Al-Husnain Motors Limited & another v Kiprono (Civil Appeal 18 of 2023) [2025] KEHC 5755 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5755 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL 18 OF 2023

JRA WANANDA, J

MAY 9, 2025

(FORMERLY ELDORET HIGH COURT CIVIL APPEALNO. E187 OF 2022)

BETWEEN

AL-HUSNAIN MOTORS LIMITED .... 1ST APPELLANT

JAKACHA AUCTIONEERS .... 2ND APPELLANT

AND

ISAAC KIPKEMOI KIPRONO .... RESPONDENT

(Appeal against the Ruling of Hon. Carolyne R.T. Ateya - SRM, delivered on 10th January 2022 in Iten Senior Principal Magistrate's Court Civil Case No. 3 of 2018)

JUDGMENT

1. This Appeal arises from the Judgment delivered on 10/01/2022 in the said suit in which the Respondent (as Plaintiff) instituted a claim against the Appellants (as Defendants). The Plaint in the suit was filed on 15/03/2018 through Messrs Mathai Maina & Co. Advocates but which was later replaced by Messrs Manani, Lilan Mwetich & Co. Advocates which then filed the Amended Plaint dated 29/10/2019. The Judgment sought was in the following terms:

    a. An order of permanent injunction do issue against the Defendants whether by themselves, their servants and/or agents, jointly and severally from in any way interfering with the motor vehicle registration number KCG 698T Mazda Bongo.

    b. Declaration that the attachment was unlawful.

    c. Declaration that he is the bona fide purchaser of that motor vehicle registration number KCG 698T Mazda Bongo having cleared the entire consideration.

d. An order of specific performance against the 1st Defendant to surrender duly executed transfer Form and the original logbook pertaining to that motor vehicle registration number KCG 698T Mazda Bongo to the Respondent for registration.

e. Damages for loss of user of the said motor vehicle at the rate of Kshs 2,500/- per day from April 2018 until the date of transfer of the motor vehicle as per paragraph *(d)* above

f. Costs and interest.

g. Any other relief as the Court may deem fit and just to grant.

2. In the Amended Plaint, the Respondent pleaded that he entered into a Sale Agreement for the said motor vehicle with the 1st Appellant's agent, Al-Hyder Trading Company Limited (hereinafter referred to as "Al-Hyder"), at the consideration of Kshs 1,400,000/- which he settled in full. He pleaded that on 7/03/2016, he paid the agent a sum of Kshs 600,000/- (Kshs 500,000/- through the agent's a bank account at Kenya Commercial Bank (KCB), and Kshs 100,000/- in cash), and on 10/05/2016, he paid Kshs 700,000/- through the same KCB account. He contended further that the 1st Defendant then requested him to pay the balance directly to it through its bank account at Equity Bank, that he has been paying the agreed instalments of Kshs 70,000/- per month and by 15/03/2017, he had cleared the entire balance. It was his further contention that on 30/03/2017 he visited the agent for purposes of discussing transfer of the motor vehicle and during which the agent confirmed receipt of the full consideration and the Respondent then requested the agent to transfer the motor vehicle to the name of the Respondent's nominee and the Respondent executed the authority to do so. According to the Respondent however, on 12/03/2018, the 2nd Defendant (auctioneers) went and seized the motor vehicle, they produced a letter from the 1st Appellant dated 19/02/2018 instructing them to repossess the same and that the letter indicated that the Respondent was in arrears of Kshs 120,200/- and also owed Auctioneer's charges of Kshs 30,000/- plus a penalty of Kshs 501,120/-, aggregating to a total sum of Kshs 651,320/- which claims, according to the Respondent, were unjustified. He termed the seizure as illegal and unlawful and as particulars thereof, he pleaded that no proclamation had been made prior to the seizure, the entire consideration had been paid and that the grace period provided under the Auctioneers' Rules was not granted. The Respondent also pleaded that as a result of the Defendant's refusal to transfer the motor vehicle, the Respondent was unable to obtain public motor vehicle licences from the NTSA thus forcing the same to be put out of business since April 2018.

3. Default Judgment was initially entered and the matter proceeded to formal proof upon which the prayers made in the Plaint were granted as prayed. However, the Judgment was subsequently set aside and the Defendants given leave to defend the suit. Pursuant thereto, the Appellants, through Messrs Andambi & Co. Advocates filed the Amended Statement of Defence dated 8/11/2019. In the Defence, the Respondent's claims were generally denied and it was averred that although the Respondent executed an Agreement with the 1st Defendant, the Respondent defaulted in payment. It was denied that the Respondent signed the Agreement with Al-Hyder since the motor vehicle did not belong to Al-Hyder but to the 1st Defendant and that the Respondent forged a "completion chit" with Al-Hyder after realizing that he had defaulted.

4. Upon the demise of Mr. Andambi, the proprietor of Messrs Andambi & Co. Advocates, the conduct of the Appellants' case was taken over by Messrs Mukabane Kagunza Advocates who were themselves later also replaced by Messrs Kitiwa & Partners Advocates.

5. The matter then proceeded to full trial whereof the Respondent's (Plaintiff) testimony already on record pursuant to the formal proof conducted earlier was retained. On their part, the Appellants (as Defendants) called 1 witness of their own.

Respondent's (Plaintiff) testimony before the trial Court

6. PW1 was the Respondent. He stated that he lives in the United Kingdom and purchased the said motor vehicle for purposes of a matatu business. He stated that the initial price was Kshs 1,300,000/- but later, it was increased to Kshs 1,400,000/-, an arrangement which he agreed to. He reiterated the matters stated in the Plaint, including repeating the payments he claims to have made simultaneously to Al-Hyder and also to the 1st Appellant, and stated that he was not given a Receipt for the cash payment and that he did not also have the Agreement. He stated that after signing the Agreement, they were taken to a Lawyer for stamping but after waiting for 1 hour, he was told that the Lawyer would send him a copy, and that he collected the motor vehicle on 9/03/2016 from Al Hyder in Kisumu and drove it to Iten. He testified further that the balance at that time was Kshs 800,000/- which he was to pay in 1 year with a grace period of 1 month and he eventually paid in full. He referred to the instalments that he claims to have paid to the 1st Appellant and stated that he did so after he received a phone call from the 1st Appellant asking him pay to the 1st Appellant because the motor vehicle belonged to the 1st Defendant and also after receiving confirmation/approval from Al-Hyder. According to him, he later learnt that the proprietors of the two companies were cousins and worked closely with each other, but that even after fully paying the consideration, he was not given the logbook upon which he made inquiries in March 2017 and the 1st Appellant told him that he still owed Kshs 120,000/-. He stated that he then went back to Al-Hyder in Kisumu and upon informing them of the matter, Al-Hyder confirmed the full payment of Kshs 1,400,000/- and put it in writing in the presence of the Respondent's witness, that on the same day he spoke with the 1st Appellant and was told that in the 1st Appellant's records, the Respondent still had a balance of Kshs 120,000/- and that the records only reflected a deposit of Kshs 100,000/-. According to the Respondent, this deficit arose because Al-Hyder remitted Kshs 500,000/- and out of the 1st deposit, the 1st Defendant only received Kshs 50,000/- instead of Kshs 70,000/-., that he explained these facts to the 1st Defendant who phoned Al-Hyder, the two conversed in dialect that the Respondent did not understand and then the 1st Appellant told the Respondent that he would effect the transfer and give the Respondent the logbook and that the 1st Appellant requested for the name of the transferee and this was put in writing.

7. The Respondent however stated that despite this assurance, the transfer was never made and instead, the 1st Appellant sent him Auctioneers to repossess the motor vehicle, and that the motor vehicle is parked at his home since 12/04/2018 as no inspection had been done due to absence of the logbook. He testified that it is only the owner of a motor vehicle who can make a booking in the NTSA online system for inspection thereof, the motor vehicle is still in the name of the 1st Appellant, and that it was to be used as a matatu but he has as a result of the said matters, not been able to run the business. In cross-examination, he conceded that the 1st Appellant and Al-Hyder are two distinct companies, and that the Agreement was between him and Al-Hyder. He also reiterated that the 1st and 2nd deposits were paid to Al-Hyder but conceded that he had no written document from the 1st Appellant allowing Al-Hyder to sell the motor vehicle. In re-examination, he stated that he paid Al-Hyder Kshs 600,000/- and the 1st Appellant Kshs 730,000/- and that in total, he paid Kshs 1,400,000/-. He stated that to Al-Haida, he paid Kshs 500,000/- and Kshs 70,000/- through its KCB Account and Kshs 100,000/-. He stated further that when the 1st Appellant phoned him, they told him that Al-Hyder was selling the motor vehicle through the 1st Appellant, and that initially he thought that it is Al-Hyder which was to effect the transfer but upon getting the documents, he noted that it was the 1st Appellant.

Appellants' (Defendants) testimony before the trial Court

8. DW1 was Kashif Riaz who stated that he is the 1st Appellant's Manager in Kisumu. He confirmed that he is the one who sold the motor vehicle to the Respondent and denied that there is any relation between Al-Hyder and the 1st Appellant. He then adopted his Statement and stated that there was a Agreement between the 1st Appellant and the Respondent for sale of the motor vehicle and that the 1st Appellant was the seller, that the Agreement was entered into on 10/03/2016 at a sale price of Kshs 1,400,000/- and a deposit of Kshs 500,000/- was paid to the 1st Appellant. He alleged that there was a forged document by Al Hyder and he did not know how Al-Hyder got involved in the deal. In cross-examination, he conceded that he had not produced anything to show that he works for the 1st Defendant. He stated that he is the one who signed the Agreement, that although his name is not indicated therein, his Identity Card number is. He stated that he was given authority by directors of the 1st Appellant to sign the Agreement but conceded that he did not have the letter of authority in Court and also that he did not produce the Sale Agreement. He stated that he is a Sales person, he alleged that the "completion chit" was forged and that he reported the forgery to the police although he conceded that he did not produce any evidence from the police occurrence book.

9. He insisted that there is no relation between the two companies, and the two had no principal-agent relationship. He however conceded that Al-Hyder would once in a while buy motor vehicles from the 1st Appellant for sale by itself but that such relationship was stopped about 5 years before. According to him, the Respondent paid Kshs 1,285,000/- and the balance is due is therefore Kshs 120,000/-. He confirmed that the Respondent paid to the 1st Appellant a sum of Kshs 500,000/- in cash and the balance of Kshs 835,000/- was paid in instalments, and that Kshs 785,000/- was paid through Equity Bank. He confirmed that he received the Kshs 500,000/- as it was paid in his office in Kisumu. He denied that he received the Kshs 500,000/- from Al-Hyder and insisted that he received it from the Respondent. He further insisted that the balance owed to the 1st Appellant is Kshs 120,200/- without penalties, and which amount he insisted that the Respondent had to clear before the motor vehicle is transferred. In cross-examination, he stated that according to the Agreement, there is a 30% penalty for default as from 2016 to 2021, and that the additional penalty is Kshs 216,360/-.

Trial's Court Judgment

10. After the hearing, as aforesaid, the trial Court entered Judgment as prayed in the Plaint, on 10/01/2022, in favour of the Respondent, plus costs and interest:

Appeal

11. Dissatisfied with the Judgment, the Appellant filed this Appeal on 6/12/2022, premised on the following grounds:

    i. That the learned trial Magistrate erred in law and in fact in finding that the Respondent had proved his case on a balance of probabilities contrary to the evidence on record.

    ii. The learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case.

    iii. The learned trial Magistrate erred in law and in fact in finding that the Respondent had paid the whole consideration contrary to the evidence on record.

    iv. The learned trial Magistrate erred in law and fact and in finding that the attachment of the motor vehicle registration number KCG 698T Mazda Bongo was unlawful.

v. The learned trial Magistrate erred in law and fact and in law in making orders against the Applicant (sic) contrary to the evidence on record.

vi. The learned trial Magistrate erred in law and fact in failing to consider the Appellants' evidence and submissions on record.

Hearing of the Appeal

12. The Appeal was canvassed by way of written Submissions. The Appellants filed their Submissions dated 7/11/2024 while the Respondent's is dated 25/11/2024.

Appellants' Submissions

13. Counsel for the Appellants cited Section 107 of the *Evidence Act* and submitted that the burden of proof lies upon the party who asserts the existence of facts. He urged that in this case, the Respondent failed to prove full payment of the purchase price to the 1st Appellant as required under the Sale Agreement dated 9/03/2016, that the evidence clearly demonstrates that the Respondent only paid Kshs 1,285,000/- leaving a balance of Kshs 120,200 and that the Respondent was also obligated to pay penalties amounting to Kshs 216,360/- for default. He faulted the trial Court for allegedly shifting the burden of proof to the Appellants.

14. He submitted that DW1 confirmed receipt of the 1st deposit of Kshs 500,000/- on the same date of signing the Agreement, namely, 9/03/2016 directly from the Respondent and not from Al-Hyder. According to him therefore, the bank transfer produced by the Respondent dated 7/03/2016 showing payment to Al-Hyder was unsubstantiated as it does not even show the motor vehicle registration number and speculated that perhaps the Respondent had purchased a different motor vehicle from Al-Hyder on 7/03/2016. He also faulted the trial Magistrate for relying on what he described as an unverified "completion chit" that had been handwritten, not bearing the 1st Appellant's letter-head and which was confirmed to be forged. According to him, some of the payments were made to Al-Hyder, a separate entity that was not a party to the Agreement and that Al-Hyder was not joined to the suit because the final payments were made to the 1st Appellant in whose name the logbook was. He insisted that the 1st Appellant unequivocally denied any relationship with Al-Hyder nor that Al-Hyder was its agent. He cited the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR in which, he submitted, the Court of Appeal stated that Courts should base their findings on evidence presented and not on conjecture. He also cited the case of Agricultural Finance Corporation vs. Lengetia [1985] eKLR on the principle of "privity of contract". According to Counsel therefore, the attachment of the motor vehicle was carried out pursuant to the rights reserved under the Agreement and that the Respondent also had to pay the 30% penalty.

15. On the principle that parties are bound by the terms of their contracts, he cited the case of Centurion Engineers & Builders Limited v Kenya Bureau of Standards [2023] KLR and also the case of Family Bank Kenya Limited v Kamwara & Another [2022] eKLR. In conclusion, he denied that the 1st Appellant was in breach of the contract and reiterated that as a result of the default in payment, the 1st Appellant was not obligated to transfer ownership of the motor vehicle

Respondent's Submissions

16. On his part, Counsel for the Respondent submitted that the Respondent brought forth evidence of the payments he made which tallied with the full consideration agreed upon, and that although neither of the parties produced the Sale Agreement, existence of the contract and the consideration agreed upon was uncontested. He submitted further that the payments were made to the 1st Appellant and

Al-Hyder which was acting as the 1st Appellant's agent, a fact the Respondent only got to know when the 1st Appellant intervened and instructed that further payments be made to it. According to Counsel therefore, the Respondent discharged his burden of proof under Section 107 and 109 of the *Evidence Act*. He trashed the 1st Appellant's contention that the "completion chat" was forged or that the 1st payment of Kshs 500,000/- was paid to it in cash when the Receipt produced by the Respondent shows that it was deposited into Al-Hyder's bank account. According to Counsel therefore, the Appellants' acts of repossessing the motor vehicle without notice of the alleged default was unlawful and the Appellant also breached the contract when it did not effect transfer of the motor vehicle. He also pointed out that the 1st Appellant had willingly, after confirming that there was no outstanding arrears, released the motor vehicle as per instructions on the letter of authority to transfer then followed up to repossess it unlawfully. He then prayed that this Court, while upholding the trial Court's decision, to also alter the order of transfer to that of refund of the purchase price to the Respondent as it is no longer practical to get the motor vehicle at the state it originally was since the repossession in March 2018. He cited the case of Jobu Muthigani v Shadrack Macharia Ndekere & Another [2021] eKLR.

Determination

17. The duty of an appellate Court has been reiterated in a plethora of cases, including, for instance the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, in which the Court of Appeal pronounced itself in the following terms:

> " On a first Appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

18. The issue that arises for determination in this Appeal, is "whether the trial Court properly entered Judgment in favour of the Respondent by declaring the Respondent the bona fide purchaser of the motor vehicle the subject hereof, by declaring the repossession thereof unlawful, and by ordering the 1st Appellant to surrender transfer documents and the log-book to the Respondent."

19. In this matter, the parties have presented conflicting versions of what really transpired during the transaction the subject hereof. There is conflicting evidence on the identity of the party who contracted as the vendor, the identity of the party who received the purchase price, and the manner in which the payments were made. Fortunately, although the Sale Agreement was not produced, there is unanimity that a contract for the indeed sale existed and that the purchase price was Kshs 1,400,000/-. However, after studying the pleadings, the testimonies given and the proceedings generally, like the trial Magistrate, I, too, am constrained to believe the Respondent on a balance of probabilities, rather than the 1st Appellant.

20. I reach the above finding for various reasons. First, the Appellant's witness (DW1) initially denied any relationship of any kind with Al-Hyder. In cross-examination, however, he conceded that indeed the 1st Appellant had some commercial dealings with Al-Hyder of the nature that Al-Hyder would purchase motor vehicles from the 1st Appellant and sell on its own. Although he claimed, without any evidence, that this arrangement had since been stopped, this admission lends credence to the Respondent's claim that the two companies, being in the same line of business, had close trading relationship with each other. In fact, according to the Respondent, he later learnt that the proprietors of the two companies were cousins. He was not cross-examined on this allegation and the 1st Appellant's witness said nothing about it. Some level of nexus was therefore established between the two companies.

21. Secondly, the Respondent testified that after all along dealing with Al-Hyder, one day "out of the blue", he received a phone call from the 1st Appellant instructing him to henceforth pay the further or remaining instalments directly to the 1st Appellant. This narrative was not controverted. It is therefore evident that the 1st Appellant was all along fully aware of the Respondent's initial dealings with Al-Hyder, including the payments already made to Al-Hyder. It has not been alleged that at this point in time, the 1st Appellant even hinted that it had any problem with the deposits or payments already received to the Respondent. This lends credence to the Respondent's testimony that the 1st Appellant and the Al-Hyder were working as Principal-Agent.

22. There is also no dispute that the Respondent was given possession of the motor vehicle in March 2016 before full payment and that only the logbook was to be released to him and transfer effected upon full payment. As held above, the 1st Appellant must have been aware that the initial deposits were paid to Al-Hyder. Why then did the 1st Appellant not intervene at this early stage on the ground of alleged non-payment or non-receipt of the deposits?.

23. Regarding payment of the deposit made by the Respondent, although according to the 1st Appellant's witness (DW1), the portion of Kshs 500,000/- paid by the Respondent on 7/03/2016, was received by DW1 in cash on behalf of the 1st Appellant, this statement was contradicted by the Respondent's production of a bank slip demonstrating, and vindicating the Respondent, that the said amount was, in fact, deposited in a bank account at Kenya Commercial Bank operated in the name of Al-Hyder. It is telling that DW1, despite alleging that the said amount was paid to him in cash, did not produce a copy of any acknowledgment or duplicate/counterpart Receipt that he issued or retained, if any. Is he saying that he did not retain anything to confirm receipt of the cash? Did he not require such evidence of the cash payment at least for company records and even for tax payment purposes? Highly unlikely. Did he therefore opt not to produce such acknowledgment note or counterpart Receipt because it would have contradicted his narrative that it was paid in cash and in the name of Al-Hyder?

24. Again, if indeed, the vendor was exclusively the 1st Appellant, how come the Respondent was given Al-Hyder's bank account to deposit the funds?

25. There is also the non-production of the Sale Agreement in evidence. The Respondent explained that after he signed the Agreement, the same was taken to a Lawyer for "stamping" and that after waiting for the copy for about 1 hour on the material date, he finally left after he was promised that a copy would be sent to him. According to him, despite repeated inquiries, he has to date not been given such copy. On his part, DW1 confirmed that indeed a Sale Agreement was executed by the Respondent and that he has the same in his possession and is 9/03/2016. This, again, corroborates the Respondent's testimony that a Sale Agreement was indeed executed. DW1 did not deny or challenge the Respondent's claim that a copy was never supplied to him. He also did not offer any explanation why, despite no doubt appreciating the crucial role of the Sale Agreement in the case, he and his legal team still deemed it fit not to produce it in evidence. Would it perhaps have shown who the real vendor was?

26. To the above, I may also add that although DW1 testified that he worked for the 1st Appellant, and not Al-Hyder, he did not produce any written evidence to prove this allegation. Since he confirms to have been the one who sold the motor vehicle to the Respondent and since according to the Respondent, DW1 was at all times working for Al-Hyder and not the 1st Appellant, I believe it was important to clear the air over this confusion. The easiest way "to clear this air" would have been for DW1 to produce evidence such as a letter of employment or even a pay-slip or any other evidence of that nature to show who his employer was. Again, it his wisdom, he never saw it fit to produce any such evidence, and thereby leaving me with a lot of doubts over the truthfulness of his testimony.

27. DW1 also claimed that the "completion chit" produced by the Respondent and written in the confirming full payment of the purchase price, was forged. When asked in cross-examination, whether he reported the alleged forgery to the police, he responded that, yes, he did so. He however conceded that he that he did not produce any evidence from the police occurrence book to demonstrate that indeed, he so reported. Again, the question is; why did not find it fit to produce such crucial evidence in his possession?

28. On the grounds of the failure by the Appellants to produce crucial evidence exclusively in their possession, as demonstrated above, the Court is entitled to draw an adverse inference. For this principle, I cite the decision of Odunga J (as he then was), in the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, in which, while following the earlier decision of Mabeya J, made in Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR, he remarked as follows:

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

29. In view of the foregoing, I find no merit in the Appellant's grievance that the trial Court shifted the burden of proof to the Appellants.

30. For the reasons enumerated above, I have formed the impression that the Respondent came out as a truthful and credible witness. The Appellant's witness, DW1, on the other hand, appeared outright evasive in his answers, and selective with information. I therefore find no fault with the trial Magistrate for believing the account given by the Respondent.

31. Having found as above, I agree that it was a significant blunder for the Respondent to have failed to join the said Al-Hyder as a co-Defendant in the suit as Al-Hyder was no doubt a key cog in the transaction having played a crucial part in the whole saga as there was lack of clarity on whether the vendor was the 1st Appellant or Al-Hyder. The absence of Al-Hyder in the suit contributed to the complications in unravelling the truth in this case and in appropriate cases, the suit could even have been dismissed on that ground alone. Nothing at all stopped the Respondent from joining Al-Hyder. To this end, I draw the Respondent's attention to the provisions of Order 1 Rule 7 of the Civil Procedure Rules, which provides as follows:

> " where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

32. The Respondent also cannot on his part, also escape some blame for very casually conducting the transaction. First, he made some payments in cash but which he did not even demand to be given a Receipt or any kind of written acknowledgment. Even riskier, he entered into the transaction and started making payments without even conducting a search to ascertain or verify the registered owner of the motor vehicle he was purchasing. When phoned by the 1st Appellant and instructed to henceforth start making payments to the 1st Appellant after making the initial payments to Al-Hyder,

he never bothered to demand for written instructions before complying. Further, although he signed a Sale Agreement, he does not seem to have bothered to aggressively demand for a copy for his records. Either the Respondent was too naïve or was just too trusting. With all these instances of lack of care and shocking lowering of guard, he dangerously exposed himself to the possibility of any uncouth person easily taking advantage of him. He must learn to employ caution in his future commercial dealings or ss they say in street language, "next time atagongwa big time" and the Courts may not always come to his aid to save him from his self-created dungeon.

33. Before I pen-off, I refer to the invitation by the Respondent's Counsel to this Court to the effect that, while upholding the trial Court's decision, this Court should also alter the part of the Judgment ordering the 1st Appellant to transfer of the motor vehicle to the Respondent to one ordering the 1st Appellant, to instead, refund the purchase price to the Respondent. The reason given for this prayer is that it is no longer likely to get the motor vehicle at the state it originally was since the repossession conducted way back in March 2018. Although the basis of this prayer is understandable, in my view, in the circumstances of this case, it will not be justiciable to make such an substantive alteration to the Judgment. First, making such an alteration may sound whimsical as the Respondent did not file a cross-Appeal of its own to urge such alteration. Secondly, the prayer has been raised at the late stage of Submissions and the Appellants will not have a chance to respond to it. Thirdly, from his own testimony, the Respondent stated that was given possession of the motor vehicle in March 2016. On the other hand, the trial before the trial Magistrate was conducted between March 2019 and September 2021. This therefore means that by the time the trial commenced in March 2019, the motor vehicle had already been under the Respondent's possession for about 2 years before it was repossessed in March 2018. The Respondent therefore had the opportunity to apply for leave to amend his Plaint to include the prayer for refund before the trial Court as an issue for determination. Having not done so, making the alteration at this appellate stage will be akin to this Court usurping the trial Court's mandate. Fourthly, the Respondent having failed to join the said Al-Hyder in the suit, there is no material before the Court to determine whether Al-Hyder actually remitted to the 1st Appellant any of the portion of the funds paid to it as purchase price. I also note that although the Respondent made a claim for damages before the trial Court, he never canvassed that prayer at the trial.

Final Orders

34. The upshot of my findings above is that this Appeal is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025

....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Chumba h/b for Kitiwa for the Appellants

Ms. Cheruto for the Respondent

Court Assistant: Edwin Lotieng