



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO. 57 OF 2017

PATRICK NJUGUNA KIMONDO.....APPELLANT

VERSUS

GEOFFREY VAMBA MBUTI.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. Kelly Resident Magistrate

in Nakuru CMCC 731 of 2014 delivered on 21st April 2017)

JUDGMENT

1. The Appellant Patrick Njuguna Kimondo was dissatisfied with the trial court's judgment delivered on the 1st April 2017. By a Decree dated 21st April 2017 he was ordered to

(a) Pay to the Respondent Geoffrey Vamba Mbuti a sum of Kshs.550,000/= with interest from date of filing the suit and cost of the suit, and

(b) To release the original logbook for Tractor Reg. No. KTCB 737 H to the Respondent.

2. The grounds for the Appeal are in the main that the trial Magistrate erred in law and fact in her findings that the respondent was entitled to the original logbook to Motor Tractor No. KTCB 727 H where

(a) It was in the appellant names thus prima facie evidence of ownership.

(b) That there was no evidence produced by the Respondent to support this ownership claim to the Tractor.

(c) Failure by the trial magistrate to appreciate provisions of Section 97 and 98 of the Evidence Act that excludes oral evidence in matters where a fact has been proved by way of a written document.

Parties urged the appeal by oral submissions.

3. The suit before the trial court was for an order of surrender of the log book of the tractor that, by the Respondent's plaint dated 1st July 2014 and filed on the 31st July 2014 he bought from CMC Motors through Hire purchase financed by NIC Bank but through the Appellant's Bank Account as he did not have an account with NIC Bank, by an arrangement between the two parties.

4. At the time of purchase of the Tractor CMC was running a promotion campaign that any winner would be given a FORD RANGE T6 Pickup.

The Respondent won and on the 10th October 2013 was presented with the price the Pick-up upon which the two parties agreed to sell the pickup and share the proceeds equally. The purchase price was Kshs.2,900,000/=. The Respondent was paid and pursuant to their oral agreement he was to give Ksh.1,450,000/= to the appellant.

5. The Respondent however released Kshs.900,000/= to the Appellant leaving a balance of Kshs.550,000/= the subject of this suit and an order for release of the logbook to the appellant.

6. It is upon the above background and evidence adduced that the trial court delivered the judgment subject of this appeal.

7. Mr. Githui advocate for the appellant in his oral submissions before me stated that the Appellant was willing to surrender the original logbook for the tractor to the Respondent.

That being the case the issue of ownership is now resolved and settled.

8. Only one issue is for determination.

Whether the Respondent is entitled to the share of the purchase price of the pickup won in the promotional raffle.

Out of the purchase price Kshs.900,000/= was paid leaving a balance of Kshs.550,000/=.

This is not in dispute. It was part satisfaction of the oral agreement to the sharing of the purchase price of the pick-up, and therefore part-performance of the contract/agreement was achieved.

9. As the first appellate court, I am under an obligation to re-evaluate and re-consider the evidence adduced before the trial court and come up with my own findings but being aware that I did not see or hear the parties testify.

Further the court will only interfere with the trial court's findings only if it is found that the same are not based on sound evidence or that the court acted on wrong principles of law. See – **Kemfro Africa T/A Meru Express Services & Another –vs- Lubia and Another (1982-88) AR 727 and Selle & Another –vs- Associated Motor Boat Company Ltd (1968) EA 123.**

10. I have considered the Appellant submissions before the trial court which Mr. Githui Advocate sought to rely on.

Admittedly the tractor was registered in the appellant's name pursuant to the parties oral agreement. In terms of **Section 97(1) Evidence Act,**

“When the terms of a contract or a grant or any other disposition of property have been reduced to the form of a document, and in all other cases which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”

11. I have seen the delivery note for the Tractor. It shows that the purchaser was the Appellant, though collected by the Respondent.

In my view collection of a property from a vendor by a party does not make the collector the owner. Ownership can only be proved by way of documentary evidence, or any other manner, in this case the logbook, sale agreement and payment of purchase price by the party who claims ownership, oral agreements if well supported by credible evidence.

12. The parties entered into oral agreements both in the manner of purchase and payment of the purchase price for the tractor. That was followed by a further agreement on the promotional raffle win of a pick-up which was won by the Appellant as the purchaser of the tractor and another for the sale and sharing of the promotional price, the pick-up.

13. On that basis the appellant made part payment to the Respondent leaving the balance of Kshs.550,000/=. Given the circumstance is the oral agreement enforceable? Had the parties agreed to share the proceeds equally or otherwise?

14. I agree with Mr. Githui's submission that the contract between the two parties was a gaming contract which is defined as a playing game for stakes with certain promises expressly or impliedly if a party wins – **Halsbury's Laws of England Vol. 18 Page 168.**

By the above definition the oral agreements between the Appellant and the Respondent can be said to be Gaming Contracts and are enforceable as contracts.

15. **Section 3(1) Law of Contract Act** does not make all contracts void and unenforceable if they are not reduced into writing.

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

16. The Appellant cannot run a way from the obligations under the oral contract between himself and the Respondent. I believe and hold that it is on this basis that part payment of the promise of Kshs.900,000/= was made, prior to filing of the primary case, and now, by his willingness to release the logbook of the Tractor to the Respondent.

17. What would have prompted the appellant to make the partial payment and the offer to surrender the logbook if not recognition of the terms of the oral agreements?

18. I agree with Mr. Musyoki Advocate for the Respondent in his submissions that the Appellants offer to surrender the logbook was and is an admission of the enforceability of the oral agreements. For the foregoing I am satisfied that the trial magistrate sufficiently applied the

evidence by the parties, and the relevant law to come to the findings that the parties were entitled to share the sale proceeds of the pickup equally.

19. I am further satisfied that the evidence on record fully supports the findings of the trial magistrate. In particular the Appellant testified that he was buying the tractor for the Respondent. The Appellant is thus barred and estopped from denying the Respondent's share of proceeds of the sale of the pick-up yet what qualified him to enter the CMC promotion and eventual win of the Pick-up was money deposited into his account by the Respondent for the purchase of the tractor for benefit of the Respondent.

20. For the above reasons, I find no merit in the appeal.

Consequently the decree of the court issued on the 21st April 2017 shall be fully enforced.

To that end, I direct that the Appellant do release to the Respondent the Original logbook to Motor Tractor No. KTCB 737H within 14 days of this judgment.

Further, the sum of Kshs.550,000/= payable to the Respondent by the appellant shall accrue interest at court rates from the date of filing of the subordinate court case.

21. As the appellant dropped part of the appeal in respect of the logbook, I order costs of the appeal to the Respondent at 50% scale fees or as may be agreed.

Dated, signed and delivered this 7th Day of February 2019.

J.N. MULWA

JUDGE