



**Rana Auto Selection Ltd v Nyamosi (Civil Appeal 130 of 2018)  
[2023] KECA 1075 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1075 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 130 OF 2018  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**RANA AUTO SELECTION LTD ..... APPELLANT**

**AND**

**NEMUEL MOTURI NYAMOSI ..... RESPONDENT**

*(Being an appeal from the judgment and all consequential orders of the High Court of Kenya at Kisumu (T.W. Cherere, J.) dated 26th September, 2018 in Kisumu Civil Appeal No. 123 of 2014))*

**JUDGMENT**

**JUDGMENT OF TUIYOTT, JA**

1. Nemuel Moturi Nyamosi (the respondent or Nyamosi), a retired teacher, sought to improve his lot by getting into matatu business. To do so, he purchased a 12 seater passenger vehicle from Rana Auto Selection Ltd (the appellant or Rana) through a written agreement dated 3<sup>rd</sup> September, 2009.
2. It was a term of the contract that the purchase price was Kenya Shillings (Kshs) 1,500,000 and that after making a down payment of Kshs 700,000, the balance of Kshs 800,000 would be paid in monthly instalments of Kshs 65,000, envisaging payment in a period of 13 months. Although, from a reading of the contract, the parties intended to provide the date when the first instalment would be paid, that was not done. It is therefore not surprising that each side suggests different dates. To Nyamosi, it is on 3<sup>rd</sup> November, 2009 as the number plate was only made available by Rana 3 months after the agreement. Rana on the other led evidence indicating that the number plate was delivered on 28<sup>th</sup> September, 2009 and insisted that the first instalment was to be made on 3<sup>rd</sup> October, 2009.
3. Whichever the effective date, there is common evidence that Nyamosi failed to keep up with the instalments and the vehicle was repossessed by Rana on 5<sup>th</sup> May, 2011, way outside the 13 months of reckoning whether the date be 28<sup>th</sup> September, 2009 or 3<sup>rd</sup> October, 2009. At trial, Nyamosi conceded



that he did not conclude the payment within the stipulated period of 13 months and that certain monthly payments made fell short of the agreed instalment of Kshs 65,000.

4. It was, however, the case of Nyamosi that the repossession was unlawful and without any repossession order, notice and/or justifiable cause. In the plaint filed before the trial court, Nyamosi contended that although he did not complete payment within the 13

months, Rana accepted payments and was estopped from repudiating the agreement or carrying out repossession. It was also the argument of Nyamosi, but now abandoned, that the repossession was in breach of the provisions of the Hire Purchase Act.

5. In the plaint dated 20<sup>th</sup> June, 2011, Nyamosi sought the following prayers:

- a) A declaration that the agreement of sale herein is a Hire Purchase Agreement and therefore governed by the Hire Purchase Act.
- b. A declaration that the repossession and sale of the subject motor vehicle herein by the defendant was illegal, null and void for want of procedure.
- c. An order of restitution of the subject motor vehicle to myself and/or a refund of the Purchase Price which I had paid.
- d. I also pray for costs of this suit.”

6. The claim by Nyamosi was rejected by the trial court (A.A. Odawo, RM (as she then was)) who made three fundamental findings: -

“Acceptance of the late and irregular payment by the defendant, does not amount to varying or breaching the terms of the agreement. In my view it is purely the defendant indulging the plaintiff...”

Time was indicated to be of the essence in the agreement at paragraph 25 thereof and the time stipulated for completion of payment was thirteen months. For this Court to declare that time was not of essence, would be re- writing the agreement between the parties...

The fact that the contractual obligations in the agreement were excluded from the provisions of the Hire Purchase Act, does not make the agreement unenforceable or invalid... This was therefore not a hire purchase agreement to be governed by the *Hire Purchase Act*.”

7. Aggrieved by those findings, Nyamosi preferred an appeal against the decision of the trial court to the High Court at Kisumu. Here, he was in better fortune as the High Court (Cherere, J) reversed the decision of the trial court and held that: -

“From the conduct of the parties, this Court finds that the respondent waived its rights arising from any breach of the sale agreement thereof by accepting payments out of time...”

It was therefore incumbent upon the respondent to give notice requiring the appellant to complete the sale within a specified time, failure to which non- compliance would amount to material breach of the contract, entitling the respondent to terminate the entire agreement but this was not done.”

8. After holding the repossession to be unlawful, the learned Judge ordered Rana to refund the purchase price of Kshs 1,108,000 to Nyamosi.



9. The pendulum had swung the other way and Rana is now before us on this appeal raising three grounds: -

- “ 1. The Learned Honourable Judge misapprehended and misdirected herself on the law and facts of the appeal before her thereby arriving at an erroneous finding.
2. The Learned Judge erred in law by failing to subject the totality of the evidence on record to proper scrutiny thereby reaching an erroneous finding that the conduct of the parties had been altered to the detriment of the Appellant herein.
3. The Learned Judge erred in law in disregarding vital evidence tendered in favour of the Appellant herein to the detriment of the Appellant’s case.”

10. While Mr. Odongo, learned counsel for the appellant, had dedicated substantial energy, both in his written submissions and in his initial address at plenary, in arguing that the learned judge erred in finding that the acceptance of late payment amounted to waiver of the vendor’s rights as to the time of completion of the contract, counsel eventually conceded on the matter. I shall shortly be proposing why this concession was well taken.

11. Counsel nevertheless contended that even if there was waiver by conduct, Rana issued a notice of 29<sup>th</sup> March, 2016 of its intention to repossess the vehicle and this had that effect of reinstating the “time of essence” clause. Counsel submitted that in the circumstances, his client was entitled to repossession once payment was not forthcoming.

12. On the order of refund, Rana’s argument is that there was no basis for making the order as it did not take into account that at the time the subject matter was repossessed, Nyamosi had enjoyed its use for about two (2) years.

13. Mr. Mose appearing for the client retorted that, emerging from the evidence in the lower court, the notice was not served. That there was no evidence of its service and that it was made for the purpose of the suit.

13. Regarding the argument that the order of refund would amount to unjust enrichment of his client, counsel argued that as the vehicle had been sold to a third party, the only option left for the Judge was to make an order for refund.

14. This is a second appeal and our remit is circumscribed to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. (See *Stanley N. Muriithi & another v Bernard Munene Itbiga* (2016) eKLR).

15. Clause 5 of the agreement provided for the manner of payment of the balance of the purchase price. Then clause 25 read: -

“ Time is always of essence in this agreement.”

16. Time and again Nyamosi not only failed to pay the instalments on time but also made underpayments. Yet on all those occasions Rana accepted the payment without protest. Rana therefore granted indulgence to Nyamosi. The law, however, is that mere indulgence for late payment may not constitute a waiver. It is for this reason that a party that argues that indulgence constituted a waiver or an



abandonment of the “time is of essence” clause in a contract must specifically plead it. In *Lombard North Central v Butterworth* [1986] EWCA Civ 5 (31 July 1986) Lord Justice Mustill observed:

“Important as it is, this point has played only a minor part in the proceedings. There is no explicit reference to it in the pleadings, although it is just open to the plaintiffs through their claim for damages. We are told that it was argued before the Master, yet there is no reference to it in his judgment. The matter received little prominence during the argument before us, nor were submissions directed at any stage to the possibility that the plaintiffs had by their prior conduct waived their right to insist on the stipulation that time was of the essence.....

For these reasons I conclude that the plaintiffs are entitled to retain the damages which the Master has awarded. This is not a result which I view with much satisfaction: partly because the plaintiffs have achieved by one means a result which the law of penalties might have prevented them from achieving by another, and partly because if the line of argument under clause 2 had been developed from the outset, the defendant might have found an answer based on waiver which the court is now precluded from assessing, for want of the necessary facts. Nevertheless, it is the answer to which, in my view, the authorities clearly point.”

17. Here, Nyamosi had pleaded this;

“8. The Plaintiff contents (sic) that notwithstanding that he did not complete payment within the 13 months stipulated period, the defendant continued to accept the instalments and thus they are estopped from repudiating the agreement and carrying out repossession.”

18. The pleading could have been more elegant but it is a sufficient foreshadow that Nyamosi would be urging that Rana had waived the “time as of essence” clause. The waiver having been properly pleaded and proved by evidence, the concession by Mr. Odongo that the holding by the High Court that the clause had been waived cannot be faulted is for applauding.

19. It was, however, proposed by counsel that the letter of 29<sup>th</sup> April, 2011 reactivated the clause. I reproduce the letter: -

“Nemuel Moturi Nyamosi

Box 1267 Nyamira

Date

29/4/2011

Dear Sir,

RE: M/V No. KBJ 087S

We refer to the above matter and bring to your attention our intention to repossess the vehicle without further reference to you. This is on account of your failure to make payments as per the terms of the agreement with you dated 3-9-2009.

However, should you wish to avoid repossession you may pay up the total outstanding balance. You may also return the vehicle to us if you are unable to complete payment.

We wish to remind you that repossession charges will be on your account.

Thanking you.



Yours faithfully,

For: Rana Auto Selection Ltd”

20. It is of course true that the “time is of essence” clause can be reactivated even where it had been waived. How reactivation can be achieved is explained in *Halsbury’s Laws of England*, 3<sup>rd</sup> Edition volume 8 paragraph 282 at page 165;

“Notice making time of the essence. In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case.”

A similar explanation is found in *Chitty on Contracts* 32<sup>nd</sup> Edition Volume I para 21-014 at p1595-1596:

“Notice making time “of the essence”. (3) Where time was not originally of the essence of the contract but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time. Notice can be served at the moment of breach; it is not necessary to wait until there has been an unreasonable delay by the party in breach before serving the notice. The period of notice given must, however, be reasonable and what is reasonable will depend upon all the facts and circumstances of the case. Factors to which the courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving the notice has continually pressed for completion, or has before given similar notices which it has waived, or that it is especially important for it to obtain early completion. A party who elects to give notice immediately upon the breach of contract would be well advised to be “cautious” in its selection of the period to be given in relation to any term of the contract. The party serving the notice must not itself be in default. Once notice has been given, both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party may be entitled to terminate. If, by notice, a party has made time of the essence, but later allows a further extension to another fixed date, time remains of the essence. The notice procedure laid down in the contract may be held to be exhaustive of the rights of the parties so that it will not be open to them to serve a notice (for example, of shorter duration) under the general law rather than the contract.”

21. This has been accepted by this Court to be the correct position of the law (See *Sisto Wambugu v Kamau Njuguna* [1983] eKLR).
22. All that remains therefore is to examine whether the contents of the letter of 29<sup>th</sup> April, 2011 constituted a notice reactivating clause 25 on time. For it to do so then it must have fixed a reasonable time within which Nyamosi was to make good his default and, without equivocation, to be a notice that in the event of non-performance within the time, Rana intended to treat the contract at an end. The letter called for immediate payment of the outstanding balance and warned of the consequence of repossession if payment was not immediately received.
23. According to the letter of 5<sup>th</sup> May, 2011, that followed, the outstanding sum was Kshs 450,000. Now, it has to be remembered that the contractual obligation was that Nyamosi would be making monthly



payment of Kshs 65,000. It therefore does seem that calling up for the immediate payment of Kshs 450,000, about sevenfold the monthly obligation, would not amount to granting Nyamosi reasonable time to remedy his default. The rationale for requiring reasonable time is that because of Rana's own conduct, Nyamosi was no longer attentive about prompt payment and it would only be fair for him to be given reasonable time to readjust. Reasonable time does not mean such extended time that it would be oppressive to the innocent party and what is reasonable would vary from case by case. In this case an immediate demand of Kshs 450,000 was not reasonable notice. For that reason, the letter could not, in law, constitute a revival of the "time is of essence" provision of clause 25 of the agreement. The end result is that the repossession of the motor vehicle was unlawful.

24. The second issue is whether the order of refund made by the learned Judge is defensible. Once it repossessed the vehicle, Rana sold it to a third party on 5<sup>th</sup> May, 2011. It was therefore unavailable for restitution as prayed for by Nyamosi. It was because of this that the learned Judge thought appropriate to order a refund of the purchase price which had been sought by Nyamosi as an alternative to restitution.
25. It is my understanding that by seeking an order for refund of the purchase price, Nyamosi was asking the court to grant him a relief that would place him in as much as possible the same place as he would have been if breach had not occurred. This in fact is one of the objectives for an award of special damages in the event of breach of contract. See *Livingstone v The Rawyards Coal Co.* [1880] UKHL 387 (13 February 1880). In the words of Lord Blackburn at page 390: -

"I do not think there is any difference of opinion as to its being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

See also *British Westinghouse Electric and Manufacturing Co. v Underground Electric Railways Co. of London* [1912] UKHL 617 (19 July 1912) where Viscount Haldane L.C. stated:

"Subject to these observations, I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach....."

26. The breach by Rana caused Nyamosi to lose the vehicle that was repossessed and sold, and also the loss of the matatu business. The latter was neither pleaded nor proved. In respect to the loss of the vehicle, Nyamosi would have lost the value of the vehicle as at the date of the repossession. The value may have been the purchase price or more than the purchase price if the vehicle had appreciated or less than the purchase price if it had depreciated. Yet there is no knowing the true value because Nyamosi neither pleaded nor proved it. This was a tactical error on his part.
27. It is for this reason that I would not endorse the holding of the learned Judge that refund of the purchase price would be a just remedy. I am however able to find a respite for Nyamosi in the evidence of Sultan Ali Khan who testified on behalf of Rana. His evidence was that on repossession of the



vehicle they carried out a valuation of it although the witness did not give evidence of the value that was returned. Nor did he produce a copy of the valuation

report. However, it was his evidence that the vehicle was sold for Kshs 500,000. This may be less than ideal evidence of value of the vehicle but Nyamosi having failed in his duty of offering evidence of value must live with it, even if with some fortitude.

28. In the end, I would propose that the appeal be partially allowed by setting aside the decision of the learned Judge ordering the appellant to refund a sum of Kshs 1,108,000 to the respondent and substituting it with an order that the appellant do pay to the respondent a sum of Kshs 500,000 with interest thereon from the date of filing of the plaint until payment in full. I would further propose that, as there is no outright victor in this appeal, each party do bear its own costs.

Dated and Delivered at Kisumu this 22<sup>nd</sup> day of September, 2023.

### **JUDGMENT OF KIAGE, JA**

1. I have had the benefit and pleasure of reading in draft the well-crafted judgment of my learned brother Tuiyott, JA. His Lordship has done the subject he treats of, and the case before us, such thorough and erudite justice, and I am in such ready and full agreement, that I would be remiss to add a word more.
2. As Joel Ngugi, JA is similarly in concord, the appeal be and is hereby disposed of in the terms proposed by Tuiyott, JA.

### **JUDGMENT OF JOEL NGUGI, JA**

1. I have had the benefit of reading in draft the judgment of Tuiyott, J.A. I am in full agreement with it and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

SIGNED

**DEPUTY REGISTRAR**

