**Njeru v Remu Micro Finance Bank Limited (Civil Appeal 148 of 2017)**
**[2022] KECA 1332 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1332 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 148 OF 2017**

**W KARANJA, F SICHALE & KI LAIBUTA, JJA**

**DECEMBER 2, 2022**

**BETWEEN**

**ROBINSON MURIUKI NJERU ..... APPELLANT**

**AND**

**REMU MICRO FINANCE BANK LIMITED ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 18th September, 2017 IN Civil Appeal No. 41 of 2016)***

## JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya sitting at Embu (Muchemi, J) dated September 18, 2017, allowing the respondent's appeal against the judgment of the trial court in favour of the appellant in Embu CMCC No 300 of 2015 dated July 19, 2016.

2. The brief background to the appeal is that Robinson Muriuki Njeru (the appellant herein), had entered into a sale agreement for the purchase of motor vehicle registration number KBW 619M Toyota Station Wagon (herein after the subject motor vehicle) with Riungu M Michael T/A Eagle Business Venture and Irene Kathure Kirimi (hereinafter the 1st and 2nd defendants) in the original suit in the lower court at an agreed purchase price of Kshs 600,000.

3. In pursuance of the said agreement, the appellant paid a sum of Kshs 450,000. and took possession of the vehicle. It was a further term of the agreement that the balance of the purchase price of Kshs 150,000. was to cleared after receiving duly signed transfer forms, original log book, copy of the PIN number and identity card of the previous owner.

4. As the appellant was waiting for the aforesaid documents, the 1st and 2nd defendants obtained a loan facility in the sum of Kshs 1,144, 551. from the respondent and subsequently defaulted on the same prompting the respondent to seek repossession of the subject motor vehicle as it had been used a security for the loan.

5. As a result, the appellant filed suit in the Chief Magistrate's court at Embu seeking, inter alia, release of the subject motor vehicle to him. The 1st and 2nd defendants entered appearance but did not file defence, whereupon the case proceeded, the respondent herein being the 3rd defendant.

6. On July 19, 2016, judgment was entered in favour of the appellant by Hon K Mutai SRM, who *inter alia* issued a permanent injunction restraining the defendants, their servants, employees' agents and or anybody whatsoever acting on their instructions from repossessing or in any way inferring with the subject motor vehicle.

7. The respondent herein was dissatisfied with the aforesaid judgment thus preferring an appeal before the High Court in Embu, namely: Civil Appeal 41 of 2016. The appeal was heard by Muchemi, J who, in a judgment delivered on September 18, 2017, set aside the judgment of the lower court and substituted the same for a judgment dismissing the appellant's case with costs both in the lower court and in the High Court.

8. The appellant was aggrieved by the judgment of the High Court thus provoking the instant appeal vide a Notice of Appeal dated September 25, 2017 and a Memorandum of Appeal dated October 17, 2017, raising 6 grounds of appeal which we shall proceed to consider shortly.

9. When the parties appeared before us on June 27, 2022, Mr. Kimanzi learned counsel appeared for the appellant whilst Mr. Mwendwa appeared for the respondent. The parties intimated to Court that they shall rely on their written submissions.

10. It was submitted for the appellant that the learned judge erred in law by holding that the respondent had a valid contract with the 1st and 2nd defendants in the lower court which was not the case as the contract could not be valid when the respondents' witnesses told the trial court that the money was fraudulently obtained and further that the 1st defendant had used false documents to obtain money from the respondent.

11. The learned judge was further faulted for holding that the ownership of motor vehicle registration number KBW 619M belonged to the respondent because it was registered in their name (the respondents).

12. On the other hand, the respondent urged us to find that the judge wrote and delivered a comprehensive judgment and covered all the issues raised in the case. Consequently, we were urged to uphold the judgment of the High Court.

13. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by this court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No 127 of 2007, and *Stanley N Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself 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 also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 wherein it was held, inter alia, that in a second appeal, the right of appeal is confined to questions of law only; that an appellate court has loyalty to accept the findings of fact of the lower court(s) and should resist the temptation to treat findings of fact as law and that, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.

14. Having carefully considered the record in light of our mandate and the rival submissions set out above, the issues that fall for our determination are as follows:

1. Whether the learned judge erred in law by holding that there was conspiracy to defraud when there was no evidence to that effect.

2. Whether the learned judge erred in law by holding that the respondent had a valid contract with the 1st and 2nd defendants in the lower court.

3. Whether the learned judge erred in law by holding that ownership of motor vehicle KBW 619M belonged to the respondent because it was registered in their name.

4. Whether the learned judge erred, prejudiced and misdirected herself by concluding that the magistrate failed to scrutinize the documents of the parties.

15. With regard to the first ground of appeal, it was the appellant's case that he had entered into an agreement for sale of the subject motor vehicle on March 24, 2014 at the price of Kshs 600,000. whereupon he paid a deposit of Kshs 450,000 leaving a balance of Kshs 150,000. which was to be paid on delivery of the log book, signed transfer forms, copies of PIN and identity card of the previous owner. It was his case that the 1st defendant did not avail the aforesaid documents despite demand and that the vehicle was repossessed on October 31, 2015, on the instructions of the respondent on the grounds that the same had been used as security for a loan that had been advanced to the 1st defendant, and which he had subsequently defaulted in making payments.

16. It is imperative to note that the 1st and 2nd defendants never participated in the proceedings both before the lower court and the High Court whereupon the appellant obtained interlocutory judgment against them which, for some strange reason, the appellant never pursued. No reasonable explanation was offered by the appellant as to why he did not pursue the interlocutory judgment that he obtained against the 1st and 2nd defendants.

17. The learned judge, while analyzing the agreement between the appellant and the 1st and 2nd defendants, stated, in part as follows:

> "The 1st defendant was in car sale business at the time he sold the vehicle from which he earned his living. The vehicle was assessed at the value of Kshs 780,000/= according to the valuation report dated March 5, 2014. The vehicle which was in good condition as per the report was sold only 20 days later at a reduced value of Kshs 600,000/=. In the absence of the 1st defendant in the proceedings, the respondent did not give any explanation of the price reduction.
>
> It is not practical for the 1st defendant to lose Kshs 180,000/= for a single vehicle from the actual valuation made the same month of the sale. The amount was quite substantial.
>
> The respondent said he insured the vehicle with CIC Insurance Co. Ltd after he took possession. He produced in evidence only an insurance cover note of one month running from March 4, 2014 was (sic) not produced although it was the current one at the time the cause of action arose.
>
> The case CMCC No 300 of 2014 was filed on November 3, 2015 three days after the repossession. The respondent had plenty of time to prepare documents for his case.
>
> The respondent said that he entered into the sale agreement with the 1st defendant on March 24, 2014 and took possession. As per the agreement that is on the same day of execution. There was no explanation why the respondent had to take insurance cover on March 4, 2014 about 20 days before he took possession of the vehicle. Yet he was not in a

position to produce the insurance cover for the period he was in possession 24 th March to October 31, 2014.

The date of inspection report is indicated as March 3,2014 while the date of the report is March 5, 2014. The 2 nd page of the report which explains the mechanical and general condition of the vehicle bears the date of March 25, 2014. The discrepancy in the dates was not explained.

The analysis of the insurance and discrepancies in the valuation report raises doubt on the authenticity of the said documents." (Emphasis supplied).

18. We fully agree with the above proposition by the learned judge for reasons we shall set out hereunder. The appellant contended that he had entered into an agreement to purchase the subject motor vehicle with the 1st and 2nd defendants on March 24, 2014. The appellant never made any effort to have the vehicle registered in his name, and he was only jolted into action when the vehicle was subsequently repossessed on 31st October 2015, which was 19 months later from the date of the sale agreement. He subsequently filed suit in the lower court on November 3, 2015{{^}}, three days after repossession. The contention by the appellant that the 1st and 2nd defendants did not avail the completion documents despite demand was not supported by any evidence.

19. All these factors coupled with the non-pursuance of the interlocutory judgment by the appellant against the 1st and 2nd defendants who were at the very core of these proceedings as they are the ones who allegedly transferred the subject motor vehicle to the appellant, a fact which never appeared to vex him, in our view, can only lead to one logical conclusion that this was a well calculated scheme between the appellant and 1st and 2nd defendants to prevent the respondent from recovering its money.

20. Consequently, we find no merit in this ground of appeal and the same falls by the wayside.

21. With regard to the second issue and as to whether the learned judge erred in law by holding that there was a valid contract between the respondent and the 1st and 2nd defendants in the lower court, it is indeed not in dispute that the respondent had offered the 1st and 2nd defendants a loan facility in the sum of Kshs 1,144,551.00 whereupon they presented three vehicles as securities including the subject motor vehicle. The said motor vehicles were then subsequently registered in the joint names of the 1st defendant and the respondent. The 1st defendant later on defaulted in loan repayments leading to repossession of the vehicles.

22. The learned judge, while addressing this issue in her judgment stated, *inter alia*, as follows:

> " The appellant had a valid contract with the 1st defendant in which he advanced the loan that was not paid in accordance with the terms of the agreement. The 1st defendant had bound himself to repay the loan as agreed and in default, the appellant was entitled to take all the necessary steps to facilitate recovery. The repossession document issued by Viewline Auctioneers in respect of vehicle registration number KBW 916 M was valid since it was grounded on the agreement of the parties."

23. From the circumstances of this case and in light of the above, we are fully in agreement with the learned judge's findings on this issue that indeed there was a valid contract between the 1st defendant and the respondent and we find no reason or basis to fault the learned judge's finding on this issue. If it were to be held that on the contrary there was no valid contract between the 1st defendant and the respondent, how else was the respondent expected to be safeguarded in case of default in loan payment by the 1st defendant? Consequently, this ground of appeal is without merit and the same must fail.

24. On whether the learned judge erred in law by holding that the subject motor vehicle belonged to the respondent because it was registered in their name, we have carefully looked at the impugned judgment and nowhere in her judgment did the Judge hold that the subject motor vehicle belonged to the respondent. The learned judge only stated at paragraph 33 of her judgment that "the vehicle KBW 916M was registered in the joint names of the 1st defendant and the appellant following the due process of the law on July 24, 2014."

25. In our view, the 1st defendant having obtained a loan facility with the respondent with the subject motor vehicle being used as security for the facility, it was only logical for the motor vehicle to be registered in the joint names of the 1st defendant and the respondent to safeguard/ protect its interests as is normally the practice in commercial transactions of this nature. The evidence of the alleged fraud in jointly registering the subject motor vehicle in the names of the 1st defendant and the respondent was not tendered in Court. Consequently, nothing turns on this ground of appeal.

26. Lastly, as to whether the learned judge erred, was prejudiced and/or misdirected herself by concluding that the magistrate failed to scrutinize the documents of the parties, we have carefully looked at the judgment of the lower court and the High Court and we are indeed satisfied with the finding arrived at by the learned judge that indeed the lower court failed to scrutinize the documents of the parties. Additionally, we are equally satisfied that the appellant did not satisfy the requirements for grant of a permanent injunction and the learned judge aptly stated that the respondent was already a co-owner of the subject motor vehicle with a legitimate interest that required to be protected by the law and, as such, a permanent injunction could not be issued.

27. Ultimately, the appellant's appeal is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**