



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**CIVIL APPEAL NO. 24 OF 2020**

**BETWEEN**

**BEYOND VISION AUCTIONEERS.....1<sup>ST</sup> APPELLANT**

**KENYA MALIK (K) LTD..... 2<sup>ND</sup> APPELLANT**

**AND**

**MAURICE ASUNA OGUTU.....RESPONDENT**

*(Being an Appeal from the ruling in Homa Bay Chief Magistrate's CMCC No. 23 of 2020 by Hon. Tom M. Olando – Senior Resident Magistrate).*

**JUDGMENT**

1. Maurice Asuna Ogutu the respondent herein, had moved the trial court by way of notice of motion dated 18<sup>th</sup> May, 2020 where the main prayer was that the respondents (now appellants) be ordered to release motor vehicle registration number KCX 267R pending the determination of the main suit. The ruling was delivered on 24<sup>th</sup> June, 2020. The application was allowed in favour of the respondent.

2. The appellants were aggrieved by the said ruling and filed this appeal through the firm of Anaya & Company Advocates. They raised seven grounds of appeal as follows:

- a) That the learned magistrate erred in fact and in law in finding that he had jurisdiction to entertain the respondent's application and/or suit.
- b) That the learned trial magistrate erred in fact and in law in ordering the unconditional release of the 2<sup>nd</sup> that the appellant's motor vehicle KCX 267R to the respondent who had admitted being in default since taking possession of the motor vehicle
- c) That the learned magistrate erred in fact and in law in failing to appreciate that the 2<sup>nd</sup> appellant's right to property and enjoyment thereof was grossly being violated by the respondent for failure to pay for the motor vehicle since taking possession.
- d) That the learned magistrate erred in fact and in law in failing to appreciate that the respondent was undeserving of any orders having come to court with unclean hands with no proposition to redeem himself.
- e) That the leaned magistrate erred in fact and in law in failing to preliminary objection by the appellants herein.
- f) That the learned magistrate erred in fact and in law in failing to appreciate that the suit as currently drafted and/or pleaded is grossly and incurably defective hence no prima facie case could be based on the said pleadings.
- g) That the learned magistrate erred in fact and in law in failing to consider the submissions and authorities by the respondent's.

3. The appeal was opposed by the respondent through the firm of Nyauke & Company Advocates.

4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the

evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The first issue for consideration by the trial court was on territorial jurisdiction. The contract which gave rise to this case was entered into in Mombasa. The appellants who were defendants in the suit have their office in Mombasa. Section 15 of the Civil Procedure Act ought to have been invoked and the preliminary objection on jurisdiction sustained.

6. It was erroneous for the learned trial magistrate to purport to interfere with the contract entered into by the parties and order that the respondent to be given time to renegotiate the contract on account of COVID-19. This was tantamount to re-writing the contract for the parties.

7. From the foregoing, I find that the trial magistrate had no jurisdiction to entertain the suit. The appeal is allowed and the ruling of 24<sup>th</sup> June, 2020 and all the consequential orders therein are set aside.

8. The appeal is therefore allowed with costs.

**DELIVERED and SIGNED at HOMA BAY this 30<sup>th</sup> day of March, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**