Executive Super Rides Limited v Thande (Commercial Appeal E033 of 2023)
[2024] KEHC 13417 (KLR) (Commercial and Tax) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13417 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E033 OF 2023

MN MWANGI, J

OCTOBER 25, 2024

BETWEEN

EXECUTIVE SUPER RIDES LIMITED ..... APPELLANT

AND

PETER NDERITU THANDE ..... RESPONDENT

(Being an Appeal from the judgment and decree of Hon. S.N. Muchungi (SRM), delivered on 30th September 2022 in Nairobi Milimani Chief Magistrate's Court Civil Suit No. 282 of 2018)

JUDGMENT

1. The plaintiff (now respondent) filed a suit against the defendant (now appellant) in the lower Court, vide a plaint dated 22nd January 2018 seeking judgment for an order of specific performance compelling the appellant to receive the balance of the purchase price for motor vehicle registration No. KCH 413F (Isuzu), amounting to Kshs.929,850.00 from the respondent and hand over all the documents to facilitate the transfer of the vehicle to him. In the alternative, the respondent herein, sought an order for the refund of the deposit of the purchase price he had paid to the appellant amounting to Kshs.1,119,150.00, an order compelling the appellant to cause the respondent's name to be removed from the Credit Reference Bureau list of defaulters, general damages, costs of the suit, and interest.

2. The respondent's case before the Trial Court was that vide an oral agreement entered into on 26th January 2017, the appellant contracted him to design and decorate the interior of Northern Galaxy Hotel in Isiolo, for Kshs.1,545,150.00. The payment terms were a deposit of Kshs.526,000/= before starting the works, Kshs.500,000/=during the construction, and Kshs.519,150.00 upon completion. About the same time, the respondent was interested in purchasing a vehicle from the appellant. Consequently, on 28th January 2017, the parties herein entered into a Sale Agreement for motor vehicle Reg. No. KCH 413F (Isuzu). Thereafter, the parties herein agreed that the appellant would retain the

1st & 3rd payments being Kshs.526,000/= and Kshs.419,150.00, respectively, as part of the deposit for the purchase of the said vehicle. They agreed that the remaining balance was to be paid in instalments.

3. The respondent averred that on 28th January 2017, the appellant retained the first payment, and he (respondent), deposited an additional Kshs.74,000/=, which allowed him to take possession of the suit motor vehicle. The appellant then paid the respondent Kshs.200,000/= on 11th February 2017, and Kshs.300,000/= on 22nd February 2017, for the construction works. The respondent further averred that he completed the said works, and handed over the Northern Galaxy Hotel in Isiolo to the appellant on 2nd February 2017, and that the third instalment of Kshs.519,150.00 due from the appellant to the respondent was applied to the purchase price for the motor vehicle. The respondent claimed to have paid a total sum of Kshs.1,119,150.00 towards the purchase of the motor vehicle within four (4) months, and that he intended to settle the remaining balance of Kshs.929,850.00 within a reasonable time.

4. His case was that in June 2017, the appellant impounded the vehicle without notice, thus breaching their Agreement. The respondent stated that in August 2017, he discovered that the appellant had registered him with the Credit Reference Bureau, stating that he owed it Kshs.1,449,000/=, but by 15th December 2017, the said amount had been reduced to Kshs.601,650.00. The respondent asserted that as a result of the foregoing, he has suffered loss and damage amounting to Kshs.1,119,150.00.

5. In opposition to the respondent's suit, the appellant filed a statement of defence dated 28th June 2018 where it denied all the averments contained in the appellant's plaint. The appellant averred that the respondent's assertion of overpayment by Kshs.149,000/= was incorrect as he had not fully met his obligations, and he had issued bounced cheques. Additionally, the appellant claimed that the respondent had breached the construction contract by abandoning the site at the Isiolo facility, causing the appellant to incur an extra Kshs.300,000/= to hire a third party to complete the works. The appellant contended that the third payment due upon completion of the construction works was not payable and could not be applied towards payment of the purchase price of the motor vehicle in issue.

6. The appellant stated that it repossessed the motor vehicle as per Clause 3 of the Sale Agreement dated 28th January 2017, because the respondent had not fully paid for it. That the motor vehicle was then sold to a third party, and the proceeds were used to settle the respondent's account. The appellant added that the respondent's failure to pay the remaining balance led to his listing as a defaulter with the Credit Reference Bureau. The appellant contended that the respondent was awarded a second contract to construct a show room at Ngong Road, which contract he did not complete, and as a result, the appellant lost goods worth approximately Kshs.9,500,000/=.

7. In a judgment delivered on 30th September 2022, the Trial Court entered judgment in favour of the respondent against the appellant for refund of the deposit of the purchase price of Kshs.1,119,150.00 less the Auctioneer's charges which ought to be taxed/assessed. The respondent was also awarded costs of the suit plus interest at Court rates.

8. Aggrieved by the aforesaid judgment, the appellant filed a Memorandum of Appeal dated 23rd February 2023 raising the following grounds of appeal-

    i. The learned Magistrate erred in law and fact by disregarding the appellant's evidence in toto;

    ii. The learned Magistrate erred in law and fact in failing to observe the terms of the Agreement for Sale of the suit motor vehicle entered between the appellant and the respondent;

iii. The learned Magistrate erred law and fact by holding that the respondent was entitled to a refund of Kshs.1,119.150/= despite his own admission of breach of the terms of the contract dated 28th January 2017;

iv. The learned Magistrate erred in law and fact by failing to evaluate the entire evidence on record and making a finding that the respondent had proved his case against the appellant, thereby arriving on a wrong finding of issues;

v. The learned Magistrate erred in law and fact in failing to uphold the appellant's submissions that the parties were bound by their contract;

vi. The learned Magistrate erred in law and fact by finding that the appellant could not charge interest because it was not a banking institution despite the interest charge clause which was in the Agreement willingly entered into by the appellant and respondent;

vii. The learned Magistrate erred in law and fact in failing to appreciate that the appellant incurred costs to complete the works abandoned by the respondent;

viii. The learned Trial Magistrate erred in law and in fact in holding that the plaintiff had discharged the burden and standard of proof as envisaged in Sections 107, 108 & 109 of the *Evidence Act*;

ix. The learned Trial Court did not evaluate the evidence on record nor apply the required burden of standard of proof (sic) ; and

x. The learned Trial Magistrate erred in law and in fact in otherwise failing to exercise her discretion in the proper manner resulting in injustice to the appellant.

9. The appellant's prayer is for the instant appeal to be allowed with costs, for the Trial Magistrate's judgment and decree to be set aside, and for judgment to be entered against the respondent dismissing the plaint dated 22nd January 2018 with costs to the appellant.

10. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Ogola Okello & Co. LLP Advocates on 23rd April 2024, whereas the respondent's submissions were filed on 17th July 2024 by the law firm of Tobiko, Njoroge & Co. Advocates.

11. Mr. Ochieng, learned Counsel for the appellant relied on the case of Jackline Njeri Kariuki v Moses Njung'e Njau [2021] eKLR, and submitted that the respondent breached the initial oral agreement dated 26th January 2017 by not completing the work at the appellant's site, and also breached the motor vehicle Sale Agreement dated 28th January 2017, by failing to pay the full purchase price of the suit vehicle. Counsel contended that since neither the Sale agreement nor the Guarantee and Indemnity included a refund clause, the respondent was not entitled to a refund of Kshs.1,119,150.00 or any other amount. He further argued that the respondent's request for a refund would effectively be asking the Court to re-write the terms of the contract dated 28th January 2017 without valid justification. To support his argument, he cited the case of South Nyanza Sugar Co. Ltd v Leonard O. Arera [2020] eKLR.

12. Counsel for the appellant argued that according to Clause 10 of the Guarantee and Indemnity and Section 40 of the *Sale of Goods Act*, the property and title of the vehicle had not transferred to the respondent, thus the appellant was within its right to repossess it. He noted that the respondent admitted to defaulting on the amount owed. Mr. Ochieng cited the case of Dickson Maina v David Ngari Makunya [2015] eKLR, and asserted that the contract between the parties herein was contingent on the respondent's full payment of the motor vehicle's purchase price, which never occurred.

13. Mr. Lesikito, learned Counsel for the respondent relied on the case of *Gichaba v Lexis Investment Limited (Civil Appeal 131 of 2019)* [2024] KEHC 479 (KLR), and submitted that the appellant failed to prove its claim that the respondent breached the construction contract, thus the provisions Sections 107, 108 and 109 of the *Evidence Act* were not met. He stated that in respondent on his part provided unchallenged photos as evidence that he completed the construction works and handed over the premises to the appellant. He submitted that the appellant presented payment vouchers as proof of hiring a third party to complete the works at the Northern Galaxy Hotel in Isiolo, but the said vouchers were found to pertain to a different project, namely, Drivers Universe in Nairobi, rather than the Northern Galaxy Hotel in Isiolo.

14. Counsel argued that despite the appellant's claim that the respondent abandoned the Isiolo project, it did not demand that the respondent completes the works but instead engaged him for another project on Ngong Road, casting doubt on the appellant's claims. He noted that the appellant acknowledged having received Kshs.600,000/= and stated that the respondent paid an additional Kshs.500,000/= in February 2017. He asserted that since the respondent completed the Isiolo construction work, the third instalment of Kshs.519,150.00 was due and should have been applied towards the vehicle's purchase price. Counsel stated that the respondent paid a total of Kshs.1,119,150.00 towards the vehicle, yet in June 2017, the appellant repossessed and sold the motor vehicle without notice, thus violating the Deed of Guarantee and Indemnity, which required a demand to be issued before repossession and Sale.

15. Mr. Lesikito relied on the decisions of Margaret Njeri Muiruri -v- Bank of Baroda (Kenya) Limited [2014] eKLR, and Nancy Muthoni Nyaruai v Grace Wanjiku Mugure [2021] eKLR, and argued that clauses in the Deed of Guarantee and Indemnity unfairly granted the appellant the power to repossess and sell the vehicle without notice or accountability to the respondent. He described the said clauses as unconscionable, and designed to unfairly benefit the appellant. He noted that the respondent was in the process of paying the remaining balance of Kshs.929,850/= when the appellant refused the payment, repossessed the vehicle, and sold it without notifying the respondent. Counsel argued that the respondent is therefore entitled to a refund of the deposit paid for the suit motor vehicle.

Analysis and Determination.

16. This being a first appeal, it is by way of re-trial. Being the first appellate Court, I have a duty to re-evaluate, re-analyze and re-consider the evidence and draw my own conclusions, bearing in mind that I did not see and hear witnesses testifying, and give due allowance for that fact.This was the position taken by the Court in the case of Peters v Sunday Post Limited [1985] EA 424, which rendered itself as follows -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. It is now well settled that an appellate Court will only interfere with the Trial Court's finding if the same is founded on wrong principles of law, or if a Court misdirected itself on the issue of facts. To

this end. I am bound by the Court of Appeal finding in the case of Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931 where it was held thus -

> " Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere".

18. I have re-examined the entire Record of Appeal and given due consideration to the written submissions by Counsel for the parties. The issues that arise for determination are –

    i. Whether the respondent breached the Construction Agreement for construction works at the Northern Galaxy Hotel in Isiolo;

    ii. How much did the respondent pay towards the purchase of the suit motor vehicle? ; and

    iii. Whether the respondent is entitled to an order for refund of Kshs. 1,119,150.00

    Whether the respondent breached the Construction Agreement for construction works at the Northern Galaxy Hotel in Isiolo.

19. It is not disputed that the appellant contracted the respondent to design and decorate the interior of Northern Galaxy Hotel, in Isiolo for Kshs.1,545,150.00. The payment terms included a deposit of Kshs.526,000/= before starting the works, Kshs.500,000/= during construction, and Kshs.519,150.00 upon completion. The appellant however claims that the respondent did not complete the works and that he abandoned the site, which compelled the appellant to hire a third party to finish the project.

20. It is trite law that he who alleges must prove. This maxim is derived from the provisions of Sections 107, 108 & 109 of the *Evidence Act*. The Court of Appeal in the case of *Eastern Produce (K) Limited v Christopher Astiado Osiro, Civil Appeal No.43 of 2001* held as follows -

    ...It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence...

21. The record shows that apart from payment vouchers to third parties, the appellant did not provide any other documentary evidence to support its claims that the respondent abandoned the project and that a third party was hired to complete it. Upon perusal of the payment vouchers produced by the appellant, I find that they are related to a different project, namely, Drivers Universe in Nairobi, and not the Northern Galaxy Hotel in Isiolo. Additionally, I agree with the Trial Magistrate's observation that during cross-examination, the appellant confirmed that it did not demand for the respondent to complete the unfinished work, it failed to produce an audit to demonstrate the loss from hiring a third party, it did not disclose the name of the third party, and did not provide proof of payment to the alleged third party. I further note that the appellant failed to produce any photos of the alleged unfinished work at the Isiolo site.

22. Consequently, this Court finds that that the appellant did not discharge its burden of proving that the respondent abandoned the site at Isiolo and did not complete the construction works he had been contracted to do. To the contrary, the respondent provided photos which were not challenged by the appellant, demonstrating that he completed the construction works and handed over the project to the appellant.

23. In the premise, it is my finding that the respondent did not breach the construction Agreement for the construction works at Northern Galaxy Hotel, in Isiolo, as he demonstrated by way of photographs that he completed the construction works he was contracted to do by the appellant.

How much did the respondent pay towards the purchase of the suit motor vehicle?

24. The appellant contracted the respondent to design and decorate the interior of the Northern Galaxy Hotel in Isiolo for Kshs. 1,545,150.00, with payment terms of Kshs.526,000/= as a deposit, Kshs.500,000/= being payable during construction, and Kshs.519,150/= was to be paid upon completion of the works. During the subsistence of the said contract, the parties also entered into a Sale Agreement dated 28th January 2017, in which the appellant agreed to sell a motor vehicle Reg. No. KCH 413F (Isuzu) to the respondent for Kshs.2,049,000/=.The parties agreed that the appellant would retain the first and third payments of Kshs.526,000/= and Kshs.419,150.00, respectively, which it would have paid the appellant as part of the deposit for the motor vehicle's purchase. The remaining balance was to be paid in monthly instalments.

25. The appellant confirmed that at the time of execution of the Sale Agreement dated 28th January 2017, the respondent had paid a deposit of Kshs.600,000/=. That amount included Kshs.74,000/= and the first instalment payment of Kshs.526,000/= for the construction work at the Northern Galaxy Hotel in Isiolo. In the premise, having found that the respondent did not breach the Construction Agreement for the hotel in Isiolo, and having demonstrated on a balance of probability that he completed and handed over the Northern Galaxy Hotel to the appellant on 2nd February 2017, it is my finding that third instalment payment of Kshs.519,150.00 was due and should have been applied to the purchase price of the motor vehicle, as agreed by the parties.

26. In the end, this Court agrees with the learned Magistrate's finding at page five, in paragraph four that the respondent indeed proved that he paid the appellant a total of Kshs.1,119,150.00 towards the purchase of the motor vehicle.

Whether the respondent is entitled to an order for refund of Kshs. 1,119,150.00.

27. The respondent defaulted on the payment of the remaining balance of Kshs.929,850.00 for the motor vehicle. He claimed that in June 2017, the appellant repossessed the said vehicle without notice and sold it to a third party, thereby breaching their Agreement. The appellant however, argued that Clause 33 of the Guarantee and Indemnity allowed it to repossess the moto vehicle if any instalment remained unpaid for more than seven (7) days after its due date. The relationship between the parties regarding the motor vehicle was governed by the Sale Agreement and the Guarantee and Indemnity, both dated 28th January 2017. The Sale Agreement did not specify how the balance of the purchase price should have been paid or the consequences of non-payment. The Guarantee and Indemnity however states that the purchase price, along with interest, was to be paid in monthly instalments. It further provides at Clause 33(d) as follows –

> This guarantee/indemnity and the consent of the lender to the debtor continuing in possession of the motor vehicle shall automatically and without notice terminate on the happenings of any of the following events in consequence of which the lender shall have the right to immediately retake possession of the motor vehicle:
>
> a. .....
>
> b. .....
>
> c. .....

d. Any instalment or the sum payable herein by the debtor remaining unpaid after the expiry of seven (7) days of becoming due.

28. The respondent contends that the aforesaid clause is unconscionable, and designed to unfairly benefit the appellant. It is trite law that parties to a contract are bound by the terms of their contract. This position was restated by the Court in the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020*) [2021] KEHC 93 (KLR) as hereunder -

... parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties.

29. In any agreement, all parties have rights and obligations. In this case, the appellant was responsible for providing the motor vehicle to the respondent in good condition and free of any encumbrances, while the respondent was obligated to pay the full purchase price of the motor vehicle as agreed. It is not disputed that the appellant met its obligations by providing the vehicle to the respondent in good condition and free of encumbrances. The respondent failed to fulfill his obligation, as he defaulted in payment of the monthly instalments to the appellants, for the remaining balance of the said vehicle's purchase price. Given the respondent's default, it was within the appellant's rights to repossess the motor vehicle, in accordance with the provisions of Clause 33(d) of the Guarantee and Indemnity dated 28th January 2017.

30. The appellant adduced evidence that it sold the repossessed vehicle to a third party for Kshs.1,200,000/=. This Court found that as at 2nd February 2017, the respondent owed the appellant a balance of Kshs.929,850.00. Given these facts, it is my finding that the sale of the suit motor vehicle for Kshs.1,200,000/= did not result in unjust enrichment for the appellant as sales are determined by market forces, and the respondent had been using the motor vehicle after he took possession of the same.

31. Further, a review of the Trial Magistrate's judgment reveals that in arriving at a conclusion that the appellant ought to refund the respondent the deposit of Kshs.1,119,150.00 paid towards purchase of the suit motor vehicle, the Trial Magistrate did not appreciate that the respondent had defaulted on payments toward the motor vehicle's purchase price.

32. In addition, the respondent admitted during cross-examination that he had not fully paid the said balance and had not made any payments for four (4) consecutive months before the appellant repossessed the vehicle. An order for specific performance cannot therefore issued due to the respondent's default in fulfilling his obligations under the Agreement.

33. As a result of the foregoing, this Court finds that the learned Magistrate erred in finding that the respondent was entitled to a refund of the deposit of Kshs.1,119,150.00 paid towards purchase of the suit motor vehicle.

34. In the end, I find that the appeal herein is partly merited as per the analysis made. Each party shall bear its own costs of the appeal as each party has been successful in its own or in his own way, as the case may be.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ochieng for the appellant

Ms Katao for the respondent

Ms B. Wokabi – Court Assistant.