



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO 43 OF 2014

JOSEPH NYONGESA SITUMAAPPELLANT

VERSUS

AL-HYDER TRADING CO. LTD.....1ST RESPONDENT

RANA S. ALI.....2ND RESPONDENT

[An appeal from judgement delivered on 14/5/2014 in Bungoma CMCC suit Number 749 of 2010 by P.N. Areri Principal Magistrate]

JUDGMENT

By plaint dated 23rd October 2010, the appellant sued the Respondent seeking recovery of earning of Kshs.6,515/= per day from 31st September 2010 until the respondents deliver log book for appellant's motor vehicle and an order of specific performance against the respondents to hand over the log book or sign transfer forms in favor of the plaintiff so that the said motor vehicle is registered in his name. he also sought interest at court rate and costs of the suit.

Briefly the case for the applicant was that on the 18th September 2009 the 1st Defendant/Respondent herein agreed to sale to Plaintiff/Appellant motor vehicle registration number KBJ 286 Chassis number LH 172-0019396 Toyota HiAce D at a sum of Kshs.1,300,000/=. It was implied term of the agreement that the plaintiff pays the consideration in two instalments and plaintiff paid the said consideration and was given the motor vehicle without number plate and log book but later given number plate but no log book to date and he has suffered loss and damage and continues to suffer since he is a businessman who relies on credit from banking institutions basing on the said property.

The Respondents in its defence denied the allegations set out in the entire plaint but while the suit was pending for hearing the Respondents handed over the log book to the Appellant which led to trial court to dismiss the suit on ground that the claim had been compromised by delivery of the log book to the Appellant.

The appellant then filed this appeal faulting the judgment and decision on the following grounds:

- i. That the learned trial magistrate erred in law and fact when he dismissed his suit against the respondents on allegations that the suit had been compromised.**
- ii. in making findings that were out rightly unsupported by facts adduced in court;**
- iii. That the learned trial magistrate erred in law and fact when he arrived at the decision that the appellant did not specifically plead his claim.**
- iv. That the learned trial magistrate erred in law and fact when he found that the Appellant did not proof that his motor vehicle was not in operation because of Respondents omissions.**
- v. That the learned trial magistrate erred in law and fact by deciding that the appellant had no cause of action as against the 2nd Respondent in the aforesaid suit.**
- vi. That the learned trial magistrate was biased on the part of the Appellant.**

This being a first appeal, this court is to reevaluate and reexamine the evidence before the lower court and arrive at its own

independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

Evaluating the evidence on record, it is my finding that the suit while pending for hearing the Respondents handed over the Log book to the appellant which led to the claim been dismissed by trial court and same never proceeded to trial.

By consent of the parties, this appeal was canvassed by way of written submissions. Mrs. Chunge for the appellant submitted that the trial magistrate erred in dismissing the appellant suit without good reason and that appellant categorically set out evidence in court on the claim. Counsel submitted that the appellant operations had been hampered because of not being able to secure a TLB Licence due to lack of log book. She submitted that the trial court failed to consider that the Respondent breached the agreement. She submitted that before filing the suit in court the appellant through his advocate wrote demand letter to the respondent requesting for the logbook that is one year after payment of full purchase price and thereof urge this court to review the evidence.

Mr. Odhiambo counsel for the respondent submitted that the trial magistrate specifically addressed his mind to the pleadings and prayers sought and arrived at a decision that was well thought founded on principles of law and submitted that finding was fair and magistrate was spot-on in holding that there was no way appellant would proceed against 2nd Respondent when agreement was between him and 1st Respondent.

The learned trial magistrate after considering the evidence in his judgement stated;

I have considered the pleadings of the parties and evidence on record. Including the exhibits and I find the plaintiff’s claim against the defendant was comprised when defendants’ advocates handed over the log book top the plaintiff through the Plaintiff’s advocates. The court cannot order the defendants’ to do what they have already done.

Secondly the Plaintiff’s has not specifically pleaded his claim of loss of earning. It is not clear how much the plaintiff is claiming from defendants jointly and severally as the claim for Kshs.6,515/= per day from 30.9.10 to the time the defendants delivers the log book is ambiguous. It is not the duty of this court to state a party’s claim’s against another. Thirdly even if I were to put a period to the plaintiff’s claim the plaintiff has not proved that the vehicle was not operational because of the defendants’ omissions. During cross examination by the defendants’ counsel it emerged that at the same time during the period in question the plaintiff’s motor vehicle has been prohibited from the road for reason of being defective and the plaintiff did not prove when the prohibition was lifted if at all.

Lastly the plaintiff did not prove why he sued the 2nd defendant if the agreement was with the 1st defendant. The fact that he deposited the purchase price of the motor vehicle into the 2nd defendant liable for any omission, commission or breach by the 1st defendant who is a limited liability company. Simply put the plaintiff had no cause of action against the 2nd defendant.

For the foregoing reasons I find the plaintiff’s claim against the defendants jointly and severally not proved and I proceed to dismiss the suit herein with costs to the defendants.

M/s Chunge for the appellant both in the grounds of appeal and submissions faulted the trial Magistrate for failing to consider the agreement and to find that it was breached by the Respondents by handing over the log book two years after making full payment and a year after filing of the suit. Mr. Odhiambo for the Respondent submitted that the Judgment was based on evidence adduced and sound in legal principle applicable.

From the evidence, there is no doubt that there was a sale agreement in respect of the motor vehicle. Payment of purchase price was made and appellant took possession of the motor vehicle but was not given the log book. He filed this suit to claim transfer of log book and loss of earning at Kshs.6.515/= from 31st September 2010 until the date the defendant delivers the log book. The log book was delivered in the course during the pending of this suit. The trial Magistrate therefore rightly in my view found that that prayer had been compromised.

The only other issue that remained for determination is whether the appellant established his case for Judgment on loss of earning of Kshs.6,515/= per day. The appellant in his evidence testified that he took possession of the vehicle from the Respondent and used the Motor vehicle for Matatu business until when T.L.B. License expired. He then parked it at his house. It is therefore clear that at all material times he had the vehicle in his possession. He however contends that he was unable to use it for Matatu business due to fear that he could not obtain T.L.B. License and is therefore entitled to loss of earning. Loss of earning is a prayer under Special damages. Special damages must not only be specifically pleaded but must also be proved. It is established that at all material times the appellant had possession of the vehicle which was at his disposal. He cannot therefore be entitled to a claim for loss of earning when he had the vehicle in his possession.

I therefore find that he did not prove his claim and the suit was properly dismissed. I find this appeal without merit and same is dismissed with costs.

Dated and Delivered at BUNGOMA this 22nd day of July, 2019.

S.N.RIECHI

JUDGE