IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 36 OF 2014

BETWEEN

DIAMOND TRUST BANK KENYA LTD…….APPELLANT

AND

SAID HAMAD SHAMISI…..…....…….……..……1ST RESPONDENT

MUSTAFA MOHAMED ATHMAN MJAHID……...2ND RESPONDENT

COACHLINE LIMITED……..……..……3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Kasango, J.) dated 15th May 2014

in

HCCC. No. 21 of 1998)

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JUDGMENT OF THE COURT

By a plaint filed in the High Court at Mombasa some 16 years ago, the 1st respondent, ***Said Hamad Shamisi (Shamisi),*** commenced action for conversion against the appellant, ***Diamond Trust Bank Kenya Limited (the Bank)***, the 2nd respondent, ***Mustafa Mohamed Athman Mjahid (Mjahid)*** and the 3rd respondent, ***Coachline Limited (Coachline)***.

The basis of Shamisi's claim was that on or about 1st February 1997 he had entered into an oral agreement with the Mjahid, who was also a director of Coachline, in which he agreed to sell and Mjahid agreed to purchase two ***Nissan Diesel Buses, Nos. KAG 088P*** and ***KAG 062T*** for Kshs 10 million. In furtherance of that agreement, Mjahid paid a deposit of Kshs 500,000 by two cheques (for Kshs 400,000 and Kshs 100,000), whereupon Shamisi gave him possession of the two buses and their logbooks for the sole purpose of valuation to enable him (Mjahid) obtain hire purchase financing to pay the balance of the purchase price.

Sooner the two cheques were returned unpaid. Mjahid did not make good the cheques, pay the balance of

the agreed purchase price, or return the buses to their lawful owner, Shamisi. Subsequently and to his great alarm, Shamisi learned that his buses had been transferred jointly to the Bank and Coachline.

He pleaded that the transfer of the buses was fraudulent and illegal because he had not authorized it and had not signed the documents of transfer. The particulars of the fraud alleged against the Bank, Mjahid and Coachline were also pleaded, followed by prayers for return of the buses or payment of their market value as of 1st February 1997, damages for wrongful conversion and loss of use, damages for breach of contract against Mjahid and costs of the suit.

Mjahid and Coachline filed a joint defence on 4th March 1998. That defence is of no moment in this appeal, because when Ouna, J. heard the suit on 3rd April 2003, the two did not appear, although they were duly notified of the scheduled hearing, and up to this day they have never challenged the judgment that was entered against them in favour of Shamisi. Shamisi though, asserts that he has never been able to recover a single cent from them. Mjahid and Coachline did not participate in the subsequent proceedings in the High Court and took no part in this appeal.

In the meantime, default judgment was entered against the Bank on 18th March 1993. That judgment was set aside by consent on 6th November 2003 and the Bank was granted leave to defend the suit. The substance of its defence was that in February 1997 one ***Aziz Heri Mohamed*** and Mjahid approached it seeking finance to purchase motor vehicles Nos. KAG 062T and KAG 088P respectively, from Shamisi as the dealer. On 13th February 1997 the Bank entered into a hire purchase agreement with the said Aziz Heri Mohamed for Kshs 5,800,000 to enable him purchase KAG 062T. On the same day it disbursed Kshs 5 million by cheque to the said Aziz Heri Mohamed and Kshs 800,000 in cash to one ***Anwar Suleiman Ahmad*** on alleged written instructions of Shamisi.

On 27th February 1997 the Bank entered into another hire purchase agreement for Kshs 5,500,000 with Mjahid, to facilitate the purchase of KAG 088P from the Shamisi. On the same day the Bank disbursed by cheque Kshs 800,000 to one ***Mohamed Ali Khamis*** and Kshs 4,700,000, also by cheque, to ***Tahfif Bus Services***, again on alleged written instructions from Shamisi.

It was the Bank's contention that Shamisi had certified the two buses to be his properties, which he was selling to the parties who had approached it; that he had signed the dealer's invoice; that he had instructed the Bank in writing on how to disburse the funds; that he was fully aware of the hire purchase agreements; that he had well and truly sold the buses; that he had voluntarily surrendered the log books and that he had executed the transfer forms for the buses. Accordingly all the pleaded particulars of fraud and illegality were denied.

Thereafter what followed was a series of false starts engineered by both parties, which considerably delayed the hearing and determination of this suit. Thus there was an unsuccessful application by the Bank for security for costs; an unsuccessful application by Shamisi to strike out the defence; a successful application by the Bank resulting in the striking out of the plaint, an application by Shamisi for stay of execution; a successful appeal by Shamisi to this Court leading to the reinstatement of the plaint; *ex parte* proceedings at the instance of Shamisi; and a successful application by the Bank resulting in the re-hearing of the case.

Eventually Kasango, J. heard the suit and in a considered judgment dated 15th May 2015, she found for Shamisi and awarded him Kshs 10 million with interest at court rates from the date of filing suit until payment in full, and costs of the suit. That judgment precipitated the present appeal in which the Bank raised seven grounds of appeal. With the consent of the parties, this Court directed that the appeal be heard and determined through written submissions, which were orally expounded by the respective learned counsel on 23rd April 2015.

Rising to urge the Bank's case, ***Mr. Rimui,*** learned counsel, invited us to conclude that Shamisi' had admitted in his evidence in chief and under cross-examination that he had never dealt with the Bank and that he had no claim against it. It was contended, supposedly on the authority of ***MOORGATE***

***MERCANTILE CO. LTD V. TWITCHING* [1975] 3 ALL ER 314,** that because he had stated that he had no claim against the bank, Shamisi was barred by the doctrine of estoppel from pursuing any claim against the Bank, since it would be unjust and inequitable for him to go back on his word.

On this point, ***Ms. Ngigi***, learned counsel for Shamisi was of a different view. She submitted that her client had particularized his claim against the Bank in the plaint and that his alleged admission of no claim against the Bank was based on selective reading of the evidence out of context. It was contended that in any event, the doctrine of estoppel had no application in this appeal, not the least, because the Bank had not pleaded it.

The Bank next upbraided the trial court for shifting the burden of proof by requiring it to prove that the disputed signatures belonged to Shamisi and that it had not received a letter of demand from Shamisi. Relying on ***sections 107*** and ***109*** of the ***Evidence Act*** as well as the judgment of this Court in ***JENNIFER NYAMBURA KAMAU V. HUMPHREY MBAKA NANDI, CA NO. 342 of 2010 (NYERI)***, it was submitted that the burden of proof of those facts was upon Shamisi and that the trial court had misdirected itself.

Still on the question of signatures on the invoices and the instruction letters allegedly received by the bank from Shamisi, it was submitted that the learned judge had erred by comparing the signature on record and reaching a conclusion on their authenticity without the aid of Shamisi's specimen signature or the opinion of a handwriting expert.

Shamisi's answer to the above contentions was that indeed the burden of proving the fact that he had signed the alleged invoices and letters of instructions lay on the Bank because it was the one asserting that he had. With Shamisi having denied that the signatures in question were his, it was submitted, the burden was on the Bank to prove that they were indeed his. It was also argued that the Bank had failed to confront Shamisi with the alleged letters authorizing it to pay third parties. As regards the burden of proving receipt by the Bank of Shamisi's letter of demand, it was contended that nothing turned on the issue because the tort of conversion could be proved even without demand and refusal, where as in this case, the alleged torfeasor had wrongfully disposed of the goods or created a title adverse to that of the owner.

The next ground of appeal was that the learned judge had erred by failing to hold that Shamisi could not sustain the suit because the property in the two buses had already passed to Mjahid. Relying on ***sections 19*** and ***20*** of the ***Sale of Goods Act***, and the decision of this Court in ***OSUMO APIMA NYAUNDI V. CHARLES ISABOKE ONYANCHA KIBONDORI & 3 OTHERS, CA NO. 46 of 1996 (KISUMU),*** it was submitted that by receiving the deposit of Kshs 500,000 and giving Mjahid possession of the buses and their logbooks, the sale of the buses was complete and Shamisi had passed the property in them to Mjahid. It was disputed that Shamisi had given Mjahid possession of the buses and the logbooks for valuation purposes because that would not have been necessary once the parties had agreed upon the purchase price.

Shamisi's response was that the property in the buses had not passed from him to Mjahid because he had given the latter possession of the buses and the logbooks solely to facilitate valuation, not for purposes of determining the sale price, but for purposes of obtaining hire purchase financing. It was also contended that under section 19 of the Sale of Goods Act, whether or not property in goods has passed depends on the intention of the parties, which in this case was very clear that property in the buses was not to pass until payment of the full purchase price by Mjahid.

The Bank next submitted that even if it were found that the property in the buses had not passed to Mjahid, it had financed him and Coachline to acquire the two buses in good faith and was therefore protected by ***section 26 (2)*** of the Sale of Goods Act which shielded it from conversion claims after receiving the buses from Mjahid in good faith and without notice of Shamisi's rights. It was contended that by virtue of ***section 2(2)*** of the Sale of Goods Act, the defence provided by section 26(2) is available even where a party is negligent, so long as he has acted honestly. Accordingly the trial judge was faulted for equating negligence with lack of good faith. We were urged to find that the Bank had acted in good

faith and without notice of any illegality, and that in registering the buses jointly in its name and that of Coachline, it was only protecting its interest as a financier.

Responding to that argument, Ms. Ngigi submitted that the Bank had not acted in good faith and could not rely on section 26(2) because it had actual notice of Shamisi's title to the two buses. It was argued that in its defence and evidence the Bank had acknowledged that the hire purchase applications had shown Shamisi as the dealer who was selling the buses; that it had also admitted that Shamisi was supposed to certify that he had agreed to sell the buses; that it is Shamisi as the dealer who should have given the Bank duly signed transfer forms; and that the Bank had purported to have paid the purchase price to Shamisi as the dealer. In these circumstances, it was submitted that by accepting the purported transfer forms from parties other than Shamisi who was indicated as the dealer and by paying the purchase price to third parties instead of to Shamisi whom the Bank acknowledged as the dealer, the Bank was not acting in good faith.

Next the Bank took issue with the award of Kshs 10 million to Shamisi without any evidence of the market value of the buses. Relying on ***McGREGOR ON DAMAGES, Sweet & Maxwell, 8th Ed.*** and ***THE ARPAD [1934] All ER 326,*** Mr. Rimui submitted that the measure of damages for conversion is the market value of the goods at the date and place of conversion. It was accordingly contended that Shamisi had not adduced any evidence of the value of the buses at the time and place of conversion and that the learned trial judge had erred by treating the agreed purchase price between Shamisi and Mjahid as the market value of the buses. If we understood learned counsel correctly, his argument was that because the amount awarded by the High Court has today skyrocketed to more than Kshs 30 million, that is far much more than the current price of two buses and constitutes unjust enrichment of Shamisi.

Shamisi's view of the award was that the learned judge had arrived at the right conclusion and that the award should not be disturbed. It was submitted on the authority of ***CHUBB CASH LTD. V. JOHN CRILLEY & SON [1983] 2 ALL ER 294*** and the majority decision of the US Superior Court for Spoke County in ***MERCHANT V. PETERSON [38 WN. APP 855]*** that the measure of damages for conversion is the fair market value of the converted goods, which is the value for which the goods could have been sold in the course of voluntary sale between a willing buyer and a willing seller. Accordingly we were urged to find that the agreed contractual price of Kshs 10 million between Shamisi and Mjahid was the best evidence before the trial court of the market value of the buses, which Shamisi was entitled to recover.

The penultimate issue taken by the Bank was that the learned judge had erred by awarding interest from the date of filing suit instead of from the date of judgment. Mr. Rimui claimed that in a liquidated claim, interest is awarded from the date of filing suit, whereas in a claim for damages, interest is not awarded until the damages have been assessed, which is from the date of judgment. The decision of this Court in ***KENYA COMMERCIAL BANK LTD V. SHEIKH OSMAN MOHAMMED, CA NO. 179 OF 2010*** was cited for the proposition that interest is awarded on general damages from the date of judgment because that is when the obligation to pay is established.

For Shamisi, Ms. Ngigi contended that the award of interest was correct and ought not to be interfered with. It was submitted that although he had prayed for interest from the date of conversion (1st February 1997) the learned judge had awarded interest from the date of filing suit (23rd February 1998). It was further argued that Shamisi had prayed for Kshs 10 million, being the agreed purchase price of the two buses on 1st February 1997, which was a specific, ascertained and determined amount. The damages sought by Shamisi, it was finally submitted did not require calculation and ascertaining, as they were equal to the value of the buses. The judgments in ***LATA V. MBIYU, [1965] EA 592*** and ***KIMANI V. ATTORNEY GENERAL [1969] EA, 520*** were relied upon in support of the submission.

The Bank's last ground of appeal was that the learned judge erred by declining to consider its documents, which were filed late and after Shamisi, had tendered his evidence in chief. It was submitted that the learned judge, having overruled Shamisi's objection to the production of those documents, could not later decline to consider the documents.

Ms. Ngigi's answer was that the documents were filed 10 years after the close of the pleadings and after Shamisi had given his evidence in chief. It was submitted that the trial judge did not err in refusing to consider those documents because they were in any event never put to Shamisi and he was not confronted with them.

That, in summary is the dispute that the two parties have placed before us. It is axiomatic that as a first appellate Court, we are under a duty to reappraise the evidence that was adduced before the trial court, look at it with a fresh eye and come to our own conclusions, which may or may not necessarily coincide with the conclusions of the trial court. (See ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123).***

In discharging that task, we are however exhorted to bear in mind, as a general proposition, that the trial court is always better placed than we are, to make findings and reach conclusions on matters touching on the credibility and believability of respective witnesses. The advantage enjoyed by the trial court stems from the fact that it has the opportunity, which we do not have, of seeing, hearing and observing witnesses as they testify and in particular the occasion to assess their demeanor. (See **NZOIA SUGAR COMPANY LTD. V. CAPITAL INSURANCE BROKERS LTD.**, ***CA NO. 86 OF 2009).***

It is only in those cases where the evidence on record clearly contradicts the conclusion of the trial contract or where such evidence has been disregarded by the trial court, that the advantage of seeing and hearing witnesses that is enjoyed by the trial court is not allowed to stand in the way of the first appellate court. Beyond that, the first appellate court will respect the findings of fact by the trial court and will not readily interfere with its conclusions, merely because, in the shoes of the trial court, it could have come to some different conclusions. (See ***GEOFFREY KIHUNYU WANJURA V. GICHUHI KIGUTA & ANOTHER, CA NO. 67 OF 1997).***

Turning to the first ground of appeal, we have no difficulty in concluding that a holistic consideration of Shamisi's evidence in chief, under cross-examination and in re-examination does not amount to an admission that he had no claim against the Bank which could have justified dismissal of his claim. The totality of his evidence was that he never went to the Bank and that he never dealt with it; that the agreement for sale of the two buses was between him and Mjahid and not with the Bank; that he was not involved in the dealings between Mjahid and the Bank although he was purported to be the dealer; and that still the Bank ended up transferring the two buses jointly to itself and Coachline.

His evidence is clear enough that he was complaining that by transferring the buses to itself and Coachline, the Bank had occasioned him loss and that he was claiming from it Kshs 10 million being the purchase price of the buses agreed between him and Mjahid. By saying that he had never dealt with the Bank, Shamisi cannot, in light of the pleadings in the plaint and his evidence in court, be taken to mean that he had no claim against the Bank, as its learned counsel tried to persuade us to conclude. We do not see any substance in this ground of appeal.

That finding should also dispose of the argument founded on estoppel. ***Section 120*** of the ***Evidence Act*** provides as follows:

> ***"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".***

We do not see in the record any unequivocal representation made by Shamisi to the Bank that he had no claim against it, which representation the Bank acted upon to its detriment. The statements relied upon to found the alleged estoppel were statements made during the hearing, which we have found do not amount to the kind of representations contemplated in section 120 of the Evidence Act.

The more compelling reason why estoppel was not applicable in this case is that it must be specially pleaded. The learned authors of ***ODGERS ON PLEADINGS & PRACTICE, 20TH EDN, (1971)*** state as

follows on estoppel:

> *"An estoppel must always be specially pleaded, unless it appears on the face of the adverse pleading, when it is ground for an objection in point of law...A plea of estoppel must always be drafted with great care and particularity. It must state in full detail the facts on which the party pleading relies as constituting the estoppel, and should also specify the allegations which it is contended the other party is precluded from proving."*

The second issue raised by the Bank relates to whether the learned judge erred by shifting the burden of proof to it to establish that the signatures in the documents it allegedly relied upon to register the buses and to disburse funds to third parties, were indeed Shamisi's signatures. We have again no hesitation in holding that there was no shifting of the burden to the Bank because from its pleadings and evidence, it was the Bank that asserted that it had paid the hire purchase moneys to Shamisi and or to persons whom he had authorized it in writing to pay. Shamisi had disputed that fact in his reply to defence and in his evidence. ***Section 107 (2)*** of the Evidence Act provides:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

On the issue whether Shamisi had signed documents authorizing transfer of the buses and disbursement of the money to third parties, the burden lay squarely upon the Bank, which was asserting so. In addition, under ***section 109*** of the Evidence Act, the burden of proving the facts as relates to the signatures lay with the Bank, which wanted the court to believe the existence of the facts it was asserting. The provision provides:

> ***"The burden of proof as to <u>any particular fact lies on the person who wishes the court to believe in its existence</u>, unless it is provided by any law that the proof of that fact shall lie on any particular person." (Emphasis added).***

If the evidence of a handwriting expert was therefore required to prove the existence of the facts that the bank was asserting, it was for the Bank to adduce it. (See ***<u>JENNIFER NYAMBURA KAMAU V. HUMPHREY MBAKA NANDI</u>, supra)***. Having failed to do so, the Bank cannot fault the trial judge for holding, on the basis of the evidence that was before her, that she was not satisfied that the signatures in question were Shamisi's. In this respect, we also bear in mind that in the case before her, the learned judge was concerned with proof on a balance of probabilities.

As we understand it, the relevance of the demand letter that was allegedly sent to the Bank by Shamisi was to show that he had demanded the return of his buses and the Bank had refused to oblige. The purpose of that demand letter was to show that the Bank was afforded an opportunity to restore the buses to their lawful owner, and it had failed to do so. To the extent that demand and refusal is not invariably required in each and every case before conversion can be proved, we are satisfied that nothing turns on whether or not the bank received the demand letter, and even if the learned judge had erred by requiring the bank to establish that it had not received the letter of demand, she could still rely on the other evidence on record to find conversion proved on the part of the Bank.

Professor John G. Fleming in his eminent work, ***<u>THE LAW OF TORTS</u>*, Sweet & Maxwell, 6th Edition**, states as follows on the rationale behind demand and refusal in the tort of conversion:

> ***"The reason for insisting on a prior demand is to ensure that one who came into possession innocently be first informed of the defect in his title and have the opportunity to deliver the property to the true owner. There is some support for dispensing with this requirement when the defendant with full information on the plaintiff's claim, categorically refutes it in his defence and thereby shows that a prior demand would in any event have been refused. No demand is necessary if conversion can be established in some other way, e.g. where possession was unlawfully acquired or the defendant has wrongfully disposed of the goods."***

In ***PHILLIPPE MARQ V. CHRISTIE MANSON & WOODS LTD. (2002) EWHC 2148 (QB)***, ***Jack, J***. was of the view that demand is not necessary in all cases to establish conversion. The learned judge expressed himself thus:

> ***"Demand is not an essential pre-condition of the tort (of conversion) in the sense that what is required is an overt act of withholding possession from the true owner. Such an act may consist of a refusal to deliver up the chattel on demand made, but it may be demonstrated by other conduct, for example by asserting a lien. Some positive act of withholding, however is required; for that absence of positive conduct on the part of the defendant, the plaintiff can establish a cause of action in conversion by making demand."***
>
> (See also ***WINFIELD & JOLOWICZ ON TORT, Sweet & Maxwell, 2010, 18th Ed.).***

Both parties spent a considerable part of their submissions contesting whether or not the property in the two buses had passed to Mjahid in terms of ***section 19(2)*** of the ***Sale of Goods Act***, when Shamisi gave him possession of the buses and their logbooks. The Bank contended that property had passed whilst Shamisi insisted that it had not. The section provides as follows:

> ***"19(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.***
>
> ***(2) For the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."***

Shamisi's evidence was that the intention of the parties was that the property in the buses would pass to Mjahid upon payment of the balance of the purchase price and that the purpose of giving him possession of the buses and their logbooks was not to pass the property in the buses to him, but solely to enable Mjahid arrange for their valuation as a first step to obtain hire purchase financing to raise the balance of the purchase price. It is difficult to see how the Bank can establish a contrary intention between Shamisi and Mjahid regarding the passing of the goods in the buses, when its evidence is very clear that it was never privy to the arrangement or agreement between Shamisi and Mjahid.

All that the Bank relies upon to argue that the intention of the parties was otherwise is the payment of the deposit and the joint defence filed by Mjahid and Coachline. The record shows that the cheques for the deposit were returned unpaid and were never made good subsequently. As regards the defence, it must be remembered that when Ouna, J. first heard the suit, Mjahid and Coachline, though notified, did not attend the hearing. Judgment was accordingly entered against them, which they have never contested. In these circumstances, the Bank cannot ignore the judgment entered against Mjahid and Coachline and purport to rely on their defence, which was never proven. On the intention of Shamisi and Mjahid on when property in the buses would pass, the only evidence on record was that of Shamisi.

We are therefore satisfied that the trial judge came to the correct conclusion regarding when the property in the buses was to pass and that from the terms of the contract as explained by Shamisi, the conduct of the parties and all the circumstances of the case, the intention of the parties was that the property in the buses should pass to Mjahid only upon payment of the balance of the purchase price, which he was striving to raise through higher purchase financing.

The heart of this appeal is whether the Bank had a defence to Shamisi's claim arising from the provisions of ***section 26(2)*** of the ***Sale of Goods Act***. Section 26 of the Act provides as follows:

> ***"(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale shall have the same effect as if the person making the***

delivery or transfer were expressly authorized by the owner of the goods to make it.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section, "mercantile agent" means a mercantile agent having, in the customary course of his business as agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods."

Before we delve into this ground of appeal, we would like to make a few pertinent observations regarding the above provision.

Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. ***(Nemo dat quod non habet)***. These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in ***BISHOPSGATE MOTOR FINANCE CORPORATION LTD V. TRANSPORT BRAKES LTD (1949) 1 KB 322, at pp. 336-337*** when he stated:

"In the development of our law, two principles have striven for masterly. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

In ***PACIFIC MOTOR AUCTIONS PTY. LTD V. MOTOR CREDITS (HIRE FINANCE) LTD (1965) AC 867 AT P 886*** the Privy Council explained that the purpose of that provisions is:

"to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitable unaware of legal rights which fetter the apparent power to dispose."

Secondly, to avail itself of the protection offered by section 26(2), the Bank would have to have received the buses in good faith and without notice of any lien or other right of Shamisi in respect of them. We agree with the Bank that, under section 2(2) of the Sale of Goods Act, in determining whether it had acted in good faith the test is whether its acts were done honestly irrespective of whether it was negligent or not. In other words, the fact that the Bank may have been negligent is not in itself evidence of lack of honesty on its part.

Lastly, the burden is upon the defendant to establish that he dealt with the goods of the plaintiff honestly or in good faith and without notice. In ***KUWAIT AIRWAYS CORPORATION V. IRAQ AIRWAYS COMPANY & OTHERS, (2002) UKHL, 19, Lord Nicholls of Birkenhead*** stated as follows on the issue:

"A person in possession of goods knows where and how he acquired them. It is up to him to establish that he was innocent of any knowing wrong doing."

(See also ***PHILLIPPE MARQ V. CHRISTIE MANSON & WOODS LTD. (supra)*** where Jack J. took the same view.)

From the evidence that was before the trial court, the Bank was aware of the fact that the two buses belonged to Shamisi. The hire purchase application forms in its possession indicated that Shamisi was the dealer, the owner, and the seller of the buses. The logbooks were in the name of Shamisi. By established practice, it was the dealer who was supposed to submit to the Bank the documents of transfer of the buses, and to receive payment. Even with the actual notice that Shamisi was the owner of the buses, the Bank opted to deal with third parties regarding the transfer of the buses from the name of Shamisi to itself and Coachline. Not only did the Bank effect the transfer of the buses without any regard to the person who was indicated as the dealer and owner of the buses, but it also paid all the proceeds to third parties, again without any regard whatsoever to the party who was shown as the owner of those buses.

When Shamisi was cross-examined by counsel for the Bank, he was never confronted with the documents that he had allegedly signed authorizing transfer of the buses to the Bank and Coachline and disbursement of the funds to third parties. Indeed, as regards the transfer of bus No. KAG 088P, the Bank never produced in evidence any documents, regarding how and who was paid.

The trial judge, who had the distinct advantage of seeing and hearing the witnesses testify concluded that the Bank had actual notice that Shamisi was the owner of the buses and that notwithstanding, it dealt with the buses without any regard to him. In a case like this, where the Bank had notice of Shamisi's title in the buses, ***Baron Cleasby*** statement in ***FOWLER V. HOLLINS LR 7 QB 616, 639*** still rings true:

> ***"persons deal with the property in chattels or exercise acts of ownership over them at their peril'."***

Having carefully re-evaluated the evidence, we are unable to disagree with the conclusion of the trial judge that on the facts of this case, the Bank did not have any basis for invoking the protection offered by section 26(2) of the Sale of Goods Act. The learned judge was also justified in disregarding the Bank's late documents when it failed to confront Shamisi with them.

There is no real disagreement between Shamisi and the Bank that *prima facie* the measure of damages for conversion is the market value of the goods at the date of conversion. The only point of contention is whether the learned judge erred by treating the sale price agreed between Shamisi and Mjahid as the value of the buses or whether valuation reports should have been produced in evidence. The value of the two buses at the date of conversion, according to Shamisi, was Kshs 10 million being the sale price agreed with Mjahid a few days before conversion, which was the money that he lost when the buses were converted. That evidence was never seriously challenged.

The general rule in award of damages is that the claimant is entitled to only what is necessary to compensate his actual loss. As Lord Templeman stated in ***BBMB FINANCE (HONG KONG) LTD V. EDA HOLDINGS LTD (1991) 2 ALL ER 129, at p. 132,*** the purpose of award of damages for conversion is to compensate, not to punish and therefore cannot be awarded as a penalty.

The evidence on record also indicates that there was a valuation report of the buses by CMC Motors Group, which was given to the Bank at the time of the application for hire purchase facility. That valuation report, together with the total amount that the Bank agreed to lend for the two buses (13, million), put the value of each bus above the Kshs 5 million agreed between Shamisi and Mjahid. Shamisi was claiming 10 million rather than the higher figure of Kshs 13 million, which he could have validly claimed. We are not persuaded that the learned judge committed any error as alleged by the Bank.

Decisions abound where the agreed purchase price of a chattel has been treated as its reasonable value. In ***AKAMBA PUBLIC ROAD SERVICES LTD V. TABITHA KERUBO OMAMBIA, CA NO 89 of 2010 (Kisumu)*** this Court upheld a decision of the High Court in which, the price paid for a *matatu* that was written off in an accident shortly after purchase, was treated as its value. Similarly in ***BBMB FINANCE (HONG KONG) LTD V. EDA HOLDINGS LTD (supra)***, the Privy Council accepted as a general rule the proposition that where goods are irregularly converted and were not recovered, the measure of damages was the value of the goods at the time of the conversion, and therefore the plaintiffs were

entitled to damages for conversion equal to the market price of the goods at the date of conversion.

As against the Bank, Shamisi had prayed for the return of the buses or payment of their full market value as of 1st February 1997. The learned judge entered judgment for Shamisi for Kshs 10 million, being the price agreed for both buses between him and Mjahid. The conversion took place barely weeks after Shamisi and Mjahid had agreed on the sale price. The valuations obtained by the Bank and the amount it lent on the security of the buses was even higher than the 10 million claimed by Shamisi. With respect, we do not see any misdirection on the part of the learned judge.

The last issue was whether the learned judge had erred by awarding interest from the date of filing suit rather than from the date of judgment. We need not belabour that Shamisi had had prayed for return of his buses or payment of their value which was indicated in the plaint to be Kshs 10 million. The actual amount that he was claiming was in the plaint and was well known before judgment was entered in his favour. The amount he was awarded is the same amount that he had sought ion the plaint. In ***DIPAK EMPORIUM V. BONDS CLOTHING [1965] 553*** it was reiterated that where the plaintiff has not suffered any fixed and ascertainable loss, the award of interest should be from the date of assessment.

The predecessor of this Court explained the rationale for award of interest as follows, in ***LATA V. MBIYU supra***, at p. 593:

> ***"In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."***

Under ***section 26*** of the ***Civil Procedure Act***, award of interest is at the discretion of the Court. See ***KENINDIA ASSURANCE CO LTD V. ALPHA KNITS LTD & ANOTHER [2003] 2 EA 512.*** Section 26 provides as follows:

> ***"26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.***
>
> **(2)** ***Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."***

Subject to the fact that the discretion must be exercised judicially, the discretion conferred by section 26 is unfettered. That discretion has been variously described as ***"wide"*** (***NEW TYRES LTD V. KENYA ALLIANCE INSURANCE COMPANY LTD (1988) KLR 380)*** and ***"absolute"*** (***CHARLES C. SANDE V. KENYA CO-OPERATIVE CREAMERIES LTD CA NO. 154 OF 1992)***. In ***OMEGA ENTERPRISES KENYA LTD V. SIRIKWA HOTEL LTD & OTHERS, CA NO 235 of 2001,*** this Court, while considering, among others, the date from which interest ought to be awarded stated as follows:

> ***"The question of interest as regards the date from which it should be paid, the rates thereof as well as whether the same should be on compound or simple basis, is essentially a matter for the discretion of the court and unless the discretion is exercised wrongly an appellate court would not interfere with the (decision of the trial court)."***

We are accordingly satisfied that the learned judge had the discretion to award interest from the date of filing suit as Shamisi's claim was definite and ascertainable before judgment. In the circumstances of this appeal, there was no wrongful exercise of the discretion.

Ultimately we have come to the conclusion that this appeal has no merit and the same is hereby dismissed with costs to Shamisi. It is so ordered.

Dated and delivered at Mombasa this 15th day of May, 2015

ASIKE- MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR