



**Marete v Bonyo (Civil Appeal E100 of 2022)  
[2023] KEHC 24830 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24830 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E100 OF 2022  
RE ABURILI, J  
OCTOBER 31, 2023**

**BETWEEN**

**DERRICK MURITHI MARETE ..... APPELLANT**

**AND**

**FRED OCHIENG BONYO ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. G.C. Serem delivered on  
the 31st October 2022 in Kisumu Small Claims Court No. 96 of 2022)*

**JUDGMENT**

**Introduction**

1. The respondent herein Fred Ochieng Bonyo was the Claimant in the Small Claims Court at Kisumu. He filed a statement of claim against the appellant herein Derrick Murithi Marete vide a claim dated 8<sup>th</sup> September 2022 in which he prayed for a refund of the monies that he paid towards the purchase of price of a motor vehicle or in the alternative, an order of specific performance of the agreement entered into by the parties. He also prayed for aggravated and exemplary damages for breach of contract and interest and costs.
2. On his part, the appellant denied the respondent's claim vide a response dated 16<sup>th</sup> September 2022 and prayed for Kshs. 40,000 being the costs incurred by the auctioneer.
3. In her judgement, the trial magistrate found that the appellant was in breach of his agreement with the respondent and ordered him to refund the respondent the monies paid to the appellant as purchase price of the motor vehicle totaling to Kshs. 420,000 together with interest on the same from the date of judgement as well as costs of the suit.



4. Aggrieved by the trial court's judgement, the appellant filed the instant appeal vide a memorandum of appeal dated 4th November 2022 and filed on the 8th November 2022. The appeal raises the following grounds:
  - i. The learned trial adjudicator erred in law in failing to appreciate the evidence before her that clearly absolves the appellant from blame.
  - ii. That the learned trial adjudicator erred in her analysis of the evidence in holding that the appellant had breached the contract.
  - iii. The learned trial adjudicator erred in failing to consider all the issues raised by the appellant in the written submissions before her.
  - iv. The learned trial adjudicator erred in law in awarding damages to the respondent.
  - v. The learned trial adjudicator proceeded on demonstrably wrong principles in reaching her decision on the award to the respondent.
5. The appeal was canvassed by way of written submissions.

#### **The Appellant's Submissions**

6. It was submitted that the respondent was the one who breached the contract of sale for the suit motor vehicle and further that the respondent in cross-examination admitted that he had notice of default and any such intended sale of the vehicle way before it was sold.
7. The appellant submitted that the suit vehicle was only sold subject to the order of the court in Kisumu CMC Misc. Civil Application No. E145 of 2022 and that if at all the respondent was aggrieved by the said order, the proper way to handle the same would have been to challenge the order or settle the balance of the purchase price.
8. The appellant submitted that through his evidence, he demonstrated that he had a lawful excuse in failing to retain the vehicle upon repossession until full payment of the balance as was in the default clause.

#### **The Respondent's Submissions**

9. The respondent submitted that the appellant failed to issue notice as stipulated in the sale agreement and further went on to appoint an auctioneer to repossess the motor vehicle which the auctioneer subsequently sold.
10. It was submitted that the respondent acted in accordance with the terms of the agreement and that both parties were bound by the doctrine of pacta sunt servanda as was held in the case of South African Railways (1903) TS 571.
11. The respondent further submitted that it was not the business of the court to rewrite contracts between parties as was held in the case of National Bank of Kenya Ltd v Pipe Plastic Sam Kolit (K) Ltd [2011] eKLR.
12. It was submitted that where the intention of parties had been reduced into writing, it was generally not permissible to adduce extrinsic evidence whether oral or written, either to show the intention or to contradict, vary or add to the terms of the agreement.



## Analysis and Determination

13. I have carefully considered the grounds of appeal, the submissions filed by both parties in this matter as well as the relevant law. The issue is whether this appeal has merit.
14. The basis of the suit before the Small Claims Court trial court was the allegation that the Appellant was in breach of the contract signed by the parties herein on the 6th May 2021 by repossessing the suit motor vehicle registration number KAS 558V Toyota Hiace Matatu through auctioneers and proceeding to sell the said vehicle contrary to the provisions of the said contract. The Appellant denied the claim.
15. It is a settled principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
16. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
17. In this case, the aforementioned contract and the operational clause provided as follows:

“Default Clause

Should the purchaser fail to pay the balance of the agreed purchase price as agreed and without any reasonable cause, excuse and or justification whatsoever or at all, the vendor shall be at liberty to repossess the said Motor Vehicle upon notice of 15 Days and retain the same until the full balance of the agreed purchase price is paid.”
18. The evidence on record is that there is no dispute that the respondent was in default as he had not paid the Kshs. 80,000 and that as at the time that the respondent was going to the offices of the auctioneer to pick the letter authorizing the auctioneer to take the suit vehicle, the auctioneer had a week earlier taken the suit vehicle registration number KAS 558V Toyota Hiace Matatu. It is this act of going to pick a letter from the auctioneer that the appellant submitted that it amounted to notice of repossession.
19. My understanding of the default clause is that prior to repossession, the appellant was to give the respondent 15 days’ notice. The appellant has not demonstrated that he gave the respondent the said Notice prior to repossession of the suit motor vehicle.
20. Case law is clear that where the terms of a Contract and/or Deed are explicit and unequivocal, the court is obliged to give effect and meaning to the said terms and the court must eschew an invitation to re-write the contract at the instance of either Party.
21. Simply put, a Party must be prepared to live within the terms of her bargain, unless any of the established exceptions, which were discussed in the National Bank case (supra) are proven and/ or established.



22. The suit contract in its Default Clause in essence provided for a mode of alternative dispute resolution in the event of breach, which mode the appellant did not comply with. The appellant was thus in breach of the contract as was correctly found by the Small Claims Court.
23. The appellant has not demonstrated that his appeal is meritorious on points of law to warrant interference with the suit contract as the issue of breach of the contract was a matter of fact and which was evident and therefore this court must uphold the contract. I find no legal basis for the appellant to deviate from the contents of the contract.
24. In view of the above findings, I find and hold that the Small Claims Court did not err in its holding that the appellant was in breach of the agreement subject of these proceedings. I uphold the finding of the trial court and find that this appeal lacks merit and proceed to dismiss it with costs to the respondent assessed at Kshs 40,000.

I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023**

**R.E. ABURILI**

**JUDGE**

