



**Titus Githinji Nderitu t/a Timau Ventures v Ng'ang'a & another (Civil Appeal E065 of 2023) [2025] KEHC 4871 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E065 OF 2023**

**TW OUYA, J**

**APRIL 24, 2025**

**BETWEEN**

**TITUS GITHINJI NDERITU T/A TIMAU VENTURES ..... APPELLANT**

**AND**

**ELIAS WANYOIKE NG'ANG'A ..... 1<sup>ST</sup> RESPONDENT**

**DUNCAN WAWERU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgement and decree of the Hon. O.M. Wanyaga (SRM) delivered on 21st December, 2023 in Thika CMCC No. 636 OF 2020)*

**JUDGMENT**

**Background**

1. This appeal emanates from the judgment delivered on 21.12.2023 by the lower Court in Thika CMCC No. 636 OF 2020 (hereinafter the lower Court suit). The lower Court suit was instituted via a plaint by Elias Wanyoike Ng'ang'a, the plaintiff in the lower court (hereinafter the 1<sup>st</sup> Respondent), as against Duncan Waweru, the 1<sup>st</sup> defendant in the lower court (hereinafter the 2<sup>nd</sup> Respondent) and Titus Githinji Nderitu t/a Timau Ventures, the 2<sup>nd</sup> Defendant in the lower court (hereinafter the Appellant) seeking inter alia a permanent injunction be issued to restrain the 2<sup>nd</sup> Respondent and Appellant, their agents or employees and or anybody else claiming under and or through them from re-possessing, selling, transferring and or interfering in whatever manner with the 1<sup>st</sup> Respondent's motor vehicle registration number KTWB 295G (hereinafter the suit motor) and that the suit motor vehicle be released to the 1<sup>st</sup> Respondent; that an order directing the 2<sup>nd</sup> Respondent to transfer the suit motor vehicle in favour of the 1<sup>st</sup> Respondent; in the alternative the Court does issue an order vesting ownership of the suit motor vehicle in favour of the 1<sup>st</sup> Respondent; loss of earnings of Kshs. 2,500 per day from 27.10.2020; interest on such damages above at Court's rate and for such period as the Court shall think fit; costs of the suit; and any other relief the Court may deem fit and just to grant.



2. It was averred that on or about the 02.12.2019 by way of an agreement the 1<sup>st</sup> Respondent purchased from the 2<sup>nd</sup> Respondent the suit motor vehicle at Kshs. 200,000 wherein upon execution, the former paid a total sum of Kshs. 170,000 to the latter and took possession of the suit vehicle. That the it was agreed, the balance would be paid in installments, to wit, the final installment of Kshs. 15,000 would be paid upon the effecting of a transfer of the suit motor vehicle in the 1<sup>st</sup> Respondent's favour. It was further averred that the 1<sup>st</sup> Respondent settled the installments as agreed however the 2<sup>nd</sup> Respondent became unavailable to effect the transfer. That on 27.10.2020, the Appellant who posed as a customer while the suit motor vehicle was in its ordinary course of use, took possession of the same for amounts owed to him by the 2<sup>nd</sup> Respondent on allegations that the latter had obtained a loan from him and offered the suit motor vehicle as security. It was averred that the Appellant despite being informed that the 2<sup>nd</sup> Respondent had sold the suit motor vehicle, he declined to release the same thereby occasioning the 1<sup>st</sup> Respondent loss to the tune of Kshs. 2,500 per day, being that the suit motor vehicle was his only source of income.
3. The Appellant filed a statement of defence denying the key averments in the plaint and concomitantly filed a counterclaim averring that on or about 08.07.2020, he advanced to the 2<sup>nd</sup> Respondent a loan facility to the tune of Kshs. 120,000 with the suit motor vehicle being availed as security. That the loan period was to be repaid within a month and in default the sum would attract interest at the rate of 30% per month until payment in full. It was further averred that the 2<sup>nd</sup> Respondent refused to settle the loan advanced, to wit, the Appellant claims a refund with interest.
4. Despite service, the 2<sup>nd</sup> Respondent failed and or opted not to file a defence in the matter and as a consequence interlocutory judgment was entered as against him on 06.11.2023.
5. The suit proceeded to full hearing, during which both the Appellant and 1<sup>st</sup> Respondent called evidence in support of their respective pleadings. In its judgment, the trial Court found in favour of the 1<sup>st</sup> Respondent by ordering that the 2<sup>nd</sup> Respondent transfer the suit motor vehicle in favour of the 1<sup>st</sup> Respondent; an order vesting ownership of the suit motor vehicle in favour of the 1<sup>st</sup> Respondent; damages for loss of use in respect of the suit motor vehicle in favour of the 1<sup>st</sup> Respondent to the tune of Kshs. 1,098,000 that the Appellant to hand over the logbook in respect of the suit to motor vehicle to the 1<sup>st</sup> Respondent and or advocate within twenty-one (21) days of the judgment; costs of the suit; and interest on awarded damages at Court's rate.

### **The Appeal**

6. Aggrieved with the outcome, the appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in his memorandum of appeal as itemized hereunder: -
  - “ 1. The learned Magistrate erred in law and fact in exercising his discretion injudiciously and arbitrarily so as to deny this matter a chance to be determined on merit.
  2. The learned Magistrate erred in law and fact in awarding loss of earnings in favour of the 1<sup>st</sup> Respondent without any legal and or evidential justification.
  3. The learned Magistrate erred in law and in fact in disregarding the Appellant's submissions and failing to properly analyse and consider the evidence before him thus arriving at an erroneous decision.
  4. The learned Magistrate erred in law and fact by awarding excessive loss of earnings when the same was not proved despite being pleaded.



5. The learned Magistrate erred in law and fact in failing to consider the pertinent issues raised by the Appellant in his counter-claim.
6. The learned Magistrate erred in law and fact in failing to appreciate the long-established principle on stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.” (sic)
7. In light of aforecaptioned grounds of appeal, the Appellant seeks before this Court, orders to the effect that: -
  - “ a) That the appeal be allowed with costs.
  - b) That the judgment of the subordinate Court made on 21.12.2023 and consequential orders be set aside with costs to the Appellant.
  - c) That the proceedings of the subordinate Court in Thika CMCC No. 636 of 2020 and all consequential orders therefrom be set aside and the Appellant be allowed to defend suit and his counterclaim be heard and determined on merit.” (sic)
8. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

### **Analysis**

9. The Court has considered the record of appeal, the pleadings and original record of the proceedings. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123. Further, it is trite that 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 vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on whether the trial Court was justified at arriving at the decision it did.
10. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties’ respective cases before the trial Court. See;- Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court had earlier outlined the gist of the respective parties’ pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court twirled on, the key query for determination is whether the trial Court’s findings on the issues falling for determination before it were well founded.
11. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself as follows; -

....“The Court has considered the evidence presented by the Plaintiff as well as submissions filed. This being a civil suit the standard of proof is on a balance of probabilities.

It is not in dispute that by the time the 2<sup>nd</sup> Defendant claims to have advanced a loan to the 1<sup>st</sup> Defendant, plaintiff had already purchased tuk tuk KTWB 295G. He had further insured it. The logbook was not in the 1<sup>st</sup> Defendant’s name. Had the 2<sup>nd</sup> Defendant conducted due



diligence, he would not have accepted to use the tuk tuk herein as security. ....In the Court view, at the time the 1<sup>st</sup> Defendant was advanced money by the 2<sup>nd</sup> Respondent, tuk tuk registration no. KTWB 295G wasn't available for use as security for the money advanced. The whole business of repossessing it was therefore unwarranted. It is the Court's finding that the said tuk tuk belongs to the plaintiff and the 2<sup>nd</sup> Defendant is ordered to surrender the logbook to the plaintiff within 21 days of this judgment.

Plaintiff has claimed loss of earnings at the rate of Kshs. 2,500 per day. No evidence of such has been given. It is however not in dispute that the same was used for commercial purposes. To the Court, it is reasonable to estimate net earnings at Kshs. 1,000/- per day. An order for release of the tuk tuk to the plaintiff was first issued on 15.12.2020. The Court will round off this period to be three years i.e 366x3 days. The Plaintiff is thus awarded Kshs. 1,098,000/- being damages for loss of user.

As a general rule, costs follow the event. Plaintiff will have the costs of this suit. Damages awarded will attract interest at Court rates from date of judgment until payment in full." (sic)

12. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments in the respective parties pleading lay with the parties themselves. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

13. However, before addressing the crux of the appeal, the 1<sup>st</sup> Respondent has challenged the competency of the appeal by arguing that the Appellant failed to include a certified copy of the decree being appealed whereas the record lacks pertinent documents availed before the trial Court that would hinder this Court to properly evaluate, analyse and consider the appeal before it. That on accord of the foregoing, the record of appeal is incomplete, to wit, the appeal ought to be struck out. The provisions of Order 42 Rule 13(4) of the Civil Procedure Rules (CPR), the decision in *Bwana Mohamed v Silvano Buko & 2 Others* [2015] eKLR and *Pharmacy & Poisons Board v Sipri Pharmaceuticals Limited & Another* [1998] eKLR were relied on in the forestated regard. The Appellant offered no riposte on the issue.
14. Thus, to address the 1<sup>st</sup> Respondent's complaint, the latter has rightly observed that the omission to file a certified copy of the decree is a technicality curable under Article 159 (2)(d) of *the Constitution*. Further, it can be garnered from the record that despite the appeal having come up for directions, the 1<sup>st</sup> Respondent did not raise any objection to the record being incomplete, as such it would appear that the objection has been raised late in the day and thus prejudicial to the Appellant if the Court were to



sustain the objection raised by the 1<sup>st</sup> Respondent, on the issue at this juncture. In any event, Order 42 Rule 13(4) of the CPR, cites documents that ought to be included in a record of appeal. And as rightly argued by the 1<sup>st</sup> Respondent, having perused the record of appeal, indeed it can be noted that a copy of the certified decree of the decision being appealed has not been included however the record contains a certified copy of the proceedings before the lower court and the judgement thereof. Order 42 Rule 13(4) of the CPR ought to be read alongside Order 21 Rule 4 and 7 of the CPR, that encapsulates the contents thereof of a judgment and decree.

15. That said, Order 42 Rule 13(4) (f) is not cloaked in mandatory terms, as it provided that the record of appeal ought to contain “the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal”. Keeping in mind the provisions of Order 21 Rule 4 & 7 of the CPR, the record before the Court contains a certified copy of the judgment of which is one of the mandatory documents that ought to be contained in the record of appeal. Further, and at the risk of repetition the 1<sup>st</sup> Respondent never raised issue with respect to the record of appeal and only just canvassed the same at the submissions stage.
16. Nevertheless, where the 1<sup>st</sup> Respondent’s contestation would succeed, concerns the omission of the evidentiary documents from the record of appeal. Having taken the liberty of perusing the certified proceedings before the trial Court, it can be noted therefrom that 1<sup>st</sup> Respondent adduced documents appearing in its list of documents dated 10.02.2021 as Exhibits before the Court. Similarly, the Appellant adduced four (4) documents in its list of documents as Exhibits before the trial Court. That said, a perusal of both the record of appeal before this Court and the original record before the trial Court, it would seem that the documents in question have not been availed for this Court’s benefit. While, this Court may be alive to the fact that the same may have been filed online vide the Case Tracking System (CTS) in Thika, it is notable that this appeal is being disposed of pursuant to Rapid Resultants Initiative (RRI), to wit, this Court only has the benefit of the record before it. And as is, no Supplementary Record of Appeal was filed in the matter. Indubitably, it would be arduous for this Court to judiciously address itself to the document evidentiary material in its judgment, where it does not have the benefit of the same.
17. Notwithstanding the wording of Order 42 Rule 13(4) (f), this Court reasonably believes that Rule 13(4)(e) of Order 42 is couched in mandatory terms and it is obligatory of the Appellant and by extension the parties to the appeal to include in the record of appeal or supplementary record of appeal the documentary material put in evidence before the trial Court. Consequently, the 1<sup>st</sup> Respondent contestation as to the competency of the appeal would appear merited on the latter front and accordingly an order to the effect of striking out of the appeal seems warranted.

#### **Determination**

18. Accordingly, the appeal is struck out with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>th</sup> DAY OF APRIL, 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellant/applicant.....ngeresa

For Respondent.....waithera

Court Assistant...Doreen Njue

