



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Ndede (Civil Appeal 589 of 2019)**  
**[2024] KEHC 8974 (KLR) (Civ) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8974 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 589 OF 2019**

**JK NG'ARNG'AR, J**

**JUNE 26, 2024**

**BETWEEN**

**JOHN BENEDICT ONYANGO OTIENO ..... APPELLANT**

**AND**

**FREDRCIK ODHIAMBO NDEDE ..... RESPONDENT**

*(Being an appeal against part of the judgment delivered on 20/9/2019 by Hon. P. Muboli, SRM in Chief Magistrate's court at Milimani Civil Suit No. 2343 of 2015 between John Benedict Onyango Otieno Vs. Fredrick Odhiambo Ndede and Boniface Wachira Gichuki)*

**JUDGMENT**

1. This judgment determines the appellant's appeal brought vide the memorandum of appeal dated 27/4/2015. The appeal relates only to the issue of costs, loss of income and interest.
2. The appellant had filed a suit against the respondent vide plaint dated 27/4/2015 seeking release of motor vehicle KBA 240A and execution of all transfer documents in favour of the plaintiff, loss of income, costs and interest. It was the appellant's case that on 6/9/2021, he had purchased the subject motor vehicle from the respondent at Kshs. 1,150,000/= and paid a deposit of Kshs. 800,000/=. That the vehicle was intended for public service use and developed mechanical issues wherein the parties agreed that the repair costs would be offset from the balance. That the vehicle again developed serious mechanical issues and the plaintiff towed it to a parking yard to secure finances for repair. That the respondent secretly repossessed the vehicle and sold it to a third party thus the filing of the instant suit. The defendant vide defence dated 5/2/2016 denied the plaintiffs averments.
3. Vide judgment delivered on 20/9/2019, the trial court found that there was a valid contract between the parties, however, the appellant was in breach of that contract having failed to pay the deposit within the stipulated three months period provided for in the contract. The court found that the clearance of



the balance was not dependent on provision of transfer documents as the appellant was always aware that the motor vehicle had been charged to NIC Bank. The court also found that the respondent did not have a good title to pass to the plaintiff at the time of the purchase as the motor vehicle was still being held by NIC Bank at the time of the sale and the bank was never involved in the sale. That discharge was only obtained on 21/1/2015 thus the respondent lacked good title. As regards the sale to the third-party, the court found that the third party was a purchaser for value under Section 48 of the [Sale of Goods Act](#) and would therefore retain the motor vehicle as there was a valid contract between him and the respondent vide agreement dated 26/2/2015.

4. The court therefore ordered the respondent to refund the deposit of Kshs. 800,000/= to the appellant within 30 days failure to which the amount would attract interest at court rate from the date of judgment till payment in full. The court also directed each party to bear their own costs. The court dismissed the prayer for loss of income and interest.
5. The appellant was dissatisfied with that judgment and filed the instant appeal on five grounds which can be summarized as; The trial court erred in failing to award costs of the suit to the appellant whom he found in favour against the respondent, the trial court erred in failing to award interest on the judgment sum from November 2013 to the date of payment.
6. The appellant's submissions were not on record at the time of writing this judgment. The respondent however complied by filing submissions dated 21/5/2024.
7. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* (1958) E.A. page 424: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

8. As regards costs, it is trite that costs follow the event. Section 27 of the [Civil Procedure Act](#) which provides as follows: -

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”



9. In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd it was held that: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

10. It then follows that it is within the court’s discretion to award costs. In the case before me, I note that the appellant was only partly successful in his claim against the respondent. The 1<sup>st</sup> respondent was also partly successful in its counter-claim, it then follows that both parties claim partly succeeded and partly failed. The trial court found that the appellant was himself in breach of the contract between himself and the respondent and found that all he was deserving of was a refund of the deposit amount on the basis that the respondent lacked good title to pass to the plaintiff. That decision has not been appealed against. Having only been partly successful and having been found to be tainted with breach, the trial court correctly exercised its discretion in holding that each party would bear its own costs. None of the parties was without fault, it was only fair and just that none was condemned to pay costs. This ground of the appeal therefore fails.

11. As regards the issue of loss of income, the same reasoning above applies. The appellant was in breach of the agreement by failing to complete payment of Kshs. 350,000/= within 3 months as agreed. The trial court correctly found that the payment of the balance was not dependent on the release of transfer documents and that the appellant was aware that the motor vehicle was held by NIC Bank at the time of the purchase. Having participated in the breach by failing to pay the deposit amount within the stipulated time, and having proceeded with the purchase fully aware that the motor vehicle was co-owned with the Bank which was not consulted in the transaction, the appellant could not now turn around and seek to benefit from its breach and actions. I do note that the appellant never argued that the motor vehicle was bought free of any mechanical issues such the liability for the mechanical issues rested on the respondent. I find that the appellant did not successfully make a case for payment of loss of income and the trial court’s finding was sound. That ground of appeal similarly fails.

12. As regards the final ground of appeal, it was the appellant’s case that the trial court erred in failing to award interest for the judgment amount from November 2013 to the date of payment. I note that in the plaint, among the prayers pleaded by the appellant was ‘interest on b (loss of income) and c (costs) at court rate. There was no prayer for interest of the judgment amount as of November 2013. It is trite that parties are bound by their pleadings and the trial court could not have awarded that which was not prayed for or pleaded. I find that the award for interest in on the amount of Kshs. 800,000/= at court rate from the date of judgment till payment in full was sound and I see no reason to disturb that finding. In any case, an award of interest is discretionary and the court was not bound to find in the appellant’s favour as a matter of right.

13. In the end, I find that the appeal is unmeritorious and the same is dismissed with costs to the respondent who participated in the appeal. The costs are hereby assessed at Kshs. 35,000/=.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

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**J.K. NG’ARNG’AR, HSC**



## **JUDGE**

In the presence of:-

No appearance for the Appellant/Applicant

Ochieng for the Respondent

Court Assistant- Peter Ong'idi

