



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), SICHALE & KANTAI, JJ.A)**

**CIVIL APPEAL NO 188 OF 2012**

**BETWEEN**

**NIELS BRUEL.....APPELLANT**

**AND**

**MOSES WACHIRA.....RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Nairobi Milimani Commercial Courts  
(Okwengu, J.) dated 30<sup>th</sup> March 2011 in H. C. C. No. 16 of 2006)***

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice H. M. Okwengu) dated 30<sup>th</sup> March 2011. The learned Judge entered judgment against Niels Bruel, (hereinafter referred to as the appellant), in favour of Moses Wachira, (hereinafter referred to as the respondent) for US\$ 110,000, together with interest and costs in a claim for damages for breach of contract. There were two other defendants in the suit, Helmuth Rame and Air Traffic Ltd, but they are not parties in this appeal.
2. The respondent's claim against the appellant and the other defendants arose from agreements made between the parties for the sale of two aircrafts, and a parallel agreement entered into between the respondent, Helmuth Rame and Air Traffic Ltd, for the repair of one of the aircrafts. The agreement of sale related to a twin engine King Air C90, LJ 528 aircraft registration No. 57N BB (the 1<sup>st</sup> aircraft), and a twin engine King Air 200, BB-211 aircraft registration No.5YB MC (the 2<sup>nd</sup> aircraft). The parallel agreement was for repair of the 1<sup>st</sup> aircraft.
3. According to the agreements, the appellant was to sell to the appellant the 1<sup>st</sup> aircraft at a consideration of US\$110,000 and the 2<sup>nd</sup> aircraft at a consideration of US\$175,000. The respondent averred that the appellant and the two other defendants represented the condition of the 1<sup>st</sup> aircraft to him as complete with two engines and two propellers, and as having all avionics, aircraft instruments, radios and a complete interior in line with its specifications. They also told the respondent that to put the aircraft in a flying and serviceable condition, he should supply spare parts worth US\$ 45,000 and pay Helmuth Rame a further US\$45,000 as repair costs. The respondent was further led to believe that Helmuth would start repairs on the 1<sup>st</sup> aircraft

immediately upon payment of a deposit of US\$10,000 towards repair costs, the balance of US\$35,000 being payable on completion of the repairs.

4. Upon being shown the 1<sup>st</sup> aircraft by the 3<sup>rd</sup> defendant's chief mechanic, the respondent noted that it had been stripped of all the major components. He was however assured by Helmuth Rame that the 1<sup>st</sup> aircraft was complete and had been merely stripped to avoid repossession by a bank. Helmuth Rame assured the respondent that all the stripped components were available and had been stored away.
5. Acting on the defendant's representations, the respondent paid various amounts in respect of the purchase of the two aircrafts and also paid a deposit for the repair of the 1<sup>st</sup> aircraft. The respondent also delivered to Helmuth Rame various aircraft parts and spares worth US\$111,000. ***It was only after paying the full purchase price that the respondent was informed that one of the engines of the 1<sup>st</sup> aircraft had in fact been stolen 6 months earlier.*** (emphasis added)
6. It was the respondent's case that the contracts were tainted by misrepresentation and fraud on the part of the appellant and his co-defendants. He also complained that the defendants, in breach of the contract, refused to repair and deliver to him the 1<sup>st</sup> aircraft in flying condition and also refused to release the transfer documents and/or register the transfer of the 1<sup>st</sup> aircraft in his favour. As for the 2<sup>nd</sup> aircraft, the appellant admitted that he had disposed of it to someone else. As a result of all these breaches, the respondent had suffered loss and damage as he had intended to operate the aircraft as a commercial charter in Kenya.
7. The appellant put forward a very interesting defence. He admitted having entered into an agreement with the respondent, but maintained that the respondent had opted to purchase the 1<sup>st</sup> aircraft at a negotiated price of US\$125,000 on "as is where is" basis. A sum of US\$19,000 was to be paid as a non-refundable deposit, and the aircraft was to be transferred to the respondent upon payment of the purchase price. He also maintained that the respondent agreed to purchase the 2<sup>nd</sup> aircraft on "as is where is" basis at an agreed price of US\$175,000 of which US\$18,000 was to be paid as a non-refundable deposit and transfer effected upon payment of the balance of the purchase price.
8. The appellant admitted having received the sum of US\$108,932.39 in respect of the 1<sup>st</sup> aircraft but maintained that neither he nor Helmuth Rame received the final instalment of US\$1,067.61 in respect of the 1<sup>st</sup> aircraft. As regards the 2<sup>nd</sup> aircraft, the appellant admitted receiving US\$40,000 out of which US\$18,000 was a non-refundable deposit. The appellant also claimed that upon discovery that one of the 1<sup>st</sup> aircraft's engine was missing, the respondent was given the option of either cancelling the entire transaction or having the price negotiated downwards to reflect the missing engine. It was his evidence that the respondent opted to have the purchase price reduced from US\$125,000 to US\$110,000. The appellant denied being party to the agreement between Wachira, Helmuth and 3<sup>rd</sup> defendant concerning the assemblage of the 1<sup>st</sup> aircraft so as to bring it into a flying or serviceable condition. He claimed that the respondent had known all along that the 1<sup>st</sup> aircraft had been grounded for 6 years and was not in a flying condition and that its propellers needed overhauling.
9. The appellant also claimed that he made an offer to the respondent to pay an additional sum of US\$65,000 over and above the purchase price so that he could receive the aircraft in a flyable condition, but the respondent declined the offer. The appellant maintained that although the aircraft had been grounded for six years since 1999, it was nevertheless in a reasonable state for rehabilitation and that the respondent was willing to buy the aircraft in the condition it was in. The appellant attributed the rescission of the agreement of sale of the 2<sup>nd</sup> aircraft to the respondent's refusal to make further payment until the repairs were completed. The appellant therefore denied liability and maintained that it was the respondent who was to blame for whatever he claimed to have lost.

10. Helmuth Rame, who was the 2<sup>nd</sup> defendant, denied the respondent's claim. He averred that he had been wrongfully joined as a party to the suit since he had never, in his personal capacity, transacted any business with the appellant. His evidence was that he was the Managing Director of the 3<sup>rd</sup> defendant and transacted business with the respondent in that capacity. The discussion between the respondent and the defendant centred on the 1<sup>st</sup> aircraft which was lying at a hangar belonging to Helmuth Rame. Helmuth Rame was selling the aircraft on behalf of the appellant, and at the time the respondent inspected it, it was in a disassembled state.
11. In relation to the agreement for sale of the 1<sup>st</sup> aircraft, Helmuth dealt with Wachira on behalf of Niels. In that regard, he was an agent for a disclosed principal. Niels gave Mr. Wachira the option of having the aircraft in the condition in which it was, and then having it assembled and brought to flying condition. It was evident that Niels was not a party to the agreement for repairs. These were to be carried out by Air Traffic Ltd, the 3<sup>rd</sup> defendant. A preliminary estimate of US\$45,000 was based on a preliminary inspection carried out by a Mr. Masden, an employee of the 3<sup>rd</sup> defendant. Mr. Wachira paid a deposit of US\$10,000. An expert witness who testified in court was firmly of the opinion that the deposit paid by Mr. Wachira was more than adequate to pay the repairs already undertaken by the time the contract was rescinded. Accordingly, there was no amount due and payable by the time the contract was rescinded, so the issue of a lien in favour of the 3<sup>rd</sup> defendant in respect of repair did not arise. Even if there was a lien in respect of repair charges, which there was none, Helmuth Rame as the managing director of the 3<sup>rd</sup> defendant had no right to retain the transfer document over the 1<sup>st</sup> aircraft.
12. The learned judge in a careful judgment dealt with the issues framed. On the issues of misrepresentation, the learned judge asked herself whether there was a false or misleading assertion in the specification to the aircrafts. And whether such assertion was given with intent to deceive. The defendants had represented that the 1<sup>st</sup> aircraft had two engines and two propellers whose flying time and circles were also given. There were also false assertions in relation to the landing gear. All those assertions were false and were deliberately made to mislead Wachira (the plaintiff).
13. The learned judge found on the evidence that after the discovery of the missing engine, the original price of US\$125,000 was reduced by US\$15,000 to US\$110,000. Although there was a false misrepresentation, this was put right with the consent of Wachira. The full purchase price for the 1<sup>st</sup> aircraft was paid to the appellant (Niels).
14. After considering the evidence given at the trial and the submissions of counsel, the judge entered judgment for the plaintiff (Wachira) against the appellant for US\$110,000 together with costs and interest from the date of filing suit. She also entered judgment against the 3<sup>rd</sup> defendant for Kshs.129,500/= together with interest and costs from the date of filing suit. She also ordered the 3<sup>rd</sup> defendant to return to the plaintiff all the spare parts forwarded to it by the plaintiff. The 3<sup>rd</sup> defendant's counterclaim was also dismissed with costs.
15. It is against that judgment and decree that the appellant has appealed to this Court. There are 5 grounds of appeal which relate to the distinction between rescission and repudiation of a contract, namely:

***i. The Judge erred in law and fact when she correctly found and determined that the plaintiff had lost the right to rescind the contract due to misrepresentation concerning the missing engine of the Aircraft 5&-NBB but proceeded to find that the 1<sup>st</sup> defendant was in breach of the contract and the plaintiff having repudiated the contract was entitled to recover the sum of US\$110,000.***

***ii. The Judge erred in law and in fact when she held that the plaintiff had repudiated the contract which contradicted her finding that the plaintiff had lost the right to rescind the***

***contract in respect of the Aircraft 5Y-NBB after the purchase price was readjusted downwards to take into account the missing engine and the plaintiff on his own volition continued to look for the missing engine after paying the full purchase price.***

***iii. The Judge erred in law by making a finding based on repudiation which was not an issue arising from the pleadings and evidence adduced.***

***iv. The Judge having correctly found and determined that the plaintiff had lost his right to rescind the contract in respect of the Aircraft 5Y-NBB should have proceeded to dismiss the suit with costs to the 1<sup>st</sup> defendant.***

***v. The Judge erred by awarding the plaintiff the sum of US\$110,000 together with interest and costs”.***

Moses Wachira lodged a cross-appeal on the following grounds: -

***i. The learned judge misdirected herself by stating that the missing engine in the 1<sup>st</sup> plane caused the lowering of its price.***

***ii. The judge misdirected herself by failing to find that the misrepresentation by the appellant on the missing parts led to the 1<sup>st</sup> respondent acquiring more parts than agreed.***

***iii. The judge misdirected herself that the appellant is entitled to the US\$18,000 which he retained a non-refundable deposit despite it not being provided in the agreements between the parties.***

***iv. The judge misdirected herself regarding privity of contact and representation where the appellant and Helmuth Rame got into contact with the appellant regarding the same aircrafts and spare parts.***

***v. The judge misdirected herself by not holding that the breach of the 1<sup>st</sup> contract regarding the 1<sup>st</sup> aircraft caused the collapse of the 2<sup>nd</sup> aircraft’s contract as they were related.***

***vi. The learned judge misdirected herself by stating that the 1<sup>st</sup> respondent was not entitled to his claim for loss of user of the 1<sup>st</sup> aircraft.***

***vii. The learned judge misdirected herself when she rejected the estimates provided by the respondent regarding the travelling expenses in the absence of receipts.***

***viii. The learned judge misdirected herself by directing that the spare parts be returned to the 1<sup>st</sup> respondent without making a finding as to the value thereof as she failed to scrutinize the evidence of the 1<sup>st</sup> respondent to arrive at a just holding.***

16. We deal first with the appeal. The memorandum of appeal contains 5 grounds of appeal. A close look at those grounds reveals that the gravamen of the appellant’s appeal is that he should not have been ordered to refund US\$110,000 to the respondent. As we understand it, what the appellant is saying is that in what was clearly a fraudulent transaction, the judge should have allowed him to pocket the purchase price paid by the respondent. The respondent intended to buy an aircraft. It was supposed to have 2 engines. Upon inspection, the respondent discovered that the aircraft had only one engine. Upon inquiry, the appellant and his co-conspirator, Helmuth Rame first said it had been removed and kept in the store. When they failed to produce it for inspection, they changed the story, claiming that it had been stolen and taken/shipped out of the country.

17. The appellant never retrieved the engine. With regard to the specifications of the aircraft, the

judge had this to say at paragraph 128 of her judgment: -

***“(128) The assertions given in the specifications included assertions that the 1<sup>st</sup> aircraft had two engines and two propellers whose flying time and circles were given, assertions that the 1<sup>st</sup> aircraft’s two propellers were due for overhaul had the landing gear was due for six year inspection. The specifications of the aircraft were important information in the negotiations concerning the sale of the aircraft (sic). Assertions such as the fact that the 1<sup>st</sup> aircraft had two engines, the information regarding flying time, the state of the propellers and the landing gears all important information to the plaintiff in making the decisions to enter into the transaction. As already stated, the specifications given to the plaintiff did not match the state of the aircraft. Some of the assertions were false e.g. the presence of two engines and this was information which was within the knowledge of the defendants. Therefore, there was a deliberate attempt to mislead the plaintiff.”*** (Emphasis added)

18. It was common ground that the respondent was informed about the missing engine in January 2005 after he had made substantial payments for the 1<sup>st</sup> aircraft. The appellant and his co-defendants having been aware about the missing engine before the contract was entered into, the disclosure of the loss ought to have been made before contract was entered into. The fact that the price of the 1<sup>st</sup> aircraft was adjusted downwards from US\$125,000 to US\$110,000, after the respondent was informed of the missing engine, was a clear indication that the parties adjusted the price of the 1<sup>st</sup> aircraft downwards taking into account the missing engine. This was a clear finding based on incontrovertible evidence.

19. Now the appellant with the benefit of hindsight and legalese is trying to say that he should not have been ordered to refund the full purchase price (US\$110,000) paid to him by the respondent. The argument advanced by the appellant’s advocate before us was that the learned trial judge completely misunderstood the difference between repudiation and rescission of a contract. Those are very basic concepts of the law of contract and we are satisfied that the learned judge applied them correctly in this case. It was a very ingenious submission based on mere technicalities. Article 159(2)(d) of the Constitution of Kenya enjoins this Court to administer justice. We cannot allow the appellant to keep the money he obtained from the respondent by deception through obfuscation of legal technicalities. Justice of the case demands that he pays back the money to the respondent.

20. From what we have said, it is plainly obvious that we find no merit in any of the grounds raised by the appellant in this appeal. A man who warms himself with the fire of fraud cannot complain if he is singed. This appeal accordingly fails and is dismissed.

21. We now turn to the cross-appeal. On the complaint that the learned judge erred in disallowing the respondent’s claim for loss of user, we find no legal reason to disagree with the learned judge. At paragraph 68 of the submissions filed by his advocates, they accepted that loss of user is a claim in special damages and ought to be pleaded and strictly proved. This is the correct position in law, and has been repeated in various decisions of this Court such as in ***Amirali Karmali v Shobhag Chandra Ratilal Shah [2000] eKLR (Civil Appeal No. 178 of 1997)***.

22. The truth of the matter is that the respondent pleaded the claim but he failed to produce evidence to support it. At paragraph 172 of her judgment, this is what the learned judge said: -

***“(172) with regard to the claim for loss of user of the 1<sup>st</sup> aircraft, the plaintiff’s claim that he intended to operate the 1<sup>st</sup> aircraft as a commercial charter was not contradicted. The plaintiff testified that he would have got a gross income of US\$75,000 a month and a net income of US\$42,000 a month. The plaintiff called witnesses who testified as to the rates of commercial charter. In absence of any other evidence, I have no reason to doubt these rates. However, since the plaintiff was also***

***negligent in failing to obtain a full assessment, and since it was evident that vital parts of the 1<sup>st</sup> aircraft such as landing gear, propellers and engine were not available, the plaintiff has only himself to blame for his loss of user. His claim for loss of user must therefore fail.”***

23. We completely agree with the learned judge. We would only add that the figures produced to support the claim were speculative and most probably concocted. As the learned judge correctly pointed out, vital parts of the 1<sup>st</sup> aircraft such as landing gear, propellers and engine were not available. Without these vital parts, a prudent man would think twice before buying the aircraft.
24. After the discovery of the theft of the engine, the respondent somehow learnt that it had been shipped to USA and embarked on tracking down the thief. Then there is a claim that the engine had been traced but could not be shipped back to Kenya because it was an exhibit in a criminal case and would be released at the conclusion of the case. He then went on to suggest that he had a spare engine which he could temporarily lend the defendants to fit on the aircraft to avoid further delay. All we can say is that respondent came out not as innocent businessman who had been conned but the author of his own misfortune. His claim for loss of user in the hefty sum of US\$3,024,000 was completely baseless and was properly rejected by the learned judge.
25. The other complaint relates to the rejection of the respondent's claim for travelling expenses amounting to Kshs.1,000,000/=. As correctly pointed out in paragraph 173 of her judgment, the claim for Kshs.1,000,000/= for travel expenses was a claim for special damages which had to be specifically proved. No such proof was placed before the judge. No receipts were produced to confirm the expenditure. In order to get over this legal hurdle, the respondent's advocates submitted at paragraph 71 of their written submissions: -

***“(71) My Lords, it is uncontested that the 1<sup>st</sup> respondent herein travelled from the United States both during the negotiations on the purchase of the aircraft and in the course of the case. He travelled on the days he came to testify and on various occasions just to see how the case was proceeding. Even though he did not produce exhibits in the form of receipts, he gave a computation of a modest figure of Kshs.1,000,000/=.”***

26. Counsel conceded that there was no documentary evidence to support the claim, yet the respondent had travelled all the way from USA! We too, find this ground untenable and hereby dismiss it.
27. The other complaint relates to the order made by the learned judge in relation to the spare parts which the respondent sent to the 3<sup>rd</sup> defendant (Air Traffic Ltd). It was ordered that the spare parts be returned to the respondent as their value had not been established. At paragraph 174 of her judgment, the learned judge said: -

***“(174) As regards the claim for US\$249,932.39 in respect of the purchase price, spare parts and repair costs, Niels having been in breach of the contract and the plaintiff having repudiated the contract, he is entitled to recover the sum of US\$110,000, being refund of the purchase price paid by him. As regards the spare parts, although the plaintiff established that he forwarded spare parts to the 3<sup>rd</sup> defendant, the plaintiff did not establish the value of the spare parts and therefore I am unable to award any specific amount in respect of spares, but would order that the spares be returned to the plaintiff.”*** (Emphasis added).

28. Counsel submitted that even though the documentation presented at the trial court can prove the supply to the appellants of parts amounting to US\$102,716.20, the amount pleaded in the plaint for the value of the parts supplied was US\$110,000. The respondent stated that the main reason for the disparity in numbers was because the respondent misplaced some documents owing to the fact that he was conducting the trial from the United States. This is a very strange submission and we

are not at all surprised that the learned judge rejected it. The burden of establishing delivery and value of the spare parts lay solely with the respondent. He cannot expect the judge to look for a needle in a haystack. It was his duty to produce a complete list of spare parts supported by authentic invoices and receipts. This he failed to do. There was evidence that most of the spares could not therefore be used. The learned judge ordered that the spare parts be returned to the respondent. We are satisfied that the judge made the right order in the circumstances.

29. In the final analysis and for the reasons we have given, we find no merit in the cross-appeal and we hereby order it be dismissed. We have also dismissed the appellant's appeal. Consequently, we make the following orders: -

- a. The appellant's appeal is hereby dismissed.
- b. The respondent's cross-appeal is hereby dismissed.
- c. We make no order as to costs.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2016.**

**P. KIHARA KARIUKI, (PCA)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**