plaintiff paid the Defendant Ksh 280,000/- for the motor vehicle. Ksh 10,000/- was to be paid upon collection of the logbook of the motor vehicle from the Seller, the Defendant.

The Plaintiff was in possession of the motor vehicle and it was in good condition after his mechanic certified it as such. Pursuant to the confiscation of the motor vehicle by Law Enforcement /Police as the motor vehicle was deemed as unlawfully sold /stolen, the Plaintiff was

left without the motor vehicle he purchased and/or the Purchase price he paid to the Defendant under the contract. It follows that the consideration of the contract was not provided and hence there was breach of contract at the instance of the Appellant.

The Contract was between the Plaintiff and Defendant, where the offer made was accepted and each party provided consideration.

Refer: Currie vs Misa [1875] LR 10 Exch 153

Consideration may take the form of;

“a right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”

The Plaintiff provided consideration in form of the purchase price. The Defendant had provided the consideration of the motor vehicle which was later confiscated as confirmed by PW3. The Defendant lacked consideration of the contract and therefore breached the Contract. This Court concurs with the Trial Court’s finding at Pg 40 of the Record of Appeal;

This is a case of failed consideration and actual breach of contract.

The **Sale of Goods Act Cap 31 Section 23** provides;

“23. Sale by person not the owner

1. subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”

The Defendant pleaded and testified he was seller of Motor Vehicle KAN 365N to the Plaintiff and he released possession of the motor vehicle to the Plaintiff but title to the motor vehicle remained unavailed or not produced for 1 year and 4 months that the Plaintiff used the motor vehicle upto when it was carted away by police.

The Defendant relied on the claim that he bought the motor vehicle from Peninah Wanjiru Kihara who bought from an auction the car and obtained Vesting Order.

Section 107 – 112 of the Evidence Act cumulatively mandates that a party that alleges must/shall prove the claim. In the instant case, apart from the Defendant claiming the clean/good title from one Peninah Wanjiru Kihara who sold him the motor vehicle, he did not take out 3rd Party Notice/Proceedings to join the said Peninah Wanjiru Kihara to testify and be subjected to cross examination on how she bought the Motor Vehicle and obtained a good/clean title which she passed to the Defendant herein.

With respect, Courts read pleadings, and hear evidence from witnesses who after cross examination where the veracity of the evidence is tested and credibility of the witness is determined, the court considers its probative value in informing the decision/order /ruling/judgment of the court.

In the circumstances therefore, it was prudent for the Defendant to bring all relevant parties to this suit to the determination of the issue(s) in question, whether the Defendant obtained a good title that he could and/or did pass to the Plaintiff during the sale of the motor vehicle in the absence of providing the vehicle’s logbook.

In the absence of Peninah Wanjiru Kihara’s testimony and/or evidence, the Defendant’s claim of sale from Peninah passing a good title is not borne out be evidence or proved on a balance of probabilities.

As matters stand the Defendant did not prove before the Trial Court that he was a *bona fide* purchaser of the motor vehicle and he had a good title to pass to the Plaintiff.

In the case of Lawrance Mukiri vs AG & 4 others [2013]eKLR, the Court held a bona fide purchaser is a party who honestly intends to purchase property on sale [read Motor Vehicle] and does not intend to acquire it wrongly. The *bona fide* purchaser would have to prove the following;

- a. He holds the Certificate of Title [logbook]**
- b. He purchased the property [car] in good faith.**
- c. He had no knowledge of fraud**
- d. The seller had apparent valid title [logbook]**
- e. He purchased without Notice of nay fraud and**

f. He was not party to any fraud.

In the instant case, the Defendant at the time of sale to the Plaintiff on 26th January 2010 he had no logbook in his name as buyer from the seller Peninah Wanjiru Kihara and he did not even have a signed Transfer Form. The Vesting order by the Court arising out of the Auction was issued in 2008, until 2010 the logbook was not processed. The sale agreement at pg 11 of the Record of Appeal, between the Defendant as Buyer of the Motor vehicle and seller Peninah Wanjiru Kihara curiously is dated on the same date 26th January 2010 as the Sale agreement between the Plaintiff and Defendant and did not refer/mention or address the issue of the logbook which was mentioned in the 2nd sale agreement.

It is during the hearing on 12th June 2012, PW1 testified that he was given the logbook by an advocate called Mr. Osolo but it was long after the motor vehicle KAN 365N was impounded by police and taken away to the Registered Owner Mary Khaemba & Ecobank Ltd.

The totality of the evidence confirms that during performance of the terms of contract between the Plaintiff and Defendant, the Defendant did not have a good title to transfer to the Plaintiff as he had no title/logbook himself or transfer form signed by seller to him as purchaser of the said vehicle from Peninah Wanjiru Kihara. He also did not provide the Plaintiff/Purchaser with a logbook 1 year 4 months after the sale of the motor vehicle as per the Sale agreement. The Defendant did not have a good/clean title to pass to the Plaintiff as required under **Section 23 of the Sales of Goods Act**.

The Appellant took issue with the Trial Court's analysis of the evidence. That the Trial court sat on appeal on the Order **CMCC 12731 of 2006** and **CMC MISC APPL. 480 OF 2008** as the court found the auction of motor vehicle KAN 365 was irregular, null and void as no valid title had passed from the registered owner to the Defendant who also purported to sell it to Plaintiff.

This Court finds that orders issued in the above 2 cases related to different parties, subject matter and are from different Courts. These orders bound the parties before those respective courts. The orders being from courts of equal and competent jurisdiction were only persuasive and not binding to the Trial Court. What lacked is that apart from annexed documents of said orders, no evidence was led to confirm that the orders were genuine orders of these courts and that the orders were complied with by those parties. The Court Orders without evidence adduced were not sufficient for the court to rely on.

Specifically, with regard to the Vesting Order, despite the issuance of the order in 2008, the logbook was not processed in either Peninah Wanjiru Kihara's name then and/or the Defendant's name so as to transfer it to the Plaintiff in the Defendant's name. From the circumstances a good title did not pass, no evidence was led to confirm a lawful auction that effected transfer was conducted.

The Appellant contested the Trial Court's finding that the Defendant breached the contract which according to the Appellant did not happen, as the Sale Agreement considered the issue of provision of the logbook. It was provided in the agreement that the Plaintiff would retain Ksh 10,000/- pending delivery of the logbook. No time limit was set the period was indefinite. However, the Plaintiff waited for over 1 year and the Police impounded the vehicle as he had no document of ownership. At the time of confiscation of the motor vehicle the Plaintiff had no title over the said vehicle. The Defendant could not transfer a good/clean title to the car as he had not passed any title at the time admittedly, he had not processed transfer of title in the vehicle and/or been provided with logbook to provide the Plaintiff with.

Section 14 of Sale of Goods Act prescribes that in a contract for sale of goods it is an implied condition that the buyer has a right to sell the goods. There is also an implied warranty that the buyer shall have and enjoy quiet possession of the goods. Also there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any 3rd party, not declared or known to the buyer at the time when the contract was made.

In the instant matter, PW1 testified that after the motor vehicle was impounded and taken to Central Police Station, he was informed that the motor vehicle belonged to Mary Nekesa Khaemba and Eco Bank as she defaulted in payment of a loan. The Plaintiff heard this information for the 1st time. Clearly, he did not enjoy quiet enjoyment of the motor vehicle and was not informed of any interest, ownership or benefit of the motor vehicle by a 3rd party. The Defendant breached the implied terms and warranties of the of the contract by virtue of **Section 14 of Sale of Goods Act**.

The Appellant took issue with the fact that the Trial court erred by holding that there was material non-disclosure with respect to the log book while the issue was disclosed in the Sale Agreement.

This Court finds it strange that the Sale agreement housed at pg 11 of Record of Appeal between Peninah Wanjiru Kihara and the Defendant Paul N. Nyota was on 26th January 2010 to sell motor vehicle KAN 365W at Ksh 290,000/- to the Defendant by the said Peninah. At page 17 of Record of Appeal, another Sale Agreement of the same date 26th January 2010 was signed now between the Defendant, Paul N. Nyota selling to the Plaintiff David Muli Mutua KAN 365W for Ksh 290,000/-. The 1st Agreement made no reference to the logbook. The 2nd Agreement refers to delivery of logbook indefinitely and thereafter payment of the balance of Ksh 10,000/-.

The Plaintiff testified that the Defendant never produced any original logbook or transfer form or any other document. The Plaintiff was never informed of the sale of the vehicle from an auction, Vesting orders issued to have logbook processed or signed any transfer form, clearly, these circumstances depict material non-disclosure by the Defendant to the Plaintiff. All these facts were disclosed when Police impounded the vehicle and conducted investigation. This court concurs with Trial Court's finding.

In the case of **Stephen Kilonzo Nyondo vs Samuel Wahome Kibuthu [2015]eKLR**, where a similar situation arose but in relating to a motor cycle the court observed;

“It is not in dispute that the parties herein entered into a sale agreement for a motor cycle, that the Respondent paid Ksh

63,000/-- and subsequently it was established that the registration number of the cycle belonged to a motor vehicle. A search verified the anomaly. It would be unreasonable to expect the buyer to have continued keeping the cycle in such circumstances. It is contrary to reason to suggest that the seller had a good title nor could he pass title to the buyer in such circumstances.... I find no difficulty in concluding that the intention of the parties was that the buyer would have a good title and he had the purchase on that understanding....”

The Appellant contended that the Trial Court’s finding of misrepresentation, duress, undue influence coupled with mistake and illegality on the part of the Defendant was erroneous. These vitiating grounds of a valid contract were not specifically pleaded and evidence was not adduced to prove any or the vitiating factors. In the Court’s evaluation of pleadings and evidence, this Court did not find any of these vitiating factors pleaded and proved. That finding by the trial court was erroneous, as no evidence was led to prove any of the vitiating factors of a contract.

The Court finds that the Defendant failed to join other relevant party (ies) to adduce evidence and prove genuine sale of the motor vehicle and/or good title. Similarly, the Appellant cannot claim the deduction of the purchase price for the period the Plaintiff used the motor vehicle. It was not pleaded, a counterclaim was not filed against the Plaintiff, this Court cannot delve in new matters that were not canvassed at Trial. On the issue that the Trial Court recorded extensively the Defendant’s testimony and submissions and not the Appellants, the court record shows PW1’s evidence was recorded by Hon. Mr. Andanyi SPM(as he then was). After proceedings were typed, PWII’s evidence was recorded by Hon. R. Ngetich Chief Magistrate (as she then was). There after the proceedings were typed and the matter proceeded before Hon. D. O. Mbeja SRM who recorded evidence of PW3 and DW1.

This court cannot with precision confirm what was said during the proceedings and what was recorded. From the court record there was evidence of **PWI and PWII** that the Trial Court did not record and the Trial Court cannot be faulted. By and large the record confirms the recording of evidence is legal and procedural and in the absence of any other inculpatory evidence, the evidence is not sufficient to make an informed decision.

The Appeal is dismissed with costs and the Trial Court’s Judgment of 11th June 2018 is upheld.

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND JULY 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MASORE NYANGAU & CO ADVOCATES FOR APPELLANT – N/A

KATUNGA MBUVI & CO ADVOCATES FOR RESPONDENT- N/A

COURT ASSISTANT: TUPET