



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 128 OF 2013

BETWEEN

MUTUBACHI ROSE WASWA.....APPELLANT

AND

BONFACE MANDA.....1ST RESPONDENT

SALIM MOKHTAR AWADH.....2ND RESPONDENT

MOHAMDED RAFIQ.....3RD RESPONDENT

NURU SHAMIM.....4TH RESPONDENT

**(Being an appeal from the Judgment of Hon. G.N. Kimang'a(R.M.) on 7.10.2013 in Mumias
SRMCC No. 431 of 2008)**

JUDGMENT

Introduction

1. The appeal herein arises from the judgment and decree of the lower court at Mumias in SPM's Court Civil Suit No. 431 of 2008 dated 10.7.2013 where the plaintiff's suit was dismissed on grounds that she had not clearly established against whom her cause of action lay.

The appeal.

2. Being aggrieved and dissatisfied by the said judgment and decree the appellant appealed to this court on the following 8 grounds;-

1. The learned Resident Magistrate erred in both law and fact in dismissing the appellants suit against the defendants on grounds that she had not established her case against the defendants when there was overwhelming evidence tendered that the 1st defendant received money based on the agreement dated 29th April, 2007 as an assignee "for and on behalf of Kevin trading Company and there was nowhere he could be a witness as the parties appended signature's as respective signatories" to an agreement that was binding to both parties as demonstrated in the agreement and the 1st defendant could have not been a witness as reasoned by the learned trial Magistrate.

2. The learned trial Magistrate errored(sic)in both law and fact by not making a finding that the 1st

defendant by virtue of the express authority shown on the agreement and acknowledgment receipt of monies on 29.4.2007 and 28.5.2007 more than once on sale of motor vehicle he was not a mere witness but an agent of KEVINA TRADING COMPANY and by virtue of the agreement that “parties hereof have appended their respective signatures” on the date, month and year above mentioned” the 1st defendant was more than a servant, heir and/or assignee but a co-owner of KEVINA TRADING COMPANY and ought to have been held liable with the 2nd and 3rd defendants

3. The learned trial Magistrate erred(sic) in both law and fact by finding that the 2nd and 3rd defendants are not liable and[that] there was no privity of contract between the plaintiff and the defendant when there was evidence tendered that they received monies for the motor vehicle in their individual capacity not as SIDRA MOTORS SALES and SPARES LIMITED had no authority to order repossession of motor vehicle chassis No. at 211-0015606 ENGINE No. 744242079 make Toyota Corona Premio and sale the same through William investment auctioneers.

4. The learned trial Magistrate failed to appreciate the fact that 2nd and 3rd defendants did not challenge the evidence on record tendered by the plaintiff and the 1st defendant that they received money for the motor vehicle kshs.710,000/= in due time and that the repossession to illegal which was meant to enrich the 2nd and 3rd defendants double and the court should make an order for interest of justice that the same motor vehicle be returned to the 1st defendant Kevin Trading Company and /or the plaintiff be refunded the monies deposited for the purchase of motor vehicle Kshs.610,000/= as prayed in the plaint.

5. The learned trial Magistrate erred(sic) in both law and facts by not taking into account the plaintiff’s submissions and her evidence that the 2nd and 3rd defendant were made aware of the agreement dated 29th April, 2007 between herself and KEVINA TRADING COMPANY and the 1st defendant when she travelled to Mombasa as indicated by the bus check ticket having been paid in due time as per clause 6 of the agreement dated 27th March, 2006 between KENNETH KENYATTA MANDA T/A KEVINA TRADING COMPANY AND SIDRA MOTORS SALES SPARES LIMITED. The only option was to effect transfer and not repossess the motor vehicle hence earning double that in all fairness the learned trial Magistrate failed to appreciate the facts, law and complexity of the matter and in view of the fact and that the seller of the motor vehicle being KEN MANDA trading as KEVINA TRADING COMPANY and BONFACE MAND as highlighted in the agreement dated 29th April, 2007. There was a case against the 1st defendant and liability had been therefore proved.

6. The learned Magistrate erred (sic) in both law and fact by not finding that the 2nd defendant was rightly sued by the plaintiff as the demand notice from Kenya Revenue Authority indicated the subject suit matter was imported in the name of MOKHTAR S. AWADH by their own admission received money for the same and repossessed the same and therefore liability would lie.

7. The learned trial Magistrate misapprehended the facts of the case was biased his reasoning was not grounded on sound law leading to miscarriage of justice.

8. The learned trial Magistrate failed to appreciate that the receiver of part payment of the money ksh.610,000/=(six hundred and ten thousand) was received by the 1st 2nd and 3rd defendant hence were liable to refund the money as claimed by the plaintiff.

3. The appellant prays the appeal be allowed and that the trial Court Judgment dismissing the appellant’s claim in Mumias SRM CC No. 431 of 2008 be set aside and be substituted by a refund of Kshs.610,000/=(six hundred and ten thousand) costs and interest from the date of filing and any other reliefs this court deems fit and just to grant.

4. This being a first appeal the court is reminded of its primary role as a first appellate court namely to re-evaluate, re-assess and reanalyze the proceedings and evidence on record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and give reasons either way. See the case of **Kenya Ports Authority – vrs- Kuston(Kenya) Limited (2009) 2 E.A 212** wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not introduce extraneous matters not dealt with by the parties in the evidence.”

See also the decisions in **Jabane – vrs – Olenja (1986) KLR 661, Selle & Another– vrs – Associated Motor Boat Company Limited & others (1968) E.A 123 and Peters Vrs – Sunday Post (1958) E.A 424.**

Analysis of evidence

5. In re-evaluating the proceedings and evidence on record this court has relied on the amended plaint, amended defence and the facts of the case as captured by the trial court.

6. Briefly the appellant’s case was that she purchased her motor vehicle from Kenneth Kenyatta Manda trading as Kevina Trading Company. The vehicle was to cost her kshs.720,000/= but she managed to pay kshs.610,000/=. There was an agreement to that effect which was attested to by KEN MANDA, BONFACE MANDA and herself (the appellant). The agreement is dated 29th April, 2007 and the same was signed in the presence of an Advocate from Momanyi Gichuki & Co. Advocates. The vehicle was given to her but she was not able to use it because it had not been registered. Eight months down the line the said motor vehicle was impounded by the Kenya Revenue Authority (customs and excise department) for investigations because it was unregistered. After a while it was sold. Upon her (appellant’s) own investigations she was able to trace who sold the vehicle to Kevina Trading Company and the amount of money that was paid. She therefore enjoined the 2nd and 3rd respondents as parties to the suit. Her claim was for refund of kshs.610,000/= which she paid as part of the purchase price for the motor vehicle.

7. The 1st and 4th respondents denied the allegations in the plaint. They filed their respective amended statement of defence. It was the 1st respondent’s testimony that Kenneth Kenyatta Manda his brother was the one who was engaged in the sale of the motor vehicle in question. He claims to have only signed the sale agreement dated 29th April, 2007 and acknowledged receipt of monies on the express directions of Kenneth Kenyatta Manda. The 4th respondent on her part maintained that the appellant would have been justified in enjoining her upon proof that she was either an intermeddler of the estate of Kenneth Kenyatta Manda or had obtained a grant of letters of administration intestate over his estate.

8. The 2nd and 3rd respondents relied on their joint statements of defence dated 26th day of September, 2012, D/EXH3, an agreement dated the 27th day of March, 2006 D/EXH1 and a copy of the certificate of incorporation of the 2nd defendant’s company, D/EXH2. It is not in doubt that the appellant paid kshs.610,000/= towards the purchase of motor vehicle registration No. AT 211-0015606 TOYOTA CORONA PREMIO ENGINE NO.74.G.242079 CHASSIS NO.1T211-0015606.

9. The transaction for the purchase of the motor vehicle according to the sale of motor vehicle agreement dated 29th of April, 2007 was between M/S KEVINA TRADING COMPANY who were the sellers and MRS MUTUBACHI ROSE WASWA LUBANGA who was the buyer. The agreement which contains the details of the property to be sold and the conditions attached was signed by the seller KEN MANDA, BONFACE MANDA and MUTUBACHI ROSE WASWA LUBANGA. It was witnessed by the firm of M/S MOMANYI GICHUKI & CO. ADVOCATES.

Issues for determination

10. The court will zero in onto the sale agreement herein in order to determine the main issue in this appeal which is whether the appellant established who is responsible for the refund of the purchase price and whether the suit was pre mature.

11. The appellant sued the 1st, 2nd, 3rd and 4th respondents herein. The agreement above was signed by the 1st respondent and his brother who is now deceased.

12. According to the agreement the 1st respondent signed on behalf of KEVINA TRADING COMPANY and not as a witness as he would want this court to believe. The appellant therefore was right to sue the 1st respondent who apparently knew the transactions between KEVINA TRADING COMPANY and the 2nd and 3rd respondents. She produced evidence to show that indeed KEVINA TRADING COMPANY traded with the 2nd and 3rd respondents. The 2nd and 3rd respondents also received money from Kevina trading company as shown by the D/EXH4 and D/EXH5 and these sums received were for the purchase of the vehicle subject matter in this suit, but of course the 2nd and 3rd Respondents had nothing to do with the money paid by the appellant to the 1st respondent

13. Having said the above, I find that the appellant was right in suing the 1st respondent who was trading at Kevina Trading Company. He is the right person to refund the sum of Kshs.610,000/= which he received on behalf of the company. The appeal is therefore allowed and the trial court judgment dismissing the appellant's claim in Mumias SRM CC NO. 431 of 2008 is set aside. I therefore enter judgment for the appellant as against the 1st Respondent with costs. The appeal against the 2nd, 3rd, and 4th Respondents is dismissed but with no orders as to costs. The 1st respondent is therefore ordered to refund the sum of kshs.610,000/= to the appellant together with costs and interest .

14. The Appellant shall have the costs of this appeal.

Orders accordingly

Judgement delivered, dated and signed in open Court at Kakamega this 14th day of September 2016

RUTH N. SITATI

JUDGE

In the presence of :-

Mr. Oyagi (present).....for Appellant

Mrs. Mahuni for Ondieki.....for 2nd and 3rd Respondent

Mr. Obilo for Mr. Kundu.....for 1st – 4th Respondents

Mr. Okoiti.....Court Assistant