



REPUBLIC OF KENYA



KENYA LAW
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**Ratemo v Okinyi & 2 others (Civil Appeal 104 of 2023)
[2025] KEHC 3446 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 104 OF 2023
TA ODERA, J
MARCH 12, 2025**

BETWEEN

JOSCAH KERUBO RATEMO APPLICANT

AND

ALLAN ROBERT OKINYI 1ST RESPONDENT

JARED OMBATA T/A HAZARA AUCTIONEER 2ND RESPONDENT

JOB ISAAC OBURE 3RD RESPONDENT

JUDGMENT

1. The appellant filed the appeal herein against the decision of Hon P.Mutai (P.M) dated 31.8.23.
2. The history of this matter is that the appellant and the respondent entered into a sale agreement dated 12.10.20 for motor vehicle registration number KAJ 397S. The agreed price was Kshs 1,050,000/= and the appellant paid Kshs400,000/= upon execution of the agreement. As per clause 3 (i) and (ii). The remaining balance of Kshs 650,000/= was to be paid in 2 instalments; Kshs 250,000/- was to be paid two months from the date of the agreement and the last one was to be paid two months after the first instalment.
3. It was a term of the said agreement in clause iv under the head “both parties have herein agreed further as follows” that incase of default the 1st respondent reserved the right to repossess the vehicle and the deposit shall not be refunded. Further that repossession charges shall be borne by the buyer. Also, at part III that the buyer shall take possession immediately. In clause ii of the same part, it is indicated that the buyer had inspected the vehicle and satisfied him that the vehicle was in a merchantable condition. At paragraph 2 line 3 of the agreement, it was agreed that the vehicle was sold on “as it is condition”. The agreement was duly executed by both parties.



4. The appellant paid Kshs 250,000/= leaving a balance of Kshs. 400,000/=which remains unpaid to date. Possession was to be handed over to the appellant upon executing the said agreement.
5. The 1st respondent then instructed the 2nd respondent to repossess the vehicle which he did. The vehicle was later sold to the 3rd respondent.
6. The appellant subsequently sued the 1st respondent in the lower court seeking return of the said vehicle or its value which she pegged at Kshs 2,800,000/= including Kshs 1,154,400/= which she spent for repairs of the vehicle. General damages for trespass or conversion and interest on Kshs 2,800,000/= @ 14 % per annum.
7. The trial court heard the case and upheld the repossession and resale of the vehicle on the grounds that the appellant was in default of payment of the balance Kshs. 400,000/= as at 12.2.21. Also, that the appellant had taken possession of the vehicle as per part ii (v) of the agreement and that parties are bound by their terms of contract and that a court of law cannot rewrite a contract between parties as was held by the Court of Appeal in the case of National Capital Co-operation Ltd vs Albert Mario Cordeiro Civil Appeal no. 274 of 2003 Nairobi.
8. The appellant faulted the learned trial magistrate for deciding the case against the weight of the evidence and also failing to appreciate that the agreement was not registered and thus the auctioneer could not proceed to conduct repossession based on it without a court order.
9. This is a first appellate court whose duty is to re-evaluate the entire evidence on record and arrive at its own conclusion bearing in mind that it had no opportunity to see and hear the witnesses during their testimonies in court as was held in the case of Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others [2013] eKLR,
10. I have carefully re-evaluated the entire evidence on record and the submissions by all the parties herein. The issues arising for determination are as follows:
 - a. Whether the appellant was in default of payment of the balance in the sum of Kshs 400,000-/=
 - b. Whether the repossession and sale were within the law
 - c. Whether the appellant is entitled to repair charges.
 - d. Whether the appellant is entitled to damages for trespass.
 - e. Whether the appellant is entitled to return of the vehicle or refund of the current value of the vehicle with interest.
11. On whether the appellant defaulted for failure to pay the balance in the sum of Kshs 400,000/=, it is not disputed that the parties entered into the agreement herein and that the appellant defaulted by failing to pay the last instalment in the sum of Kshs 400,000/= which was due on 12.2.21. The appellant testified that the same was not paid on time as the respondent delayed in giving her possession of the vehicle and hence the instalment was due on 31.3.21. However, looking at part II clause I of the agreement it indicates that the buyer took possession of the vehicle immediately upon execution of the agreement. The agreement is in plain and clear language and must be interpreted as it is. I agree with the trial magistrate that there was no evidence of delay in release of the vehicle. I find that the appellant was in default for failure to pay the Kshs. 400,000/= within the agreed time.
12. On whether the repossession was within the law, the parties agreed in part II clause v that incase the buyer defaulted the remedy of the seller was to repossess the vehicle. The appellant argued that the respondent did not have leave of the court to repossess the vehicle since the agreement was not



registered. Also, that the auctioneer did not comply with Section 23 (b) of the Auctioneers Act. The said Section provides that “A licensed auctioneer shall act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written contract” Also that Rule 12 (1) (b) of the auctioneer’s rules was not complied with as no inventory acknowledged by the appellant or certificate that she refused to sign were produced in the trial court. The appellant also argued that the list of bidders was also not produced. The appellant also averred that the auctioneer ought to have moved that court to obtain orders to proceed with the repossession and cited the case of; In Simon Muiruri Wanjohi v Resma Commercial Agencies & Another [2005] eKLR, the court held that “The 1st respondent took the law into his own hands and unlawfully took possession of the said motor vehicle from the appellant. In the event of breach of the agreement the 1st respondent was required to seek the intervention of the law and not use the law of the jungle to take away the appellants property --- the 1st respondent robbed the appellant of his motor vehicle.” The respondents argued that the auction was above board. In the case of African Merchant Assurance Co. Ltd v Hezron Getuma Onsongo [2019] KEHC 819 (KLR) it was held that ” 19. I find that the failure by the respondent to comply with the Auctioneers Rules marred the entire proclamation and he cannot therefore demand costs based on a defective and unlawful process.”.

13. The proclamation and the list of inventories herein indicate that the appellant refused to sign them but there is no certificate of the same by the auctioneer as required by Rule 12 (1) (b) of the auctioneers’ rules. The list of the bidders and their offers was also not produced in court. The said list would have enabled the court to compare the offers and determine whether the price offered by the purchaser was the best in the circumstances. It is trite law that if a seller of a movable property intends to have rights to repossess a vehicle without a court orders, then the agreement must be registered under the Movable Properties Security Rights Act 2017. Section 7 of the said Act provides that”.

(1)A security right may secure one or more obligations of any type, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating. (2)A security right may encumber— (a) any type of movable asset, whether tangible or intangible;(b) parts of assets and undivided rights in movable assets;(c) generic categories of movable assets; and(d)all of a grantor’s movable assets.

14. Though the agreement says that the 1st respondent had a right to repossess the vehicle upon default and the court cannot rewrite a contract between parties, an agreement must be within the law. Clause v of the agreement provides that in case of default the buyer shall not be entitled to a refund of the deposit and the seller shall be entitled to repossess vehicle. Repossession upon default in payment is within the right of a seller however he cannot have both a right to repossess and to retain the deposit. The said clause v of agreement is clearly unlawful and oppressive in as far as it states that the seller would also retain the deposit and also repossess the vehicle upon default as this would unjustly enrich him twice.
15. On whether the appellant is entitled to repair charges she pleaded that she spent Kshs. 1,154,400/= on repairs and the respondent’s case is that the vehicle was sold on “as it is basis” and thus the issue of repairs does not arise. Paragraph 2 of the agreement confirms the position espoused by the respondents. The appellant cannot therefore be heard to seek repair charges.
16. On whether the appellant is entitled to damages for trespass and conversation. I have already found that the repossession of the vehicle was unlawful. The actions of the 1st respondent of unlawfully taking away the vehicle from the appellant amounts to trespass. Conversion is willful interference with a chattel without belonging to another without any lawful justification. Trespass is a tort whose remedy is damages as the appellant suffered damage as a result therefore, she is entitled to damages. I find that the 1st and second respondents trespassed on the vehicle belonging to the appellant and converted it by way of sale to 3rd respondent. It is trite law that damages for trespass and conversion must be adequate considering the value of the good and injury done on them awards for comparable cases, inflation



factor etc. In the case of Real People Kenya Limited & another v Nyandega t/a Akmal Enterprises & another [2022] KEHC 2118 (KLR). The appellant was awarded general damages for Kshs 500,000/= for trespass. The said decision is persuasive and recent and I am persuaded by it. Taking into account the nature of the case, its circumstances, the age of the said Real people case, the inflation and all the necessary factors. I proceed to award general damages for trespass and conversion by sale at Kshs. 500,000/=.

17. On whether the vehicle can be returned to the appellant, I find that that it was sold to the 3rd respondent who is an innocent purchaser and it has already exchanged hands. The only remedy of the appellant lies on special damages.
18. On special damages, it is trite law that special damages must be specifically pleaded and strictly proved. The price was pleaded at Kshs 1,050, 000/= and this was not disputed and was supported by the agreement. Since I have already found that the sale was unlawful, I proceed to award will award the value of the vehicle as per the agreement at Kshs 1,050, 000/= with interest on the same at 14% p.a from 1.4.2021 when the repossession was commenced till payment in full.
19. On costs, it is trite law the costs follow event the appeal has partially succeeded. I proceed to award the appellant costs of this appeal at Kshs. 70,000/=.
20. The appellant proved her case in the lower court on a balance of probability.
21. In the upshot, I find that the learned trial magistrate erred in finding that the appellant failed to prove her case. I proceed to set aside the judgment of the lower court and substitute it with judgment in favour of the appellant against the 1st and 2nd respondents jointly and severally on the following terms:
 - a. The repossession sale of the motor vehicle herein is hereby declared to be unlawful.
 - b. The vehicle was sold on “as and it is basis” and thus the issue of repairs does not arise.
 - c. The 3rd respondent was an innocent purchaser for value and the vehicle has exchanged hands and thus orders of release of the vehicle cannot issued.
 - d. General damages for trespass in the sum of Kshs. 500,000/=.
 - e. Special damages in the sum of Kshs Kshs 1,050, 000/= and interest on the same @ 14% p.a from 1.4.2021 when the repossession commenced till payment in full.
 - e. Costs of the appeal in the sum of Kshs 70,000/= and also costs in the lower court.
 - f. Interest on (d) and(e) above at 14 % p.a from the date of this judgment till payment in full.

T. A ODERA

JUDGE

12.3.25

Delivered virtually Via Teams Platform on this 12th day of march 2025 in the presence of:

Miss Nduhukire - for 1st and 2nd respondents

Miss Ndemo - I hold brief for Ochoki for the appellant

Court Assistant - Oigo

Nduhukire:I seek 30 days stay and leave to appeal within 14 days

Ndemo: No objection.



Order: Granted.

T.A ODERA

JUDGE

12.3.25

