



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 122 OF 2018

BETWEEN

RICHARD AREGE OMayio.....APPELLANT

AND

CHARLES JUMA OKAL.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Wamucii, RM dated 16th November 2018 at the Magistrates Court in Kisii in Civil Case No. 335 of 2018)

JUDGMENT

1. The appellant, as plaintiff before the subordinate court, appeals against the judgment dismissing his claim against the respondent, who was the defendant, for the following reliefs:

- a. Return of motor vehicle Mitsubishi FH 215 KBZ 185R in good condition.*
- b. Special damages and mesne profits and opportunity costs of Kshs. 30,000/= per month X 36 months the defendant has had the vehicle = 1,080,000/=.*
- c. General damages for breach of contract and illegal impounding of the motor vehicle.*
- d. Costs of the suit,*
- e. Interest on the above and any relief the honourable court may deem just and equitable to grant.*

2. For ease of reference, I shall refer to the parties in their capacities before the trial court save where the circumstances otherwise dictate.

3. The plaintiff's case was that the defendant had obtained a loan from Equity Bank Limited ("the Bank") to purchase the motor vehicle Mitsubishi FH 215 registration number KBZ 185R ("the vehicle") but he decided to sell his interest to the plaintiff. In that regard the parties entered into an agreement dated 15th August 2014 titled, "Guarantee Agreement." The defendant was the *Guarantor* while the plaintiff was the *Guarantee* and it provided, in part, as follows;

AMOUNT OF GUARANTEE is the outstanding loan owed to EQUITY BANK payable at the rate of Kenya Shillings One Hundred AND Forty-eight thousand only (Kshs. 148,000/=).

SPECIAL CONDITION

- 1. THAT the Guarantee undertakes to pay monthly instalments of Kshs. 148,000/= inclusive of insurance for 60 months.*
- 2. THAT the Guarantor to notify the Guarantee of any change of user or routes.*
- 3. THAT the Guarantor shall keep the Guarantee at EQUITY BANK running in the period of stay.*
- 4. THAT there is no consideration for the undertaking herein,*

5. THAT the Motor Vehicle is registered in the names of CHARLES JUMA OKAL and EQUITY BANK and the said CHARLES JUMA OKAL shall handover the logbook and transfer to the said RICHARD AREGE OMayio.
6. THAT in the case of default and the Bank repossess the vehicle the Guarantor shall have the right to recover any shortfall resultant from the process from the Guarantee.
7. THAT the Guarantee has paid a deposit to CRATER AUTOMOBILE (NBI) LTD Kshs. 500,680/- the suppliers of the motor vehicle at the date of execution.
8. THAT the Guarantee has paid costs of insurance as required by the terms of the loan i.e life cover and for the motor vehicle (comprehensive).
9. THAT the sale is subject to the LAW SOCIETY condition of sale (1987) in so far as they are not inconsistent in this agreement and/or specifically hereby excluded.
10. THAT any defaulting party to this agreement shall forfeit and/or surrender 10% of the purchase price.

4. The plaintiff stated that after the signing of the agreement, paying Kshs. 500,000/- and all the money for licences, insurance under the loan agreement and all other monies required to operationalize the agreement, the defendant forcefully took the vehicle, immobilized the tracker and lied that the vehicle had been involved in an accident therefore taking it to KCI garage where it remained. He claimed that he did not have use of the vehicle and thus sought the reliefs I have set out above.

5. The defendant denied the plaintiff's claim and stated that he was the registered owner of the vehicle subject to the interest by the Bank and that he was still servicing the loan. He denied that he vandalized the vehicle after the plaintiff had paid all the necessary money to operationalize the agreement. He also denied that he took the vehicle to the KCI garage in Nairobi by using deception and the police. He also asserted that the plaintiff failed to pay the agreed monthly instalments and that following an accident on 17th October 2014, he paid the loan of Kshs. 6,351,843/- and that the plaintiff was not entitled to the vehicle.

6. Both the plaintiff and defendant testified and after considering the evidence, the trial magistrate held as follows:

[11] Given that both parties have breached their own agreement, what remedy is there for the plaintiff? None at all. He cannot recover the said motor vehicle because he stopped paying for it long before the defendant took possession, having made the '3rd payment' on 14/11/2014 and the vehicle having been taken on 12/03/2015. It is disturbing that he chose to wait until he heard that the motor vehicle had been fully paid for then he files this suit to recover not only the vehicle but that he calls special damages and mesne profits of a whopping Kshs. 1,080,000/-. Prayer (a) lacks merit and is dismissed with costs.

7. The appellant raised several grounds of appeal in his memorandum of appeal dated 17th November 2018. However, the issue for resolution is summarized in the prayer set out in the memorandum that this court declares, "The appellant was the one whose funds were sourced to purchase the subject motor as admitted by the respondent and he had a right to possess the same."

8. The appellant case was he paid for the vehicle and that the respondent took it from him forcefully in breach of the agreement. He was of the view that he was entitled to the agreement. The respondent submitted that he had settled the loan with the Bank hence the appellant was not entitled to the vehicle.

9. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd* [1968] EA 123).

10. Before I consider the factual issues, I accept that the relationship between the parties was governed by an agreement reduced into writing. Thus in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another* NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR 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." Further in *Twiga Chemical Industries Limited v Allan Stephen Reynolds* NRB CA Civil Appeal No. 300 of 2006 [2014] eKLR, the Court of Appeal held that:

The parole evidence rule is a well-grounded rule in law, the circumstances prevailing in this case, however, exclude its application. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. [Emphasis mine]

11. Although the agreement is not the hallmark of good draftsmanship, this court must give it the meaning the parties intended. Under the agreement the plaintiff was to pay Kshs. 148,000/- per month for a period of 60 months until the loan was settled. It is only when the loan with the Bank was settled that the plaintiff obtain title to the vehicle. It was the burden of the plaintiff to show that he had paid all the instalments to entitle him to the vehicle. I have reviewed the evidence and I agree with the trial magistrate that the plaintiff did not show that he paid the 60 instalments as agreed. According to the evidence he only made 8 payments and some of which were not towards payment of the vehicle. In his evidence, the plaintiff admitted that he was not able to service the loan as those payments were pegged on him having the vehicle for his business. He testified that since the defendant had taken the vehicle he could not service the loan. In re-examination he stated that he paid the last loan payment of Kshs. 170,000/- on 6th February 2015. He also admitted that the defendant had paid the loan in full. On the other hand, the defendant produced the bank statements for the loan account which showed that he had completed paying for the vehicle.

12. The court will only assist a party to enforce a contract if the party has performed its part of the bargain as the court in *Aziz v Bhatia Brothers Ltd* [2001] 1 EA 7 held, "A party who has performed his part of the bargain may be assisted by the Court to enforce the contract

against the defaulting party...". As both parties agree that the plaintiff had not paid all the agreed installments and that the defendant cleared the loan, it follows that the plaintiff is not entitled to the vehicle and the court cannot assist him in that regard.

13. The plaintiff's other claim was for special damages and mesne profits. It was pegged on the fact that the defendant took the vehicle on 12th March 2013. The plaintiff claimed that he was therefore unable to pay the installments. Since the plaintiff had already defaulted in paying the monthly instalments, the respondent decided to repossess the vehicle. The trial magistrate rightly found that the right of repossession for the defendant was not available in the agreement as such the defendant also violated the agreement. The remedy for either party under *Clause 10* of the agreement was, "*THAT any defaulting party to this agreement shall forfeit and/or surrender 10% of the purchase price.*" It is clear from the agreement that neither party was entitled to any other form of damages other than what was agreed upon.

14. Even if I accept that the appellant was entitled to special damages for the time the vehicle had been repossessed, it was the duty his duty to specifically plead and prove such damages. This principle is well established and I can only reiterate what the Court of Appeal stated in *Siree v Lake Turkana El Molo Lodges [2002] 2EA 521* that, "*This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages.*" The appellant did not prove the nature and extent of his loss for example by producing documentary evidence of daily collections or other evidence of the nature of the business to support the claim.

15. For the reasons I have set out, this appeal is dismissed with costs to the respondent which I assess at Kshs. 20,000 exclusive of court fees.

DATED and DELIVERED at KISII this 13th day of MAY 2019.

D.S. MAJANJA

JUDGE

Appellant and respondent appeared in person.