REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 158 OF 2012

FRANCIS MBURU. ..... APPELLANT

VERSUS

MOSES OMUSE. ..... 1ST RESPONDENT

MINASE AUTO CAR SALES (K) LIMITED. ..... 2ND RESPONDENT

RICHARD GIKONYO GITHU. ..... 3RD RESPONDENT

ANDREW K LANGAT. ..... 4TH RESPONDENT

J U D G M E N T

1. The 1st Respondent was the Plaintiff while the Appellant was the 4th Defendant in **NRB CMCC no. 4112 of 2004 Moses Omuse Ekabten Vs Minase Auto Car Sales (K) Ltd & 3 others.** In that suit, the 1st Respondent alleged that in or about 1997/1998, he purchased a motor vehicle Engine No. FB-12-007951 from Japan through the 2nd and 3rd Respondent. That upon the motor vehicle arriving in Kenya, the 4th Respondent cleared the same whereby the 3rd Respondent unlawfully released the motor vehicle to the Appellant in breach of the contract between the 3rd Respondent and the 1st Respondent. The 1st Respondent further alleged that the motor vehicle got stolen while in the hands of the Appellant. He therefore prayed for the value of the motor vehicle against the four (4) Defendants in the lower court, jointly and severally.
2. The Appellant and the 2nd and 4th Respondent filed separate defences. In his defence, the Appellant denied the 1st Respondents claim and pleaded that he was granted the temporary use of the subject motor vehicle by the 3rd Respondent without notice of the 1st Respondent's interest thereon. He denied any privity of contract between him and the 1st Respondent and that there was no cause of action established against him as pleaded. He urged that the claim against him be dismissed.
3. The suit was heard ex-parte and by a judgment delivered on 7th September, 2009, the trial court found the case of the 1st Respondent to be uncontroverted and allowed the same. However, when the Appellant learnt of the judgment, he successfully had the same set aside on 6th September, 2010. In the ensuing inter partes hearing, the 1st Respondent and his witness PW 2 adopted the evidence they had earlier on tendered whereby Counsel for the Appellant cross-examined them on the same. The 4th Appellant closed his case without calling any evidence. Both Counsels for the 1st Respondent and the Appellant filed written submissions whereupon by a judgment delivered on 1st March, 2012, the trial court found that since the Appellant had not testified, the position

remained ante 6th September, 2010 and accordingly rein-stated the judgment of 7th September, 2009.

4. Aggrieved by that judgment, the Appellant has appealed to this court setting out a total of 13 grounds of appeal. These can be summarized into three (3) as follows:-

a. that the trial court erred in re-instating the judgment of September, 2009 without considering the merits of the Appellants defence on the grounds that he had not testified;
b. that the trial court erred in failing to adequately consider the evidence before it which indicated that no cause of action had been established against the Appellant, and
c. that the trial court erred in failing to consider the legal issues raised in the pleadings and the submissions before it.

5. This being a first appeal, this court is enjoined to re-evaluate the evidence afresh and come to its own independent conclusions. But in doing so, it must always have in mind the fact that it did not see the witnesses testify to deduce their demeanor. See the case of **Selle Vs Associated Motor Boat Co. Ltd. 1968 EA 123.**
6. The evidence of the 1st Respondent (PW1) was that on 27/12/1997, he saw an advert in the Daily Newspapers in which the 2nd and 3rd Respondents indicated that people could import motor vehicles directly from Japan through them. Pursuant thereto, he placed an order through the 2nd and 3rd Respondent for the importation of an FB12-007957 Nissan which was landed in Mombasa later that year. He later paid other charges for the clearance of the said vehicle by the 4th Respondent. On being cleared, the 3rd Respondent handed over the same to the Appellant from whom it was stolen. The vehicle was at the time valued at Kshs.370,240/= which amount the 1st Respondent claimed from the Defendants in the lower court.
7. On his part PW2, No.54808 P.C Joseph Magut told the court how he was instructed by his seniors in January, 2008 to investigate a case of theft of motor vehicle which had been reported by the 1st Respondent. He took statements from the 1st Respondent, the 3rd Respondent and the Appellant. He established that the motor vehicle had been imported by the 1st Respondent but was stolen whilst in the hands of the Appellant. That the vehicle was never traced. That then was the evidence before the trial court.
8. The Appeal was argued vide written submissions which were ably hi-lighted by learned Counsel. Ms Kagai Learned Counsel for the Appellant submitted that the trial court failed to consider that there was no privity of contract between the Appellant and the 1st Respondent; that the 1st Respondent's case as pleaded was on contract yet the only connection between the Appellant and 1st Respondent is the possession of the subject vehicle by the Appellant which was not through any contractual dealings between the two. That the 1st Respondent's case as pleaded in the lower court did not disclose any cause of action against the Appellant. That the failure of the Appellant to testify did not justify the trial court's failure to consider if the 1st Respondent had discharged his burden of proof against the Appellant. Counsel referred to the case of **S.K.N Vs Eric Ndungu Warui & anor (2014) eKLR** in support of her submissions.
9. On his part, Mr. Alubayi, Learned Counsel for the 1st Respondent submitted that, the Appellant had closed his case without calling any evidence; that the only evidence on record was that of the 1st Respondent which remained uncontroverted and the trial court was entitled to act on the same and should not be faulted for doing so. Counsel cited the case of **Janet Kaphiphe Ouma & Anor Vs Marie Stopes International (K) HCCC No. 68 of 2007 (UR)** in support of his submissions. Counsel further submitted that the 1st Respondent's claim against the Appellant is not founded on contract but on chattel had and received. He urged that the appeal be dismissed with costs.
10. It is not in dispute that the appellant did file a defence to the 1st Respondent's claim. It is also not in dispute that on cross-examining the 1st Respondent and his witness, the Appellant closed his case without offering any evidence. It is also not in dispute that the Appellants counsel did file submissions before the trial court. What is contended is the manner in which the trial court treated all these. In his judgment at page 202 of the Record of Appeal, this is what the Learned Trial Magistrate had to say:

"On 7/9/2009, I delivered judgment in favour of the Plaintiff as against the defendant as prayed in the plaint. On 6/9/2010, I set aside the said judgment to enable the 4th defendant to defend the suit. On 17/1/2012 this matter came up for hearing. The 4th defendant was not in court and his advocate closed his case.

Failure by the 4th defendant to testify in his defence renders the Plaintiffs evidence non rebutted, uncontroverted and unchallenged as was the case when I delivered the judgment on 7/9/2009.

In order to save judicial time and notwithstanding the written submissions filed by counsel for the 4th defendant, I order that the judgment I entered on 7/9/2012 be reinstated forthwith.

Accordingly, I enter judgment as entered on 7/9/2009."

11. It is clear from the foregoing that the failure of the Appellant to testify influenced the learned trial magistrate in failing to re-evaluate the evidence on record afresh, in light of the re-hearing of the case, (the cross-examination undertaken) and the submission made on behalf o the Appellant. It is true that in a proceeding where no evidence is called by a party, the evidence tendered on oath by the other party remains uncontroverted. Such evidence however must been evaluated in light of the legal issues raised by a Counsel at the close of the case. In order for evidence to prove a claim, it must be based on sound legal principles upon which the claim is predicated upon.
12. It is not always necessary that a party must personally attend and offer evidence in a proceeding to prove his case or defence. He can do so either through other witnesses who have direct and relevant evidence or through legal arguments. In the case of **Nathaniel Kipkorir Tum Vs The Inspector of State Corporations (2015) eKLR** the court held that:-

"Through the testimonies of AW1 and AW2, RW3, RW4 and RW8 the relationship between Soet(K) Ltd and KSC and how the subject payments were made was clarified. I do not think that there was any reason why the Appellant was to testify on the said relationship yet there was sufficient evidence on record on that fact. I have always known the law to be that unlike in criminal cases, it is not mandatory in civil cases for a party to testify personally. He can prove his case through acceptable direct evidence of witnesses other than himself. See the case of Juliae Ulrke Vs Tiwi Beach Hotel Ltd (1998) eKLR."

13. In the said **Juliae Ulrke Vs Tiwi Beach Hotel Ltd (Supra)** the Court of Appeal delivered itself thus:-

"There is no reference in this rule to Plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A Plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 Rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his Counsel and we say with no hesitation whatsoever, that the point taken by Mr. Kirundi could be described as an abuse of the process of court and that the acceptance of this point and the reasons for this in the ruling by the learned judge were not only surprising but also totally erroneous." (Emphasis mine)

14. In the present case, the Appellant's defence was twofold; that there was no privity of contract

between him and the 1st Respondent and secondly, that the Plaintiff's claim did not disclose any cause of action against him. Upon cross-examination of the 1st Respondent and his witness, it was clear that there was no contract that was established as having existed between the Appellant and the 1st Respondent. There was therefore no need for the Appellant to appear and testify to confirm what was already clear; that there was no privity of contract between him and the 1st Respondent.

15. Accordingly, in view of the foregoing, the Learned trial magistrate erred in re-instating the Judgment of 07/09/2009 without considering the submissions made on behalf of the Appellant on the basis that the Appellant had failed to testify or offer any evidence.
16. The second and third grounds can be disposed off together; these are that the trial court erred in failing to consider the evidence before it that indicated that there was no cause of action disclosed against the Appellant and that it erred in failing to consider the legal issues raised in the pleadings and submissions. The cause of action pleaded in the Plaint was of contract. The Defence denied any privity of contract between the 1st Respondent and the Appellant and asserted that there was no cause of action disclosed in the 1st Respondent's claim. This was also re-iterated in the submissions filed by Counsel for the Appellant.
17. In Chitty on Contracts para-18-014 at page 911 the learned writers observe that:-

> ***"The doctrine of privity (of contracts) means, and means only that a person cannot acquire rights or be subjected to liabilities arising under a contract to which he is not a party."***

At **page 971 of the 3rd Edn of the same Text** it is stated:-

> ***"A contract cannot confer rights or impose obligations arising under it on any person except the parties to it."***

18. In **Read Vs Brown (1888) 22 QBD 128**, the court defined the cause of action as comprising every fact which it would be necessary for the Plaintiff to prove. In **Blacks Law Dictionary 9th Edn, 2009**, at page 251, a cause of action is defined as: -

> ***"A group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain a remedy in court from another person."***

Finally, **Edwin E. Bryant**, is his works the **Law of Pleading under the Codes of Civil Procedure, 2nd Edn. 1899 at pg 170** has observed as follows: -

> "***What is a cause of action? …….. it may be defined generally to be a situation or state of facts that entitle a party to maintain an action in a judicial tribunal. This state of facts may be: -***

a. ***a primary right of the Plaintiff actually violated by the defendant; or***
b. ***the threatened violation of such right, which violation the Plaintiff is entitled to restrain or prevent, …….***
c. ***it may be that there are doubts as to some duty or rights… which the Plaintiff is entitled to have cleared up, that they may safely perform his duty, or enjoy his property."***

19. In view of the foregoing, it can be safely stated that a cause of action is a state of affairs or facts whose existence entitle a person to claim or maintain a claim against another in a judicial process. It is only when such a party proves those facts or state of affairs, that he is entitled to the remedy sought.
20. As already stated, the cause of action which the 1st Respondent pleaded in the lower court was that of contract. The evidence on record proved the existence of a contractual relationship between

the 1st Respondent and the 2nd, 3rd and 4th Respondent. Indeed the particulars of breach pleaded in paragraph 15 of the Plaint, were as against the said Respondents only. The Plaint did not make any allegation of existence of any contractual relationship between the 1st Respondent and the Appellant. Indeed no breach of any such contract was either pleaded or proved. In this Appeal Mr. Alubayi Counsel for the 1st Respondent readily admitted that the 1st Respondent's claim was not based on contract.

21. As quite rightly submitted by Mr. Alubayi the claim by the 1st Respondent against the Appellant was not on contract but for a chattel had and received. It is not in dispute that the Appellant did have in his possession the 1st Respondent's motor vehicle without the latter's permission. The vehicle was lost while in the Appellants possession. Of course he was liable to account for its loss to the 1st Respondent but not on contract. That being the position, did the Plaint in the lower court contain a claim against the Appellant for Chattel had and received? Sadly it did not.
22. In the circumstances of this case, where the Appellant readily admitted having had in possession of and having lost the 1st Respondent's Motor Vehicle, was the 1st Respondent to be without a remedy against the Appellant? I have always known the law to be that the parties' cases are framed by pleadings. Pleadings give notice to the opponent the case he is to face. It is on the basis of that notice that the opponent prepares his case or defence, as the case may be. This is the basis of the old age principle that **"parties are bound by their pleadings."** If, during litigation, a party wishes to change the basis of his case, there are processes in law of doing that, through amendment. That is why amendment of pleadings are freely allowed at any stage of the proceedings.
23. In the present case, the evidence tendered at the trial, which was not controverted by the Appellant which in any event he was not bound to controvert, disclosed a completely different cause of action from the one pleaded in the Plaint. This is to the effect that the Appellant had received into his possession, used and caused to be lost the Plaintiff's motor vehicle without the latter's permission. However, this was not the case that was pleaded and which the Appellant had prepared his defence to meet.
24. Accordingly, had the Learned trial magistrate evaluated the pleadings, the evidence on record and the submissions made on behalf of the Appellant, he would have concluded that there was no privity of contract that had been established to have existed between the 1st Respondent and the Appellant and that the 1st Respondents claim did not disclose any cause of action against the Appellant. In the circumstances, the Judgment of the trial court cannot stand.
25. Regrettable as it may be, I have come to the inescapable conclusion that the Appeal is meritorious and is allowed with costs to the Appellant.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 10th day of July, 2015.

…….

A. MABEYA

JUDGE