



REPUBLIC OF KENYA



**Amwanzo v Mogo Auto Limited (Civil Appeal E850 of 2022)  
[2024] KEHC 7665 (KLR) (Civ) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7665 (KLR)

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

**CIVIL**

**CIVIL APPEAL E850 OF 2022**

**WM MUSYOKA, J**

**JUNE 24, 2024**

**BETWEEN**

**SELPHER KHAKASA AMWANZO ..... APPELLANT**

**AND**

**MOGO AUTO LIMITED ..... RESPONDENT**

*(An appeal arising from the judgment of Hon. Caroline Ndumia, Senior Resident Magistrate/  
Adjudicator, delivered on 23rd September 2022, in Nairobi SCCC No. E1358 of 2022)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the respondent, against the appellant, seeking a sum of Kshs. 400,166.00. The case was that the respondent had offered her motor vehicle, KCE 315V, to secure a loan of Kshs. 150,000.00, granted to a relative by the appellant. The motor vehicle was subsequently sold by the appellant, for Kshs. 380,000.00, in default of payment of an outstanding amount of Kshs. 38,432.00, after issuing a notice, dated 4<sup>th</sup> January 2022, which was received on 6<sup>th</sup> January 2022, intimating that the vehicle would be sold on the date of the notice if the balance was not paid. The respondent argued that the vehicle was sold at an undervalue, given that its value was Kshs. 450,000.00, and that after deducting the amount of the outstanding loan, Kshs. 38,432.00, and the cost of handling the alleged sale, of Kshs. 11,400.00, the appellant should have paid to her the sum claimed, of Kshs. 400,166.00.
2. The appellant filed a response, in which it admitted the transactions that he had with the respondent. It averred that upon the security agreement being executed, on 26<sup>th</sup> October 2021, the subject vehicle became its property, and it held the logbook for the vehicle as collateral for the Kshs. 150,000.00 loaned. It averred that there was default, and that after several notices, the borrower failed to pay. The vehicle was subsequently re-possessed, and sold, to recover the amount due. Upon the sale, the respondent



- was entitled to the balance of Kshs. 152,017.00, which it had not remitted to the respondent as it was unable to contact her.
3. The matter was disposed of through a formal hearing. The respondent testified, while the appellant called a witness.
  4. The testimony by the respondent was aligned to her statement of claim.
  5. The witness presented by the respondent testified along the lines of the response. He stated that a notice to sell was issued on 4<sup>th</sup> January 2022, and the amount outstanding then was US\$ 272.00, or Kshs. 30,600.00. He said that could not confirm whether a notice was issued to the respondent. He stated that, although the issue was escalated to the Advocates for the appellant, no suit was filed. The amount claimed, in the notice of 4<sup>th</sup> January 2022, was Kshs. 38,432.00, as it included penalties for default, and after loading on additional costs, the amount ballooned to Kshs. 49,832.00. He stated that a valuation had been done. He put the market value at Kshs. 520,000.00, the forced value at Kshs. 410,000.00, and Kshs. 450,000.00 as the assessed value. He conceded that the vehicle was sold at Kshs. 380,000.00, which he said was below the assessed value. He said, that the amount the appellant was admitting, of Kshs. 152,017.00, was paid in June 2022.
  6. After taking written submissions from the parties, the trial court delivered the judgment of 23<sup>rd</sup> September 2022. The court concluded, from the documents on record, that as at 7<sup>th</sup> December 2021, the respondent was said to have owed US\$ 248.27, or about Kshs. 29,000.00, and the notice of 4<sup>th</sup> January 2022 put the amount owing as Kshs. 38,432.00, and that there was no evidence that as at 5<sup>th</sup> January 2022, the respondent owed Kshs. 152,017.00. It was concluded that, as per the date when the vehicle was sold, its value was Kshs. 450,000.00. It was held that the vehicle was sold at an undervalue, and the respondent was entitled to recover the assessed value, less the amount alleged to be due in January 2022, of Kshs. 38,432.00, and Kshs. 11,400.00, making a total of Kshs. 49,832.00, and proceeded to enter judgment in favour of the respondent for Kshs. 400,168.00, plus costs and interests.
  7. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 21<sup>st</sup> October 2022, revolve around the trial court not having jurisdiction to invoke Article 46(1) (c) of the *Constitution*; erring in finding that the amount due was Kshs. 38,432.00 was what was due, for that was a mere instalment; failing to consider that the appellant had advertised the motor-vehicle for sale in a daily newspaper of national circulation; failing to consider that the respondent was given adequate notices in January 2022, but she slept on her rights, and the appellant properly exercised its statutory rights; and failing to consider that the appellant had issued the notice of 4<sup>th</sup> January 2022.
  8. Directions were given on 12<sup>th</sup> June 2023, for disposal of the appeal by way of written submissions. Both sides have filed written submissions.
  9. The appellant has identified 4 issues for determination: whether there was jurisdiction for the trial court to make a declaration under Article 46(1) of the *Constitution*, whether the trial court had failed to consider the evidence adduced, whether the appellant was within its rights to sell the subject motor vehicle, and costs.
  10. On the constitutional declaration, it is submitted that the trial court had no jurisdiction to make pronouncements on the *Constitution*, it could not interpret the *Constitution*, and the issue was not even raised in the pleadings by the respondent. On whether the trial court did not properly consider the evidence, it is submitted that the sum of Kshs. 49,834.00 was not the final amount due, but just an instalment, for the respondent was yet to pay another 7 outstanding instalments. On whether the appellant had to sell the motor vehicle offered as collateral, the appellant cites sections 67 and 72 of the *Movable property Security Rights Act*, 2017, and *Brits Freighters Limited vs. Standard Chartered*



*Bank (K) Ltd* [2018] eKLR (Nzioka, J), to assert that it acted within the law. It is submitted that the appellant is entitled to costs of the appeal.

11. On her part, the respondent identifies 2 issues for determination, which are actually regurgitations of the grounds of appeal: whether the appeal is competent, and whether there was basis for interfering with the verdict of the trial court. On the first issue, section 38 of the *Small Claims Court Act*, Cap 10A, Laws of Kenya, is cited, for the argument that the appeal to the High Court is on points of law only, and that the grounds of appeal turned on facts, and not law. It is argued that there was only one ground that raised legal issues, that on Article 46(1) of the *Constitution*. It is submitted that Article 3 of the *Constitution* places an obligation on every person to respect, uphold and defend the *Constitution*, and, as such, the trial court was obligated to defend the *Constitution*. On the second issue, it is submitted that the notice of 4<sup>th</sup> January 2022 demanded Kshs. 38,432.00, being the total outstanding loan balance.
12. I will consider all the issues raised by the parties, starting with what the appellant has submitted on. On whether there was no jurisdiction to invoke Article 46(1) of the *Constitution*, I note that the trial court adverted to that provision, while addressing the issue of collateral being sold at an undervalue. The trial court literally lifted Article 46(1) from the decision in *NCBA Bank PLC vs. Cyrus Ndung'u Njeri t/a Digital Tours and Logistics* [2021] eKLR (Odunga, J), which turned on sticking to the advertised reserve prices at the point of disposal of collateral, upon default, and the court, in that case, cited Article 46(1), to assert consumer rights. The finding of the trial court was that the motor vehicle was sold at an undervalue, which violated the consumer rights of customers, as protected under Article 46(1) of the *Constitution*.
13. The trial court sat as a subordinate court, which is a creature of the *Constitution*, under Article 169(1) (d). Being a creature of the *Constitution*, its authority would flow directly from the *Constitution* first, and then from the statutes. Statutes are subordinate to the *Constitution*, which according to Article 2 of the *Constitution*, is the supreme law, binding all persons and all State organs. Under Article 2(2), no person may claim or exercise State power except as authorised by the *Constitution*. Article 2(4) is also relevant, that any law which is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid. Finally, Article 3(1) of the *Constitution* enjoins every person to respect, uphold and defend the *Constitution*. In addition to these provisions, there is Article 10, which states the national values and principles, which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*; enacts applies or interprets any law; or makes or implements public policy decisions. The values are said to include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development.
14. I cite the above provisions as the appellant has submitted the trial court had no business with the *Constitution*. It could not interpret it, as that was the preserve, I suppose, of higher courts. As the trial court is a creature of the *Constitution*, and as the *Constitution* is part of the body of law in Kenya, which such a court applies, it would follow that the *Constitution* is the business of any court, whether the Small Claims Court, or any other that is set up by or through the provisions of the *Constitution*. Under Article 2(1) of the *Constitution*, the *Constitution*, being the supreme law, binds all persons and all State organs. The officer presiding over the trial court was a person, and she served in the Judiciary, which is a State organ. That made her, and the entity she served, bound by the *Constitution*, and that meant that whatever she did, in discharge of her duties, as part of the Judiciary, had to be subject to the *Constitution*. It cannot then be said that the *Constitution* could not be her business, and that she could not cite, apply and interpret it. She was duty bound to consider the law that bound her, to ensure that



she acted completely and totally within its prescriptions. Article 2(2) is about exercising State authority, as authorised by the Constitution. The trial court, when it handled the dispute herein, exercised State authority, and that authority derived from the Constitution, by dint of Article 169(1)(d). It cannot, then, be that a person and entity exercising State power, donated to her or it by the Constitution, cannot advert to that authority for guidance on any of the issues that are placed before her or before it. Article 2(4) is about laws and acts that are inconsistent with or contravene the Constitution, being void or invalid. A person exercising State authority, flowing from the Constitution, would have her or its antennae up at all times, to guard against applying laws or condoning acts which are inconsistent with or which contravene the Constitution.

15. Then Article 10 makes all State organs and State officers bound by the Constitution. The Judiciary is a State organ, and magistrates, and the Hon. Ndumia was one, being a Senior Resident Magistrate, was a State officer, serving within the Judiciary. Article 10 applied to her. She was bound by it. As stated above, the Constitution is the supreme law in Kenya, all other laws, by dint of Article 2, draw their legitimacy from it. That is where it all starts. Application and interpretation of any law depends on the Constitution, which is the mother law. Any court which applies and interprets any law, and the core mandate of courts is, in any case, application and interpretation of the law, would have the mandate to apply and interpret the Constitution, for all the other laws are referenced to the Constitution. Article 10 identifies among the national values and principles of governance, the rule of law, social justice, human rights and protection of the marginalised. Consumer protection is about all that rule of law, social justice, human rights and protection of the marginalised from exploitation. A court seized of a consumer protection dispute, such as the instant one, could not walk away from the Constitution, for the issues before it were grounded on these national values. No court of law, regardless of its position in the hierarchy of the courts, can be blind to the existence of the Constitution, in terms of it dealing with ordinary everyday cases before it without any reference whatsoever to the Constitution. the Constitution is the base, bedrock and foundation of the law and the legal system in Kenya. It gives legitimacy to the law and to the courts. It cannot then be the case that a court can be said to be wrong for citing the Constitution, and making decisions based on the provisions of the Constitution.
16. I have referred to human rights above, as among the bundle of national values and principles of governance. Chapter 4 of the Constitution, on the Bill of Rights, captures consumer rights, in Article 46, and recognises them as among the rights and fundamental freedoms that should be protected, in order to preserve the dignity of individuals, and to promote social justice and realisation of the potential of all human beings. Consumer rights are protected under Chapter 4 of the Constitution, and any court, which has to interpret any statute, which touches on consumer rights, and their protection, has to advert to the guidance provided by Chapter 4, and more specifically Article 46. There is nothing in Chapter 4, which limits the jurisdiction of magistrates courts from relying on and interesting the provisions of the Constitution, with respect to matters that are before such courts. I note that for the purpose of enforcement of the Bill of Rights, Articles 23 and 165(3)(d) refer to the High Court. However, that does not make the Constitution a no go zone for the other courts. The jurisdiction of the High Court, with respect to the Constitution, is very well-defined, and that definition does not limit or diminish the jurisdiction of the other courts, to advert to the Constitution, for guidance or reference on any of the matters before it. It is not lost on me, that Article 23(1) of the Constitution, envisages subordinate courts sharing jurisdiction with the High Court in this area.
17. There can be no merit, therefore, in the argument that the trial court had no jurisdiction to refer to and even interpret the Constitution, with respect to the dispute that was before it. There is no law, none has been cited to me, and I am unaware of any, which requires courts to consider constitutional provisions, with respect to business before them, only where such constitutional provisions have been cited or raised before them by the parties. In any event, even if I were to find that that holding was wrong, the



same would not affect the other orders, principally that awarding the sum of Kshs. 400,168.00, for the same was not wholly or solely hinged on Article 46(1) of the *Constitution*.

18. The second issue is whether the trial court did not consider the evidence that was before it. I have read and re-read the record of the trial court, and I am persuaded and satisfied that the trial court appreciated the evidence that was before it. The issue was about disposal of an asset that had been offered as collateral for a loan, upon default. The issue was not so much whether there had been a default, but rather about how the appellant went about realising the collateral or security. There was the issue of whether the requisite notices issued, and whether they were served on the respondent. The secondary issue was about how the sale was handled, with respect to the value of the asset sold, the moneys that the appellant was alleging was due, and, upon sale, the appellant turning over the surplus funds, after taking away what it was claiming to be the outstanding debt, after factoring its expenses and disbursements with respect to the sale, to the respondent. The trial considered all that, and its decision was ultimately based on the evidence tendered, as analysed and appreciated by the trial court. On the way the trial court handled the evidence, no legal issue has been raised, and it has not been demonstrated that the trial court went wrong on the application of the law of evidence and procedure.
19. The issue that the trial court should have considered the sum of Kshs. 38,432.00, or Kshs. 49,834.00, not being the final amount owing by the respondent, and that she was still had 7 months' worth of instalments outstanding, is part of the second issue. My answer to it is that parties are bound by their pleadings. At the trial court, the appellant did not raise that issue, that the sale of the collateral was meant to address default in payment of only one instalment, and that there was a lot more owing. The matter proceeded on the basis that that amount was final, and the sale of the vehicle was to clear the total outstanding balance. The appellant cannot possibly raise issues, on appeal, that were not before the trial court. It is a matter of common practice, in this business, that collateral is disposed of to clear the total outstanding balances, and not just one instalment that falls due, for the asset is offered as collateral for the total loan amount, and not just to cover one instalment. In any case, if there were still more moneys owing, why did the appellant pay over to the respondent the sum of Kshs. 152,017.00, in June 2022.
20. The third issue is about the trial court not appreciating that the appellant was within its rights to sell the subject motor vehicle. With respect, whether the appellant had rights in law to dispose of an asset offered as security or collateral for a loan, upon default, was not an issue before the trial court. The respondent never made it an issue, not in her pleadings, nor in her oral evidence. She was not inviting the court to declare that the appellant had no such rights, or that the sale be declared null and void on the basis that the appellant had no right to sell the asset. That was not the case that was before the trial court. The respondent acknowledged the right, accruing to the appellant, to sell the collateral, for default, and her issue was with the collateral being sold at an undervalue. Indeed, in her claim, she acknowledged that the relative, who had taken the loan, that was being secured by the collateral, was not able to repay it, and, therefore, the right to dispose of the collateral had accrued. The respondent did not, anywhere in her pleadings, challenge the right to sell the collateral; she was only concerned about notices not being served on her properly, and on the vehicle being sold at an undervalue. The issues that the court considered, in determining the matter, did not revolve around the appellant not having the right to sell, but around the undervalue, and the final orders were founded around that, and not the right to sell. There is no basis, therefore, for this ground.
21. One disturbing thing about the case by the appellant is the attitude that once the respondent offered her motor vehicle to the appellant as collateral for a loan, it became the property of the appellant, or the appellant became the owner of the vehicle. That would explain how it went about realising the security, with little effort to involve the respondent in the process, and without caring to have it sold at market



value. The fact that an asset has been offered as a security or collateral for a loan, by the owner, does not have the effect of transferring ownership of the property to the lender. The asset very much remains the property of the borrower or whoever is offering the asset as security, unless the registration, details at either the registry of motor vehicles or of lands, to make the lender a co-owner of the asset with the borrower or the guarantor. So, this notion that it becomes the asset of the lender is a misconception and a misapprehension of the whole arrangement, for if that were so, the issue of realising the security would not arise. Offering an asset as security or collateral for a borrowing is not the same as selling the asset to the moneylender.

22. The last issue, identified by the appellant, turns on costs. Costs follow the event. The same shall follow the party who shall eventually succeed in these appeal proceedings.
23. Let me now turn to the issues raised by the respondent. The first is on the matter of appeals from decisions of the Small Claims Court being on matters of law only. That is the law. The only issue, herein, founded on the law is that framed in ground 1 of the memorandum of appeal. The rest raise issues of fact. I need not address my mind to them. The second issue, identified by the respondent, is framed in the alternative, should I find the first issue in the negative. I have found in the positive, so I need not address my mind to the second issue, for it turns on facts, not law. In any case, I have already addressed the issues around that matter, in the foregoing paragraphs of this judgment.
24. In the end, I find that the appeal herein is not merited, and I hereby disallow it. The consequence is that the order made on 23<sup>rd</sup> September 2022, by the trial court, allowing the claim by the respondent, is hereby upheld and affirmed, and the appeal herein is dismissed in its entirety. The respondent shall have the costs of this appeal. It is so ordered.

**JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,  
THIS 24<sup>TH</sup> DAY OF JUNE 2024**

**W MUSYOKA**

**JUDGE**

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Turanga, instructed by Turanga Ithagi & Company, Advocates for the Appellant.

Mr. Dondo, instructed by Mulanya & Maondo, Advocates for the Respondent.

