



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 20 OF 2018

JACKSON OJERA HADULO.....PLAINTIFF

VERSUS

JOHN KAMANYA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff filed this suit against the defendant seeking the following prayers:-

a. An order of mandatory and temporary injunction to issue directing the OCS Nakuru Police Station to release motor vehicle registration number KBQ 219N to the plaintiff and a declaration that the plaintiff is the beneficial owner of motor vehicle registration number KBQ 219N.

b. Damages and costs of the suit and interest.

2. The plaintiff's claim is that he purchased the vehicle herein from the defendant at a cost of kshs 1,780,000 for which he paid kshs 1,279,000; and he was to clear the balance upon obtaining original documents.; The plaintiff contend that on 13th June 2014, the defendant misled his brother to believe that he had a customer who wanted to transport tomatoes and upon the vehicle being taken to Nakuru, he snatched the car keys from his brother thereby denying the plaintiff the use and enjoyment of the vehicle.

3. In response to summons to this claim, the defendant filed defence and counterclaim dated 6th August 2014. In the counterclaim, the defendant averred that together with the plaintiff, they approached an Advocate by the name Njuguna Ndungu to draft a partnership agreement between themselves.; defendant aver that the partnership agreement was drafted but the plaintiff declined to execute; he further averred that the plaintiff herein was to give kshs 890,000 as startup capital of the business since he was the registered owner of the vehicle and kshs 39,000 for refurbishing the vehicle. Defendant acknowledged that he received kshs 890,000 as part of the business share but not for purchase of the vehicle.

4. That sometimes on 12th June 2014, the vehicle was forcibly taken to the police station and was released to the plaintiff; and despite numerous demands, the police refused to release the vehicle to the defendant; that the court only issued preservative orders and not release of the vehicle to the defendant.

5. The defendant aver that as a result of not having the vehicle, he has lost kshs 450,000 per month from February 2014. Defendant sought to restrain the plaintiff from disposing off, dealing adversely or using the vehicle.

PLAINTIFF'S EVIDENCE

6. The plaintiff testified that on 10th October 2013, he saw an advert for sale of a lorry registration number KBQ 219N with contact number 0722340378. He said upon calling the number, the defendant answered and confirmed that he was selling the lorry and said he was asking for kshs 1.8million; and upon negotiation, the defendant agreed to reduce the cost by kshs 20,000. He said the defendant informed him that he had a loan with Consolidated Bank and kshs 750,000 had to be deposited in the account before logbook was released. He deposited kshs 500,000 and did tentative agreement because they were not able to do a conclusive agreement. He said that prior to 5th February 2014 when he deposited the money, he had sent the plaintiff kshs 29,000 through Mpesa and the total of kshs 529,000 already paid was captured in the agreement. He said the plaintiff was to clear the loan for the logbook to be released. He said he was to pay another kshs 400,000 as per the agreement.

7. He further testified that details of how he was to pay was to come in the entire agreement. He showed agreement and deposit slip to show that he deposited the kshs 500,000 in Equity Bank.

8. Plaintiff further said he paid kshs 400,000 on 7th February 2014 and kshs.350,000 on 6th May 2014; he showed court the deposit slips. He said the defendant was to do a sale agreement but instead sent to him a partnership agreement; plaintiff then instructed the firm of Odeny and Company Advocates to do an agreement stating how he was going to pay the balance; in total, he paid a total of kshs 1,279,000.

9. He testified that on 13th June 2014 the defendant tricked his brother to bring the vehicle to Nakuru in the pretext that there was a customer who wanted to use the vehicle to transport tomatoes and in the process confiscated the car keys.

10. The plaintiff testified that when he failed to agree with the defendant, he filed Nakuru CMCC No.577 of 2014 and the defendant was restrained from interfering with the lorry and the lorry was given to him on 16th June 2014; he showed court a copy of the court order. He said that he has the vehicle and outstanding balance is kshs 501,000 of which he deposited kshs 250,000 in the firm of Mongeri & Company Advocates to reduce the balance of kshs 501,000.

11. The plaintiff denied that the transaction was partnership agreement. He produced in court draft sale agreement. He said the lorry was sold to him and he modified it for the job he was doing. He said the defendant has not particularized the kshs 450,000 loss in the counterclaim and that there was no illegal seizure of the vehicle as he got it through court order. He denied having approached Njuguna Ndungu Advocate for partnership agreement and said he does not know Njuguna Advocate; he denied any intention to sell the vehicle and prayed that the defendant be directed to give him the logbook, as he is ready to give him the balance. He played for the defendant to be permanently restrained from interfering with the vehicle plus damages and costs of this suit.

12. In cross-examination, plaintiff said the agreement is titled release of the vehicle and there is no mention of sale of the vehicle in the agreement. He said deposit of kshs 400,000 was to be made on or before 7th February 2014; he confirmed that it was deposited on 7th February 2014 as per deposit slip. He acknowledged possession of the vehicle on 5th February 2014 at 5.45pm; he said the defendant signed the agreement and was witnessed by his cousin.

13. He confirmed that the name of a company green leaf tea D.L Koisagat was mentioned in the agreement as he intended to work for the company; he however denied that there was partnership to have the motor vehicle carry green leaf for D.L Koisagat Company.

14. Plaintiff denied that they did release agreement due to time limit so that they could do a partnership agreement later. He said there is no document to show that the defendant demanded more payment after deposit of kshs 400,000. He denied having colluded with officer commanding police station (OCS) and lawyer to have the vehicle released to him.

15. He confirmed that he modified the vehicle to fit the job he was going to do. He showed court a picture of the modified body. He said the only modification he did was to change colour from blue to green. He however said he could not do the job as the defendant refused to have the vehicle inspected; he said he was forced to repaint the vehicle blue. He said he relied on the vehicle for a living when it was working and that he earned kshs 40,000 per month. He said there was no agreement for money for repair of the vehicle to be sent to the defendant and that kshs 750,000 was to be deposited in Consolidated Bank.

16. In reexamination plaintiff said, he is not the registered but beneficial owner of the vehicle as the vehicle was sold to him as per agreement marked Exhibit 1. He said that he paid kshs 400,000 on 7th February 2014 due to technicality in the bank which he explained to the defendant. He said the vehicle was released to him by the court and the order releasing it has not been challenged. He said he was not required to seek authority to modify the vehicle and that he only changed the colour. He said he is not using the vehicle now, as it requires inspection, which can only be done by registered owner.

17. PW2 who is the cousin and driver to the plaintiff testified that he was present when the vehicle was released to the plaintiff. He said he signed the agreement releasing the vehicle to the plaintiff and what he was witnessing was sale of the vehicle from the defendant to the plaintiff. He said the agreement does not talk of sale but he witnessed money change hands, he said first payment was kshs 500,000 and plaintiff was to pay kshs 250,000 the next day for the logbook of the vehicle to be released. On being question on the name, Koisagat Company PW12 testified that the plaintiff was to use the vehicle to transport tea leaves to D.L Koisagat. He drove the vehicle to Kisumu and to Nandi.

18. He confirmed that he drove the vehicle from Kisumu to Nakuru on 12th June 2014 when the defendant snatched the car keys. He said the OCS released the vehicle to the plaintiff after 2 days. PW2 confirmed that he received kshs 30,000 from the defendant, which they had agreed would be his commission if he convinced the plaintiff to purchase the vehicle. He denied that it was part of money for repair of the vehicle. He confirmed that the vehicle had tracking device when he drove it. He said the vehicle worked shortly at D.L Koisagat. He said from February 2014, the plaintiff has had physical possession of the vehicle.

19. In reexamination PW1 said what he witnessed was sale of motor vehicle and before the sale, he had not heard of partnership agreement. He confirmed payment of kshs 500,000 and kshs 250,000 deposited with Mongeri Advocate. He said plaintiff used the vehicle until when the inspection sticker expired.

DEFENDANT'S EVIDENCE

20. The defendant testified that on 5th February 2014 he entered into a partnership agreement with the plaintiff. He said he had advertised a lorry for sale in the year 2013 and the plaintiff developed an interest and he instructed the driver who was on transit from Pokot to Bungoma to allow plaintiff view the vehicle. Defendant said the plaintiff agreed that they could go into partnership and in January 2014, the plaintiff sent kshs 9,000 for minor repairs and kshs 20,000 on 26th January 2104.

21. He testified that the plaintiff informed him that he had a good rapport with management of D.L Koisagat and he would be allowed to transport tea but he did not have a lorry. He said after testing the lorry, they went to Njuguna Advocate to do a partnership agreement. He said they told him the lorry was to carry tea and that they gave him details and presented their identity cards but they were not able to conclude the agreement as it was becoming late.

22. He said the plaintiff left his email address and that he had deposited 500,000 before they went to the Advocate.

23. He said they agreed at kshs1,780,000 as value of the vehicle but he could not release the vehicle before a document was done; that they got a paper and wrote PW1. He acknowledged receipt of that kshs 500,000, 400,000 and 350,000 was deposited in his account. He confirmed having signed exhibit 1 for release of the vehicle. He confirmed having taken the key of the vehicle on 11th June 2014 and asked the driver that he wanted to see the plaintiff. He confirmed that the police broke the lock and drove the vehicle to police station since he declined to appear with the keys. He said that on 16th June 2014 he took the keys and vehicle documents to OCS Nakuru police station. He said at the police station he met plaintiff and PW2 together with Mongeri Advocate; he said he was intimidated and forced to hand over the car keys. He said the next day he wrote protest letter to Officer Commanding Police Station (OCPD) on detention of the vehicle. He testified that when he went there next, he found the vehicle missing. He confirmed that on 30th July 2014, the court ordered that the plaintiff do ensure safe keeping of the vehicle until the case is determined. He produced Mpesa statement to confirm the same.

24. He confirmed sending kshs 30,000 to PW2, but denied it was a token for talking to plaintiff to purchase the vehicle and said it was for feeding speed governor.

25. Defendant stated that he has suffered great loss, which has affected him physically, and economically; he said he was relying on the vehicle to educate his children and was earning kshs 400,000 to kshs 600,000 per month. He produced government regulations showing hourly earnings for transport vehicle of between 7 to 8 tones, which he based to calculate monthly earnings; he said according to the regulations his earnings per day were kshs 15,000. He confirmed that police returned the original logbook to him. He prayed to be given back the lorry in the condition he gave the plaintiff.

26. In cross examination the defendant confirmed that he advertised the vehicle for sale and that he did not know the plaintiff before. He also confirmed that exhibit 1 was release of the vehicle note which they executed as he was releasing the vehicle; and it has not shown that a partnership agreement was to follow. He confirmed that the word partner is not in exhibit 1. He also confirmed having received kshs 1,290,000 which was deposited in his account and that he was expecting 890,000 from the plaintiff. He confirmed that the draft partnership agreement was not signed. He also confirmed that he never produced any document to confirm that he was earning kshs kshs15, 000 per day and 450,000 monthly from the lorry; and that there is no term in the agreement to the effect that he was to send him kshs 15,000 per day. He confirmed that apart from government regulations, he never produced any statements to show his earnings.

27. In reexamination, defendant confirmed that partnership agreement was not actualized. He denied having intended to sell the vehicle.

ANALYSIS AND DETERMINATION

28. What I consider to be in issue is whether the transaction between plaintiff and defendant was sale of vehicle agreement or partnership agreement.

29. In his defence, the defendant testified that he entered into a partnership agreement with the plaintiff in which they were to transport green tea to D.L Koisagat Company in Nandi. On the other hand, plaintiff said he paid partly for the vehicle and was to pay the balance of the purchase price upon being given logbook by defendant. He said he agreed with the defendant that he would deposit kshs 750,000 which defendant owed Consolidated Bank so that the logbook could be released by the bank.

30. Though the defence tries to drive a defence to the effect that the document marked Exhibit 1 was only to facilitate release of vehicle awaiting partnership agreement, he admitted that they agreed on the cost of the vehicle at kshs 1,780,000. If indeed there was a partnership arrangement to be reduce to writing, terms of the partnership which should include daily, weekly or monthly earnings and not cost of the lorry should have been agreed and set down in the document releasing the vehicle.

31. Further to the above, for the period between February and to June 2014 when the vehicle was released to plaintiff impounded, there is no mention of any profits or earnings shared. Plaintiff said the vehicle was operational until when the inspection sticker expired; the question is if indeed there was a partnership between plaintiff and defendant the question that remain unanswered is why the defendant never asked from the earnings from the vehicle for the period

32. Further, the defendant confirmed that he had advertised the vehicle for sale and that the plaintiff learnt of the said sale through the Advocate; he confirmed that plaintiff communicated to him through the mobile phone number he had indicated in the advertisement. The intention to change the initial intention of sale of vehicle to partnering with the intended purchaser has not been explained; and even if that intention was changed and accepted by the intended purchaser, that intention was not reduced to writing neither has any other evidence adduced to confirm the allegations.

33. All evidence adduced point at sale of the vehicle by the defendant to the plaintiff. The purchase price is not disputed. It is not also disputed that kshs 1,279,000 was paid to the defendant leaving a balance of kshs 501,000; of the said balance, plaintiff said that he deposited kshs 250,000 with the Mongeri Advocates now leaving a balance of kshs 251,000.

34. From the foregoing I find that the vehicle herein. Was purchased by the plaintiff from the defendant. That there was no partnership agreement entered between plaintiff and the defendant.

35. FINAL ORDERS

1. That the plaintiff is beneficial owner of motor vehicle registration number KBQ 219N.
2. Balance of kshs501,000; Kshs 250,000 being part of the balance deposited with Mongeri Advocate be released to the defendant within 30 days from the date of this judgment.
3. Balance of kshs 251,0000 to be paid by the plaintiff to defendant within 30 days from the date of this judgment
4. Upon payment of purchase price the vehicle herein KBQ 219N be registered in the name of the plaintiff.
5. Counter-claim is hereby dismissed.
6. Costs of the suit to plaintiff.

Judgment dated, signed and delivered at Nakuru this 21st day of November 2019

RACHEL NGETICH

JUDGE

In the presence of:

Schola Jeniffer – Court Assistant

Mr. Opar counsel for plaintiff

M/s Mbecha holding brief for Mukira counsel the for State