



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 250 OF 2017

SEKAI CAR SALES LIMITEDAPPELLANT

VERSUS

ERICK OLOO ODEK.....RESPONDENT

J U D G M E N T

Historical background

1. On 21/4/2017, the appellant and the Respondent entered into a sale agreement by which the appellant sold to the respondent a motor vehicle, **Toyota Hiace Chesis No. TRH 200-0124091**, at a price of consideration of Kenya Shillings two million four hundred and fifty thousand. **[Kshs.2,450,000/=]**

2. The sale agreement disclose that there was payment of a deposit of Kshs.700,000/= with the balance being made payable by 13 equal monthly instalments of **Kshs.145,962/=**, with effect from 21/6/2017. It was then pleaded in the plaint that the vehicle was employed in the business of public transport but during the month of June 2017, it developed mechanical problems and the Respondent then failed to pay the agreed instalments and come September 2017 the Appellant had the motor vehicle repossessed pursuant to the terms of the agreement between the parties.

3. The Respondent then moved to court by a plaint dated 13/11/2017 essentially blaming the Appellant for refusal to have the terms of the contract reviewed and pleaded four particulars of breach on the part of the Appellant. Based on such complaint the Respondent sought from court orders that:-

- a) **A declaration that the defendant's actions are illegal, malicious and bad in law.**
- b) **Permanent injunction restraining the defendant from taking possession of the Plaintiffs motor vehicle registration no. KC. 157N.**
- c) **A review of the contract between the plaintiff and the defendant dated 21st April 2017.**
- d) **Special and General damages.**
- e) **Costs of this suit with interests at court rates.**
- f) **Any other relief the court may deem fit in the circumstances.**

4. Together with the plaint was filed a Notice of Motion which sought an order of injunction to restrain attachment or disposal of the suit motor vehicle pending the determination of the application, the release of the motor vehicle and review of the terms of the contract in the interim.

5. The Records reveal that over above entry of Appearance, the Appellant filed a statement of defence and counter claim as well as a Repling Affidavit.

6. When the matter was placed before the trial court, experte on the 14/11/2017 the court granted interim orders in terms of prayer 2 and scheduled the matter for *interpartes* hearing on the 27/11/2017. On the date so fixed, the record reads as follows:-

“27/11/17

Before Hon. E. Mutunga SRM

Court clerk – Amuma

Ngure holding brief for Ogutu, for plaintiff/Applicant

Odundo for Defendant/Respondent

Ngure – The matter is for Notice of Motion dated 13/11/17.

We are ready to proceed and we can fix a hearing date

issues raised in the plaint are shown to the case in the application.

Ngure – Pray that prayer No. 3 for fixing the hearing date.

at 11.00am.

RULING

“I have perused the application dated 13/1/17 instant and submissions made by respective advocates for parties.

It's by the opinion of the counsel for the Defendant

Respondent that issues raised in the application are

similar to the ones in the plaint this was prudent that matter be set for main hearing of the suit.

On the part of Ngure advocate for the applicant he

submit prayer 3. It's not in dispute that the plaintiff

herein is overruled but having the suit motor vehicle

lie awaiting determination of the suit would

return the same business. The vehicle be vested.

This court would give a hearing date on primary

basis so that issues as raised can be canvassed.

In lieu of that the above Application is allowed in

terms of prayer 3”.

7. It is the foregoing decision that aggrieved the Appellant who then filed a memorandum of Appeal two days later. That memorandum of Appeal attacks the decision on some eight grounds as follows:-

i. **“THAT the Trial Magistrate erred in fact and law by ordering the release of Motor Vehicle KCL 157N unconditionally to the Respondent.**

ii. **THAT the trial Magistrate erred in law by ordering the release of the motor vehicle to the Respondent as the said orders have determined the issues to be canvassed in the main suit at an interlocutory stage.**

iii. THAT the Trial Magistrate erred in fact and law by no considering the Appellant's response and opposition to the release of the said motor vehicle as the Respondent has admitted and is indeed indebted to the Appellant.

iv. THAT the Learned Magistrate erred in law and fact and totally misdirected himself in finding that the suit be set down for full hearing on priority basis without fixing a time for the same and at the same time favoured the Respondent without giving any cogent reasons for the same.

v. THAT the learned Magistrate misdirected himself in the issues that were for determination before him and hence made a wrong determination in the circumstances.

vi. THAT the learned Magistrate erred in law and fact in failing to appreciate that the Motor Vehicle in dispute belongs to the Appellant and that the Respondent has failed to honour his part of the Contract and is in default and cannot fail to pay instalments and keep the motor vehicle as well.

vii. THAT the trial court failed to accurately record the proceeding and documents have been removed from the original court file to give or reflect a given position.

viii. THAT the trial court was openly biased against the Appellant herein and is incapable of offering/rendering a just and impartial determination of issues in this matter”.

8. The appeal raises, in my considered view, the following issues for determination:-

i. Whether the order for conditional release was lawful based on the law and facts?

ii. Whether the order made finally disposed off the dispute at an interlocutory stage?

iii. Whether the trial court gave my regard to the law, facts and the Appellants opposition for the application including the fact that the debt was acknowledged and the ownership of the motor vehicle vested upon the Appellant?

iv. Whether there was accurate and impartial/unbiased recording of the proceedings and if the decision reached was thus impartial and unbiased?

Analysis and determination

9. This being a first appeal this court is by law mandated and obligated to proceed by way of a retrial. In doing so the court has the duty to re-examine and reappraise all the facts on record and the law applicable and find for itself a conclusion without the need to be bound by the findings of the trial court[1]. In this case however, there was no oral evidence led hence the caveat that the court takes notice that it has not observed the demeanour of the witnesses as they give evidence is of no application.

10. It is a critical constitutional dictate that a litigant before court is entitled to being afforded the opportunity to have his dispute decided in a fair and public hearing by an impartial judicial authority[2]. A fair hearing connotes the chance and opportunity to put one's case forward freely and to the best of one's ability. Here the record doesn't say what opposition was recorded from the Appellant even though a counsel was recorded to have been present in court as appearing for it. This being a court of record it is open to doubt if the Appellant was ever given the chance to adequately put its case forward. If indeed that chance was given then there was want of forthwith and accurate recording of the proceedings of the day which in itself stripes the court of its cloth of impartial and unbiased arbiter. That alone would be enough to say that the Appellant was not given its right enshrined under article 50(1) of the constitution and being so is sufficient enough to negate the order thereafter made. In fact it is difficult to understand and comprehend both the proceedings and the ruling appealed against. It was at the very best a mistrial.

11. However, in the ruling the trial court seem to record that the Appellant had faulted the application for seeking same order as in the plaint and therefore proposed that instead of the application being accorded scarce judicial time, the matter would have proceeded to hearing of the suit. Based on that, the trial court proceeds to overrule the plaintiff but diametrically proceeded to allow the application in terms of Prayer 3. No reason is availed for allowing the application. Additionally the order as issued in the ruling present two problem:-

- It is not clear if it was pending the hearing of the application or the suit.
- It is in effect a mandatory injunction against the Appellant.

12. The baseline is that for a court to grant an injunction, whether Restrictive or compulsive, there must be established a right shown to be capable of infringement or violation if the order be denied. Here it was not in dispute that the property in the motor vehicle was vested in the Appellant. It was also a covenant between the parties under the agreement of sale that if there would be default, the Appellant would be entitled to repossess and sell the motor vehicle. The order issued by the trial court cannot be seen to protect any infringement upon the Respondent but itself an infringement on the property rights of the Appellant.

13. Those being the fundamental terms of the contract between the parties did the plaint present a reasonable cause when it sought in the trait the terms be reviewed by the court? The elementary learning is that a court of law has no mandate to renegotiate nor re-write a contract between the parties.

14. That being the courts appreciation of the matter at trial, the suit presented before the trial court was to this court not revealing any prima facie case with any prospects of success and worse of all it did meet the thresholds of suit for a mandatory injunction. It was a suit seeking that the court re-writes a contract between the parties. It did not deserve the orders issued.

15. The court failed to appreciate the fact that there was an acknowledged debt and therefore, even if in its inherent powers, it was inclined to order release, there ought to have conditions to protect the legal owner of the motor vehicle. To the extent that the court granted the unconditional release, which to this court was ambiguous and failed to give timelines for hearing the dispute and without regard to the debt owed, I do find that the court did not exercise its judicial discretion correctly and for that reason, the order given on the 27/11/2017 cannot be left for stand. It is ordered set aside by which reason this appeal is allowed with costs to be paid by the Respondent to the Appellant.

16. For avoidance of doubt let the Appellant pursue his right to repossession as covenanted in the agreement.

17. For case management purposes, it is directed that the matter be placed before the Chief Magistrate for purposes of having it allocated to another judicial officer other than the one whose decision is the subject of this appeal. That be done within 14 days from today.

Dated and delivered at Mombasa this 3rd day of October 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Selle vs Associated Motorboat Co. Ltd [1968] E.A. 123

[\[2\]](#) Article 50(1), Constitution of Kenya