



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: TUNOI, GITHINJI, J.J.A & ONYANGO OTIENO, AG. J.A

CIVIL APPEAL NO. 251 OF 2003

BETWEEN

HERIBERT MAIER.....APPELLANT

AND

EVA-MARIE KERSTEN.....RESPONDENT

*(Appeal from the judgment and decree of the High Court of
Kenya at Mombasa (Khaminwa, Comm. of Assize) dated 20 th
December, 2002*

in

H.C.C.C. No. 192 of 2002)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court of Kenya at Mombasa (*Khaminwa, Commissioner of Assize, as she then was*), delivered on 20th December, 2002 whereby that court ordered the appellant, the defendant in the suit, to refund a total of Shs.505,000.00 to the respondent, the plaintiff in the suit, being in respect of the refund of the purchase price and the value of added accessories for a motor vehicle which the appellant had sold to the respondent pursuant to an inconclusive contract of sale.

The facts giving rise to the matter now before us are largely not in dispute and may be briefly stated as follows. On or about the 3rd day of March, 2002, the appellant agreed to sell to the respondent motor vehicle *Mitsubishi Pajero* registration NO. KAD 754C at a consideration of Shs.450,000.00. The full purchase price was paid over to the appellant and the motor vehicle was handed over to the respondent. However, five weeks after the execution of the agreement of sale the motor vehicle was seized from the respondent by *Kilifi Police Station* on the ground that the motor vehicle had been stolen and had a fake Logbook. We are informed that upto now the motor vehicle is still being detained at the Police Station.

Consequent upon the repossession, the respondent sued the appellant on 10th May, 2002 for recovery of the consideration and the cost of accessories subsequent to the purchase. The appellant defended the suit contending that he had no knowledge that the motor vehicle had been stolen as the police had not charged anyone with its theft.

In the reserved judgment the learned Commissioner of Assize held:

“I find that when the defendant sold the vehicle to the plaintiff he guaranteed good title. As it is, it is clear the defendant had no title to pass to the plaintiff. There was also an implied warranty that the plaintiff shall have and enjoy quiet possession of the goods (motor vehicle). These are conditions given under the sale of Goods Act.

Evidence which is not controverted is that the purchaser (plaintiff) by being deprived of possession of the vehicle she is unable to enjoy the rights of ownership of the vehicle. She is unable to use the vehicle and therefore she is denied the rights of owner. The price she paid for the vehicle has become without consideration and she is suffering loss of user.

I find therefore whether the vehicle was stolen or not is irrelevant. The fact is that the vehicle is detained by Police and she cannot use it. And therefore these are reasons why the vehicle is in Police custody and the plaintiff is deprived of quiet and peaceful enjoyment of the same.”

The learned Commissioner of Assize then entered judgment for the respondent. Being aggrieved by that judgment the appellant has preferred this appeal, his main ground of appeal being that it was an error on the part of the trial court to hold that the motor vehicle had been stolen when there was no evidence to support that finding.

Mr. Kamundi for the appellant has further argued that the learned Commissioner of Assize erred in not finding that the respondent had breached the contract by not going to collect the motor vehicle from the Police Station.

The evidence on record shows that the appellant was not in possession of the logbook or any other document to show his ownership of the motor vehicle at the time the sale agreement was executed. His ownership of the motor vehicle was therefore suspect after repossession by the Police and it was the appellant's duty and not the respondent's to prove that he was its lawful owner. That he failed to do and thereby breached the contract.

The essence of the contract of sale is the transfer of the property in the goods sold; consequently, where the seller has no right to sell the goods, a fundamental condition has been broken and the buyer can recover the price from the seller because the consideration for its payment has totally failed. See section 14 of the Sale of Goods Act.

In the case of ***RAWLAND V. DIVAL [1923] 2KB 500*** plaintiff, a motor-car dealer, bought a car from seller for £334 and resold it to a customer for £400. The car was seized by the police because it was stolen and the plaintiff returned the £400 to his customer. The Court of Appeal held that the dealer was entitled to recover the £334 from the seller because the condition implied by Section 12(1) was broken and there was a total failure of consideration although buyer had used the car for some time. Section 12(1) of the English Sale of Goods Act 1893, corresponds with Section 14(a) of our Sale of Goods Act.

Clearly, the appellant's ownership over the motor vehicle was not beyond reproach and the appellant did not attempt to perfect it when the police seized it. In the circumstances, the appellant had no right title to the motor vehicle and could pass none to the buyer, the respondent herein, at the time of the contract.

In the circumstances, we think that the learned Commissioner of Assize cannot be faulted in her judgment. We see no merit in the appeal which we order dismissed with costs.

Dated and delivered at Mombasa this 23 rd day of July, 2004.

P.K. TUNOI

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR