



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 15 OF 2012

FRACIAH HIGIRU GITHINJI.....APPELLANT

VERSUS

JOHN NDUNG'U.....1ST RESPONDENT

FRANCIS KINJANJUI.....2ND RESPONDENT

HUTCHINSON THEURI MWANGI.....3RD RESPONDENT

(Being an appeal from the judgment of Honourable F.N Kyambia, Principal Magistrate delivered on 14th May, 2012 in Eldoret CMCC No. 110 of 2007).

JUDGMENT

The 1st respondent filed a suit in the trial court, Eldoret CMCC No. 110 of 2007 seeking orders for a refund of Kshs. 270,000/- from the appellant. The 1st respondent purchased a vehicle KAK 578Y from the appellant for a consideration of Kshs. 270,000/- on 23rd October 2006. The vehicle was allegedly seized by CID and later customs and excise department officers for being uncustomed. The 1st respondent sought for a refund of kshs. 270,000/-.

The trial court held that the plaintiff had proven his case and entered judgment in favour of the plaintiff. The appellant being dissatisfied with the decision filed the present appeal.

APPELLANT'S CASE

The appellant filed submissions on 19th November 2018.

He submitted that there was no material non-disclosure by the respondent. The 1st respondent knew that he was purchasing a second hand motor vehicle that had already been used locally for some time. He referred to the sale agreement and submitted that it was clear that the appellant sold the vehicle to the 1st respondent in the same way she had bought it from the 2nd respondent. The 1st respondent had not proven that there was material non-disclosure. It was therefore preposterous to expect the appellant to disclose what was not within her knowledge. The 1st respondent did not discharge the burden of proof in establishing whether there was a basis for holding that there was material non-disclosure.

Although the 1st respondent testified that the vehicle was seized by KRA it is evident from PExh-3 that the vehicle was suspected to be uncustomed from the notice of seizure. The 1st respondent did not call anyone from KRA to confirm the outcome of the investigation. Without calling the witnesses we cannot be sure whether the respondents chose to abandon the vehicle at KRA offices and file a frivolous claim after wasting the vehicle. Without proof that the appellant had no authority to sell the vehicle, 1st respondent's claim ought not to have succeeded. He relied on the case of *Joel Muthuri v Julius Gichuru Guantai [1996] EKL.R.* The 1st respondent did not prove that the appellant had imported the suit vehicle and therefore to require the appellant to furnish importation documents was farfetched to say the least.

There was overwhelming evidence that the vehicle was second hand. The appellant led evidence to show that the vehicle had been acquired from the 2nd respondent. It is evident that the vehicle was sold to the 1st respondent in the same state it had been acquired from the 2nd respondent. If there was any fault it was attributable to the 2nd respondent who had sold the vehicle to the appellant. The trial court erred in dismissing the appellant's claim.

The trial magistrate took into account irrelevant consideration in arriving at the decision. The trial magistrate erred in holding that the chassis in the logbook had been altered as he is not an expert and no evidence had been led to prove the same.

If there was any alteration, it was the duty of the plaintiff to prove that this was done with the full knowledge of the appellant. From the record there is no evidence to suggest the same and therefore the findings of the court were superfluous.

The trial court decided to rescind the contract yet the same had not been prayed for. Parties are bound by their pleadings and evidence. He relied on the case of *IEBC & Another v Stephen Mutinda Mule & 3 others [2014] EKLK* to support this submission.

From the analysis of all the issues, the appellant submitted that the trial court erred in awarding costs to the 1st respondent. This was in view of the fact that the appellant had bought the vehicle from the 2nd respondent and there was no evidence that she had altered anything. The vehicle was sold in the same state to the 1st respondent.

1ST RESPONDENT'S CASE

The 1st respondent filed submissions on 3rd December 2018.

The respondent testified as PW1 and testified that the vehicle was sold to him on 7th December 2006 and he took possession of the same. He testified that the logbook was improper and the chassis number had been cut and another number inscribed and KRA impounded the vehicle as an uncustomed property. He did a search on the chassis number on 22nd march 2007 and the owner was Abednego Adudo Andaja and the chassis number was AE91004897. Upon discovering that the names in the logbook are different the appellant refused to refund the purchase price after being asked to. During cross examination the 1st respondent testified that the logbook says the vehicle was KAK 578Y, chassis number AE91005692 engine number 5A-3338597. Further, he testified that the sale agreement refers to chassis number AE91-00452 engine number SA 333859. PW2, SGT Fredrick Simiyu Sirengo testified that he could see welding marks around the chassis number meaning the numbers were padded in the motor vehicle and the engine was not genuine. The appellant also confirmed vide DExh 3 that the records from KRA show that the chassis number is AE91 00486697 while in the agreement it is no. 0045692. It is not in contention that the vehicle was tampered with and the appellant was aware of this fact and failed to make full disclosure to the respondent. It was the duty of the appellant as the seller to make a full disclosure and as a result the vehicle was not sold on an as is where is basis.

It was the 1st respondent's claim that the chassis had been tampered with and he also called PW2, a CID officer who corroborated his testimony.

The trial court was correct in finding that the vehicle had been seized for non-payment of duty. The 1st respondent produced a notice of seizure of the suit vehicle from the customs and excise department as plaintiff exhibit 3. The 1st respondent was required to show that duty had been paid on the vehicle but on approaching the appellant he failed to provide the documents as required and also in compliance with the agreement of sale. A copy of records from the registrar of motor vehicles (PEXh-4) confirms the fact that the chassis number was different from that in the vehicle or that in the log book.

It was within the knowledge of the appellant whether the duty had been paid or not. The appellant failed to provide the 1st respondent with any documents in support of the claim that duty had been paid, as required in the agreement. The appellant could have called a witness from customs to corroborate this claim but he did not. The trial magistrate took into consideration relevant facts in reaching his conclusion on the issue of the seizure of the vehicle.

At page 50 of the record of appeal the respondent prayed for judgment against the appellant for refund of Kshs. 270,000/-. In support of the prayer the respondent called PW2 to corroborate his testimony that the suit vehicle's chassis number had been cut and another number inscribed which was evidenced by exhibit 2(a) and (b). Exhibit 3 evidenced that the vehicle had been impounded as uncustomed property. He produced a receipt book as PEXh-1 which proved that Kshs. 270,000/- had been paid as the purchase price. The 1st respondent testified that the appellant had failed to supply all the necessary documentation as agreed between them. *Section 3A of the Civil Procedure Act* provides for unlimited powers of the court to make any orders as may be necessary for the ends of justice or to prevent abuse of the court process.

The 1st respondent pleaded for a refund of the purchase price and once refunded, the contract is automatically rescinded within the parties.

The appellants' statement of defence was full of mere denials. The appellant failed to tender any documentary evidence in support of his case and also failed to call out any witness or evidence to the effect that she had paid duty. She also failed to prove the year of alteration and admitted to the fact that the chassis number had been tampered with. The trial magistrate having gone through all the pleadings and evidence on record framed the issue for determination and on the strength of the 1st respondent made a finding in her favour.

3RD RESPONDENT'S CASE

The 3rd respondent submitted that only parties to a contract have privity to that contract and any person outside of that contract cannot be bound by the terms of the contract. The trial magistrate rightly dismissed the claims against the 3rd respondent as he was not a party to the contract and had passed a good title to the 2nd respondent.

ISSUES FOR DETERMINATION

- a) Whether the trial court erred in rescinding the contract and ordering the refund of the purchase price.

The 1st respondent and the appellant entered into an agreement for the sale of a motor vehicle agreement. It was a term of the agreement that the seller will hand over the necessary documents regarding ownership to the 1st respondent. One and a half months after purchase of the

vehicle, it was seized for being uncustomed goods. The 1st respondent called PW2, an officer from the CID who corroborated the evidence that the chassis number had been tampered with. The customs and excise department would only release the vehicle if the respondent supplied the documents to prove duty had fully been paid. The appellant failed to provide the documents and failed to refund the sum resulting in the suit.

The appellant clearly concealed certain facts from the 1st respondent when she entered into the agreement. This is evidenced by the failure to produce the necessary documents. The plaintiff therefore suffered loss and damage.

Section 3A of the *Civil Procedure Act* provides;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Further, the 1st respondent sought a refund of the purchase price. This would automatically result in the contract being rescinded. According to Cheshire, Fifoot & Furmston’s *Law of Contract*, 14th Edition at page 311, it is stated that;

‘It is a fundamental principle that the effect of misrepresentation is to make a contract voidable and not void. This means that the contract is valid unless it is set aside by the representee. Upon discovering the misrepresentation the representee may elect to affirm or rescind the contract’

The 1st respondent sought to rescind the contract by asking for the refund which the appellant did not provide resulting in the suit in the trial court. It is evident that the appellant clearly misrepresented the suit vehicle’s status with regards to payment of custom and failed to provide all the necessary documents of ownership in breach of a clear term of the contract. The trial court exercised its inherent jurisdiction in rescinding the contract.

There is no doubt that the vehicle was seized for non-payment of duty. The appellant has failed to prove that the trial court failed to take into account relevant considerations in arriving at its decision. The Appellant having failed to meet the terms of the contract had breached the contract, especially the provision of all necessary documentation with regards to ownership of the said motor vehicle, and as a result the 1st respondent was entitled to a refund of its purchase price.

In the premises the appeal fails on all grounds with costs to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of November, 2019

In the absence of:

Mr. Kima for the appellant

In absence of Mr. Ngigi Mbugua for the 1st and 2nd respondent

Mr. Juma for the respondent, and holding brief for the 3rd Respondent

Ms Abigaël – Court assistant

Mr. Chege :-

We pray for 30 days stay to make arrangements.

Mr. Juma:-

No objection.

COURT:-

30 days stay is granted.

SIGNED

S.M GITHINJI

JUDGE

16/12/2019