REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL CASE NO. 243 OF 2013

PATRICK MUIA MUTINGA .....APPELLANT

VERSUS

PETER MWEU .....DEFENDANT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Machakos delivered by Hon. L. Simiyu (Ag. Senior Resident Magistrate on 21st November, 2013 in C.M.C.C. No. 357 of 2010)

JUDGMENT OF THE COURT

1. The present appeal emanates from a claim for a liquidated sum of Kshs.208,000/= plus costs and interest which was lodged by the Respondent against the Appellant in **Machakos CMCC. No.357 of 2010**.

2. Brief background of the matter is that the Respondent filed suit against the Appellant for refund of sum of Khs.208,000/= which had been paid to the Appellant as part payment of purchase price for a certain motor vehicle registration number KAN 937 A make Nissan Minibus. The Respondent's case in the lower court was that the Appellant unlawfully repossessed the said motor vehicle without any notice or a court order and then hid it from him yet the (Respondent) was willing to clear the balance of the purchase price. It was the Respondent's further evidence that the sale agreement had not provided any completion date and further had no clauses regarding mode of payment of balances. The Respondent thus sought for refund of the purchase price plus interest. The Appellant on his part stated that it was the Respondent who defaulted in payment and after a long period without receipt of the balance instructed his lawyers to proceed and repossess the vehicle. The Appellant did also claim certain sums for loss of user from the date of non-payment of the balance by Respondent.

3. After the trial, the trial court entered judgment against the Appellant holding that he had acted unlawfully by repossessing the said motor vehicle from the Respondent. The court further dismissed the Appellants counterclaim and proceeded to enter judgment for the Respondent in the sum of Kshs.208,000/= plus costs and interest.

4. The Appellant, being dissatisfied with the said judgment filed the present appeal raising several grounds of appeal as follows:-

(1) The learned trial Magistrate misdirected herself in her assessment of the evidence and thus arriving at a wrong, erroneous unjust conclusion and judgment.

(2) The learned trial Magistrate erred in law and fact by stating that there was a valid contract between the parties.

(3) The learned trail Magistrate failed to consider the Appellant's evidence.

(4) The Learned trial Magistrate erred in law and fact by failing to appreciate the reasonableness of time in a contract.

(5) The Learned trial Magistrate erred in law and fact by failing to appreciate the rights of an unpaid seller in a contract of sale of goods.

(6) The learned trial Magistrate erred in law and the entire judgment is totally misconceived in law.

5. The Appellant prays that this appeal be allowed and the judgment of the learned Magistrate be set aside and this court be pleased to dismiss the Respondent's suit and costs both in this Appeal and in the lower court be awarded to the Appellant.

6. With the leave of the court parties filed submissions to the appeal which the court has considered.

7. This being the first appeal, it is the duty of this court re-evaluate the evidence and to reach its own conclusion on the matter bearing in mind that it neither saw nor heard the witnesses testify but to make an allowance for that (see **SELE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] E.A 123).** It was the evidence of the Respondent that he entered into an agreement with the Appellant who sold motor vehicle registration number KAN 937 A. The agreed purchase price was Kshs.500,000/=. Both Respondent and Appellant confirmed that they had been good friends. The Respondent first made a payment of Kshs.14,000/= and took possession of the vehicle. Over time the Respondent made several payments which were acknowledged by the Appellant such that at the time the Appellant repossessed the vehicle, a total sum of Kshs.208,000/= had been paid to the Appellant by the Respondent. The Appellant does not deny receipt of the said sum only that his contention was that the Respondent took too long to clear the balance and was then using the vehicle for matatu business thereby making huge profits. Upon the filing of the suit herein, the Appellant filed a defence and made a counterclaim against the Respondent for breach of contract and loss of user of the vehicle for the period the balance of the purchase price had not been paid. The trial court considered the evidence of both Appellant and Respondent and ruled in favour of the Respondent and dismissed the Appellant's counterclaim.

From the record of appeal and from the submissions of the parties, there are several issues raised but which in my view are not necessary for the determination of the matter before the court. The only issues for determination are as follows:-

(a) Whether or not the Respondent breached the agreement of the sale of motor vehicle registration Number KAN 937 A.

(b) Whether or not the repossession of the said motor vehicle by the Appellant was lawful.

(c) Whether or not the Respondent was entitled to refund of the purchase price already paid.

8. As regards the first issue it is noted that both the Appellant and Respondent signed a sale agreement which did not expressly indicate a completion date. I have perused all the payment notes and find that all of them basically confirmed receipt or acknowledgement of the monies from the Respondent to the Appellant. The payments were far and between namely 13/07/2008 to 6/12/2009. The initial handwritten agreement did not indicate the date of completion and that the subsequent acknowledgements as to when the last payment were to be made by the Respondent. The Appellant indicated that he and the Respondents were great friends and therefore they had some kind of mutual understanding. It would appear that the Appellant had given the Respondent a certain leeway to be paying him monies as and when he managed to get them. This explains why the various payments which took over a whole year were silent as to when the last one was to be received. The Appellant's counsel has submitted that the sale transaction should be governed by the Law Society of Kenya Standard Conditions of Sale which stipulated a maximum of period of ninety (90) days. Even if that was to be the position I find the Appellant continued to receive the purchase price for more than one (1) year and each acknowledgment

was silent as whether the same was the last payment or failed to indicate the last payment date by the Respondent. Hence it would appear from the conduct of the parties that the completion date was being renewed each time a payment was being made. It is noted that the payments were duly received by the Appellant and it is silent as to whether the same was being received outside the agreed completion date and therefore on a without prejudice basis. The conduct of the Appellant appeared to be that he had given his friend a leeway to be making payments whenever he had monies and that is why he kept on receiving payments over a span of one year. Indeed the Appellant admitted on being cross – examined that the agreement did not stipulate the date of completion. I find his conduct in receiving payment even after a long time from the Respondent legitimized any implied late violations of an assumed completion date. Under those circumstances I am unable to find that the Respondent breached the sale agreement in any way.

9. On the second issue the Appellant admitted having repossessed the vehicle from the Respondent after he failed to clear the balance of the purchase price. The Appellant's counsel submitted that the repossession was justified on the ground that the seller was exercising his right of a seller under the sale of Goods Act. Indeed that might have been so but then equity and natural justice demands that the seller notifies the buyer of this intention. This is made more necessary due to the fact that the agreement did not put in clauses on repossession or certain penalties. The Appellant had been receiving frequent payments from the Respondent not too long before the repossession and hence the Appellant is estopped from taking such an action without issuing a notice or even moving to court for an order of repossession. The Appellant neither served the Respondent with a demand notice nor a court order so as to justify him to repossess the vehicle. The Appellant's conduct on receiving payments over a long period barred him from waking up one morning and seizing the vehicle from the Respondent without any notice or a court order to that effect. Hence I find the repossession of the vehicle by the Appellant was unlawful and which justified the Respondent to seek redress from the court.

10. As regards the last issue the Appellant confirmed receipt of Kshs. 208,000/= from the Respondent. The payments had been made over a span of a long period of time. The Appellant had stated in the lower court that the Respondent had made some profits out of the use of the vehicle and therefore he was justified to repossess the vehicle and not make any refund. In fact the Appellant had sought for loss of user at the rate of Kshs. 5,000/= per month which claim was rejected by the lower court. The Appellant kept on receiving payments over a long period from the Respondent and at no time did he warn the Respondent that in the event of failure to pay the balance he would repossess the vehicle. It was therefore unconscionable for the Appellant to receive back his motor vehicle and then retain the purchase price paid yet the agreement did not provide that the same would be forfeited. Indeed the conduct of Appellant in receiving the several payments had the effect of renewing the completion date if any and that if he intended to repossess the vehicle, he was under obligation to give the Respondent a notice to that effect or even obtain an order from the court. In the premises I find the Respondent's claim for refund of the purchase price merited. The Appellant had claimed that the Respondent used the vehicle for sometimes and made profits but did not avail evidence to that effect. The trial court found the claim for loss of user not proved by the Appellant. In any case the Appellant had been receiving part payment of the purchase price before repossession and hence his claim for loss of user was righty rejected by the trial court. It is also noted that the Appellant was not the registered owner of the vehicle since it was under the name of third party and at the time of the sale to the Respondent the property ownerships had not passed to the Appellant in order to enable him pass the interest to the Respondent.

11. For the forgoing reasons it is the finding of this court that this appeal lacks merit. The appeal is hereby ordered dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Machakos this **4TH** day of **APRIL** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

..Sila for Respondent.....

..C/A: Munyao .....

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