



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 126 OF 2012

PAUL MBUGUA GITHUI APPELLANT

VERSUS

JOYCE ODUOR RESPONDENT

[Being an Appeal from the Judgment of the Honourable E. Owino the Senior Principal Magistrate – Kisumu delivered on the 9th October 2012 in the original lower Court case vide Kisumu CMCCC No. 265 of 2011]

JUDGMENT

In the lower Court the appellant sought:-

- “(a) A declaration that Motor Vehicle Registration KBA 042C be given to the Plaintiff;***
- (b) A permanent injunction restraining the Plaintiff from interfering with the defendant;***
- (c) Costs of the suit.”***

The Respondent who was the Defendant counterclaimed for:-

- “(a) A declaration that Motor Vehicle Registration KBA 042C be released to the Plaintiff named in the counterclaim;***
- (b) A declaration that the logbook and the transfer forms on the strength of which the defendant named in the counter-claim registered Motor Vehicle KBA 042C be deemed to be cancelled;***
- (c) A declaration that the Motor Vehicle be registered in the name of the Plaintiff named in the counter-claim and a log book be issued in the name of Joyce Achieng Adede;***
- (d) An order that the defendant named in the counter-claim be restrained from interfering with Joyce Achieng Adede's use of the said Motor Vehicle;***
- (e) Damages for unlawful possession of the vehicle;***
- (f) Costs of the counter-claim;***
- (g) Any other relief that the honourable court may deem fit to grant.”***

After hearing and considering evidence from both sides the Trial Magistrate dismissed the appellant's case and entered judgment for the respondent as prayed in the counter-claim.

Being aggrieved the appellant filed this appeal whose grounds as set out in the Memorandum of Appeal are:-

“1. The Learned Trial Senior Principal Magistrate was completely biased against the Appellants;

2. The Learned Trial Senior Principal Magistrate did not appreciate the fact that the appellant paid Kshs.300,000/= to purchase the motor vehicle;

3. The Learned Trial Senior Principal Magistrate did not at all understand or appreciate the law relating to the Agency and ostensible authority;

4. The Learned Trial Senior Principal Magistrate did not make a finding as to who was liable for the amount paid by the appellant to purchase the car for Kshs.300,000/=;

5. The Learned Trial Senior Principal Magistrate did not appreciate the strong evidence given by the Appellant as to the ownership of the motor vehicle KBA 042C.”

Briefly, the appellant's case was that on 29th June 2011 he purchased Motor Vehicle KBA 042C from one Dennis Odhiambo Sweta for a consideration of Kshs.300,000/= which he duly paid. He then obtained registration of the motor vehicle but when he took it to Nairobi for repairs the Respondent emerged and started claiming that the vehicle was hers. This culminated in the vehicle being impounded by the police and brought to Kondele police station where it was detained pending the hearing of the suit. It was his case that the sale agreement was in writing and that he had done due diligence by conducting a search on his phone. The Vendor had also shown him the original logbook, transfer form, PIN and Certificate of Incorporation of Auto Cruise which was the registered owner. The transfer form was duly executed by Auto Cruise and the Vendor alleged he had bought the vehicle from someone. During the transaction he had two witnesses one Nganga and Kariuki. After successfully purchasing the motor vehicle he took it to Grogan in Nairobi for repairs. However on 6th July 2011 his mechanic called him to say that policemen had visited the garage and were claiming the vehicle had been stolen from Kisumu. He went and showed them his documents but that did not stop them from impounding the vehicle and taking it to Kisumu. After the police harassed him he went and effected the change of ownership and obtained a logbook in his name. He contended that the Respondent had no documents to prove ownership and urged the Trial Court to enter judgment in his favour. He produced the sale agreement, Dennis Sweta's National Identity Card, the logbook in his name, a copy of records and a letter from Kioko & Company Advocates.

On her part the Respondent gave evidence that she had purchased the motor vehicle from one Solomon Mwangi on 25th May 2009 at a consideration of Kshs.600,000/=. Their transaction was also reduced in writing. She paid Kshs.500,000/= and took possession of the vehicle after which she entrusted it to Dennis Sweta, whom she had employed as a driver, to operate as a matatu. Denis Sweta was to remit to her the proceeds of the business on a weekly basis and was also responsible for paying to the Vendor the balance of Kshs.100,000/= by way of installments. She stated that she duly paid the balance and in July 2009 the Vendor gave the documents – (Logbook, PIN, transfer form) to Sweta on her behalf. Because of her work schedule she did not ask him for the documents and Sweta assured her they were in safe hands. On 27th June 2011 Sweta allegedly informed her husband that the vehicle had broken down and he had taken it for repairs only for her to get a call from the man who had sold the vehicle to her, inquiring whether she had sold the vehicle to somebody in Nairobi. He even told her where he had seen the vehicle. She reported the matter to the police and subsequently the vehicle was impounded and towed to Kisumu. She denied that she had authorized Sweta to sell the motor vehicle and urged the trial Court to enter judgment in her favour.

The appeal was canvassed by way of oral submissions with Mr. Mwamu representing the Appellant and

Mr. Otieno R the Respondent.

As the first appellate Court I have reconsidered and evaluated the evidence but bearing in mind that I did not have the benefit of seeing the witnesses give evidence. I have also considered the submissions of Counsel for the parties.

There is evidence that before the Appellant purchased this motor vehicle from Denis Sweta it belonged to the Respondent. She exhibited a sale agreement between her and Solomon Mwangi dated 25th May 2009 which proves on a balance of probabilities that she bought it. She explained that she did not have the vehicle transferred into her name immediately because she had not finished paying the purchase price. It was her evidence that when she finished doing so the Vendor gave a duly executed transfer form, Certificate of Incorporation and PIN of his company in which the vehicle was registered to Denis Sweta who was her driver. This explains why those documents were in Denis Sweta's possession when he sold this vehicle to the Appellant. The Respondent vehemently denied that she had authorized Denis Sweta, who was her driver, to sell this vehicle. It is he who alleges that must prove and therefore the onus to prove that Denis Sweta was, in fact as the Respondent's agent lay on the Appellant. He did not do so. Whereas in Ground 3 of the petition the Appellant faults the Trial Magistrate for not understanding or appreciating the law relating to agency and ostensible authority and whereas agency had not been pleaded the Trial Magistrate took cognizance of this issue. He found that agency had not been pleaded in this case and that Denis Sweta had falsely represented himself to the Appellant as the owner. I agree with the Trial Magistrate because in his testimony nowhere did the Appellant allege that Denis was selling the vehicle on behalf of another person. It was his testimony that **“He said he bought the motor vehicle from someone.....”**. Meaning that Denis Sweta had presented himself as the owner of the motor vehicle. The Appellant did not call Denis Sweta to prove that this vehicle was his. Neither is there any evidence that ownership of the vehicle moved from the Respondent to Denis Sweta. The Respondent's evidence that Denis Sweta was her driver was therefore not rebutted. Neither was her evidence concerning how the vehicle and the original documents came into the possession of the said Denis Sweta. The Trial Magistrate properly understood the law of agency and ostensible authority and there is no error of principle in his judgment. He relied, and I agree with him, on Section 23(1) of the Sale of Goods Act which provides that a person such as Denis Sweta could not pass any title to the vehicle to the Appellant. He himself had no title to the vehicle as he had not been authorized to sell it. I am not persuaded that this is a case where the owner of the car, the Respondent, is by her conduct precluded from denying the Seller's authority to sell. She had entrusted the vehicle to Denis Sweta to operate a matatu, which is not unusual. There is no evidence to support Counsel's submission that she changed her mind after the vehicle was sold. Neither is the fact that nobody has been charged with theft of the vehicle as this would be an issue beyond the Respondent's control. The Appellant sued the Respondent and the burden was therefore upon him to prove his case on a balance of probabilities. The Respondent rebutted his case by production of a sale agreement between her and Solomon Mwangi and she need not have called him as a witness, as the agreement between them was not disputed. The Appellant is the one who stood to lose by not placing all the facts before the Court and as he did not call Denis Sweta to demonstrate how he acquired this vehicle, the Trial Magistrate was entitled just as this Court is, to find that Sweta had no title to pass to him. Whereas the Appellant cannot be faulted for quickly effecting the change of ownership of the vehicle to himself, this Court finds that he had not acquired any title to it the same having been sold to him by a person who had no title to it in the first place. This appeal has no merit and it is accordingly dismissed with costs to the Respondent.

Signed, dated and delivered at Kisumu this 9th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Adwar for the Appellant

Mr. Okwoyo for the Respondent

C/A: Serah Sidera