



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 266 OF 2014

GERALD MUTUNGA MUTYETUMOAPPELLANT

VERSUS

FESTUS K. MUTHIANI..... RESPONDENT

(Being an appeal against the Judgment of the Chief Magistrate's Court at Nairobi delivered on 6th June, 2014 by Hon. Leah W. Kabaria(MS) RM in CMCC No. 2058 of 2012

JUDGMENT

The Appellant herein was the Defendant in the trial court in the Chief Magistrate's Court at Nairobi, Civil Case Number 2058 of 2012, whereas the Respondent was the Plaintiff. In the said suit the Respondent filed the plaint dated 20th day of February, 2012 claiming special damages in the sum of Kshs. 1,361,310/=, damages for breach of contract, costs of the suit and interest from the Appellant.

The Respondent pleaded that on the 21st December, 2010 he entered into a sale agreement with the Appellant for the sale of motor vehicle registration number KBK 260C Range Rover at an agreed price of Kshs. 4,000,000/= and the parties agreed on the payment of the purchase price.

He averred that the Appellant breached the terms of the sale agreement and declined to pay the balance of the purchase price. That the Appellant only paid Kshs. 2,638,690/= out of the agreed price of 4 million leaving a balance of Kshs. 1,361,310/= which the Respondent has claimed together with interest with effect from 1st January 2011. The Respondent also claimed damages for breach of contract and costs of suit.

The Appellant filed a statement of defence on the 16th day of July, 2012 in which he denied the claim. He admitted having entered into the agreement for sale of the Respondent's motor vehicle KBK 260C Range Rover on the 21st December, 2010 but stated that the same was done on the understanding that the purchase price of Kshs. 4,000,000/= was a tentative price and not the final price as alleged by the Respondent as the final price was subject to the outcome of a valuation report which valuation was released on the 1st March, 2012 which revealed that the respondent's motor vehicle aforesaid was valued at kshs. 2,638,690/=.

The Appellant stated that following the valuation, he informed the Respondent that he was ready and willing to pay the balance of kshs. 438,680/= in full and final settlement or in the alternative, he was ready to return the vehicle to the Respondent in exchange of the money that he had already paid. He further stated that the Respondent was not ready to refund the deposit and he refused to accept the balance that was being offered to him of Kshs. 438,690 but which amount he later accepted.

The Appellant contended that by accepting the balance as aforesaid, and executing the transfer document the Respondent received the balance in full and final settlement otherwise, he would not have executed the transfer form and/or confer ownership of the motor vehicle to him.

He denied owing the Respondent the claimed sum of kshs. 1,361,310/= or any more money and he reiterates that he paid for the motor vehicle in full and for what it was worth.

The Respondent filed a reply to the defence on the 27th July, 2012. He specifically denied that the agreed purchase price of Kshs. 4,000,000/= was a tentative price subject to any valuation. He admitted having received the deposit of Kshs. 2,000,000/= for the sale of the subject motor vehicle.

The Respondent averred that the payment of kshs. 438,690/= by the Appellant instead of Kshs. 1,361,310 being the agreed balance of purchase price was indeed a breach of the express terms of the sale agreement between the parties. He contended that the receipt of Kshs. 438,690/= was done on account and on a "without prejudice" basis pending the payment of the balance of the purchase price.

At the hearing, the Respondent testified and called a witness in support of his case. In his evidence, he stated that they entered into a sale agreement with the Appellant dated 21st December, 2010 for sale of motor vehicle KBK 620C, Range Rover at a price of Kshs. 4,000,000/= out of which he received a deposit of Kshs. 2,000,000/=. That in addition, the Appellant gave him his Mercedes Benz as a trade-in but the Appellate took it back. It was his evidence that on the date they signed the agreement, he signed the transfer form and gave it to the Appellant together with the logbook and the motor vehicle was transferred to the Appellant on the 24th February, 2011. He averred that apart from the sale agreement dated 21st December, 2010, parties did not enter into any other agreement regarding the condition of the said motor vehicle.

He testified that he obtained the valuation report dated 1st March, 2011 two months after the vehicle was transferred. He averred that the Appellant did not pay him Kshs. 1.8 million after he repossessed the Mercedes Benz. It was his evidence that he sold the vehicle as it was and the agreement they signed did not refer to any valuation.

The brother to the Respondent testified as PW2, he is Humphrey Suleiman. He is the one who introduced the Appellant to the Respondent as a customer as he was interested in buying the motor vehicle. He confirmed that the purchase price was agreed at Kshs 4,000,000 and a sale agreement was entered into by the parties and he witnessed the same. He stated that there was no other agreement that was entered into by the parties apart from the one dated 21st December, 2010. He confirmed that his brother was not paid the balance of the purchase price.

The Appellant testified as the only witness in support of his case. He admitted having signed the sale agreement dated the 21st December, 2010 and on the same day he transferred Kshs. 2,000,000/= into the Respondent's account as the deposit. He stated that the vehicle was old and used and was not in the state that he had been promised and he gave some conditions precedent before the sale could proceed and the Respondent agreed to these conditions. Among them were that the vehicle would be valued and that the Respondent would meet repair costs of kshs. 661,310.55 which was to be deducted from the balance of the purchase price.

He denied that he had authorized the Respondent to take his Mercedes Benz and averred that he does not know how the Respondent managed to get it from DT Dobie but he was able to recover it after he threatened to report the matter to the police.

The trial Magistrate in her judgment delivered on the 6th June, 2014 entered judgment in favour of the Respondent plus costs and interest. That judgment is the subject of this appeal. In his memorandum of appeal filed on 2nd July, 2014, the Appellant has listed seven (7) grounds of appeal.

The appeal was disposed of by way of written submissions.

This court has considered the grounds of appeal and the submissions filed herein. The duty of this court as the first appellate court is to evaluate the evidence afresh and come to its own conclusion except to remind itself that it neither saw nor heard the witnesses when they testified. See the case of ***Selle & Another Vs. Associated Motor Boat Company Limited (1968) EA. 123.***

It is not in dispute that the parties herein entered into an agreement dated the 21st day of December, 2010. The same was for sale of motor vehicle registration number KBK 260C, Range Rover for an agreed price of Kshs. 4,000,000/=. The agreement has stipulated how the purchase price was to be paid as follows;

1. Kshs. 2,000,000/= was paid into the Respondents Bank account at K-Rep Bank.
2. Kshs. 1,800,000/= as trade in for Mercedes Benz Motor vehicle registration number KBK 444R.
3. Kshs. 200,000/- to be paid with no specific mode or time for payment.

The Respondent averred that the Appellant breached the terms of the agreement when he repossessed motor vehicle KBK 444R from him and declined to pay the balance of the purchase price.

On the other hand the Appellant contended that he paid for the vehicle in full basing his argument on the valuation report of the motor vehicle at kshs. 2,438,690/=. The Appellant has submitted that the Learned Magistrate erred in entering judgment where there was a valuation report showing the value of the vehicle at Kshs. 2,438,690/=. According to the Appellant, the price of Kshs. 4,000,000/= was a tentative price and that the Learned Magistrate failed to appreciate that the value could only be arrived at after proper valuation. He relied on Sections 16 and 35 of the Sale of Goods Act to support that contention.

The court has cautiously perused the agreement in issue. It was duly signed by both parties and the terms are clearly stipulated therein. In his evidence, the appellant stated that he saw the subject motor vehicle before he paid the first installment of kshs. 2,000,000/=. He was given possession of the same, a copy of the log book and a duly signed transfer form. The purchase price of the vehicle as stated in the agreement was agreed at Kshs. 4 million.

The court has considered the submissions by the appellant. The parties herein entered into a contract of sale and not agreement to sell. Under Section 3 of the Sale of Goods Act, a Contract of Sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. A contract of sale can be absolute or conditional see Section 3 (3).

Under Section 3(4) where a Contract of Sale the Property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

In the case herein, parties entered into a contract of sale in that the property in the goods was transferred from the seller to the purchaser. The evidence available to court is that the Appellant was given possession of the vehicle, and by March, 2010 the vehicle had been transferred into his name and therefore theirs was not an agreement to sell as alleged by the Appellant.

The Appellant submitted that the sale was subject to valuation of the vehicle and that the price was to be determined after the valuation of the same. Section 10 of the Sale of Goods Act is on ascertainment of price and it provides thus,

“The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties.”

I have looked at the agreement of sale entered into by the parties. The same contains very specific terms regarding what was being sold, the price and how the purchase price would be paid. As rightly submitted by counsel for the Appellant, the agreement does not contain a clause referring to a valuation at a later date nor does it state that it is a tentative agreement.

As to the assertion by the Appellant that the agreement of sale was subject to some conditions as set out in page 41 of the Record of Appeal, the court notes that the alleged conditions were supposed to be met before parties could sign the agreement for sale. If that was the case, why did the Appellant sign the agreement before the conditions could be met? Secondly, the court notes that the alleged conditions were signed by only one party, the Appellant herein and not the Respondent. If it is true that the parties had agreed on these conditions, why weren't they signed by both parties?

The only logical conclusion that the court can make in the circumstances of this case is that, the said conditions if at all, they existed, were never agreed upon by the parties and that explains why the Respondent did not sign the same.

The Appellant in reliance on Section 35 of sale of Goods Act contended that the buyer had a right to examine the goods.

Section 35(1) provides;

“Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.”

But the proviso can be found in sub-section (2) which provides;

“Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract”

The Appellant also relied on Section 5 of the Consumer Protection Act, 2012 on the quality of goods which provides as follows;

“The supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of reasonably merchantable quality.”

This Section, in my view, and in the circumstances of this case should be read together with Sections 35 (1) and (2) of the Sale of Goods Act and in particular, Sub-Section (2) . In this regard, it is noted that when the vehicle was delivered to the Appellant, he took possession of the same and never requested to be afforded a reasonable opportunity of examining the same. A clear reading of Section 35(1) would reveal that the seller is only bound to afford the buyer an opportunity to examine the goods upon request. The Appellant having made no such request, cannot be heard to complain that he was not given an opportunity to examine the vehicle. The reasonable presumption is that he was satisfied with its condition and even went ahead to pay the deposit of the purchase price after the vehicle was delivered to him.

Under Section 28 of the Sale of Goods Act, it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the Contract of Sale.

The payment and the delivery of the motor vehicle are concurrent conditions under Section 28 which provides;

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

The appellant contended that there was fraud on the part of the respondent. Courts have in several occasions held that a court of law cannot re-write a contract between the parties as they are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. See the case of National Bank of Kenya Ltd Vs. Pipe Plastic Samkolit (K) Ltd & Another. Though the Appellant alleged that there was fraud on the part of the Respondent, no particulars of fraud were pleaded or proven.

Similarly, the court in the case of Caesar Njagi Kunguru vs. Kenya Commercial Bank Limited Nairobi Hcc. No. 1543/2000 held thus;

“It is not the function of the courts to modify a party’s contractual obligations.”

In view of the foregoing, I find that the Learned Magistrate arrived at the correct finding and this court would not have a reason to interfere with her decision.

In regard to the claim on general damages for breach of contract, this court too, concurs with the finding by the Learned Magistrate. No evidence was lead to support the same.

In the end, I find that the appeal has no merit and it is hereby dismissed. Due to the nature of the case, each party shall bear its own costs of the appeal.

Dated, signed and delivered at **NAIROBI** this **14th** Day of **November** 2019.

L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

..... For the Respondent