IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 72 OF 1996

DR. JOEL MUTHURI………………………......................………APPELLANT

AND

JULIUS GICHURU GUANTAI……….......…………………..RESPONDENT

(Appeal against the judgment and decree passed by High Court of Kenya at Meru (Justice C.O. Ong'undi) dated 27th November, 1995

IN

H. C. C. C. NO. 523 OF 1991)

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JUDGMENT OF THE COURT

On 5th October, 1989, Julius Gichuru Guantai, the respondent in this appeal (hereinafter called "the plaintiff") purchased from Dr. Joel Muthuri, the appellant (the defendant (the defendant) a motor vehicle registration No. KXV 659 a Peugeot 404 pick-up (the vehicle) at a price of K.Shs.160,000/=. The purchase price was paid by the plaintiff to the defendant in full, part whereof the plaintiff borrowed from a finance company known as Kenya Finance Corporation Limited.

The vehicle was seized by the police on 20th December, 1989 and the reason for such seizure as pleaded by the plaintiff in the superior court was that the vehicle was stolen property and that the defendant had no title to sell the vehicle.

The learned judge in the superior court (Ong'undi, J.) correctly addressed himself as regards the burden of proof in a claim of this nature namely that the onus was on the plaintiff to prove his claim on a balance of probabilities. Having so correctly directed himself the learned judge went on to say:

> "There is no dispute the vehicle was seized by police as being stolen property."

This being a first appeal it falls on to us to reappraise the evidence which was adduced before the superior court.

With respect to the learned judge there was a serious dispute as to whether or not the vehicle was stolen property. In paragraphs 7 and 9 of defence the defendant pleaded as follows.

"7. The defendant states that if the plaintiff's vehicle was illegally detained by the police and

subsequently unlawfully sol by the Government then the plaintiff should follow the Government and not the defendant to recover any damages which the plaintiff may have incurred."

"9. Further the defendant states that if he had no title to the vehicle the defendant would have been charged by the police for selling a stolen motor vehicle to the plaintiff."

The relevant evidence before the superior court as related by the plaintiff was as follows:

"On 20th December, 1989 I was arrested with the vehicle at Meru Town. I was with my driver. We were arrested by C.I.D.'s (sic) from Nairobi who alleged the vehicle was a stolen vehicle. We were locked in the cells from 3 p.m. It was at Meru Police Station. I told police I had been sold the vehicle by the defendant. He was brought to police station at 7 p.m. the same day. I recorded a statement on 21st December, 1989. The vehicle was never released to me. I was never charged in court. We were released after our statements were recorded."

In cross-examination the plaintiff said:

"I used to see the defendant driving the vehicle for about a week before we negotiated the price. He showed me the log book and told me he had brought it from someone else. There was a name and the doctor alleged he wanted to sell it. He gave me a transfer from duly signed by previous owner. I was to take the log book to the bank. I was to transfer the title to my name and the bank. I took possession of the vehicle; before I was arrested nobody claimed possession of the vehicle. I was not shown the complaint. From 1989 to-date I do not know who claimed the vehicle. I was never charged in any court of law. The defendant was not charged.I do not know who authorized the auction of the vehicle. I was not shown any court order. I was told by the police the vehicle had been auctioned. I was not shown any document. I do not know who purchased the vehicle. I have never seen it again.

When I inquired at the police station I was told to go to Nairobi. I did not go as I had no money. The sale to me by the defendant was proper. He gave me all the documents. I am not to blame for the loss, or why it was sold by the police. I have no proof the vehicle was stolen. I saw the defendant at police station."

It became clear therefore that, except for hearsay evidence as regards the vehicle having been allegedly stolen, there was no evidence at all that it was stolen property. The plaintiff's case was based entirely on the proposition that since the vehicle had been stolen the defendant could not sell it as he had no title. There is unfortunately not an iota of evidence to show that the vehicle was stolen property.

The plaintiff's advocate had heavily relied on the case of Lakhamshi Bros. Vs Raja & Sons (1966) E.A. 17B to say that there being a breach of an implied condition as to title the defendant had no title to pass. But the very first holding in Lakhamshi Bros case points out that the appellant having in its pleadings alleged theft of the boot polish and having failed to prove it, could not succeed on a claim based on breach of implied condition as to title.

The predecessor to this Court, in Lakhamshi Bros case however went on to hold that proof that the appellant's possession had been disturbed by the police together with evidence of the respondent's knowledge that their title was liable to challenge established prima facie a breach of warranty for quiet possession of the goods which the respondents had failed to rebut was sufficient to prove the breach of warranty as to quiet possession of goods so as to entitle the appellant to claim damages.

The plaintiff's counsel urged us to hold that the plaintiff had proved a breach of warranty for quiet possession and that the learned judge was therefore right in ordering the defendant to pay damages.

In order that a plaintiff may succeed in his claim for damages for breach or warranty as to quiet possession we are of the view that the plaintiff ought to show:

(i) that the intervention by the police was lawful;

(ii) that the disposal by the police of the goods was lawful.

Unfortunately there is not the slightest evidence to show why the police impounded (if it did) the vehicle; nor is there any evidence to show that the vehicle was stolen; or that the police actually sold the vehicle at an auction; or that there was a lawful claimant of the vehicle claiming the vehicle as his; or that the vehicle was unlawfully registered. In fact there is nothing but a bare, unsupported and bland statement by the plaintiff that the vehicle was stolen property and that it was auctioned by the police. Evidence should have been led to show that the police lawfully seized the vehicle and disposed of it by sale to enable a court to arrive at the conclusion that the seller did not have a good title which would amount to a breach of implied warranty for quiet possession.

Atkin L.J. observed in the English case of Niblett vConfectioners' Materials Co. Ltd. (1921) 3K 387 at page 403:

"Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as a beneficial owner in being subject to certain limitations, and purports to protect the purchaser against lawful acts of third persons and against breaches of the contract for sale and tortious acts of the vendor himself."

In the case of Ali Kassam Virani Limited vs The United Africa Co. (Tanganyika) (1958) E.A. 204 (C.A.) the aforementioned statement of ATKN L.J. was accepted with approval.

Section 14 of the Sale of Goods Act reads as follows:

"14 In a contract of sale, unless the circumstances of the contract are such as to show a difference intention, there is,

(a) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the absence of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;

(b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods'"

In the Ali Kassam Virani case it was said at page

211 (D) that-

"The claim under S.14 (b) would still not necessarily be barred, even if the claim of superior right was false and conviction was wrong, for the action of the police was lawful, even if based on incorrect information"

Unfortunately in this case there was nothing proved, by the plaintiff, even on a prima facie basis, that the action by the police was lawful. There was no link shown between the action of the police and sale by the vendor.

The learned judge was, in our view, not entitled to simply say that the defendant had no title to sell the vehicle in the absence of any evidence to show that his title was questionable. The evidence in the superior court was to the effect that the defendant had purchased the vehicle for a sum of Sh.120,000/= from one Mr. Joseph Muiga Nga'nga who passed to the defendant a bland (but signed) transfer form and Mr. Nga'nga was deed at the time the vehicle was delivered to the plaintiff. The proof of his death was shown to the superior court. The defendant had not yet transferred the vehicle to his name a often happens when a party wishes to sell the vehicle. The registration book in respect of the vehicle exhibited in the superior court showed that the vehicle belonged to one Joseph Ochuodho Agano who transferred the vehicle to G.D. Limited who in turn signed a bland transfer from which was delivered by the defendant to the plaintiff a the time of sale and delivery of the vehicle by the defendant to the plaintiff. Save for the defendant not registering the suit vehicle in his name there appears nothing on record to

show that the defendant had no title to sell the suit vehicle. A log book is only evidence of title but property in a vehicle passes to the buyer at the time when the contract is made. See Section 20 (a) of the Sale of Goods Act. Traffic Act provisions do not confer title to the vehicle and the learned judge, with respect erred in thinking that lack of transfer form in accordance with Section 9 of the Traffic Act vitiated the title.

In our view the defendant is not liable to the plaintiff and the issue of damages does not therefore fall to be decided. The learned judge assessed damages under the head of general damages whereas he should have assessed the same as special damages. That was an error. However the learned judge correctly held that the plaintiff's loan account with his financiers could not be part of head of damages within the contemplation of the parties, particularly the defendant.

Perhaps the learned judge had in mind interest element lost by the plaintiff when he added a sum Shs.40,000/= to the figure of Shs.160,000/=, the latter being the value of the vehicle but there was no evidence to show how it had been arrived at.

We allow this appeal, set aside the judgment and decree of the superior court and substitute therefore an order dismissing the plaintiff's suit with costs. The defendant will have the costs of the appeal.

Dated and delivered at Nairobi this 15th day of November 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL