Best Cars Limited t/a Impact Motors v Omoke & another (Civil Appeal E409 of 2023) [2025] KEHC 474 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E409 OF 2023

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

BEST CARS LIMITED T/A IMPACT MOTORS ..... APPELLANT

AND

MORARA OMOKE ..... 1ST RESPONDENT

ESABEL GATHIGIA ..... 2ND RESPONDENT

(Being an appeal from the judgment of D.S. Aswani (Adjudicator) (RM) Small Claims Court delivered on 25th May, 2023 in Nairobi Milimani SCCC No. E7883 of 2022)

JUDGMENT

1. This appeal emanates from the judgment delivered on 25.05.2023 in Nairobi Milimani SCCC No. E7883 of 2022 (hereafter the lower Court claim). The claim was filed by Dickson Morara Omoke and Esabel Gathiga, the claimants before the lower court (hereinafter the 1st and 2nd Respondent/ Respondents) as against Best Cars Limited t/a Impact Motors (hereinafter the Appellant), Esther Waheto Kiara, Benmack Ragot and Kate Njogu, the respondents before the lower Court seeking judgment by way of general damages to the tune of Kshs. 500,000/- for breach of contract, mental anguish, unnecessary inconvenience, emotional distress & loss of legitimate expectation; special damages to the tune of Kshs. 400,000/-; a declaration that the respondents before the lower Court misrepresentation of the faulty vehicle to be in perfect working condition and or merchantable quality constitutes breach of the agreement of sale between the parties; costs of the claim; and interest on the above at Court's rate until payment in full.

2. It was averred that on 13.01.2020, the Respondents entered into an agreement with the Appellant for the sale of motor vehicle registration number KCK 790E (hereinafter the suit motor vehicle) at Kshs. 630,000/-. That the Appellant intentionally and malevolently sold the suit motor vehicle

misrepresenting it to be in perfect working condition and or merchantable quality despite knowing this to be false. It was further averred that Appellant misrepresentation of the aforementioned faulty vehicle to be in perfect working condition and or merchantable quality is a clear breach of the agreement of sale between the Respondents and the Appellant which occasioned the former loss by way of repairs to the tune of Kshs. 400,000/- but also underwent the time-consuming agony of fixing the defects to the suit motor vehicle.

3. The Appellant filed a response dated 23.12.2022 denying the averments in the statement of claim meanwhile reiterated the contents of the sale agreement between the parties wherein Clause 1 thereto captured that the suit motor vehicle was sold on "AS IS" basis. That on accord of the latter, it is was understood that the use of the said term is unequivocal and consequently, the Respondents are estopped from claiming misrepresentation, fraud, deception or otherwise.

4. The claim proceeded to hearing during which both parties called evidence. In its judgment, the trial Court found in favour of the Respondents and proceeded to entered judgment as against the Appellant to the tune of Kshs. 400,000/- with interest on the sum at Court's rate from date of filing until payment full. Meanwhile, the claim as against Esther Waheto Kiara, Benmack Ragot and Kate Njogu were dismissed with costs.

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -

> " 1. That the learned Adjudicator erred in fact by failing to appreciate that the Respondent was consistent in the description of the motor vehicle unit sold to them by the Appellant in their pleadings.
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> 2. That the learned Adjudicator erred in fact in failing to appreciate that the description of the motor vehicle was a central issue to the determination of the case as relates motor vehicle known as KCK 790E Volkswagen model Golf.
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> 3. That the learned Adjudicator erred in fact in failing to appreciate the central term of the concept as relates to the "as is" principle in contract law and its application in the sale of goods.
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> 4. That the learned adjudicator erred in fact and in law by conflating the concept of "as is" prudential rule and principle of implied warranty in the judgment whereas the two are mutually exclusive.
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> 5. That the learned Adjudicator erred in fact and in law by failing to appreciate that the term "as is" prudential rule excludes any form of warranty whether express or implied where the buyer has had an opportunity to inspect the goods.
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> 6. That the learned Adjudicator erred in fact and law by observing, in their analysis and determination, that the contract for sale entered into between the Appellant and Respondent was a contract for sale by description.
>
> 7. That the learned Adjudicator erred in law by failing to consider the provisions of Section 16(b) of the *Sale of Goods Act* in its entirety and failing to apply the same.

8. That the learned Adjudicator erred in fact and law by failing to consider the merits of the submissions presented by both the Appellant and Respondents in their entirety."

6. The Respondents thereafter moved this Court vide a Preliminary Objection (PO) dated 04.08.2023 that the grounds of appeal are fully based on facts and therefore offends Section 38(1) of the *Small Claims Court Act* which provides that appeals to the High Court shall be on matters of law only; and that the appeal was filed in the wrong division of the High Court, and was therefore incurably defective. Meoli, J. by way of a ruling delivered by on 23.07.2024, partially allowed the Respondents PO. And accordingly struck out grounds 1, 2, 3, 4, 5, 6 & 8 in the memorandum of the appeal thereby leaving Ground 7, solely for disposal in the instant appeal. It is on the premise of the foregoing ruling that parties hereto proceeded to canvass the above singular ground by way of written submissions, of which this Court has duly considered.

7. That said, the Court has equally considered the record of appeal. It would be pertinent to restate that this is a first appeal, though an appeal from the Small Claims Court. The scope of this Court's duty is limited by Section 38(1) of the latter Act. An appeal premised on Section 38(1) of the *Small Claims Court Act* is likened to a second appeal as provided for in the CPA. In considering its mandate on a second appeal, that is, on points of law only, the Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, distinguished between matters of law vis-à-vis matters of fact by stating that: -

> "I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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."

8. Thus, upon review of the memorandum of appeal and submissions by the respective parties, it is the Court's view that the appeal turns on whether the trial Court erred in law by failing to consider the provisions of Section 16(b) of the *Sale of Goods Act* in its entirety and or apply the same in the impugned decision. Apposite to the determination of issue before this Court are the pleadings, which form the basis of the parties' respective cases before the trial Court and are relevant before dealing with the singular issue on appeal. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be

adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

9. This Court having earlier captured the gist of the respective parties' pleadings, it serves no purpose restating the same at this juncture. However, at the risk of repetition the gravamen of the Appellant's contention as per the Ground 7 of the memorandum of appeal is that the trial Court failed to consider the provisions of Section 16(b) of the *Sale of Goods Act*. The trial Court after restating and analyzing the evidence before it held in part as follows in its judgment; -

> " The Court has considered the pleadings, evidence adduced in Court both viva voce and documentary as well as the rival submission filed by the respective parties' advocates. I have also considered the authorities cited by counsel.
>
> In my humble view and from the pleadings and evidence adduced the following issues emerge for determination: -
>
> 1. Whether on the claimant's pleadings and evidence, the suit motor vehicle contained fundamental defects or was the same in perfect working condition as at the time of sale?
> 2. Whether the Respondents were in breach of the contract and whether the Claimants are entitled to special damages and general damages for breach of contract as pleaded in the statement of claim?
> 3. What orders should this Court make?
> 4. Who should bear the cost of the suit?
>
> .....
>
> Whether the Respondents were in breach of the contract and whether the Claimants are entitled to special damages and general damages for breach of contract as pleaded in the statement of claim?
>
> Section 16 of the *Sale of Goods Act* provides that: -
>
> .....
>
> Section 16.....provides that there is an implied condition as to fitness for purpose and warranty of goods provided the buyer makes known to the seller the purpose for which the goods are required. The 1st respondent sold to the claimants a motor vehicle which was not fit for the purpose for which it was purchased. This amounted to breach of an implied condition by the 1st Respondent.
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> There was tangible evidence adduced by the claimants to demonstrate that the motor vehicle was not in perfect working condition as represented to the claimants by the respondent to the claimants. The 1st claimants testified and the 4th respondent confirmed that road tests were not allowed on the road/highway since the motor vehicles did not have insurance, which allegations the 2nd respondent refuted in her testimony.
>
> .....

At the trial and through the adopted witness statements of the claimants 3 witnesses, the mechanics, it was the uncontroverted evidence of the claimants that the motor vehicle exhibited problems soon after it was handed over to the 1st claimant.

All the respondent seemed to be telling the Court was that the motor was sold as is hence any issues that developed there was not theirs to resolve.

.....

The Court holds the view that it mattered not that the motor vehicle was inspected to the claimants' satisfaction and installed to her satisfaction. The claimants are not experts in that particular field and the defects having presented themselves after a drive were not such as would be easily detected, even upon ordinary examination.

Having established on issue (a) above, I find that as the buyer herein relied on the seller's skill of judgment, there was an implied condition that the motor vehicle would be of merchantable quality and the development of numerous and serious mechanical problems soon after being handed over to the claimants as pleaded and proven is clear proof that the same were not." (sic)

10. At the outset Section 16 of the Sale of Good Act provides that: -

> Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:
>
> Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:
>
> Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;
>
> (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
>
> (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

11. Here, on behalf of the Respondents three (3) witnesses testified orally whereas the other three (3) witness statements (mechanics) were adopted into evidence. The gist of the 1st Respondent's evidence, who testified as CW3, was that as at purchase of the suit motor vehicle he was under the assurance from the Appellant that the car was buy and drive whereas the same was in perfect condition. That upon

driving off with the said motor vehicle, the same developed mechanical issues therefore the vehicle was not of merchantable quality. The Appellant on its part equally called one (1) witness, one Gerald Kangichu Mwatha, whose evidence was to the effect that the 1st Respondent executed as sale agreement, drove the suit motor vehicle at the point of sale, and was satisfied that the vehicle was in good condition.

12. The kernel of the Appellant's contestation on this appeal is that parties hereto were bound by the sale agreement which provided that the suit motor vehicle was sold "AS IT IS". Specifically, the sale agreement provided that "it is further agreed upon between the buyer and the seller as follows 1) The aforesaid vehicle is sold on the basis of "as it is" basis and the buyers have satisfied themselves that the vehicle is up to their expectations. The seller does not guarantee the buyer whatsoever". It was further contended that the 1st Respondent having being given an opportunity to inspect and examine the condition of the suit motor vehicle, using his mechanics, there was no breach on the part of the Appellant. Counsel thus relied on the provisions of Section 16(b) of the Sale of Good Act and the decisions in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR and Prudential Printers Limited v Carton Manufacturers Limited [2012] eKLR in urging the Court to allow the appeal.

13. In riposte, while calling to aid the decisions in Wood Products Limited v Rufus Kithela Kobia [2019] eKLR, Vivid Printing Equipment Solutions Limited Monicah Ng'ong'oo t/a Identity Partner [2019] eKLR and James Watenga Kamau v CMC Motors Group Limited [2020] eKLR, counsel for the Respondents contended that reading of Section 16(b) of the Act, the Appellant is only exempted from the implied warranty that his goods are of merchantable quality where the buyer is an expert in that particular field and he examines the goods whose defects are identifiable upon ordinary examination.

14. The duty of this Court while adjudicating a dispute between contracting parties was well settled in the oft-cited decision of National Bank of Kenya Ltd (supra) wherein the Court observed that; -

> ....."A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

15. With the above in reserve, this Court must first answer the question whether the sale in question was one by description, sample or both? As to what constitutes either the same succinctly discussed by the Court of Appeal in Pradip Enterprises (EA) Limited v Magic Chemicals Inc [2019] KECA 607 (KLR). That said, here the Court reasonably believes that nature of the sale given that the merchantability of the suit motor vehicle was captured in the sale agreement despite the limited test drive undertaken at the point of sale, the nature of sale was one of description. The trial Court was correct in its judgment, when it observed that there was tangible evidence adduced by the Respondents that the suit motor vehicle was not in perfect working condition and it mattered not that the latter was inspected to the Respondents satisfaction given that they were not experts in the field. Meanwhile, defects having presented themselves after driving off with the suit motor vehicle were not such as would be easily detected, even upon ordinary examination. Further, even by RW3's - Kate Njogu own evidence, the Respondents did not have an opportunity to road test the suit motor vehicle on the highway since it did not have a valid insurance. The highlights that buttress this position are as follows:

    a. The claimant's witness Mr. Godfrey Mutuma averred that he replaced the vehicle's water pump, 2 radiator fans, 4 ignition coils and the super change but the day after, the vehicle was

taken by the claimants. In High Court in Keri Alminium Products Limited Vs Hightech Air Conditioning (2018) eKLR it was held that;

> " Consequently, I would find and hold that the fact of the breakdown of the machine and in particular the leakage in the copper pipes was due not to tampering... but due to the fact that the same was not of merchantable quality within the ambit of Section 16 of the *Sale of Goods Act*"

The learned Judge proceeded to say

> " The obligation of the appellant to supply a machine that would provide Respondent with a lasting solution to its problem and not one that would break down in a few months."

In the current case, there are documents to prove that the repairs and purchases were made a day after purchase to several months later these purchases and repairs would not certainly have been carried out if indeed the vehicle was in a 'perfect' condition. Needless to say, this evidence was not challenged meaning that indeed at the point of sale, the vehicle was faulty.

b. The test drive done at the yard (50 meters) could not expose latent defects of the motor vehicle given the short period it took. There is no evidence that the repairs done by the claimant were as a result of an accident after taking the motor vehicle or negligence on his part. The parts replaced or repaired are not the ones done during normal service such as oil filter or tyres but are significant parts which are rarely replaced within a short period of time.

c. When the claimant inspected the motor vehicle the gear box was not opened and it was an implied condition the gear box was in perfect condition.

16. Perceptibly, without having carried out a proper road test, the Respondents wouldn't have known of any mechanical defects to the car despite the mechanic having inspected the vehicle and conducted a miniature test drive at the point of sale. It must be remembered that the vehicle was not bought brand new going by the sale agreement that was executed as between the parties. Thus, a proper road test would have been warranted in the circumstance on accord of an implied condition that the vehicle was of merchantable quality or sold as it is whereas the limited examination of the vehicle as argued by the Appellant did not waive the implied condition of defects which could not be reasonably revealed upon the limited examination and or test drive. Consequently, the trial Court cannot be faulted at arriving at the decision it did whereas it is evident that the learned Magistrate considered the entirety of the provisions of Section 16(b) of the Sale of Good Act. In the circumstances, the trial Court's decision ought to sustain with commending order being that the instant appeal lacks merit and ought to be dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Nguru for the Applicant

Morara for the 1st Respondent and on behalf of 2nd Respondent

Guyo - Court Assistant