



REPUBLIC OF KENYA



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**Ojwang v Kara & another (Civil Appeal E097 of 2023)
[2024] KEHC 3131 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E097 OF 2023
RE ABURILI, J
MARCH 28, 2024**

BETWEEN

GLADYS OJWANG APPELLANT

AND

RAHIM TAJDIN RAHEMTULLA KARA 1ST RESPONDENT

LUCY SAUNYA 2ND RESPONDENT

(An appeal arising out of the Judgment and decree of the Honourable G.C. Serem in the Small Claims Court at Kisumu delivered on the 22nd June 2023 in Kisumu Small Claims Court Commercial Case No. E243 of 2022)

JUDGMENT

Introduction

1. The appellant herein is Gladys Ojwang. She filed a suit by way of a statement of claim on the 29.11.2022 seeking judgement against the respondents herein and 2 others in the sum of Kshs. 750,000 for breach of contract relating to the sale of a motor vehicle.
2. In response, the 1st respondent filed a defence contending that he did not owe the claimant any money and urged the Court to dismiss the claim against him. The 2nd respondent neither entered any appearance nor filed any defence despite being served with the claim and summons.
3. The trial court found that 1st respondent performed his obligations in the contract and that it was the 2nd respondent who was in breach of the contract and hence liable to settle the Kshs. 750,000. The court proceeded to dismiss the suit against the 1st respondent and 2 others not before this court and went on to award the appellant costs of the suit and interest from the date of judgment.



4. Aggrieved by the said decision, the appellant filed this appeal vide a memorandum of appeal dated 27th June 2023 raising 19 grounds of appeal which I need not reproduce here from the memorandum of appeal as they all boil down to two as follows:
 1. That the learned trial adjudicator erred in law and therefore arrived at a wrong conclusion and decision on liability.
 2. That the learned trial adjudicator erred in law by holding that interest on special damages was to run from the date of judgment on 22nd June 2023 rather than from the date of filing of the claim on the 29th November 2022.
5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that the 1st respondent breached the contract between him and the appellant on the sale of the car by failing to fulfil his primary obligation under the contract of transferring the legal title in the car to the appellant and further that the 1st respondent breached the contract between him and the appellant on the sale of the car by failing to fulfil his primary obligation under the contract of transferring the legal title in the car to the appellant.
7. It was submitted that the 1st respondent did not have a good title to the car that he could pass to the appellant and was therefore in breach of the contract contrary to the doctrine of nemo dat quod non habet.
8. The appellant further submitted that the car was not registered in the name of Umarali Motors Ltd as presented by the 1st respondent and that the car was registered in the names of 3rd parties as at 30.6.2022 and 12.9.2022 and further that when the 1st respondent purported to sell the car on the 5.8.2022, the car had encumbrances by the 3rd parties who took a loan using the vehicle as security.
9. It was further submitted that the appellant never had quiet possession of the car as she was divested of the car by auctioneers on instruction of 3rd parties and the vehicle was eventually sold by public auction.
10. The appellant submitted that the learned adjudicator erred in law and in fact in dismissing the appellant's claim against the 1st respondent without assigning proper reasons and further that the adjudicator was wrong as she tried to re-write the terms of the contract signed between the parties to the sale agreement.
11. It was further submitted that the 1st respondent was guilty of non-disclosure of facts critical to the car's sale contract with the appellant which amounted to fraudulent misrepresentation specifically, that a 3rd party was the registered owner of the car and not Umarali Motors and further that the 2nd respondent still had access, beneficial and actual possession of the car.

The 1st Respondent's Submissions

12. It was submitted that the appellant's nineteen grounds of appeal as well as its prayers were in their nineteen issues of facts as opposed to law as demanded by section 38 of the [*Small Claims Court Act*](#). It was further submitted that for liability to be established between the parties in dispute, the point of ascertainment was that of facts pointing fault to a given party to the dispute.



13. The 1st respondent submitted that prayers (d), (e) and (f) of the appellant's memorandum of appeal were based on the discretion of the court and the appellant has failed to give an insight as to how the said discretionary powers were applied in a manner that was not judicious.
14. Accordingly, it was submitted that the instant appeal raised no issues of law for determination by this Honourable Court and as such ought to be dismissed.
15. It was submitted that the issue of transfer was not expressly provided for in the contract for sale as imagined by the appellant but rather that it was implied that the appellant was eventually to be registered as the owner of the motor vehicle.
16. The 1st respondent submitted that the contract between the Appellant and the 1st Respondent was partially written and partially oral and further that it was a conditional contract in that the 2nd Respondent was to effect the transfer in favour of the Appellant. It was submitted that the title was to pass as at the time when the 2nd Respondent effected the transfer in line with Section 19 of the [Sale of Goods Act](#).
17. It was submitted that the Appellant was asking the Court to re-write the contract and save it from a seemingly bad bargain by finding that the 1st Respondent was to effect transfer of the motor vehicle in the Appellant's favour. Further, the 1st respondent submitted that the Appellant admitted on oath that she was not unduly influenced, coerced and unduly influenced to purchase the said motor vehicle.
18. The 1st respondent submitted that other than directing the fault to the other Respondents and advancing reasons as to why it did so, there is no logical way the 1st Respondent would have counterclaimed against parties not claiming against it hence the position by the Appellant that the 1st Respondent ought to have counterclaimed lacks any legal and procedural foundations.
19. It was further submitted that the Appellant's case against the 1st respondent failed to meet the threshold for the allegations of fraud as was held in the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR where the court dismissed the appellant for want of proof of fraud to the required degree.
20. The 1st respondent submitted that the Appellant voluntarily assumed risk of purchasing a motor vehicle that was not in the 1st Respondent's name and further agreed to have the 2nd Respondent transfer the same to her and thus the Appellant ought not to cry foul for having voluntarily assumed a risk. It was submitted that the *volenti non fit injuria* doctrine bars the Appellant from seeking remedies against the 1st Respondent for a transaction she entered into freely knowing the risks involved.
21. It was submitted that it was a general rule that only parties to a contract enjoy the rights to it and bear the obligations as contained therein as dictated by the doctrine of privity of contracts and that in the instant case, the 2nd Respondent was the third party bestowed with the obligation to effect transfer of the sold motor vehicle in favour of the appellant.
22. The 1st respondent submitted that all the parties in the present appeal knew their obligations, rights and benefits and that aside from the agreement which did not confer the obligation to transfer, parties agreed on who was to effect transfer and as such, the Appellant cannot divorce the position and ask the Court to find that it is only the Respondents who agreed between themselves on the issue of effecting transfer.
23. It was submitted that it was undisputed that once the 1st Respondent sold the motor vehicle, it intended the Appellant to enjoy quiet possession and eventually have her proprietary interests over the same registered and that the 1st respondent never at any point exhibited adverse interests to that of the Appellant.



24. The 1st respondent submitted that the 1st Respondent in the very least did not breach the contract but that however, the 2nd Respondent having procured a loan facility through a proxy using the said motor vehicle as a consequence of which the same was impounded and sold, there was a radical change in circumstances such that the transfer was incapable of being effected.
25. It was submitted that the instant appeal lacked merit as it is entirely grounded on factual issues as opposed to matters of law as statutorily demanded.

Analysis and Determination

26. This Being a first and last appellate court, this Court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. This is what section 78 of the *Civil Procedure Act* dictates as interpreted in various cases. This court must also bear in mind that it neither saw nor heard the witnesses as they testified hence it must give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

27. Although this case does not involve claim for damages arising out of a road traffic accident, it nonetheless involves a claim for special damages. For an appellate court to interfere with the award of damages made by the trial court, there has to be sufficient grounds and the applicable principles were settled by the Court of Appeal in the cases of *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470 that:

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.”

28. In addition, the principles on interfering with judicial discretion were laid down in the case of *Price and Another v Hilder* [1996] KLR 95 as follows:

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”



29. Further, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR the Court of Appeal held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that: ‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’”

30. I have considered the rival submissions by the appellant and the 1st respondent, the evidence on record and the authorities cited by both counsel. The instant appeal is based on two broad grounds; the issue of liability of the 1st respondent and the issue of the award of interest by the trial court, whether the same should be from the date of filing the claim or the date of the judgement as granted by the trial adjudicator.

31. The first issue for consideration is whether these two issues of liability and interest constitute points of law or fact. This is so because section 38 (1) of the *Small Claims Court Act* is explicit that a person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

32. I have considered the many grounds of appeal which are, indeed, unnecessarily verbose and hence my reduction into two and the two main issues extracted therefrom. It is trite that a point of law is a term for a matter of law in a case that will depend on existing statutes and not from a matter of fact.

33. In my view, issues of liability for the alleged breach of contract were determined by the Adjudicator on a factual basis that the agreement in issue between the parties was clear that it was the 2nd respondent who was to transfer the vehicle to the claimant and that being a factual issue, there is no other interpretation in law that would change the situation to shift the blame to the 1st respondent. I do not find any issue of law raised capable of being determined by this court, contrary to the factual findings by the Adjudicator, based on the agreement.

34. I find that the issues on liability as determined by the Adjudicator in the case herein do not constitute points of law. Accordingly, I decline to delve into matters of liability of the 1st respondent as they are matters of fact as decided upon by the Adjudicator.

35. In the case of *Mbogo & Another v Shah* (1969) EA 93, it was held, inter alia, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in



exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

36. The above issue was also considered by the Supreme Court of Kenya in the case of *Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others* [2019] eKLR where the court stated as follows in paragraph 39 of the judgment:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010)NZSC 112; (2011)2 NLRI (Kacem) where it was held para 32]:

“In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

37. On the other hand, it is my finding that issues of interest and when it is to accrue are matters of law. They are anchored on Section 26 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides as follows:

“26. Interests

- (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.”

38. I have reviewed more than fifty decisions of this Court and of the Court of Appeal and in all those cases without exception, the Courts have held that interest on special damages accrue from the date of filing suit, in cases where there is no specific claim for interest to run from date when the money was paid out or received by the defendant.

39. Taking all the aforementioned into consideration, it is my finding that the instant appeal succeeds to the extent that the interest payable on the special damages claimed shall be from the date of filing suit until payment in full. This is because Section 26 of the *Civil Procedure Act* envisages such a scenario and there is absolutely no reason why the Adjudicator ordered that interest be paid from date of judgment. Furthermore, the decree as drawn already provides for interest from the time of filing suit.

40. Accordingly, this appeal partially succeeds to the extent stated above.



41. As the appeal is only partially successful, each party shall bear their own costs of this appeal.
42. This file is closed. The lower court file to be returned forthwith with a copy of this judgment.
43. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

