



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 1 OF 2016

1. WOODVENTURES (K) LIMITED

2. AUTO SELECTION (K) LIMITED APPELLANTS

-VERSUS-

MOREHAI IRESA MWITA.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. D. K. Kemei

Chief Magistrate (as he then was) in Migori Chief Magistrate's

Civil Suit No. 363 of 2014 delivered on 15/12/2015).

JUDGMENT

1. On 07/05/2009 the Respondent herein, **MOREHAI IRESA MWITA**, entered into a Hire Purchase Agreement with **WOODVENTURES (K) LIMITED**, the First Appellant herein towards the purchase of an unregistered second hand Mitsubishi Canter Model FE53, Chassis No. FE53CEV560731, Engine No. 4D 33 H97905 (hereinafter referred to as **'the vehicle'**) at a total agreed purchase price of Kshs. 1,610,000/=.
2. The Respondent made an initial deposit payment of Kshs. 600,000/= by way of a Bankers Cheque in favour of **AUTO SELECTION (K) LIMITED**, the second Appellant herein and the balance was to be liquidated by way of monthly instalment payments.
3. The Respondent took possession of the vehicle from the Appellants' business premises in Mombasa and took it to Isebania where he intended to carry out some transport business from. The Respondent however had to await the vehicle's registration number plates before the vehicle could be legally and validly on the road.
4. As the delivery of the vehicle registration number plates delayed, the Respondent through the firm of his Advocates formally wrote to the Appellants and terminated the agreement on the ground that the Appellants had breached a fundamental term thereof and demanded for a refund of the deposit payment and that the Appellants do collect the vehicle from Isebania where the Respondent had just parked it awaiting the said registration plates.
5. The Respondent then filed Kisii High Court Civil Case No. 296 of 2010 which was later transferred to the Migori Chief Magistrate's Court for hearing and determination. The suit became Migori Chief Magistrate's Court Civil Case No. 363 of 2014 (hereinafter referred to as **'the suit'**). The Respondent sought for judgment against the Appellants jointly and severally for a declaration that the Appellants had breached the Agreement, a refund of the Kshs. 600,000/= deposit payment with interest, loss of expected earnings, security costs, interests and costs of the suit.
6. The Appellants, then Defendants, filed a Defence and a Counter-claim and prayed for judgment against the Respondent for the balance of the agreed purchase price, interest, costs of attempted repossession, interests and costs. A Reply to Defence and Defence to Counter-claim was filed.
7. The suit was heard by way of vova-voce evidence. The Respondent testified and called one witness, PW2, who was the security officer he had employed to take care of the vehicle. A representative of the Appellants testified for and on behalf of the Appellants and contended that it was the Respondent who was in breach of the agreement having failed and ignored to pay Kshs. 50,000/= for the procurement of the vehicle's registration number plates.
8. At the close of both the Respondent's and Appellants' cases, the trial court rendered a judgment where it found for the Respondent. The

Appellants' Defence and Counter-claim were dismissed and judgment was entered for the Respondent for the declaration, Kshs. 600,000/= with interests since 07/05/2009, security costs at Kshs. 5,000/= monthly for the period the vehicle was in the Respondent's possession and costs of the suit. That was on 15/12/2015.

9. Aggrieved by the judgment and decree of the trial court the Appellants preferred an appeal and filed a Memorandum of Appeal on 06/01/2016 where they preferred nine grounds of appeal.

10. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. In their respective submissions the parties reiterated their positions as so pleaded in their pleadings. The Appellants urged this Court to allow the appeal and find that it was the Respondent who had breached the agreement instead. The Appellants made reference to the decisions of **David Kahuruka Gitau v. Nancy Ann Wathithi & Another (2016)eKLR**, **Richard M. Mutiso v. C.F.C. Bank Limited (2006)eKLR** and **Mburu Gatheo t/a Gatheo Enterprises v National Industrial Credit Bank Ltd (2015) eKLR**. On the other hand, the Respondent opposed the appeal and relied on the decision of **Chege Gitahi (suing as a personal and legal representative of Peter Gikonyo Chege (Deceased) v. Maboko Distributors Ltd & Ano. Nairobi Court of Appeal Case No. 65 of 2004** (unreported).

11. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni –versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

12. I have carefully and keenly read and understood the proceedings and the judgment of the trial court as well as the grounds and the parties' submissions and the authorities on appeal.

13. The starting point is for this Court to determine whether or not the Respondent breached the agreement as alleged. It is not in doubt that the parties herein entered into an agreement. I have carefully perused the agreement which was entered into on 07/05/2009. It is true the agreement provided that the Respondent was to make a further deposit of Kshs. 50,000/= on 30/05/2009 and that the balance was to be further liquidated by way of monthly instalments of Kshs. 70,000/= until payment in full. The agreement however did not have a provision for the delivery of the vehicle's registration number plates. I have however seen a document entitled '**DEPOSIT AND PAYMENT DETAILS**' at page 28 of the Record of Appeal which appears to be part of the agreement. I say so because it was produced as part of the Plaintiff's exhibit 1 which was the agreement. That document has a provision for Further Deposit at paragraph 4. It reiterates that the further deposit was due for payment on 30/05/2009. The words '**or no plates**' were however cancelled.

14. The Respondent admitted that he did not pay the further deposit as scheduled as the Appellants had undertaken to deliver the vehicle's registration number plates to the Respondent at Isebania within 7 days of the agreement or within a reasonable period but failed to do so without any explanation. It was the Respondent's further contention that by so doing the Appellants forced the Respondent not to use the vehicle for the intended transportation business out of which he was to get the money to service the agreement.

15. Clause 3 of the agreement has a recourse to the Appellants in case the Respondent remained in default of more than three instalments. It provides for the repossession of the vehicle by the Appellants at the sole cost of the Respondent. Clause 8 of the agreement provided that any outstanding balance after 07/08/2009 shall be charged interests at the rate of 4% on the reducing balance.

16. It is therefore clear that the Appellants were properly secured on how to recover any outstanding balances of the purchase price from the Respondent. Certainly not delivering the vehicle's registration plates was not any of those options. I do agree with the trial court that the default to pay the further deposit of Kshs. 50,000/= on 30/05/2009 was to be treated as a default of an instalment and had no relation to the delivery of the vehicle's registration plates as agreed or expected.

17. I have also looked at the copy of the vehicle's registration book which was produced by the Appellants in evidence. It is No. 20091700256 and bears the particulars of the vehicle. It so confirms that the vehicle was registered on 10/06/2009 and allocated number KBH 276W and was for commercial purposes. Being a commercial vehicle it is true that the Respondent was not able to put the vehicle into use before its registration. That fact was readily admitted to by the Appellants' witness and is what the law provides. (**See Part II of the Traffic Act**, Chapter 403 of the Laws of Kenya).

18. This Court therefore finds that the duty to procure the registration of the vehicle was on the Appellants and that it had nothing to do with the further deposit of Kshs. 50,000/= or the Respondent. The position taken by the Appellants of not delivering the said plates (if they had so obtained them) based on the said default by the Respondent cannot therefore be justified and be a basis of a finding that the Respondent breached the agreement. This Court agrees with the analysis and finding of the trial court on the issue. The finding of the learned trial magistrate is hereby affirmed.

19. On the other hand, there is ample evidence of the breach of the agreement by the Appellants. The fact that the Appellants procured the registration of the vehicle one month later, that is on 10/06/2009, and the withholding of the plates came long after the Respondent had made up his mind to rescind the agreement and had duly instructed his Counsel who did a letter to that effect. Indeed, the Appellants were at the hearing of the suit still of the firm view that they would not release the registration number plates on account of the non-payment of the Kshs. 50,000/=. From the foregone and on the basis of the provisions of **Section 5** of the **Hire Purchase Act**, Chapter 507 of the Laws of Kenya, the Appellants' Defence and Counter-claim were hence properly so disallowed.

20. As aforesaid, the trial court properly entered judgment for the declaration and the refund of the deposit of Kshs. 600,000/=. As to the interest on the said sum of Kshs. 600,000/=: the court pegged it as from 07/05/2009, the day the agreement was entered into. I would respectfully differ with the learned magistrate on that finding. The sum of Kshs. 600,000/= was pleaded as special damages in the plaint. That being the case the interest attached to it would normally run from the date of filing of the suit and not from the date when the agreement

was entered. (See the Court of Appeal case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR**).

21. There is also the issue of the security costs at the rate of Kshs. 5,000/= for the period the vehicle was in the custody of the Respondent. That means it is from 07/05/2009 until when the Appellants will take possession thereof. It is already a period of 8 years by now and that translates to well over Kshs. 480,000/=. That aside there was no proof of employment of PW2 by the Respondent. Further there was still no proof of payment of the monthly sum of Kshs. 5,000/= on account of the alleged salary. Since the sum of Kshs. 5,000/= was pleaded as special damages, the same ought to have been specifically pleaded and proved. There is a long list of such decisions including **Coast Bus Service Limited v. Murunga & others Nairobi Civil Appeal No. 192 of 1992** (unreported), **Kampala City Council v. Nakaye [1972]EALR 446**, **Ouma v. Nairobi City Council [1976] KLR 297**, **Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991** (unreported) among others. The award on the security costs was therefore erroneous in law and cannot stand.

22. That being the position, the upshot of the appeal is that it partly succeeds and this Court hence makes the following final orders:

- a) *The Appellants (then Defendants) breached of the Hire Purchase Agreement entered on 07/05/2009;*
- b) *The Appellants herein shall refund the sum of Kshs. 600,000/= (Read: Kenya Shillings Six Hundred Thousands Only) to the Respondent with interest at court rates from the date of filing of the suit;*
- c) *The Respondent's prayer for security costs at Kshs. 5,000/= monthly is hereby dismissed;*
- d) *The Appellants shall bear the costs of the suit;*
- e) *As the appeal has partly succeeded, each party herein shall bear its own costs of this appeal.*

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of March 2017.

A. C. MRIMA

JUDGE