Onyango v Onepay Credit Limited (Civil Appeal E965 of 2022)
[2025] KEHC 382 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 382 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E965 OF 2022

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

KENNETH OLUOCH ONYANGO ..... APPELLANT

AND

ONEPAY CREDIT LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. D. S. Aswani (RM/Adjudicator) delivered on 26th October 2022 in Nairobi SCCC No. E1366 of 2022)

JUDGMENT

1. This appeal derives from the judgment delivered on 26th October 2022 in Nairobi SCCC No. E1366 of 2022. The suit was commenced by way of the statement of claim dated 31st May, 2022 and amended on 28th September 2022 (the amended claim) and filed by Kenneth Oluoch Onyango being the claimant in the Small Claims Court (hereafter the Appellant) against Onepay Credit Limited, the Respondent in the Small Claims Court (hereafter the Respondent). The claim was for general damages and various declaratory orders arising out of a claim for recovery of the motor vehicle registration number KBW 754B (the subject motor vehicle).

2. It was alleged in the amended claim that on 7th February, 2022 the Appellant took out a loan facility with the Respondent, in the sum of Kshs. 553,500/- on the agreement that the subject motor vehicle belonging to the Appellant at all material times, would act as collateral for the said loan. That due to unforeseen circumstances, the Appellant defaulted on his loan repayments in the month of April, 2022 thereby resulting in delivery of the subject motor vehicle to the Respondent and which motor vehicle was stored at Startruck Yard along Kiambu Road at all material times.

3. It was further pleaded in the amended claim that as at 24th May, 2022 the Appellant had fully repaid the loan sum plus penalties and accrued interest and related charges, and hence he was not indebted

to the Respondent. That nevertheless, the Respondent refused and/or neglected to return the subject motor vehicle into the custody of the Appellant, hence the claim.

4. Upon service of summons, the Respondent entered appearance and filed its response to the amended claim dated 15th June, 2022 denying the key averments in the claim and liability. More particularly, the Respondent averred that the loan facility which was in the sum of Kshs. 600,000/- was advanced to the Appellant sometime on or about 7th February, 2022 pursuant to the agreement that the subject motor vehicle would act as security thereon. That resultantly, a charge was registered on the said motor vehicle, in favour of the Respondent. That the loan facility was to be repaid by the Appellant in 12 monthly instalments, together with the interest agreed upon.

5. The Respondent averred that the Appellant failed to meet his financial obligations under the loan agreement, thereby prompting the Respondent to recall the loan facility and to cease the subject motor vehicle, which vehicle was subsequently sold by way of a public auction held on or about 18th May, 2022 following an advertisement in the Standard Dailies dated 10th May, 2022. That in the circumstances, the claim had already been overtaken by events and the Appellant was therefore not entitled to the reliefs sought in the amended claim.

6. When the parties attended the Small Claims Court on 14th September, 2022 it was the agreement by their respective advocates that the matter proceeds on the basis of the documentation and written submissions filed. Upon therefore considering the same, the learned adjudicator rendered judgment on 26th October, 2022 in favour of the Appellant and against the Respondent, in the sum of Kshs. 256,000/-.

7. Being aggrieved by the aforesaid decision, the Appellant preferred this appeal by way of the memorandum of appeal dated 17th November, 2022 and amended on 28th November, 2023 (the amended memorandum of appeal) which is premised on the grounds hereunder:

    1. The learned magistrate erred in law by failing to make a finding that the auction was marred with illegalities and irregularities in the attachment of Motor Vehicle Registration No. KBW 745B and that the process was a complete abuse of the law.

    2. The learned magistrate erred in law by failing to acknowledge that the sale by auction of Motor Vehicle Registration No. KBW 745B failed to meet the threshold stated in the *Auctioneers Act* Cap 526.

    3. The learned magistrate erred in law by failing to make a finding that a recording of the sale proceedings was not done to ascertain whether the claim was fully satisfied.

    4. The findings of the learned magistrate on the purported sale of Motor Vehicle Registration No. KBW 745B was against the weight of the evidence.

    5. The learned trial Magistrate erred in law in failing to find that a case for detinue and conversion had been made out and in failing to grant the consequential relief for the same." (sic)

8. Pursuant to the directions of the court, the appeal was canvassed by way of written submissions.

9. The court has considered the amended memorandum of appeal; the record of appeal featuring inter alia, the pleadings and original record of the proceedings; and the submissions by the respective parties.

This is notably a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

11. Upon review of the amended memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on the key issue being whether the Appellant's claim was meritorious as pertains to the purported sale of the subject motor vehicle and consequently, whether the trial court arrived at a reasonable finding in respect of the claim, in the circumstances. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court.

12. The Appellant on the one part submitted that the Respondent lacked the legal justification to repossess and sell the subject motor vehicle, in the absence of any existing security agreement between the parties herein. He further submitted that there was non-compliance on the part of the Respondent, in adhering to the statutory requirements for sale of the subject motor vehicle. The Appellant equally took the position that as at 10th June, 2022 the proceeds of the sale of the subject motor vehicle had not been applied towards settlement of his loan. That in the premises, the doctrines of detinue and/or conversion would become applicable.

13. In retort, the Respondent maintained that it repossessed the subject motor vehicle regularly and in the exercise of its rights under the terms of the loan facility. The Respondent further argued that contrary to the averments being made by the Appellant, the said motor vehicle was lawfully sold by way of a public auction following the Appellant's default in fulfilling his financial obligations under the loan facility. It was similarly the Respondent's contention that the doctrines of detinue and conversion are inapplicable here.

14. Various authorities were cited in support of the respective parties' submissions.

15. That said, the key components of the parties' respective pleadings have already been set out hereinabove. Furthermore, and as earlier mentioned, the parties through their respective advocates, consented to having the claim dispensed with on the basis of the documents and written submissions filed.

16. The learned adjudicator upon restating the pleadings by the parties, stated in its judgment that it was not in dispute that the Respondent had advanced a loan facility to the Appellant. The learned adjudicator further stated in her judgment that the Respondent followed the due process in undertaking the sale of the subject motor vehicle, adding that the details captured in the copy of records would not negate a valid sale of a motor vehicle. Suffice it to say that the learned adjudicator found that the Appellant would only be entitled to a refund of the sums paid towards settlement of the loan on 24th May, 2022 amounting to Kshs. 256,000/-.

17. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
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> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

18. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other

which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

19. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the amended claim lay squarely with the Appellant.

20. In the present instance and going by the material tendered before the trial court, it is not in dispute that the Appellant took out a loan facility with the Respondent. From a perusal of the record of appeal, the court identified the letter of offer dated 31st January, 2022 found on pages 126 to 130 of the record of appeal, confirming the above position. The contents thereof are that the amount loaned was the sum of Kshs. 600,000/- with interest being set at 3.5% flat rate, while the loan term was set at 24 months maximum. According to the said letter of offer, the loan sum was payable in 12 monthly instalments comprising the principle, interest and tracking fee of Kshs. 49,000/- the total sums of which are laid out therein. The letter further indicated that the subject motor vehicle would act as security and equally contained clauses pertaining to the consequences of default, including but not limited to the recovery and sale of the subject motor vehicle. The said letter was signed by both representatives of the Respondent and the Appellant, thus giving it a binding effect upon the parties.

21. It is apparent from the record that consequently, the subject motor vehicle was registered in the joint names of the parties herein, as seen in the copy of records tendered by the respective parties.

22. From a further re-examination of the pleadings and material on record, it is likewise not in dispute that the Appellant defaulted on the loan repayment, a fact which was admitted in his pleadings. The record shows that the Respondent therefore demanded repayment of the outstanding loan arrears from the Appellant, which going by the contents of the letter dated 12th April, 2022 and found on page 133 of the record of appeal, stood at Kshs. 77, 661.08. The said letter further indicated that in the absence of compliance within seven (7) days thereof, the Respondent would be at liberty to repossess the subject motor vehicle.

23. It is apparent from the record that the above turn of events triggered the repossession of the subject motor vehicle by the Respondent and subsequently, its sale by way of a public auction. More specifically, the record shows that the Respondent instructed Laar Auctioneers (the Auctioneers) to effect the repossession and sale thereof, vide a letter of instructions dated 20th April, 2022 and found on page 134 of the record of appeal.

24. It is also apparent from the record that subsequently, the Auctioneers in acting upon the Respondent's instructions, issued a proclamation of attachment and a notification of sale dated 24th April, 2022 to that effect, both contained on pages 136 to 137 of the record of appeal. From the court's re-examination of the record, it observed that service of the aforementioned documents was not denied by the Appellant. Likewise, it is apparent that the Appellant did not seek to challenge the validity of the said documents at that point in time.

25. Nevertheless, the record further shows that thereafter, the Auctioneers advertised the intended public auction of the subject motor vehicle vide the newspaper advertisement in the Standard Newspaper dated 20th May, 2022 and contained on page 49 of the record of appeal. Going by the record, it is apparent that the sale took place on 18th May, 2022 with the subject motor vehicle being purchased by the highest bidder, one Benjamin Ndirangu. This position is confirmed by the certificate of sale, memorandum of sale and auction report dated 18th May, 2022 found on pages 46 to 48 of the record of appeal.

26. Upon consideration of the foregoing factors and upon re-examination of the material and evidence tendered therefore, the court did not come across any credible material to support the Appellant's averment that the sale was founded on an illegality or irregularity for that matter. Moreover, the court did not come across any credible material to indicate that the Appellant had cleared the outstanding loan amounts in full, as at the time of sale of the subject motor vehicle in the public auction. While it is apparent that the Appellant tendered various statements of account pertaining to his accounts, there was no way of discerning or ascertaining the contents thereof.

27. It is the court's considered view that the Appellant would have no legal claim over the subject motor vehicle following its lawful and proper sale by the Respondent and purchase by Benjamin Ndirangu, by way of the public auction. The said purchaser would ordinarily be considered a bona fide purchaser for value in the circumstances.

28. In any event, as seen in the letter of offer which was executed by both parties herein, it is clear that the said parties had agreed to bind themselves to the terms contained therein. The long-standing legal principle is that a court of law cannot undertake the business of rewriting a valid contract entered into between parties, and that parties are naturally bound by the terms of their contractual arrangements. Such was the position held by the Court of Appeal in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2011] eKLR thus:

> " 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."

29. In view of all the foregoing circumstances and in the absence of any contrary evidence therefore, the court is satisfied that the learned adjudicator reasonably applied her mind to the pleadings and material placed before her and arrived at a proper finding. No credible material was tendered to support the averments that the sale undertaken by the Respondent was invalid or defective. Equally, the court is doubtful that the doctrine of detinue and conversion would become applicable in the present instance.

30. The court therefore supports the decision by the trial court and is satisfied that the trial court took into consideration all relevant material as well as the submissions placed before it, and cannot therefore be faulted for its finding. There is no reason for disturbance with the decision.

31. Consequently, the appeal is hereby dismissed for want of merit, with costs to the Respondent. The decision rendered by the trial court on 26th October 2022 in Nairobi SCCC No. E1366 of 2022 is hereby upheld.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Mulungo for the Appellant

No appearance for Respondent

Guyo - Court Assistant