

JACOB NYAMUDA
versus
EDIAS KATI KI

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 28 November 2013 and 14 May 2014

Opposed matter

Mrs *E Mupanduki*, for the applicant
EdiasKatiki, in person

MTSHIYA J: On 28 November 2013 I gave the following order in favour of the applicant:-

“IT IS ORDERED THAT:

1. The respondent, Mr Edias Katiki be and is hereby ordered to refund applicant, Mr. Jacob Nyamuda, US\$5 500-00 being the purchase price paid by the applicant for the purchase of a Nissan Elgrand Registration No ABT 1883, Engine No. VQ35160644 chassis No. APWE50-011193.
2. The respondent is ordered to pay interest at the prescribed rate from 27 January to date of full payment.
3. Respondent pays costs on the ordinary scale.”

I then indicated that my reasons for the above order could be given upon request.

The respondent is appealing my order and therefore requires reasons for the above order. These are they:-

On 6 December 2011 the applicant and the respondent entered into an agreement for the purchase by the applicant of a motor vehicle (Nissan Elgrant, Registration ABT) (the vehicle) for the sum of US\$5 500-00. Payment in two instalments was completed on 7 December 2011.

On 23 January 2012 the vehicle was impounded by the police on the ground that it was reported as a stolen vehicle. The applicant then demanded reimbursement of his US\$5 500-00 (i.e. the purchase price of the vehicle).

The respondent told the applicant that he had sold the vehicle as an agent of the owner, a Mr Democracy Ndou, (Ndou) in whose name the vehicle was registered at the time of sale. The respondent had already passed the proceeds of the sale to the said Ndou. He, the respondent, had not been aware that he was selling a stolen vehicle. The respondent had since caused criminal proceedings to be laid against Ndou. Ndou was convicted and an order of restitution was granted by the Magistrate Court.

The respondent said the said Ndou has not yet paid the sum of US\$5 500-00 to him as ordered by the lower court. Restitution, it was argued, would put the respondent in a position to reimburse the applicant. That has not happened and hence this application.

In arriving at a decision it was necessary to examine all the papers placed before the court. The agreement of sale was clearly between the applicant and the respondent. There is nothing in the agreement of 6 December 2011 which shows the involvement of a third party. The sale was executed on the basis of that agreement.

Upon being sued the respondent filed two further documents, namely:

- a) Vehicle Sale Mandate dated in the following manner:
“06 -011 -20011” and
- b) An Acknowledgement of receipt of US\$5 000-00 by, Ndou on “Protile Car Sales” letter head.

I believe that these documents were ‘created’ after the dispute. I therefore, place no value on them. There is nothing to show that they were shown to the applicant at the time of agreement. The documents are not part of the agreement.

The above documents were intended to prove that the respondent was acting as an agent of third parties. I must hasten to point out that there is no law which says car dealers cannot sell their own cars. They can, apart from selling for third parties, sell their own vehicles. The agreement of sale does not disclose any third party. In terms of the agreement, the respondent sold what was his to the applicant. The applicant paid for the vehicle in terms of that agreement. The contract was therefore fully executed. The circumstances of the case therefore support the prayer for reimbursement.

It was easy for the respondent to state in the agreement that he was operating as an agent. The agreement is, unfortunately, silent on that and it would be misleading to hold that all car dealers are agents. There must be clear evidence of agency. There is none in this case.

The language of the agreement of 6 December 2011 is clear and allows for no introduction of agency. The respondent accepts that the prayer for a refund is justified but only finds himself in a difficult situation in that restitution has not yet been effected in order for him to satisfy the applicant's claim.

There being no issue of agency, the principles applicable to that concept cannot be invoked *in casu*.

In light of the foregoing, on 28 November 2013, I granted the order referred to at page 1 herein.

Messrs Coghlan Welsh and Guest, Applicant's Legal Practitioners
EdiasKatiki
c/oProtile Car Sales
8 Denmark Avenue
Milton Park, Harare, Respondent