



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 48 OF 2017

LEAH ADHIAMBO AWITI.....APPELLANT

VERSUS

RANA AUTO SELECTION LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 379 of 2012

delivered by Hon. A. Odawo (SRM) on 24th May, 2017)

JUDGMENT

1. LEAH ADHIAMBO AWITI (*hereinafter referred to as appellant*) sued RANA AUTO SELECTION LIMITED (*hereinafter referred to as respondent*) in the lower court praying for the following orders:

- a) An order of permanent mandatory injunction restraining the defendant whether by himself or his servant/agent from interfering with ownership, selling or otherwise disposing off and/or dealing in adverse manner to plaintiff's interest in motor vehicle KBH 561D*
- b) A declaration that the repossession was illegal null and void ab initio*
- c) An order that accounts be given and release of motor vehicle KBH 561D to the plaintiff*
- d) Damages for breach of the sale agreement*
- e) Costs and interest of the suit*

2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss the appellant/plaintiff's claim with costs.

3. In a judgment delivered on **24th May, 2016**, the learned trial Magistrate **found that the repossession was illegal and awarded the appellant Kshs. 300,000/- for breach of contract**

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 22.4.18 filed the Memorandum of Appeal dated 20.1.17 which he raised 6 grounds which I have summarized into 3 grounds that: -

- 1) The Learned Magistrate erred in fact and in when she failed to appreciate the law, pleadings and evidence presented before her and in so doing failed to hold that the respondent had breached the contract in question**
- 2) The Learned Magistrate erred in fact and in awarding the appellant Kshs. 300,000/- as compensation in damages which amount is inordinately low instead of ordering a refund of the already paid purchase price**
- 3) The Learned Magistrate erred in fact and in when she failed to make a finding on the issue of accounts which was specifically pleaded and prayed for by the appellant**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for admission on 18.4.18, the court directed that it be disposed off by way of written submissions which the advocates dutifully filed.

Appellant's submissions

6. It was submitted for the appellant that the total purchase price of Kshs. 1,250,000.00 was paid and that the alleged balance of Kshs. 10,000/- arose because the said sum was not receipted. Appellant submitted that the sum of Kshs. 300,000/- awarded to her as compensation was inordinately too low and would not put her in the same position that she was before the breach of contract.

7. Appellant placed reliance on the following authorities

a) **MBOGO V SHAH (1968) EA 93**

b) **SELLE V ASSOCIATED MOTOR BOAT CO [1968] EA 123**

c) **JOHN RICHARD OKUKU OLOO V SOUTH NYANZA SUGAR CO LTD [2013] eKLR**

d) **HADLEY V BAXENDALE (154) 9. EXCH.214,**

e) **SIMON MUIRURI WANJOHI Vs RESMA COMMERCIAL AGENCIES LTD & ANOTHER, CIVIL APPEAL No. 91 of 2002**

Respondent's submissions

8. Respondent acknowledged receipt of the initial payment of Kshs. 1,000,000.00 but submitted that the balance of Kshs. 250,000.00 was not paid even as at the time of repossession. Respondent also submitted that all paymentst were acknowledged and that there was no necessity for taking of accounts. Respondent additionally submitted that it was the appellant that breached the contract and was not therefore not entitled to the sum of Kshs. 300,000/- awarded to her.

ANALYSIS AND DETERMINATION

9. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties.

10. I am mindful of my duty as an appellate court which is grounded in Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion, but in doing so, I must give an allowance of the fact that I neither saw nor heard the witnesses as they testified. (See **Mbogo v Shah** and **Selle v Associated Motor Boat Co (Supra)**).

11. In addition, as the appellate court, I will only interfere with the lower court's judgment if the same is founded on wrong principles of fact and/ or law as guided by the Court of Appeal decision in **Nkube – Vs – Nyamiro [1983] KLR 403** that

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

12. In the instant appeal the facts of the case are not disputed. The Appellant purchased motor vehicle registration number KBH 561D make Toyota Hiace from the Respondent by a sale agreement dated 26th March, 2009. The agreed price for the said motor vehicle was Kshs 1,250,000/-. At the time the agreement was executed the Appellant paid the sum of Kshs 1,000,000/-. The balance of Kshs 250,000/- was to be paid within 2 months of executing the sale agreement. The Appellant defaulted in paying the monthly instalment as agreed but however paid Kshs. 240,000/- between 24.12.09 to 27.1.12. The Respondent invoked clause 9 of the agreement and repossessed the said motor vehicle and sold it to a 3rd party.

13. The learned trial magistrate found as a fact that the appellant did not pay Kshs. 250,000.00 being the balance of the purchase price within 2 months from 21.3.13 and was therefore in breach of the agreement.

14. The learned trial magistrate also found as a fact that the repossession of the subject motor vehicle was illegal since the respondent did not issue a notice as stipulated in the contract.

15. On further re-evaluation of the evidence on record, it is the finding of this court that the said motor vehicle ought to have been restored to the possession of the Appellant since she had paid a substantial sum of the purchase price. However, since the Respondent had sold the said motor vehicle, it would have been unfair after a period of three years to order that the said motor vehicle be restored to the Appellant.

16. I have considered the impugned judgment and I find that the learned magistrate rightfully appreciated the holding in **John Richard Okuku Oloo V South Nyanza Sugar Co Ltd** (Supra) that ***“the fact that damages cannot be assessed with certainty does not relieve***

*the wrongdoer of the necessity of paying damages for his breach of contract” and the proposition in **Hadley v Baxendale** (Supra) “that in cases of breach of contract only damages as may fairly and reasonably be considered either as arising naturally from such breach and which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, are payable”.*

17. The appellant had been in possession of the subject motor vehicle for about 4 years before it was repossessed. She stated that she was using the vehicle for matatu business and had no doubt benefitted from its use. From the evidence on record, I am not convinced that in assessing the damages of Kshs.300,000/-, the learned magistrate considered an irrelevant factor, or left out of account a relevant one, or that or that the amount awarded is so inordinately low that it must be a wholly erroneous estimate of the damages.

DISPOSITION

18. In the end and for the reasons given on the assessment above, the appeal is disallowed. Each party shall pay its own costs

DATED AND SIGNED IN KISUMU THIS...20th ..DAY OF..September..2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent - Ms. Nabifo