THE REPUBLIC OF UGANDA.

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA.

CORAM:

HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.

HON. JUSTICE C.K. BYAMUGISHA, JA.

CIVIL APPEAL NO.29/2002

MUBARAKA BATESAKI:::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

MUBARAKA MAGALA:::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the Judgement of the High Court of Jinja at Jinja (Y. Bamwine J.), dated 17/10/2001 in Civil Appeal No. 4 of 1999]

JUDGEMENT OF A.E. MPAGI-BAHIGEINE, JA.

This is a second appeal. The appellant, Mubaraka Batesaki, unsuccessfully appealed to the High court at Jinja (Y. Bamwine. J.) against the dismissal of his claim, by the Chief Magistrate, Iganga on 31/3/1999.

The background facts were that, by a written agreement dated 3/1/1996, Mubaraka Magala, hereinafter the respondent, sold his motor vehicle, Hiace Minibus, to Mubaraka Batesaki, hereafter the appellant, at Shs 3,800,000 of which Shs 2.500,000/= cash was paid on the day of the agreement and the appellant took possession of the vehicle, but without the log book. The balance of 1.300, 000/= was agreed to be paid in two equal instalments of Shs 650,000/= on 30/3.1996 and

15/4/1996 respectively. It was then that the appellant would receive the logbook.

When the appellant failed to pay the instalments the respondent proceeded to repossess the vehicle on 15/6/1996, two months after the agreed last date of payment. He thereafter filed suit on 13/1/1997, seven months later, for recovery of the unpaid balance.

The trial magistrate dismissed the suit and ordered that the sum of Shs 2.500,000/= paid by the appellant to the respondent be refunded with interest from the date of the agreement. Each party was ordered to meet its own costs.

The appellate Judge upholding the magistrate's order of dismissal of the claim, set aside the order for the refund of Shs 2.500,000/= and ordered that it be retained by the respondent together with the vehicle. Each party was to meet its own costs.

The memorandum of appeal comprises the following grounds, namely:

1. That the learned Judge erred in law and fact and reached on erroneous decision when he held that the appellant was entitled to retain possession of both the vehicle and the deposit of Shs 2.5 million when he had found:-

- **That it was wrongful for the appellant to have repossessed the vehicle.**
- **That the proper course of action was to sue for breach of contract where he (appellant) would be considered for compensatory damages.**
- **That once the contract was considered repudiated, and the plaintiff was in possession of the vehicle, the suit for**

recovery of the balance on the purchase price was unmaintainable.

2. **That the learned Judge erred when he made an award to the respondent to retain possession of both the vehicle and the deposit of Shs 2.500, 000/=, a remedy that had not been pleaded or claimed for by the respondent both on appeal and in the final court.**
3. **That the learned Judge erred in law and in fact when he failed to properly re-evaluate the evidence on record, and instead considered matters relating to mitigation damages and depreciation which were neither supported by any evidence nor raised in the lower court, hence reaching a wrong decision.**
4. **That the learned Judge erred to base his findings on a counter – claim, which had already been shuck off in the trial court.**
5. **That the learned Judge erred to deny the appellant costs of the appeal when the appeal was substantially dismissed.'**

The respondent filed written submissions while learned counsel for the appellant argued viva voce.

Mr. Shaban Muziransa represented the appellant. Mr. Mugenyi Ivan was for the respondent.

Regarding ground no. 1, Mr. Muziransa, learned counsel for the appellant argued that the learned Judge reached an erroneous decision in holding that the appellant was entitled to retain both the vehicle and deposit of Shs 2.500,000/=. The proper course would have been to sue for breach of contract and the respondent would be considered for damages. Once the respondent was in possession of the vehicle, the

suit for recovery of the balance of the purchase price was unmaintainable.

He pointed out that once the vendor parted with possession of the goods, he lost his lien hereon, and he could only sue for breach of contract. Possession having been handed over to the appellant, the respondent should not have impounded it but should only have sued for the balance. In support of his submissions he cited the case of **Dies and Another vs British and International Mining and Finance Corporation Limited (1939) I.K.B 724** where part of the purchase price and a deposit were distinguished. A deposit is forfeitable on the purchaser's default while a part payment is refundable. The respondent was not entitled to keep both the vehicle and Shs. 2,500,000/-.

For the respondent, it was argued that the learned Judge exercised his inherent powers to order that the respondent do retain possession of the vehicle and the deposit. He had such powers under 039 rule 2 of the Civil Procedure Rules. He had powers to go beyond the grounds of objection in the memorandum of appeal. He relied on **Jane Bwiriza vs John Nathan Osapil SCCA No. 5 of 2002 at page 15 – 17 of the judgement of Hon Odoki C. J, Stockloser vs Johnson (1954) A.E.R 630**, amongst others.

The learned Judge held:

> **"… it is settled law that in a case of breach of contract, the innocent party may elect to enforce the performance of the said contract or opt to sue for damages for the said breach. I take that to be the correct legal position….. this was not a hiring agreement. It was an agreement of sale; the property was not to pass until the whole of the**

purchase price was paid. Appellant ensured that this was so by retaining the logbook. By impounding the vehicle, the vendor must be assumed to have regarded the breach as serial, going to the very root of the contract. Having taken the course he did, he disentitled himself to sue for the balance of the purchase price. The learned trial Chief Magistrate was entitled to reject his claim for Shs 1,300,000/= in the circumstances of the case. The proper course of action was to sue for the breach of contract where he would be considered for compensatory damages. He did not adopt that procedure. He can not be heard to complain that he was not offered any remedies….

Accordingly the judgement of the lower court dismissing the plaintiff's suit is upheld. The order of refund of Shs 2.5million to the respondent is set aside. The appellant is entitled to repossess the vehicle and retain the deposit…"

It appears that the terms 'appellant' and 'respondent' are cross applied at times by the learned Judge. He refers to the 'appellant' when it should be the 'respondent' and vice versa. However, be that as it may, the agreement of sale was very, simple and brief. It ran along these lines:

"I, Mubaraka Magala of Nakasubi Bugweri, have sold my vehicle to Mubaraka Batesaki of Nakasubi Bugweri Type of vehicle Hiace Minibus REG No 3Y – 0589488.

CHASSIS No YH 61V - 0058507

COLOR - WHITE

MODEL - 1987

I have sold it to him at only Shs 3.800, 000/=. He has part paid 2.500, 000/=. He remains with a balance of 1.300,000/= to pay. He will be paying 650,000/= on 30/3/1996. The balance, he will pay on 15/4/1996 without any excuse whatsoever."

The retention of the logbook was not embodied in the said agreement. It was, however, not a disputed fact.

I think the issue is whether the Shs 2.500, 000/= was a deposit or just part payment of the purchase price. It was dealt with by **Denning L J in Stockloser vs Johnson (1954) I.A.E.R 630 at 637,** thus:

"It seems to me that the cases show the law to be this:

When there is no forfeiture clause, if money is handed over in part payment of the purchase piece, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross claim by the seller for damages…..".

It is apparent that there was no forfeiture clause in the sale of agreement. The cash down Shs 2.500, 000/= was thus clearly in part payment of the purchase price. The sum was quite a substantial

percentage of the purchase price. It was clearly not a mere deposit as found by the learned Judge. Once the respondent had decided to repossess the vehicle, he thereby put the contract at an end. He repudiated it.

The buyer thereby became entitled to a refund of his 2.500, 000/= he had paid. It was not a deposit to ensure performance which is not refundable but part payment of the purchase price which was refundable – **Dies And Another vs British And International F. C. Limited (1939) I.K.B. 724.** As rightly pointed out by the learned Judge, the respondent had the option of not impounding the vehicle but suing for breach of contract since he had the additional security of the logbook in his possession. He would thus be compensated in damages covering the balance of the purchase price and non-use of his vehicle. **Omer vs A Besse Ltd (1960) E A 907**. He chose not to follow this course. He is bound to refund the 2.500, 000/=.

The learned Judge was thus in error on this point. In an attempt to avoid a multiplicity of suits he purported to compensate the respondent for breach of contract and non-use of the vehicle by allowing him to keep the part payment of the purchase price of Shs. 2,500,000/-. I think this was an error. These matters were never pleaded and were thus not properly assessed by the Judge. As a trial Judge, he had the opportunity of ordering amendments to the pleadings on which evidence could be adduced to assist him reach a just decision.

The appellant buyer is thus entitled to recover his Shs 2.500, 000/=. This disposes of grounds 1, 2, 3 and 4, which I would allow.

Ground 5 concerns the issue of costs.

The learned Judge ordered each party to meet the costs of its advocate in the High Court and the court below. The appellant objected that since he was the successful party he should have been awarded costs. The respondent contended that the award of costs being discretionary, the order made by the learned Judge was justified and could not be interfered with. The learned Judge considered the conduct of each party when making the order.

I entirely agree with him that none of the parties to the suit had clean hands. The appellant / buyer breached the agreement he had undertaken to honour without fail. The respondent / seller rushed to impound the vehicle in-spite of the fact that he had the logbook in his possession and had received a substantial part of the purchase price. He could only have sued in damages.

In **Devram Nanji Dattani vs Haridas K Dawda (1949), 16 EACA 35**. Where it was held that a successful party can be deprived of his costs, the following passage was referred to:

> "**It is well established that when the decision of such a matter as the right of a successful litigant, to recover costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts…. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the court of Appeal will not interfere with the discretion in that instance.' Per Lord Atkinson in**

Donald Compbell vs Pollock, (1927) A. C. 732 at p 813".

This passage is on all fours with section 27 (1) Civil Procedure Act which the Judge must have followed. It gives him full powers and the discretion to determine by whom and out of what property and to what extent costs are to be paid. Thus this court cannot interfere with that discretion as it is apparent that it was exercised unjudicially or based on wrong principles.

This ground of appeal would in my view fail. As indicated above, I would allow this appeal partially. I would also order each party to bear its own costs.

Dated this.....21st .....day of.....July.....2005.

A.E.N. Mpagi-Bahigeine.

JUSTICE OPF APPEAL.