



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 32 OF 2011

(Being an appeal from the judgment of Hon. E. Tanui [R.M.] delivered on 10th February 2011 in Nakuru CMCC No. 888 of 2008)

VITALIS K. KAITANY.....APPELLANT

VERSUS

JOSEPH C. CHEPKWONY.....1ST RESPONDENT

REGISTRAR OF MOTOR VEHICLES.....2ND RESPONDENT

JUDGMENT

1. The 1st Respondent was the Plaintiff in CMCC NO. 888 OF 2008. By the Plaint dated 9th September 2008, he sought judgment against the Defendants (*Appellant and 2nd Respondent*) jointly and severally for-

- (a) *a mandatory order compelling the defendants jointly and severally to revoke the registration of the logbook to lorry no. KAC 073 R Nissan Lorry in the name of the 1st Defendant;*
- (b) *general damages;*
- (c) *costs of the suit;*
- (d) *any other and or further relief as the Honourable Court may deem fit and just to grant.*

2. The Appellant, the 2nd and 1st Respondent entered appearance and filed their respective defences dated 25th September 2008 and 14th September 2008 respectively. After full trial, the court found that the 1st Respondent had proved his case on a balance of probability and entered judgment for him in terms of prayer (a). The claim for general damages was not awarded because there was pending before the High Court HCCC NO. 51 of 2007 in regard to the right of possession of the said lorry.

3. Aggrieved with the said Judgment, the Appellant filed this appeal against the judgment on the grounds that-

- (a) *the learned trial magistrate erred in law and in fact in failing to find that the 2nd Respondent, the Registrar of Motor Vehicles is not a legal entity capable of suing or being sued and as such erred in failing to find that the suit before her could not stand having been instituted against an entity with no legal capacity;*

(b) *the learned trial magistrate erred in law and in fact in failing to find that the suit against the Registrar of Motor Vehicles was statute barred;*

(c) *the learned trial magistrate erred in law and in fact in failing to find that the first prayer in the Plaint for revocation of the name of the Appellant from the log book of motor vehicle registration number KAC 073 R could not be granted as the legal entity with the mandate to revoke the same had not been properly sued;*

(d) *the learned magistrate erred in law and fact in disregarding the Appellant's evidence ;*

(e) *the learned magistrate erred in finding that the suit in the lower court was an abuse of the court process in light of the already pending suit in the High Court, Nakuru HCCC NO. 51 of 2007;*

(g) *the learned magistrate erred in law and in fact in disregarding the Appellant's submissions and failing to properly analyse and consider the evidence before her thus arriving at an erroneous decision; and*

(f) *the learned magistrate erred in failing to find that the evidence and the documents before her demonstrated beyond any reasonable doubt that the First Respondent had disposed of the suit motor vehicle and had no claim over it whatsoever.*

THE EVIDENCE

4. The Plaintiff case was that he purchased motor vehicle registration number KAC NISSAN LORRY (*motor vehicle*) from Brook Bond (K) Limited on 6th July 2004. Sometimes in April 2006, the 1st Defendant who was at the time an employee of Kiptangich Tea Factory, approached him with a business proposal. He asked him to allow his vehicle to be used by the company at a fee which they would split equally. The Plaintiff agreed with the proposal and would receive between Kshs. 30,000/= and 50,000/= per month.

5. In December 2006, the Plaintiff gave the 1st Defendant the original log book for purposes of inspection of the vehicle. They continued with the business until January 2007 when the Plaintiff asked to be given back his lorry as the First Defendant (*now Appellant*) was not properly accounting for the proceeds.

6. The First Defendant informed him that the vehicle had been sold to him by a Mr. Sigei and that the original log book that had been given to him was lost.

7. He then obtained a duplicate log book from Brook Bond and had the vehicle registered by the Registrar of Motor Vehicles under his name on 29th January 2007. A search conducted on 6th February 2007 (PEX 7) shows that he was listed as the owner of the motor vehicle. He immediately lodged a caveat with the Kenya Revenue Authority against registration of any transfer of the motor vehicle without his authority by the letter dated 6th February 2007 (PEX 8).

8. His efforts to retrieve his vehicle from the First Defendant were futile which prompted him to write to the Director of Public Prosecutions on 30th January 2007 to investigate the matter. The letter to the First Defendant was produced as PEX 10 and that to the Director of Criminal Investigations was produced as PEX 11.

9. On 22nd February 2008, the Plaintiff did another search and realized that the First Defendant was now registered as the owner of the vehicle (*see* PEX 9). He complained to the Kenya Revenue Authority and also issued the Attorney-General and the Permanent Secretary in-Charge of the Ministry of Transport of his intention to sue. On 18th June 2008 the Attorney-General responded to his notice and sought information from the Kenya Revenue Authority concerning the lorry. The office of the

Attorney-General later notified him that it had issued the First Defendant with the log book (*see exhibits 12, 13, 14 and 15*).

10. The Plaintiff denied having signed any transfer in favour of the 1st Defendant. He asked the court to rectify the log book and to award him special damages for loss of user which he estimated at Kshs. 6,000/= per day.

11. The Plaintiff confirmed that he had entered into an agreement for sale of the motor vehicle with Jonathan Sigei and Willie Sigei and confirmed that he signed the agreement dated 30th July 2004. During cross-examination he explained that this agreement was not completed because the vehicle was damaged and the its purchase price was much higher than originally agreed. The vehicle was impounded by the Police, but later released to him following a settlement of the matter with Mr, Sigei. He denied the authenticity of DMFI 2.

12. PW2 was the Administration Officer of Unilever Tea (K) Limited which was previously known as Brooke Bond (K) Limited. The Certificate of Change of Name dated First April 1982 was produced as PEX 1. She confirmed that the vehicle belonged to Brooke Bond (K) Limited and was sold by tender to the Plaintiff who was then issued with the log book no. 227088, the vehicle form, Certificate of Incorporation and Company's Pin Certificate. (PEX 1, 3 and 4)

13. PW3, the Registrar of Motor Vehicles, was a witness for both the Plaintiff and the First Defendant. His duties include registering and keeping records for the motor vehicles and orders and issuing log books and searches. He explained that a log book is a document proving ownership and that there can never be two log books in respect of the same motor vehicle unless one is canceled and another issued or where one is lost or defaced and a duplicate is issued. Further if a person wishes to be issued with a log book he must fill in the prescribed form and attach a copy of his PIN Certificate and Identification Card. If the vehicle is purchased, a Transfer Form duly filled by the seller must be attached.

14. He testified that the motor vehicle was initially registered in the name of Brooke Bond (K) Limited before it was sold to the Plaintiff. He confirmed that the Plaintiff was issued with a duplicate log book upon verifying that the same belonged to him. The witness also confirmed that he transferred this motor vehicle to the First Defendant after he produced a Sale Agreement for the motor vehicle (PEX 16) between the Plaintiff and Jonathan Kipkoech Sigei and Kiplangat Sigei dated 20th July 2004 and a further sale agreement between Jonathan Kipkoech Sigei and the First Defendant dated 4th April 2005. He however testified that Jonathan Sigei is the same person as Kiplangat Sigei.

15. PW3 also testified that if the vehicle is being transferred by an administrator letters of administration authorizing such action must be produced. He was satisfied with these documents that when the seller is not available, the Registrar may sign the transfer form on his behalf. In this case, the witness signed the transfer on behalf of Jonathan Kipkoech who was unavailable. The said Jonathan had not given him a power of attorney. He canceled the log book issued to the Plaintiff because it had been forged.

16. DW1 testified that he bought the motor vehicle from Jonathan Kiplangat. He was informed by Jonathan that the First Respondent had been unable to pay for the lorry and therefore wished to sell the same to the Appellant. He produced a copy of a letter written by Eboso Advocate for the third parties on 16th April 2004 demanding for deposit of the log book (DEX 5).

17. The agreement was finalised by Jonathan Kiplangat's brother Robert Kipngeno as he was going to Sudan. He paid the entire purchase price of Kshs. 800,000/= and was issued with the log book. He denied entering into any oral agreement with the First Respondent over the use of the lorry.

18. Robert Kipngeno Sigei was DW3. He was a brother to Jonathan Kiplangat Sigei and Willie Kipkoech Sigei. He told the court that his brothers gave the Plaintiff money to purchase the the lorry which is the subject of the suit and a tractor from Brooke Bond (K) Limited. The vehicle was eventually

released to his brothers who then sold it to the Appellant.

SUBMISSIONS

19. For the Appellant, Mr Murimi for the Appellant argued the first, second, third and seventh grounds together. He submitted that the office of the Registrar is established under Section 3 of the Traffic Act (*Cap 403 Laws of Kenya*). It is not established as a legal person capable of suing or being sued in its own name. The Plaintiff issued a notice of intention to sue to the Attorney-General but did not include him as a party to the suit. Therefore the suit before court is a nullity and cannot stand. The prayer for cancellation of the log book could not be added as the Attorney-General was not included in the suit. No orders could be made against the Registrar of Motor Vehicles. Further Section 3(1) of the Public Authorities Act provides for a limitation of 12 months from the time the cause of action arose.

20. The claim ought to have been filed within 12 months from the date the logbook was issued to the First Defendant. These issues were raised in the lower court but were not addressed. The judgment of the court is also a nullity in its entirety in that it refers to the wrong motor vehicle. The pleadings referred to motor vehicle registration number KAC O37 R whereas the trial magistrate referred to motor vehicle registration number KAC 017 R in her judgment and this is the same vehicle that is referred to in the judgment.

21. Counsel submitted that the trial court failed to consider the documents which proved the transaction between the Appellant and the First Respondent and further that the First Respondent made a false report to the Second Respondent that he had lost the original log book. Finally, Counsel submitted that the suit in the lower court was an abuse of the court process in light of the already existing suit in the High Court over the same motor vehicle.

22. Section 9 (1) of the Traffic Act authorized the Registrar of Motor Vehicles to register a motor vehicle if the documents are not availed to him within seven days.

23. In response, Mr. Gai learned counsel for the First Respondent submitted that some of the issues raised in this appeal were raised for the first time in the submissions and not in the pleadings. The question of the capacity of the Registrar was not raised. The Attorney-General is the government's advisor and the First Respondent did issue a notice to sue. The Registrar of Motor Vehicles entered Appearance and appointed Counsel to act for it in the matter.

24. With regard to the contention that the suit is statute barred, Counsel submitted that this is not only a case of conversion but also one of fraud as the Appellant presented forged documents to cause registration in his name. Therefore the suit was filed within the time limit and is properly before the court.

25. Counsel also submitted that the entire Appellant's case was premised on two agreement, one dated 30th July 2007 and the other of 4th April 2005. The First Respondent testified that the first agreement was not followed through the and the vehicle was not sold to the third parties. It was Counsel's submission that the second agreement was fraudulent as it was not executed by one of the persons who had purchased it from the First Respondent, Willie Sigei. This sale transaction was an attempt by Jonathan to recover money owed to him by the First Respondent.

26. Counsel further submitted that the 1st Respondent filed a suit in the High Court HCCC 51 of 2007 against Kipgatch Tea Factor for release of the motor vehicle. After realizing that the motor vehicle had been registered in favour of the Appellant, the First Respondent filed the suit in the lower court for mandatory injunctions and general damages. The Appellant applied to have this suit strike out but his application was dismissed and no appeal was subsequently filed against ruling.

WHETHER THE SUIT WAS DEFECTIVE IN SUBSTANCE

27. The Registrar of Motor Vehicles is a person appointed under Section 3 of the Traffic Act, and who is responsible for the registration and licensing of motor vehicles and trailers and for the licensing of

drivers, and for the keeping of such records in relation thereto as are required by the Act. This section was amended by the Traffic (Amendment) Act No. 33 of 2012. These duties are now vested in the National Transport and Safety Authority established under the National Transport and Safety Authority Act.

28. However at the time he was vested with this duties, the Act did not confer upon him a legal personality by which he may undertake legal proceedings in his own name. He is a public officer who exercised jurisdiction delegated to him by the Minister who was at the time of responsible for matters relating to public works. Any claim against him should have properly be made against the state which is sued through the Attorney General, its principal adviser and who undertakes proceedings for and on its behalf.

29. Having said so however, I am of the view that failure to enjoin the Attorney-General in these proceedings was not fatal. The First Respondent's complaints were directed against the Registrar's office and sought orders against it. I find that it was proper for him to enjoin the Registrar of Motor Vehicles, to enable him answer the questions and nothing bars him from being enjoined. Submissions to the contrary is rejected.

30. Further I find that there was no prejudice suffered by any party. The Registrar of Motor Vehicles, instructed an independent counsel who acted entered appearance, filed a defence and conducted the proceedings on his behalf. He had the capacity to seek the services of the Attorney-General and instead chose to engage the services of an independent Counsel. Accordingly I find that the non-joinder of the Attorney-General did not go to the root of the matter and as such cannot be a valid reason to nullify the entire proceedings. Such an action would occasion great injustice to the First Respondent and would be in derogation of this court's duty under Article 159 (2) (d), to administer justice without undue regard to technicalities.

31. **WHETHER THE SUIT AGAINST THE SECOND RESPONDENT WAS TIME BARRED**

32. Counsel for the Appellant submitted that the suit against the Second Respondent is statute-barred. The evidence was that the Appellant was registered in the logbook as the owner of motor vehicle on 25th January 2005. Section 3 (1) of the Public Authorities Limitation Act (*Cap 39 Laws of Kenya*) provides that -

“3(1) No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

33. Accordingly this suit was filed outside the time limit on 9th September 2008 and ought to have been dismissed on this ground.

34. On my part I find that this suit was not merely one of the tort of conversion. The First Respondent accused the Appellant and the Second Respondent of fraud whose particulars were provided for in the Plaint. Therefore it fell outside the scope of a claim for tort which is time-barred under the said Section of the Public Authorities Limitation Act. This ground of appeal is also rejected.

WHETHER THE SUIT IN THE LOWER COURT WAS AN ABUSE OF THE COURT PROCESS IN LIGHT OF THE ALREADY PENDING SUIT IN THE HIGH COURT

35. It was common ground that the First Respondent had filed a suit in the High Court HCCC NO. 51 of 2007 against the Appellant and Kiptagich Tea Estates Limited. By a Chamber Summons dated 17th January 2009, the Appellant sought to strike out the suit in the lower court for being an abuse of the court process. He relied on Section 6 of the Civil Procedure Act which barred the court from proceeding with -

“the trial of any suit or proceeding in which the matter in issue is also directly and

substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

36. The court considered this application and found that although both suits revolved around the same motor vehicle, the parties involved and the reliefs sought were different. In HCCC NO. 51 OF 51 of 2007 the Plaintiff had sued Kiptagich Tea Estate Limited and the First Defendant seeking a mandatory injunction compelling the Defendants to hand over and give possession of the motor vehicle and to render an account of the work schedule of the lorry and an order compelling them to pay the Plaintiff the money due to him for utilising his lorry in their business. In the suit before the lower court, the Plaintiff was seeking a mandatory injunction compelling the Defendants to revoke the registration of the log book to the motor vehicle and general damages for conversion.

37. I concur with the finding of the trial court in its entirety. The First Respondent's case was for revocation and cancellation of the registration made in favour of the Appellant and damages for conversion. In the suit before the High Court he was seeking to repossess his motor vehicle and an account of the profits made from the unlawful use of the lorry. Accordingly I find that this ground of appeal has no merit.

WHETHER THE TRIAL COURT PROPERLY ANALYSED THE EVIDENCE

38. It was not disputed that the vehicle was originally owned and registered in the name of Brooke Bond (K) Limited now Unilever (K) Limited. PW2 confirmed that the same was sold to the First Respondent by way of tender. He was given all the documents necessary to effect a transfer in his name including the original logbook, but failed to present them to the Registrar of Motor Vehicles for registration and inclusion of his name in the logbook until he realized that the Appellant was also claiming ownership of the said motor vehicle. He explained that at the time, he had already given the original logbook to the Appellant for purposes of conducting an inspection on the motor vehicle who then claimed to have misplaced it. He was however able to obtain a duplicate logbook and registered as the owner.

39. This duplicate was subsequently canceled on the basis that it ought to have been issued to the original owner Unilever (K) Limited. Indeed the application for the duplicate, (DEX 3) is by Unilever (K) Limited who alleged to have lost the original in the house. Further the First Respondent did not produce any transfer of the vehicle to him executed by Unilever. That notwithstanding PW3 was satisfied that the Plaintiff had acquired ownership of the motor vehicle. He was also satisfied that he subsequently sold it to third parties who eventually sold it to the Appellant currently registered as the owner.

40. Although there was no transfer documents presented by the First Respondent or the third parties to the Appellant, PW3's belief was predicated on two sale agreements. The first (PEX 16) was a Sale Agreement between the First Respondent, the Seller, and Jonathan Sigei and Willie Sigei, the purchasers. In this agreement dated 30th July 2004 the First Respondent agreed to sell the motor vehicle to the third parties for a consideration of Kshs. 800,000/= and acknowledged receipt of the money.

41. The First Respondent however explained that this sale did not materialize because ***“the vehicle was in pieces and the prices were higher.”*** This led to a dispute which led to the vehicle being impounded by the Police. It was eventually settled amicably by an oral agreement.

42. The second document (PEX 17) is a Sale Agreement dated 4th April 2005 between Jonathan Kiplangat Sigei and the Appellant. In that document the seller indicated that he was selling the motor vehicle to recover the Kshs. 800,000/= given to the First Respondent.

43. That document is not executed by the second purchaser Willie Sigei or a Mr. Robert Sigei who is described as the Administrator of the Seller executed it for Jonathan Kiplangat Sigei. The evidence was that Jonathan Kiplangat Sigei was at the time out of the country and not deceased. Notwithstanding,

PW3 testified that if the agreement is not executed by the owner of the vehicle the person acting on his behalf must present a power of attorney or letters of administration authorizing him to act on his behalf.

44. PW3 testified that the Appellant did not produce either of these documents nor did Robert Sigei appear before him. Again this notwithstanding, he exercised his power under Section 9(3) of the Traffic Act, to sign the transfer on behalf of the Plaintiff who had refused to sign and Jonathan Sigei who was unavailable.

45. The said Section 9(2) of the Act, now deleted by Section 39 of the Act No. 8 of 2009 provided as follows-

(2) upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall, within seven days from the date of the transfer, inform the Registrar in the prescribed form of the name and address of the new owner and deliver to the new owner the registration book in respect of such vehicle; and the new owner shall, after inserting particulars of the change of ownership, forward the registration book with the prescribed fee to the Registrar, whereupon the vehicle shall be registered in the name of the new owner:

Provided that, where in any case the registered owner of a vehicle has failed to comply with the provisions of this sub-section, the Registrar, on being satisfied that the registered owner has died or has left Kenya or cannot be traced or refused to comply with the provisions of this subsection, may on payment of the prescribed fee, cause the vehicle to be registered in the name of the new owner.

46. In my view, the above section provides that the registered owner must inform the registrar in the prescribed form II, of the name and address of the new owner of the vehicle and submit the original registration book to the new owner. The new owner then after inserting the particulars of change of ownership, forwards the registration book to the Registrar for registration. The proviso applies where the registered owner fails to present the transfer form to the Registrar and the Registrar is satisfied that he is deceased, out of the country, cannot be traced or has merely refused.

47. The circumstances named above did not present themselves in the present situation. Firstly there was evidence that the First Respondent did not merely refuse to submit the transfer documents to the Registrar. He contended that the said transaction was fraudulent and denied that he had sold the vehicle to the third parties as alleged. He informed the Registrar of his objections and went ahead to lodge a caveat against any registration without his consent.

48. In this case therefore the Registrar acted outside his mandate in purporting to determine the dispute of ownership between the Appellant and the First Respondent. He upheld the Appellant's contentions that he was the rightful owner whereas, admittedly, there was evidence that the First Respondent had an interest in this vehicle.

49. Secondly the documentation was that which no person exercising due diligence and presented with the First Respondent's complaints, could have acted on in causing a registration. The Appellant alleged to have acquired title after purchasing it from a third party to whom the vehicle had been sold by the First Respondent. The Sale Agreement was signed by an administrator of one of the parties who did not present letters of administration. The other owner did not execute it. Further the said third parties did not have any transfer registered in their name and other than the purported Sale Agreement there was no other evidence that the First Respondent had transferred his vehicle to them.

50. In my view the transaction between the Appellant and the third parties is tainted with fraud. Whereas the Plaintiff demonstrated how he came to own the vehicle and the circumstances under which the same was given to the Appellant together with the original log book, the Appellant case had no convincing evidence in support thereof.

51. In contrast, the transaction between the First Respondent and third parties was suspicious. DW3 alleged that the vehicle was purchased by the First Respondent on behalf of the third parties, the

evidence produced did not support his contention. The letter from the third parties' Counsel (DEX 5) suggests that in fact the vehicle was being sold to the third parties and that the First Respondent would be given the balance of the purchase price upon releasing the original log book. The Appellant himself testified that Jonathan sold him the vehicle in order to recover the money owed to him. This testimony was supported by PEX 17 wherein the seller indicates that his intention in selling the car is to recover the money owed by the First Respondent.

52. In my analysis of the entire evidence, I find that the Plaintiff demonstrated that he acquired an interest over the motor vehicle which he did not pass lawfully to any other person. The circumstances under which the Appellant was registered as the owner of the vehicle were fraudulent and the court was right in allowing the prayer for revocation of the registration book issued to him and cancellation of his registration as owner.

53. With regard to the claim for general damages for conversion, the trial court found, rightly, that the same could not be determined at that juncture in light of the pending claim in the High Court for profits earned by the Defendants in that suit from the use of his car.

WHETHER THE JUDGMENT OF THE LOWER COURT IS A NULLITY ON ACCOUNT OF THE ERRORS

54. In the judgment, the lower court erroneously referred to motor vehicle registration number KAC 017R Nissan Lorry as the subject of the suit. The pleadings and evidence of the parties were clear that their dispute was in regard to ownership of the motor vehicle registration KAC 073 R Nissan Lorry. Accordingly, the motor vehicle referred to by the court was not the subject to the suit and reference to it was made in error.

55. Firstly I note that this allegation was not contained in the memorandum of appeal and was only raised for the first time at the hearing of the appeal. A party is bound by their pleadings and they cannot at the hearing of the matter raise new issues that are not contained in the documents containing their claim. The First Respondent was not given proper notice of this contention hence denied a fair chance to respond to it. Raising it at the hearing and the same ought not be entertained.

56. Nonetheless, I find this was only an error that did not go to the root of the judgment of the court or in any way lead to a misapprehension of the final pronouncement of the court of the rights of the parties. The motor vehicle which constituted the subject matter of the suit was known to both parties and they understood that it is the vehicle to which the court was making reference in its judgment.

57. The court is fallible and may make errors. Hence the slip rule under Section 99 of the Civil Procedure Act, allows the court to correct clerical or arithmetical, or errors arising there from by accidental slip or omission. This was an error that could be corrected by the court on its own motion or upon the application of the parties and would not be a reason to set aside the entire judgment.

CONCLUSION

58. I find that the appeal herein has no merit and dismiss it with costs to the First Respondent. It is so ordered.

Dated, signed and delivered at Nakuru this 7th day of November 2014

M. J. ANYARA EMUKULE

JUDGE