

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0530 OF 2004

WERE FRED
PLAINTIFF

.....

VERSUS

KAGA LIMITED
DEFENDANT

.....

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU
BAMWINE

J U D G M E N T:

The Plaintiff's suit against the Defendant is for the recovery of special damages, general damages, interest, exemplary damages and costs of the suit. He bought a vehicle from one Muyingo. The vehicle was in the names of the Defendant. He paid the full purchase price and took possession. His attempts to transfer it into his names failed because of the Defendant's claim that Muyingo had no authority to sell it. The defence grounds its claim in the *Nemo dat quod non habet* rule.

The only point of agreement is that the car was registered in the names of the Defendant. The rest is disputed. There are three issues for determination:

1. Whether there was a contract of sale between the Plaintiff and the Defendant.
2. Whether the Defendant is in breach of the contract, if any.
3. Whether the Plaintiff is entitled to the remedies sought.

Representation:

Mr. Sekaana for the Plaintiff.

Mr. Kajeke for the Defendant.

Before I delve into the assessment of evidence in this case, I consider it necessary to state the law on some aspects of this case.

1. **Burden of proof**

In law, a fact is said to be proved when Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities.

Relating the above to this case, the Plaintiff has alleged that the sale was between him and the Defendant through its agent Muyingo. The burden rests on him to prove that allegation.

2. **The Nemo dat principle**

The case relates to alleged passing of title. The basic principle is *Nemo dat quod non habet* [No one gives who possess not]. In other words, a transferor cannot give a better title to property than he or she possesses. This principle was established at common law. However, it is now part of our Statute law. Section 22 of the Sale of Goods Act (Cap 82) provides:

“Subject to this Act, where goods are sold by a person who is not the owner of the goods the buyer acquires no better title to the goods than the seller had”

As we shall see later in this Judgment, there is an exception to this rule: unless the owner of the goods is by his or her conduct precluded from denying the seller’s authority to sell.

3. **Contract**

This means an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be:

- i. capacity to contract.
- ii. intention to contract.
- iii. consensus ad idem.
- iv. valuable consideration.
- v. legality of purpose.
- vi. sufficient certainty of terms.

The agreement in this case appears to embody all the above factors to make it enforceable at law.

4. **Authority**

In as far as there was no direct relationship between the Plaintiff and the Defendant, Court will consider the status of Musingo in this case: his authority to sell the vehicle. Authority in the context of this case simply means delegated power: a right or rights vested in a person or a body of persons. In law, a person vested with authority is usually termed as agent, and the person for whom he acts, the principal. In this way, he may have power to make a contract on behalf of that other person, the principal. That contract then becomes the principal's, the agent not being himself a party because it was not personally his contract. In short, our law recognizes that he who does something through another does it himself: *qui facit per alium, facit per se*. Agency can arise expressly or by implication.

Enough of the legal principles. I now turn to the evidence of each party, the Plaintiff's first.

He (Plaintiff) hails from Bugiri District. He came to the city on 8/6/2004 looking for a vehicle to buy. In the company of his brother, Were Moses, they proceeded to a place called Pine, in the city, where second hand vehicles were on sale. He found there a vehicle with a notice that it was on sale. His evidence is that he inquired about it and was allowed to test it on the road. On liking it, one Musingo who was taking care of it told him to pay for it. He said he had the power to conclude the deal. He there and then paid Shs.1,500,000- and went back to Tororo to mobilize the balance of Shs.4,000,000-. The vehicle remained at Pine.

On 10/6/2004 he returned to Kampala and paid the balance to Musingo. They then executed a sale agreement, P. Exh. 1. Upon execution thereof, he was given the log book; a page extract from the Defendant's Managing Director's passport bearing his photo and signature; a copy of the Defendant's certificate of incorporation; and 4 transfer forms duly stamped and signed. Thereafter, he took possession of the vehicle.

It lacked seats and tyres. He worked on them and made the vehicle road worthy. He used it for two weeks and thereafter embarked on the process of registering it in his names. He delegated the task to one Kebba who later

told him that the Defendant wanted to see the original sale agreement. He contacted the Defendant's Managing Director, one Allan Mugisha, who refused to sanction the transfer.

According to Kebba, PW2, on taking the documents to URA, he was told that some clearance was required from the Defendant before the transfer could be effected. When he contacted the Defendant's officials, they told him to produce the buyer himself. He did just that.

PW3 Were Moses was with the Plaintiff when the sale between him and Musingo took place. Musingo assured them that he was an agent of the Defendant. The other brokers around also stated so. He, Musingo, directed him where to find the Defendant's offices at Namirembe Rd and he went there. He met a Secretary who told him that the vehicle was on sale and that Musingo was handling it. On the strength of that assurance, the parties concluded the sale transaction.

Turning now to the defence, DW1 Allan Mugisha is the Defendant's Managing Director, MD. The Plaintiff went to him claiming that he had bought the vehicle in issue. Since the company records did not show that the vehicle had been paid for, he went to police and lodged a complaint. In the end, the Plaintiff surrendered the vehicle to the police and the police returned it to him (DW1).

As to whether he knows Musingo, he said he does. However, he (Musingo) is not an employee of the Defendant. DW1's evidence is that the Defendant gave the vehicle with its log book to Gerald Associates to sell it at Shs.8m. They did not give him any other document. He identified the stamp on the transfer documents as that of the Defendant but said he did not know how Musingo got it. Likewise, he did not know how Musingo got the extract from his passport, or the certificate of incorporation in respect of Kaga Ltd. According to him, such documents are only issued upon the purchaser showing evidence of payment of the purchase price to the company.

DW2 Mildred Bamuhimbise is the official in the Defendant's company to whom the Plaintiff first reported the matter through Kebba (PW2). She retained the log book and forwarded the matter to her boss, DW1 Allan Mugisha, to handle.

DW3 Mwine Arthur is the brain behind Gerald Associates. He claims that he was given the vehicle in question to sell it. He left it at Pine. Later, he was contacted by the Defendant who wanted to know whether he had sold it. When he went to Pine to find out the whereabouts of the vehicle, he was told that one Musingo sold it. He does not know how Musingo accessed the log book.

From the evidence, there was no direct sale transaction between the Plaintiff and the Defendant. The Plaintiff's case is that Muyingo sold the vehicle to him on behalf of the Defendant. In the circumstances of this case, I have to decide whether Muyingo had express or implied authority to sell it.

There is no direct evidence regarding any express authority to do so. The evidence tending to indicate so is basically circumstantial in a sense that no written authority has been exhibited. I will now proceed to consider the circumstantial evidence relied upon by the Plaintiff as giving him a cause of action against the Defendant. By circumstantial evidence I mean a series of circumstances leading to the inference or conclusion that something happened and happened in the way indicated by the party asserting so, in the absence of direct evidence to that effect. In law, evidence which although not directly establishing the existence of the facts required to be proved is admissible as making the facts in issue probable by reason of its connection with or relation to them. It is sometimes regarded to be of higher probative value than direct evidence which may be perjured or mistaken: **Osborn's Concise Law Dictionary**, 9th Edition at p.81.

I have considered the Plaintiff's evidence on the matter. He came from upcountry with intention of buying a vehicle. He went to a place where vehicles are sold and identified the vehicle in issue. He did not know the owner of that particular vehicle. However, one Muyingo came forward and

offered himself as the seller of the vehicle. He did not claim to be the owner because the log book spoke for itself on the matter: the owner was Kaga Ltd, a company which could only transact business through its servants/agents.

The Plaintiff took the bother to find out from Muyingo whether he had the owner's authority to sell the vehicle. Muyingo assured him that he did. He produced to him the log book and other duly signed documents.

As learned counsel for the defence has correctly argued, a Motorcar Reg. book is not a document of title. Delivering thereof to the buyer does not of itself bestow title upon the person to whom it has been delivered. However, as the learned author states in **Sale of Goods** by Prof. Ewan Makendrick, Edition 2000 at p. 257, Sales of vehicles present particular problems because, although registration books cataloguing previous owners are not documents of title, it is not usual to sell a second hand vehicle without its registration book. I take judicial notice of this notorious fact.

Consequently, if the seller does not produce the log book, the Court will be very suspicious about whether the purchaser has really bought in good faith. The Plaintiff is a taxi driver. He appears to have been in the know of that much.

In the instant case, the Defendant parted company with both the car and its original log book. At the hearing, he talked of written authority to Gerald Associates but none has been produced to Court. DW3 Arthur Mwine, the very brain behind Gerald Associates claims that he received the log book and kept it securely in his drawer. Surprisingly, he claims that he does not know how it landed in Muyingo's hands. No evidence has been presented to Court that his premises were ever broken into to raise inference that he did not willingly part possession with it, assuming that DW1's evidence that he handed it to them is truthful and not an afterthought. Muyingo himself did not appear as a witness. He is said to have left the country soon after the sale. Apparently he used the sale proceeds for an air ticket. In the absence of any evidence that Gerald Associates premises were ever broken into, and in the absence of any written authority by the Defendant to Gerald Associates, Court is unable to rule out the possibility that the log book was given to Muyingo by Servants of the Defendant or that he got it from the person who had lawful possession of it with the blessing of the Defendant.

I have also considered the Plaintiff's evidence regarding Allan Mugisha's conduct upon hearing that Muyingo had sold the vehicle.

It is that he asked the Plaintiff to produce the original sale agreement or else he would be considered to have bought air. He did not say that Muyingo was

a thief or that he had no authority to deal with any prospective buyer whatsoever.

The Plaintiff states:

"..... He then told me that they had instructed Sulaiman Muyingo to sell the vehicle but did not take the money to him. That since he did not pass on the money, he was impounding the vehicle."

From this evidence, which in my assessment came from an honest source, Court is of the view that Mugisha knew who the seller of the vehicle was. The issue at that time was not whether Muyingo had the authority to sell the vehicle but his failure to remit the sale proceeds to them.

It is significant to note that Mugisha does not in his evidence deny personal knowledge of Muyingo.

The Plaintiff continues:

"Mugisha told me that to assist me, there was a vehicle which Sulaiman Muyingo had left. That Muyingo had left the card with his (Mugisha's) wife at the shop. He gave me a particular number plate and advised me that on seeing the vehicle, I should call him (Mugisha) and inform him where the vehicle was. Around the Arua Park I sighted the vehicle and called him. That

vehicle was UAE 730 Z. On calling him, he told me to go to police and tell police that the vehicle had caused an accident and knocked somebody. I told him I wouldn't manage that."

This evidence was never challenged at all during cross-examination. I accept it as truthful. It shows Musingo as a person who was a very close associate of Mugisha to the extent that when he was leaving the country, he left a card of his vehicle with Mugisha's wife. I believe that evidence. It is evidence that strengthens the Plaintiff's case that Mugisha and Musingo were not strangers to each other. They were business associates.

Further, I have considered the efficacy and effect of the other documents which the Plaintiff received from Musingo as evidence of authority to sell the vehicle. As already stated above, they include a page from Mugisha's own passport, P. Exh. IV. Mugisha claims that he does not know how Musingo got it. In this country, a passport is personal to the holder, unless of course it has been stolen from him. There is no such evidence of its theft from Mugisha.

Musingo also handed over to the Plaintiff a copy of the Defendant's certificate of incorporation, P. Exh. 111. Again, Mugisha claims that he does not know how Musingo got it.

He also gave him 4 transfer forms duly stamped and signed. Mugisha has admitted the stamp to be genuinely that of Kaga Ltd. The signature appearing on those forms in all respects resembles that of Mugisha as it appears in his passport. There was no attempt to lead any handwriting expert's opinion that it is not Mugisha's. If opinion evidence is required in a case like this, this was a proper case for such opinion. As far as Court is concerned, there is no visual difference between the signature attributed to Mugisha on the transfer forms and Mugisha's genuine signature in his passport as per P. Exh. IV.

In all these circumstances, the Plaintiff was of the view that the Defendant had authorised Musingo to sell the vehicle through the release of the log book to him and signed transfer documents. From my analysis of the evidence above, Court is of the same view. Its view would have been different if the log book had been found to be a forgery or credible evidence had been led of its disappearance from the person who had lawful custody of it. The Court's opinion would also have been different if the Defendant had led credible evidence which raised doubts as to the efficacy of the extract from Mugisha's passport or the duly signed and stamped transfer forms.

I have already observed that if the goods are sold without the authority or consent of the owner, the buyer acquires no title. Section 22 of the Sale of

Goods Act is clear on that. However, the section is subject to the other provisions of the Act.

The same Act preserves the rules of common law regarding principal and agent in section 58 (2) thereof. Under common law, a sale within the usual or ostensible authority of an agent, even though outside his actual authority will bind the owner. It is therefore immaterial in this case that Muyingo did not first hand over the sale proceeds to the owner before handing over possession of the vehicle to the Plaintiff.

In the final analysis, Court has come to the conclusion that Muyingo had ostensible authority to sell the vehicle. His problem may have been the pocketing of the sale proceeds a matter that would not vitiate the sale.

The Plaintiff identified the vehicle on 8/6/2004. He effected the final payment on 10/6/2004. The transfer documents are dated 21/6/2004. It is not known when Muyingo left the country. For 2 weeks, the Plaintiff used it without anybody raising a finger of the alleged theft. If it had been entrusted to Gerald Associates and it had disappeared as alleged, they would have been the first to know, not the Defendant who had already given possession to third parties and all it was waiting for was the payment. I have also considered the amount of Shs.5,500,000- realised from the sale. For a

second hand vehicle, it does not appear to Court to have been so low as to raise suspicion of any body buying it that the seller was up to any mischief.

In my view, the Plaintiff was a purchaser for value without any notice of the seller's defect of title. He acted in good faith. There was, accordingly, a contract of sale between him and the Defendant. I so find.

As to whether the Defendant is in breach of it, there is evidence that upon realizing that Musingo had left the country without remitting the proceeds to the Defendant, the Defendant's servants caused the vehicle to be impounded. It was later returned to them at the instance of the police. I'm unable to say that the justice of the case warranted such hurried action on the part of the police, in the absence of evidence that the Plaintiff had committed an offence of theft of the motor vehicle. Police could have waited for the issue of ownership to be determined between the parties. The repossession of the vehicle by the Defendants and its subsequent disposal, were in the circumstances of this case in breach of the contract of sale.

The second issue is also answered in the affirmative.

As to whether the Plaintiff is entitled to the remedies sought, there is no doubt in my mind that the Plaintiff is an injured party. The principle is that

the injured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured.

He has given evidence to show that he paid Shs.5,500,000- for the vehicle. The Defendant has since repossessed it. Plaintiff is entitled to a refund of the said purchase price from the Defendant who can in turn seek recovery of it from the said Muyingo as money had and received.

He has also given evidence that shows that by the time the same was sold to him, it lacked seats and tyres. He put them there. His claim is that he spent Shs.2,500,000 in that regard but the receipts he has tendered in evidence come to a total of Shs.1,252,000-. Court is satisfied that he incurred that expense. Shs.1,252,000- is awarded to him as special damage.

He has claimed loss of income in the sum of Shs.100,000- per day from 23/6/2004 to-date. This is based on his claim that for the two weeks he had so far made use of the vehicle, he was earning that much out of it daily. In view of that short time he had stayed with it, Court is of the view that the amount is on the high side and the claim largely speculative. In my view, an award of general damages would meet the ends of justice. Doing the best I can, I consider a sum of Shs.1,000,000- (one million only) an adequate award of general damages and I award it to the Plaintiff.

As for exemplary damages, these are normally awarded as punitive damages over and above actual damages when the Defendant has acted with recklessness, malice and deceit. I have not considered those factors to be present in this case. Court is therefore unable to make any award of exemplary damages. In any case, a claim for exemplary damages must be specifically pleaded in the body of the plaint together with full particulars of fact relied upon to support the claim and not merely the prayer. There has not been any such pleading herein.

He has prayed for interest of 30% per annum on special damages without specifying from which date. The principle is that where a person is entitled to a liquidated amount or specific goods, as in this case, and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where, however, damages have to be assessed by Court, the right to those damages does not arise until they are assessed. In such event, interest is given from the date of Judgment. Considering that the issue of interest herein is coming up after the assessment of damages, I would award interest at the claimed rate of 30% per annum from the date of Judgment till payment in full. I do so.

He has prayed for the costs of the suit. The usual result is that the loser pays the winner's costs. I see no good reason to order otherwise. The

Plaintiff shall therefore have the costs of the suit to attract interest at Court rate from the date of taxation till payment in full.

In the final result, Judgment is entered for the Plaintiff against the Defendant in the following terms:

- a. Special damages: Ug. Shs.6,752,000- (six million seven hundred fifty two thousand only).
- b. General damages: Ug. Shs.1,000,000- (one million only).
- c. Interest on (a) and (b) at the rate of 30% p.a. from the date of Judgment till payment in full.
- d. Costs of the suit.
- e. Interest on (d) at Court rate per annum from the date of taxation till payment in full.

DATED at Kampala this 23rd day of December, 2005.

Yorokamu Bamwine

J U D G E