



REPUBLIC OF KENYA



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**Wanjiku v Irungu (Civil Appeal E022 of 2024) [2025] KEHC 3907 (KLR)
(Commercial and Tax) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E022 OF 2024
BK NJOROGE, J
FEBRUARY 13, 2025**

BETWEEN

BETH WANJIKU APPELLANT

AND

JULIUS IRUNGU RESPONDENT

JUDGMENT

1. This Judgment arises out of a Judgment of the Small Claims Court delivered on 11/12/2023 by Honourable Habrovinah Nyamweya in Milimani Small Claims Case No. E6130 of 2023.
2. The Small Claims Court entered Judgment for the Respondent for Kshs.720,000/- plus costs and interest from the date of Judgment until payment in full. It dismissed the Appellant's Counter-Claim.

Background facts:

3. The dispute arises out of a sale of a motor vehicle between the Appellant and the Respondent.
4. The Respondent was the original Claimant and the buyer of the motor vehicle.
5. The Appellant was the original Respondent and the seller of the motor vehicle.
6. The parties entered into an agreement for sale of the motor vehicle dated 29/1/2022. The Respondent paid a deposit of Kshs.600,000/-. A further payment of Kshs.200,000/- was to be made within 90 days. Thereafter, the Respondent was to continue to pay the loan for the motor vehicle with Sidian Bank Limited at kshs.72,000/- per month, with effect from October, 2022.
7. The Respondent took possession of motor vehicle. He stated that he encountered many problems with the vehicle and did not make the repayments. The Appellant repossessed the motor vehicle. The Respondent cried foul citing a breach of the sale agreement.



8. The Respondent sued for refund of the deposit and monies paid arising out the breach of the agreement.
9. The Appellant Counter-claimed for a sum of Kshs.217,000/- on account of the unpaid loan by the Respondent, to Sidian Bank Ltd.
10. The learned Adjudicator delivered a Judgment, allowing the Respondent's claim and dismissing the Appellant's Counter-claim. It is this decision that has triggered this Appeal.
11. The appeal was disposed of by way of written submissions. The Respondent did not file any submissions in opposition to the Appeal.
12. What has concerned the Court as an issue to be tackled at the outset is whether there is a proper appeal before the Court.

Whether an Appeal can be filed out of time without leave?

13. The Court notes that alongside the Memorandum of Appeal dated 26/1/2024, the Appellant has filed a Notice of Motion dated 20/1/2024. It seeks the following orders.
 1. That this Honourable Court be pleased to grant the Appellant leave to file an appeal out of time against the Judgment of Hon. Habrovinah Nyamweya (RM) delivered on 11th December, 2023 in Milimani Small Claims Court Civil Case No. E6130 of 2023.
 2. That the cost of this application be provided for.
14. The Judgment of the Small Claims Court was delivered on 11th December, 2023. The Memorandum of Appeal was filed and uploaded in Court on 27/1/2024.
15. The Court notes that pursuant to Order 50 Rule 4, of the Civil Procedure Rules Cap 21 of the Law of Kenya, time stops running between 21st of December and the 13th of January the next year.
16. It would therefore follow that the Appeal was filed within time.
17. The Appellant has filed a Memorandum of Appeal that raises 4 grounds of appeal.
18. The Court frames 2 issues for determination as follows;
 - a. Whether the Appeal is meritorious
 - b. What reliefs lie from the Appeal?

The Appellant's case

19. The Appellant firstly submits that she was not granted a fair hearing. That she was condemned unheard. That the learned Adjudicator misinterpreted the terms of the contract.
20. She also submits that the Respondent did not prove any breach of contract. That the Respondent had not fully repaid the loan. That he cannot be said to have done equity before seeking equity.
21. It is further submitted that the learned Adjudicator misinterpreted the terms of the contract. That it was not the business of the Courts to rewrite the contracts between the parties. The Courts' duty was to interpret the contracts between the parties and enforce them. The Court was referred to Centurion Engineer and Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA, 1289 and DNK vKM [2021] eKLR.



22. Lastly, it was submitted that the learned Adjudicator erred in misunderstanding the facts of the case. That the learned Adjudicator should have found that it is the Respondent who breached the contract, by failing to repay the balance of the purchase price as well as the loan.
23. The Court is urged to allow the Appeal with costs.

Analysis

24. An Appeal to this Court from the Small Claims Court is pursuant to Section 38 of the *Small Claims Court Act*, which states as follows;

Appeal:

1. A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.
2. An appeal from any decision or order referred to in subsection (1) shall be final.
25. The Court proceeds to analyse the issues framed.

a. Whether the Appeal is meritorious

26. The Appellant submits that she was not granted a fair hearing that she was condemned unheard.
27. The Record of the proceedings before the learned Adjudicator shows that the matter proceeded under Section 30 of the *Small Claims Court Act*. It states as follows.

30. Proceeding by documents only

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court

28. Parties proceeded in this manner by agreement and filed their submissions. They were considered by the learned Adjudicator. This manner of proceeding with hearings is now common place before the Small Claims Court. The Court notes there was no objection by the Appellant to proceeding by documents only. This ground is therefore rejected.
29. The Appellant submits that the Court erred in interpreting the terms of the sale agreement contrary to their clear reading.
30. Clause 14 reads as follows;

“It Is Further Agreed if the purchaser fails to honour this agreement the vendor is at liberty to re-possess the motor vehicle and refund the amount paid by the purchaser less 20%. If the vendor fails to assist the transfer through TIMs Account once full paid and full repayment of loan he will refund the amount paid to the purchaser plus a penalty of 20%.”

31. The learned Adjudicator in her findings stated as follows:

“The parties herein according to the agreement that they had signed indicated that “If the purchaser fails to honour this agreement the vendor is at liberty to repossess the vehicle and refund the amount paid by the purchaser less 20%. If the vendor fails to assist the transfer through TIMS Account once full paid and full re-payment of loan he will refund the amount paid to the purchase plus a penalty of 20%.” Therefore, from the analysis the



Court therefore finds that the Respondent frustrated the Claimant from fulfilling his part of the contract by repossessing the motor vehicle..... That judgment is entered for an amount of kshs.600,000/- plus 20% of 6000,000/- making it a total of kshs.720,00/-.”

32. This Court agrees with the Appellant that the learned Adjudicator interpreted Clause 14 in a manner not intended by the parties. In doing so, the learned Adjudicator re-wrote the contract between the parties.

33. The decision of Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR) is applicable herein as follows;

“We have anxiously considered this appeal and the authorities cited by the appellants and the respondent. As it is a second appeal, we are obliged, by dint of section 361 (1) (a) of the *Criminal Procedure Code* to consider only issues of law. Where the two courts below have made concurrent findings of fact, we are further obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as Karingo v Republic [1982] KLR 213. In M’Riungu v Republic [1983] KLR 455, this Court was empathic that:

“[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

34. The manner in which the learned Adjudicator interpreted the contract is a matter of law and this Court is entitled to interfere. The decision was not supported by the facts presented before the learned Adjudicator.

35. The Court notes that the Appellant in her statement states that she repossessed the motor vehicle because the Respondent had changed the tyres and the battery before making full payment. The agreement does not set out this as a ground for repossession.

36. The Appellant did not demonstrate to the learned Adjudicator that the Respondent had defaulted on payments. No such evidence was adduced.

37. The learned Adjudicator reached the correct finding that the agreement had been frustrated by the Appellant. This was through the act of repossessing without notice and establishing the act of default.

38. From the evidence presented and the Judgment of the learned Adjudicator, the Respondent produced proof of payment of Kshs.600,000/-. To this Court that is the only monies that the Respondent was entitled to. The learned Adjudicator erred in awarding the Respondent more than that which he had paid.

39. In view of the above, the Court is of the view that observations based on non-repayment of the loan and the learned Adjudicator misunderstanding the facts of the case, call for examination and review of the facts. This is not what is contemplated under Section 38 of the *Small Claims Court Act*. Simply put the Court cannot proceed on a merit review of this Appeal based on the facts determined by the Small Claims Court.



b. What reliefs lie from the Appeal?

40. The Appeal succeeds partially. The Respondent is entitled to a refund of Kshs.600,000/- and not Kshs.720,000/-. The order for costs and interest as granted in the Small Claims Court will apply.
41. As to costs, the fair order is that each party bears its own costs of the Appeal.

Determination

42. The Appeal succeeds to the extent that the decree of the Small Claims Court in Milimani Small Claims Court Case Number E6130 of 2023 is set aside and replaced with a Decree awarding the Claimant a sum of Kenya Shillings Six Hundred Thousand (Kshs.600,000/=) with costs and interest as awarded in the Small Claims Court.
43. As for this Appeal, each party is to bear her/his own costs.
44. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

N/A for Mr. Kimotho for the Appellant

Mr. Moriti holding brief for Mr. Kimani for the Respondent

Court Assistant – Mr Luyai.

