REPUBLIC OF KENYA

IN TH HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. 83 OF 2018

FREDRICK KARIUKI MUNENE.....1ST APPELLANT

MUUSI KIITI KIIO.....2ND APPELLANT

VERSUS

JOSEPH MUSYOKA NZAVU.....RESPONDENT

(Being an appeal against the judgement of the Hon. J. Munguti, delivered on 5th September 2018

at the Chief Magistrate's Court in Kitui Civil Case No. 522 of 2016)

J U D G E M E N T

1. This is an appeal against the judgement of Hon. J. Munguti Principal Magistrate delivered on ***5th September, 2016 vide Kitui Chief Magistrate's Court Civil Case No. 52 of 2018***.

2. In that suit the respondent in this appeal had sued the appellants herein for breach of contract and/or trust. His claim going by the Plaint filed in the lower court, indicates that he had bought a motor vehicle Registration No. **KBT 907K** from the appellants at agreed consideration of Kshs. 660,000 and that upon paying a deposit of Kshs. 600,000 he took possession of the car but did not change ownership in the logbook and continued paying insurance premium in the name of the 2nd appellant in the reported understanding that the insurance cover was to continue and cover him.

3. It was the Respondent's case that the subject motor vehicle got involved in an accident on 6th February 2015 as a result of which it was written off and that the insurance company upon claim made through the 2nd appellant paid the claim at Kshs. 775,000 but the Respondents only paid the Respondent Kshs. 100,000 and declined to pay the balance.

4. The appellants going by the defence filed denied the Respondent's claim stating that there was no provision in the agreement for sale that the Respondent would upon purchase of the subject motor vehicle would continue paying insurance premiums in the name of 2nd appellant. The appellants position was that the Respondent was to take full responsibility upon signing the sale agreement and the appellant would not be responsible.

5. The appellants further pleaded that the Respondent was not privy to insurance contract between the 2nd appellant and her insurers. They further contended that an insurance cover was not transferable to a buyer.

6. The trial court in a brief judgement delivered on 5th September 2018, found that the Respondent had proved his claim against the appellants and entered judgement against the appellants jointly and severally for Kshs. 675,000 costs and interests.

7. The appellants felt aggrieved and filed this appeal and raised the following grounds namely: -

i. That the trial Magistrate erred in law and fact by failing to find that on the basis on evidence on record, the Respondent had failed the appellants.

ii. That the learned trial magistrate misdirected himself in law when he founded his judgement on matters not pleaded.

iii. That the learned trial magistrate mis-directed himself while evaluating evidence by relying on a document that was not produced.

iv. That the learned magistrate erred by concluding that the respondent paid insurance premiums for Motor Vehicle Registration No. KBT 907 K, a fact not supported by evidence.

v. That the learned magistrate erred in law and fact in relying on a discharge voucher whose production was objected to by appellant's counsel and upheld by the trial magistrate.

vi. That the learned trial magistrate erred by concluding that fraud cannot be proved unless it is reported to the police.

vii. That the learned magistrate erred in law and fact against the first appellant on grounds that he was a seller of a motor vehicle he did not own against the principle of privity of contract.

viii. That the learned magistrate misdirected himself by holding that the Respondents be paid costs of the suit.

8. In their written submissions done through learned counsel M/s M.M. Kimuli and Co. Advocate, the appellants submit that the 1st appellant was a mere witness in the agreement of sale and ought not to have been sued in the first place. According to them the suit against him should have been struck out.

9. The appellants contend that it was a mockery of justice for the trial to rely on discharge voucher which was not produced as the same trial court sustained their objection to the production of the same discharge voucher. They submit that the trial court's finding based on the said voucher was erroneous.

10. The appellants further submit that the Respondent's case against them was not proved to the required standard. They take the position that there was no provision in the sale agreement between the Respondent and the appellants indicating that insurance premiums would be paid by the Respondent in the name of the 2nd Appellant. They fault the trial court for rewriting terms of the said agreement terming the same as contrary to the intention of parties. They rely on ***National Bank of Kenya versus Pipelastic Samkolit (K) Ltd. & Another [2001] eKLR*** to buttress their contention.

11. They also submit that the judgement of the trial court was founded on matters not pleaded and aver that parties must as matter of law be bound by their pleadings. In that regard, they rely on ***Independent Electoral and Boundaries Commission & Anor. Versus Stephen Mutinda Mule & 3 Others [2014] eKLR***.

12. Finally, the appellants contend that Insurance Policy does not extend beyond the time of sale of the insured property as the insurable interest is lost once the insured property is sold. They submit that a purchaser cannot be privy to insurance contract between the seller and his/her insurer. They rely on ***Kenya Orient Insurance Ltd. versus Kelvin Macharia Karanja [2017] eKLR.***

13. The Respondent on the other hand has opposed this appeal through written submissions by his learned counsel M/s J.K. Mwalimu & Co. Advocates.

He submits that though the 2nd appellant upon sale of the subject motor vehicle did not have direct insurable interest in the said motor vehicle, she was a proxy for the respondent until the formal transfer of the motor vehicle. The Respondent submits that the 2nd appellant was the Registered owner of the subject motor vehicle going by the logbook (tendered as **P Ex 2)** and the Police Abstract. According to her there was no transfer of ownership of the motor vehicle because at the time of sale the motor vehicle was charged to Equity Bank owing to a loan.

14. The respondent contends that the insurance on the motor vehicle expired on 30.06.2014 but a fresh one was paid out by the Respondent in the name of 2nd appellant through mutual consent of both parties.

15. The Respondent contends that the 2nd appellant was paid Kshs. 775,000 through a letter dated 4.16.2016 (It must be typing error as this court did not see a letter by that description and obvious the months in a year are twelve months only. The Respondent contends that the discharge addressed to the insured shows that the 2nd appellant was paid. He faults the appellant for getting compensated for a loss they did not incur. He submits that the appellants were just a conveyor belt for the compensation received. He relies on ***Lion of Kenya Insurance Co. Ltd. versus Edwin Kibuba Kihonge [2018] eKLR.***

16. They submit that the appellants paid him Kshs. 100,000 directly by depositing the amount in his account and a further amount of Kshs. 50,000 paid through his uncle one Benjamin Kasi Musyoka. He submits that the appellants are estopped from evading settling the balance paid to them as compensation. He relies on ***Serah Njeri Mwobi versus John Kimani Njoroge [2013] eKLR***.

17. He submits that he gave evidence on oath that since the motor vehicle was registered in joint names of Equity Bank and 2nd Appellant, he paid insurance premiums in the name of 2nd appellant. He contends that his evidence was not seriously challenged and has relied on ***Kenya Akiba Mlevo Financing Ltd. versus Ezekiel Chebii & 14 Others [2012] eKLR.***

18. He faults the 1st appellant by not applying during trial in the subordinate court to have his name struck out and that he cannot raise the issue of misjoinder at this stage.

19. The Respondent finally submits that though the discharge voucher was not tendered in Evidence, this court should invoke the provisions of ***Article 159 (2) (d)*** and make a finding that meets the ends of substantial justice.

20. This court has considered this appeal and the response made. The issues arising from this appeal are basically three (3) issues: -

i. Whether there's a breach of terms of contract of sale of subject motor vehicle between the appellants and the Respondent.

ii. Whether there was a trust between the parties herein.

iii. Whether there was insurance cover taken out by Respondent and whether the same was transferable.

21. This court has framed the issues above in the above manner in an attempt to simplify the context of the dispute between the parties herein. I must say at outset that all the 3 issues are intertwined and all boil down to one question which is, whether the respondents claim against the appellant was proved to the required standard as found by the trial court.

22. The mandate of this court as the first appellate court is to re-evaluate the evidence tendered at the trial court with a view to reaching own conclusions.

23. (i) **<u>whether there was breach of the terms of sale agreement.</u>**

The existence of a sale agreement of motor vehicle ***Registration KBT 907K*** between the Respondent who was the purchaser and the 2nd Appellant is not disputed.

The undated agreement tendered by the Respondent as ***P Ex 1*** is clear. The trial court in its judgement captured the agreement dated 30.06.2014 which obviously was an error. The trial inadvertently mistook the date appearing as the ‘‘***insurance validity date*** ’’ indicated as 30th June 2014 to be the date of the said agreement.

24. I have keenly looked at the agreement and it does not indicate the date the transaction took place which could have been some inadvertence on the part of the parties to the contract. In fact, when one looks at the pleadings filed and in particular paragraph 3 of the plaint, the respondent pleads that the date of the transaction was on an unspecified date in July 2014. The Respondent found himself in some difficulty stating when the transaction took place. However, going by the evidence tendered, it can only be implied that the transaction took place in the month of July 2014, given that one of the terms of the agreement was that the remaining balance Kshs. 60,000 (sixty thousand) was to be paid in 3 instalments beginning on 4.08.2014. This court also finds that the date of the transaction was not an issue at the trial or this appeal. I will therefore leave the issue to rest because it is a non-issue really.

25. What is more important in this matter is whether there was breach of clear terms of the agreement that could have given rise to a cause of action. This court has looked at the main agreement (***P Ex 1)*** and the second condition of the agreement may have escaped the mind of the trial court but has caught the attention of this court. The condition reads;

‘‘The buyer has taken full responsibility of the car after singing (signing) this agreement. The seller will not be responsible for any accident, theft or damage after singing (should be signing) this document.’’

26. The question posed is what was the implication of that condition visa vis the nature of the claim made by the respondent against the appellants"

27. The answer to that question can be debatable but what is certain is that it could not support the respondent’s claim or cause of action at the trial court. The Respondent’s suit against the appellant could not be based on that sale agreement because, the cited condition actually absorbed the 2nd appellant from any liability in the event of an incident such as the one that occurred on 6th February, 2015. Where parties have agreed on some conditions in an agreement, the same is binding unless the conditions are illegal, fraudulent or against public policy. To that end am properly guided by the decision of the ***Pipelastic Samkolit (K) Ltd. & Another [2001] eKLR (****supra)* cited by the Appellants above.

28. The trial court in my considered view fell into error when it concluded that the appellant breached some contractual obligations and that the respondents case had been proved on a balance of probability when the contrary conclusion obtained in light of the evidence tendered. The defence mounted by the appellants to the respondents claim contrary to the trial court’s finding was strong and in any event the respondent had the burden of proof.

29. (ii) **Whether there was an existence of trust between the appellants and the respondent.**

The respondent’s claim was largely based on trust because he claims that the appellant’s acted as trustees, stewards or as he calls it a conveyor belt of the proceeds reportedly received from an insurance company which he says was supposed to be the ultimate beneficiary.

30. As trust is a question of fact which must be proved by whoever alleges. (***Section 107 of the Evidence Act*** is clear on this). I have considered the evidence tendered at the trial and though the Respondent insisted that the Appellants were paid Kshs. 775,000 out of which he claimed that only Kshs. 150,000 was paid, I am not convinced that he was able to prove his claim at all. The reasons why I have come to that conclusion are as follows: -

31. (i) In the first place, the attempt by the Respondent to produce a document detailing the payments of Kshs. 775,000 to the appellants was futile because, as the appellants have submitted, their objection to the production of the crucial document was sustained by the trial court. The same court in its judgement ironically and erroneously relied on the same document when it stated in its judgement;

‘‘……..I find the defendants defence wanting and the discharge dated 16.4.2015 confirm that the claim was settled……’’

32. There was no document dated 16.04.2015 tendered in evidence and by relying on a non-existent document, the trial fell into error as it considered extraneous matter to arrive at his conclusion that the appellants had been paid. That conclusion was erroneous as it was not supported by the evidence tendered.

33. (ii) Secondly, the Respondent failed to prove that there was privity of contract between him and the insurance company.

It is true that he bought and took possession of the subject motor vehicle and even if one was to overlook the plain conditions of the sale agreement which showed that the buyer was assuming all the risk arising after sale, there was no basis for the trial to find that the Respondent was privy to an insurance contract between the 2nd appellant and her insurer if there was any of course, the existence of that contract was not even established to begin with. So the claim by the Respondent in that regard was really a mirage because how else can one describe a non-existent thing.

34. The Respondent has urged this court to use the oxygen rule stipulated under ***Article 159 (2) (b) of the Constitution of Kenya*** to try and give life to the Respondent claim but that would be stretching the oxygen rule too far. That rule can only be applied to save a viable cause, but in this instance, the Respondent's claim was a misconception and dead on arrival. It could simply not be salvaged given the issues raised.

35. Thirdly, the sale agreement clearly showed that the Insurance cover in respect to the subject car was valid only up to 30th June 2014. The Respondent says he renewed it in the name of the 2nd appellant but there was no evidence even supporting that the same supposing that the same was legal.

36. Finally, it is a matter of law that an insurance policy is

not transferrable to a purchaser even if a motor vehicle is sold when the cover existence whether 3rd party or comprehensive is still valid.

It is trite that ***Section 8 of the Traffic Act*** provides that the person whose name appears on the logbook is prima facie the owner of that motor vehicle but there is an exception to that rule. As was held ***in Gichira Peter versu Lucy Wambura Ngaku & Anor.[2021]eKLR***, registration or the details appearing on log book of a car is prima facie evidence of ownership unless the contrary is proved. There are incidents like in this instance where evidence clearly shows that sale took place but ownership had not been effected. In such instances, the buyer or purchaser is taken to be beneficial owner because for all practical purposes, he took possession of the motor vehicle for this exclusive use because of valuable consideration. He is required to take own insurance because of the transfer of the insurable interests.

37. The Respondent could only benefit from a temporary cover for a period of not exceeding 3 months after sale. ***Section 76 A of Insurance Act Cap 407 Laws of Kenya*** provides;

''1. Upon change of ownership of a motor vehicle, an insurer should;

a) Only issue a temporary cover for a period not exceeding three months pending the registration of the motor vehicle in the name of the new owner.

b) Not renew the temporary cover or issue any annual policy in respect of the motor vehicle unless the new owner provides proof of the registration of the motor vehicle. In his name by the Registrar of motor vehicles.''

The Respondent's claim against the appellant's was based on an illegality in the first place because the claim even if it was proved (which was not) was outside the 3 months' statutory period. The sale was in July while the incident giving rise to the claim occurred on 6th February, 2015.

38. The 1st appellant has submitted that it should not have been made a party in the suit and going by the evidence tendered his contention is legitimate notwithstanding that he appended his signature to an acknowledgement of Ksh. 15,000. It is true that the 1st appellant and 2nd appellant are man and wife and perhaps that is what explains the comfort the respondent had when he paid

instalment of Kshs. 15,000 to him. But I agree with the Respondent's contention that the 1st appellant should have raised the issue of misjoinder at the earliest opportunity. The issue however is insignificant because the same could not have possibly changed the direction of the decision reached by the trial court and certainly it does not have any bearing to the decision of this court on the merit of this appeal.

39. There is also something which I have noted from the judgement. While the handwritten judgement is dated 5th September 2018, the typed judgement is not dated perhaps due to a typing error. A trial court should always ensure that its judgement is dated as stipulated by the law.

40. The long and short of this is that for the reasons aforesaid, this court finds merit in this appeal. The judgement of the lower court dated 5.09.2018 is set aside in its entirety. In its place, the court substitutes it with an **Order dismissing** the **Respondent suit against the Appellants with costs**. The Appellants will also have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF MARCH 2022.

HON. JUSTICE R. K. LIMO

JUDGE