REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 72 OF 1994

FRANCIS M. KIRIGIA.....APPELLANT

VERSUS

PAUL MURUNGA.....RESPONDENT

RUFUS MBAYA.....RESPONDENT

(From the original decision in Principal Magistrate's Court Civil Suit No 135 of 1994 at Meru - Solomon Wamwayi Esq CM)

JUDGMENT

By a plaint dated 28th February, 1994 the appellant had sued the respondents for the return of motor vehicle Reg No KAA 901V Toyota Corolla DX which had allegedly been sold to him by the 1st respondent but which had been subsequently repossessed by the respondents. He further sought an order that 1st respondent be compelled to transfer the logbook in his name. He also prayed for damages for loss of use of the car from 23rd February, 1994 and costs of the suit plus interest.

It was alleged that he had bought the said car from the 1st defendant through an oral agreement of sale for Shs 170,000/=. He paid Shs 160,000/= by instalments and the balance remaining was only Shs 10,000/= which the plaintiff averred he was willing to pay. The oral agreement of sale provided no time limit for completion of payment. He had taken possession of the said car in 1990. The plaintiff drove around in his new car oblivious of any dangers and only dreaming about completing payment to the 1st respondent. On 23rd February, 1994 he was jolted into reality from his somnambulism when his treasured toy was repossessed.

The 1st respondent's defence dated 22nd June, 1994 filed in the court below denied any agreement being entered into with the appellant, and further denied receiving any money at all for the purchase of the vehicle. He contended that the Shs 150,000/= received by him was for a car which was yet to be imported by him for the appellant. The price of the car was agreed at Shs 300,000/= which the appellant had not raised. The appellant then pleaded with him to hold on to the money while he raised the remainder. In the meantime he further requested to hire the suit car from the 1st respondent at a fee.

The learned Chief Magistrate patiently listened to these wrangles in his Court and on 11th August, 1994 handed down his judgment from which this appeal now lies. He found that there was a valid agreement

of sale for the suit car to the appellant for Shs 170,000/= out of which Shs 150,000/= had been paid to the 1st respondent. He further found that there remained a balance of Shs 20,000/=.

He dismissed the contention of the 1st respondent that the car had been given on hire to the appellant. The learned magistrate further found that lack of time limit for the completion of the payment did no validate the contract.

In his well reasoned judgment the learned Chief Magistrate believed the appellant had not been registered as owner of the suit car, and that either party could have pleaded that by the non-failure to perform as mutually agreed the contract was frustrated. He concluded by making a fundamental mistake of law (to which I shall refer later) by saying that as full payment had not been made the appellant had no title to the suit car as property to the same had not passed to him. He ordered the appellant to file fresh suit for the recovery of the money he paid to 1st respondent and ordered release of the car to 1st respondent.

Mr Mithega has argued seven grounds in his appeal. I shall deal with first two. It is submitted the learned Chief Magistrate lacked jurisdiction to entertain the suit as his pecuniary limit was only Shs 125,000/= at the time he heard the matter and delivered judgment. The subject matter of the suit was for a car valued at 170,000/=. I shall briefly now refer to the pleadings.

The filed defence of the 1st respondent increased this sum to Shs 300,000/=. So whether he was dealing with the appellant's version, it was clear that the suit concerned a subject matter beyond Shs 125, 000/=. The learned Chief Magistrate found on the evidence before him that the appellant, had paid Shs 150,000/= to the 1st respondent and there was a balance of Shs 20,000/=. The issue before the court below was not payment of the balance of the purchase price but the value of the whole car as the same had been repossessed by the respondents, who did not admit any sale or receipt of the money towards the car. It becomes clear that this was outside the monetary jurisdiction of the trial court. I do not find favour with Mr Mithega's submission that the Court has a duty to look at the pleadings and determine whether it has jurisdiction. It is rather the duty of the counsel appearing to assist the Court by raising the matter at the first instance. None of the counsels appearing here and the court below pointed out the question of jurisdiction to the learned trial magistrate. Probably if the judgment of the court below had not been in disfavour of the appellant this matter would never have been raised.

The issue of jurisdiction may rightly be argued on an appeal as it goes to the root of the matter whether the trial court was competent to adjudicate on the matter before it – see judgment of Gachuhi JA in– *Bagwasi Nyangau v Omosa Nyakwara* [1985] 1 KAR 811.

Section 19 (i) of the Sale of Goods Act provides:

"Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such a time as the parties to the contract intended it to be transferred."

Section '20' of the same Act further provides:

"Unless a different intention appears the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:-

(a) Where there is an unconditional contract for the sale of specific goods, in a deliverable state the property in the goods passes to the buyer, when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed" (underlines mine)."

I find that property in the suit car passed to the appellant when he paid the first instalment and was given the car by the 1st respondent. The learned trial magistrate put unnecessary emphasis on section 8 of the Traffic Act which reads:

“A person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle.”

The registration of 1st respondent (in the log book) was only *prima facie* evidence of the ownership of the car. Having established that there was a valid contract for the sale of the car, the learned magistrate ought to have investigated the appellant’s claim to ownership *vis-a-vis* the payments received by 1st respondent and to have determined who was legally entitled to the car (see *Ernest Orwa Mwayi vs Victoria Enterprises Ltd* CA No 14 of 1991 (KSM).

It must be borne in mind that a motor-car registration book is not a document of title and delivery thereof does not give to the person to whom it is delivered the means of appearing to be the owner – *Matayo Musoke v Alibhai Garage Ltd* [1960] EA 31.

If the ground of appeal relating to lack of jurisdiction had not been successful I was inclined to remit the case before the learned magistrate to determine the issues further. But as this Court had no jurisdiction from the onset the matter should be dealt with a fresh by a Court of competent jurisdiction.

For the above reasons I allow this appeal, set aside the judgment and orders of the court below and order that the matter be re-tried by a magistrate with requisite monetary jurisdiction either in Nyeri or Nairobi. I entertain no doubts that the parties who have shown a keen interest in the disposal of the matter shall intimate to the deputy registrar of this Court where they next want to be heard. I further award costs of this appeal and the court below to the appellant.

The suit-car be retained by the OCS Meru until further orders from the trial magistrate who shall have taken over the matter.

It is so ordered.

Dated and delivered at Meru this 10th day of January 1995

C.O ONG’UDI

JUDGE