REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 123 OF 2014

NEMWEL MOTURI NYAMOSI.....APPELLANT

VERSUS

RANA AUTO-SELECTION LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate at Kisumu Hon.A.A.Odawa in Kisumu CMCC NO.185 of 2011 delivered on 23rd October 2014)

JUDGMENT

The Respondent was the Plaintiff in the lower court while the Appellant was the Defendant. The facts of the case at the lower court are that the petitioner and the Respondent on or about 3rd September 2009 entered into a sale agreement in which the appellant agreed to buy and the respondent agreed to sell motor vehicle KBJ 087S for a consideration of Kshs. 1,500,000/-. It was a term of the sale agreement that the appellant would pay a deposit of Kshs. 700,000/- upon execution of the sale agreement and the balance of Kshs. 800,000/- by 13 monthly instalment of Kshs. 65,000/- each after collection of the number plate from the respondent which he received on 3rd November 2009.

The appellant's case is that as at the time the vehicle was repossessed on 5.5.11, he had paid a total of Kshs. 1,218,000/- which was a substantial sum of the total purchase price. The appellant sought orders for a declaration that the sale agreement between the parties was a hire purchase agreement; that the repossession by the respondent was illegal, null and void and without procedure and for restitution and/or refund of the purchase price.

The lower court in a Judgment delivered on **23rd October 2014** found that the appellant had not proved his case on a balance of probability. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 6th November 2014 whichset out 9 grounds of appeal that may be summarized into the following two major grounds that:-

> **1) The Learned Magistrate erred in law and in fact by failing to appreciate that the respondent's act of repossessing the subject motor vehicle from the appellant was illegal, null and void for want of procedure and legal justification**
>
> **2) The Learned Magistrate erred in law and in fact by failing to appreciate that the terms of the contract were relaxed by act/conduct of the respondent acknowledging payments from the appellant out of time and time was not of essence**

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the

evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul HammadSarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

Circumstances under which an appellate court may interfere with a decision of the trial court were set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

When the appeal came up for hearing, it was agreed that the same be determined by way of written submissions. The court has very carefully considered the pleadings, proceedings, exhibits and the grounds of appeal. The court has also consideredwritten submissions, the Hire-Purchase Act and an authority cited by appellant's counsel.

The appellant in ground Nos. 4, 5 and 6 challenges the magistrate's finding that the sale agreement between the appellant and the respondent was not governed by the Hire Purchase Act. The appellant in his plaint averred that having entered into an agreement for sale, and having paid the deposit, and mutually agreed to pay the remaining balance by way of instalments, the agreement became a hire purchase agreement and that the purported clause excluding the Hire-Purchase Act was null and void.

Section 5(1) of the Hire Purchase Act, Cap 507 laws of Kenya, requires every Hire Purchase Agreement to be registered within 90 days of execution. Section 5(2) of the Hire Purchase Act makes payment of Stamp Duty a precondition to registration of Hire Purchase Agreement under the Act. Section 5(4) of the Hire Purchase Act provides that any Hire Purchase Agreement which is not registered is not enforceable against the hirer. I have examined the agreement dated 3rd September 2009 produced by the appellant, before the trial court, and it is neither registered nor duly stamped for purpose of Stamp Duty Act. Clause 2 of the agreement provides that: -

> ***The terms and conditions set out herein shall be binding on the parties at the exclusion of the provisions of the Hire Purchase Act.***

The trial court while analyzing clause 2 of the sale agreement held:-

> ***This was therefore not a hire purchase agreement to be governed by the Hire-Purchase Act.***

The trial court relied on **National Bank of Kenya Ltd VPipe Plastic Samkolit (K) Ltd and another (2002) EA 503** in which the court of Appeal of Kenya stated:-

> ***"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.***

It is not in the realm of courts to rewrite contracts for parties. I am satisfied that the sale agreement in

question is not subject to the provision of the Hire-Purchase Act and that the trial magistrate objectively evaluated the appellant's testimony and written submissions and rendered a proper interpretation of the intention of the parties in making a finding that the sale agreement between the appellant and the respondent was not governed by the Hire Purchase Act. I therefore after evaluating and re-analyzing the evidence find no merits in ground No. 4, 5 and 6 of the appeal and the same are dismissed

The appellant in ground No. 2 faults the magistrate's failure to appreciate that the terms of the contract were relaxed by act/conduct of the respondent acknowledging payments from the appellant out of time and time was not of essence. Clause 10 of the sale agreement states:-

> ***That the payment of the monthly instalment shall begin one month from the date of delivery of the vehicle***

The delivery book marked DEXH. 1 shows that the vehicle was delivered on 3rd September 2009 and it therefore follows that the first instalment of Kshs. 65,000/- fell due on 3rd October 2009. The agreement clearly specified at clause 10 that the time was of the essence in connection with the payment of the instalments.

In **Njamunyu vs. Nyaga (1993) KLR 282** the Court of Appeal stated the law on completion once time is made of essence as follows at page 287:

> **"The principle to be acted in such a case is stated in *9 Halsbury's Laws (4thEdn)* p. 338, para 482, i.e:**
>
> **'Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this will fulfill the intention of the parties"**

The respondent's first witness in his testimony before the trial court conceded that the plaintiff did not make monthly payments as agreed but that late instalment payments for Kshs. 65,000/- on 8.12.09, Kshs. 50,000/- on 20.1.10, Kshs. 65,000/- on 14.4.10, Kshs. 50,000/- on 16.8.10, Kshs. 10,000/- on 24.8.10, Kshs. 80,000/- on 6.9.10, Kshs. 30,000/- on 2.2.1 and Kshs. 58,000/- on 19.5.11 were accepted and received. From the conduct of the parties, this court finds that the respondent waived its rights arising from any breach of the sale agreement thereof by accepting payments out of time.

Consequently; I find that the magistrate erred in law and in fact by failing to appreciate that the terms of the contract were relaxed by acts and conduct of the respondent acknowledging payments from the appellant out of time and that time had ceased to be of essence.

In the case of **SAGOO v DOURADO (1983) KLR page 366** the court inter alia held as follows:-

> ***"…in contracts of all types, time will not be considered to be of essence unless***
>
> **……**
>
> **c.A** ***party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence…."***

The respondent's first witness told the trial court that before the repossession and sale; the appellant was served with notices dated 29.4.11 and 5.5.11 which were marked as DEXH. 1 and DEXH.2 respectively. In cross-examination; the witness conceded that he did not have evidence to confirm that plaintiff had been served thereby corroborating the plaintiff's evidence that he was not served with the notices. I have considered the notice dated 29.4.11 DEXH. 1 that was allegedly issued before repossession and it did not specify the time within which the appellant was required to pay the outstanding sum. The flexibility in the parties' dealingsin my considered and humble view resulted in too much uncertainty as to time. It was therefore incumbent upon the respondent to give notice requiring the appellant to complete the sale within

a specified time, failure to which non-compliance would amount to a material breach of the contract, entitling the respondent to terminate the entire agreement but this was not done. Clause 10 of the sale agreement stood varied through the conduct of the parties and the respondent was legally estopped from claiming otherwise. The purported notices issued by the respondent are of no consequence as the same were in my view made as a way of pacifying the respondent's resolve to repossess the subject motor vehicle.

In finding as above, this court is not re-writing the sale agreement of 3rd September 2009 as between the appellant and the respondent. This court is simply construing the conduct of the parties towards each other and then arriving at the conclusion that the inference drawn is the correct position of the parties' intention. It is my opinion that had the learned trial magistrate considered the conduct of the parties towards each other; she would certainly have come to the conclusion as I hereby do that the respondent's action of repossessing the subject motor vehicle while at the same time retaining the purchase price paidis unconscionable.

In the result and for the reasons given hereinabove, I allow this appeal, set aside the order made on the 23rd October 2014 dismissing the suit and substituting it with the following orders.

a. The respondent's act of repossessing the subject motor vehicle from the appellant was illegal, null and void.

b. Due to effluxion of time; the order for restitution of motor vehicle KBJ 087S is not viable and it is therefore hereby ordered that the respondent refund the purchase price paid in the sum of Kshs. 1,108,000/- (**one million, one hundred and eight thousand**) to the appellant

c. The respondent will pay costs of the suit and the costs of this appeal.

DATED AND DELIVERED THIS 16th DAY OF March 2017

T. W. CHERERE

JUDGE