Equity Kenya Limited v Njenga (Civil Appeal E059 of 2024)
[2025] KEHC 7073 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7073 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E059 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

EQUITY KENYA LIMITED ..... APPELLANT

AND

PAULINE WANJIKU NJENGA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. Milimu (SRM) delivered on 26th February 2024 in Thika CMCC No. E162 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. E162 of 2022 whereby the trial court found in favour of the respondent as against the appellant and made a declaration that the appellant's action of detaining the logbook of motor vehicle KAU 205B was unlawful and awarded her damages in the sum of Kshs. 4,680,000/-. The court further ordered the appellant to replace the logbook in respect of motor vehicle KAU 205B and release it to the respondent at its own costs within 30 days of the delivery of the judgment.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 10 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in fact by failing to acknowledge that the respondent had no locus standi to institute the suit.

    b. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent's suit offends the maxim of res judicata.

    c. The learned trial magistrate erred in law and in fact by failing to direct the respondent to avail the registered owner of the suit motor vehicle.

d. The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant facilitated the process of replacing the logbook but the endeavor was frustrated by the respondent when she failed to avail the registered owner of the logbook.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that, the respondent has never been the registered owner of motor vehicle registration number KAU 205B. The registered owner is one Ann Wangari Gitonga. The appellant submits that it produced a motor vehicle sale agreement showing that the respondent bought the motor vehicle from Samuel Ndungu Mugure.

5. The appellant refers to the case of Daykio Plantations Limited vs National Bank of Kenya Limited & 2 Others (2019) eKLR and submits that the respondent brought the suit in the lower court in her capacity as the owner of the suit motor vehicle. The appellant argues that the respondent lacked the standing to bring the suit without joining the registered owner of the motor vehicle.

6. The appellant submits that there was a previous suit being Thika CMCC No. 165 of 2019 Pauline Wanjiku Njenga vs Equity Bank Limited filed on 19th March 2019 whereby the respondent sought for the orders of an injunction against it and compensation of Kshs. 5,000/- per day for the period the motor vehicle had not earned income until full payment. The appellant submits that the suit was struck out on 5th August 2020.

7. The appellant submits that the respondent then filed another suit in the lower court seeking similar orders. Thus, the appellant argues that the suit in the lower court was res judicata pursuant to Section 7 of the *Civil Procedure Act*. To support its contentions, the appellant relies on the case of Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR.

8. The appellant submits that the respondent testified that she bought the motor vehicle from Samuel Ndungu Mugure. Further, the agreement provides in Clause 5 that transfer would be done "immediately after the payment of purchase price in full". The agreement was executed on 16/12/2013 but no transfer was done in the name of the respondent. on 19/3/2015, the motor vehicle was used as security for a loan with the log book still in the name of Anne Wangari Gitonga.

9. The appellant submits that from the correspondence by both parties, there was no communication between its representatives and the respondent on the loss of the original log book and the process of acquiring a new one. The respondent ought to have effected the transfer after she finalized her loan repayments in the year 2016. However the attached correspondences are dated 2019, three years after the respondent settled the loan.

10. The appellant submits that DW1 testified that they began the process of replacing the log book in the year 2019 after the respondent requested for the same. The appellant further submits that the transfer could not go through unless the registered owner was availed and when they requested her to avail the owner, she failed to do the same. Thus, equity does not aid the indolent. The appellant argues that the respondent frustrated their efforts in procuring a new log book for the suit motor vehicle.

11. The appellant relies on Section 6(6) of the *Traffic Act* and submits that it initiated the process of renewing the misplaced log book by reporting the loss of the same at Thika Police Station. The police abstract however indicated the information of the registered owner who was required to be present while applying for a duplicate log book which the respondent failed to do. Thus the appellant argues

that the respondent had a part to play to enable it fulfil its obligation in the replacement of the lost log book.

12. The appellant submits that although the respondent claims that she could not use the motor vehicle since the year 2017 and is entitled to compensation for loss of user, she cannot claim for damages by alleging that she does not have any liability in the case. The appellant argues that most of the loss incurred by the respondent was as a result of her indolence and nonchalant attitude.

13. The appellant relies on the case of Jackson Mwabili vs Peterson Mateli [2020] eKLR and submits that the learned trial magistrate applied the wrong principles of law when awarding Kshs. 4,680,000/- by failing to consider all the relevant factors it presented. Further, the respondent did not dispute the claim that it requested for the registered owner to be availed for purposes of registering and transferring the log book.

14. The appellant argues that the amount awarded is inordinately high and the same should be mitigated to allow a shorter period of about six months.

The Respondent's Submissions

15. The respondent refers to the case of Nancy Ayiemba Ngaira vs Abdi Ali C.A No. 107/2008 [2010] eKLR and submits that from the conduct of the appellant agreeing to advance the loan to her using the log book as security despite not being the registered owner shows that she had some ownership rights to the motor vehicle. The respondent submits that she purchased the motor vehicle, was in possession of it and was using it for business thus she had both beneficial and possessory ownership over the motor vehicle. She further submits that she instituted the suit after the appellant failed to release the log book after she had fully repaid the loan which breach lead her to the loss of income, difficulty in disposing the subject motor vehicle or even securing another loan to boost her business.

16. The respondent submits that the suit in Thika CMCC No. 165 of 2019 was struck out without parties ever being heard on issues raised and the matter fully and finally determined on merit. The suit was struck out on technical issues and not on merit and thus the suit in the lower court is not res judicata pursuant to Section 7 of the *Civil Procedure Act*.

17. The respondent argues that the loan agreement was between her and the appellant. The appellant's claim that the logbook was misplaced in its custody is a clear breach of the duty of care it had towards her log book. Thus, by losing the log book, the respondent argues that she was entitled to indemnity for any loss and damage as a result of her inability to use the subject motor vehicle. The respondent refers to the case of Karak Brothers Company Ltd vs Burden [1972] All ER 1210 and submits that the appellant had a duty of care in ensuring the customer's documents were kept safe. The appellant admitted to having misplaced the log book and hence did not release it even after she had cleared the loan.

18. The respondent submits that the issue of producing the registered owner and replacing the missing log book lay solely on the appellant. The respondent argues that the appellant is trying to pin the blame for the breach of the agreement upon her and an attempt to excuse its acts of negligence towards her logbook.

19. The respondent submits that the award for loss of user is sufficient and not excessive as it was calculated based on the loss of income she suffered. Further, the respondent submits that she cannot dispose of the motor vehicle due to the missing log book. Additionally, even after the appellant knew that it had lost her log book, it did not take the necessary steps to replace the log book but instead watched her suffer loss of income whilst blaming her for its breach of duty of care.

20. The respondent submits that the trial court awarded damages from the period of March 2019 to the period of March 2022 when the suit was instituted. Thus, the respondent argues that the trial court magistrate was very lenient and reasonable to the appellant when awarding loss of user damages.

Issues for determination

21. The main issues for determination are:-

    a. Whether the respondent had locus standi to institute the suit in Thika CMCC No. E162 of 2022.

    b. Whether the suit in Thika CMCC No. E162 of 2022 was res judicata.

    c. Whether the appellant breached the loan agreement.

    d. Whether the award of loss of user was manifestly excessive.

The Law

22. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..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. 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 into account of particular circumstances or probabilities materially to estimate the evidence."

23. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> 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.

24. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the respondent had locus standi to institute the suit in Thika CMCC No. E162 of 2022.

25. The appellant challenges the respondent's locus standi to have brought the suit in the lower court.

26. The court in Law Society of Kenya vs Commissioner of Lands & Others [2001] eKLR held as follows on the issue of locus standi:-

> Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law. Further in the case of Alfred Njau & Others vs City Council of Nairobi [1982] KAR 229, the court also held that:-
>
> The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.

27. It is clear that locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritious case, he cannot be heard because of that.

28. In the instant case it is not disputed that the appellant entered into a loan agreement dated 17/12/2013 with the respondent where the appellant was to advance to the respondent a loan of Kshs. 500,000/- for the purchase of motor vehicle KAU 205B. The respondent offered the log book of the said motor vehicle as security of the loan on condition that the appellant would return the log book upon the respondent clearing the loan amount. The respondent instituted the suit in the lower court on the grounds that the appellant had breached the terms of the loan agreement. Therefore, it is evident that the main issue at hand is the violation of the loan agreement between the appellant and the respondent. The magistrate opined that the ownership of motor vehicle registration number KAU 205B was secondary to the matter in the suit before her. I find that reasoning correct was based on the facts of the case. Accordingly, as a party to the loan agreement, the respondent had the requisite locus standi to institute the suit in the lower court.

Whether the suit in Thika CMCC No. E162 of 2022 was res judicata.

29. The appellant argues the matter in the lower court is res judicata as the respondent had filed an earlier suit being Thika CMCC No. 165 of 2019 Pauline Wanjiku Njenga vs Equity Bank Limited seeking for orders of an injunction and compensation of Kshs. 5,000/- per day for the period the suit motor vehicle had not been hired until payment in full. The appellant argues that the suit was struck out and therefore the subsequent suit filed by the respondent was res judicata.

30. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act*. It provides:-

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which issue has been subsequently raised, and has been heard and finally decided by such court.

31. The Court of Appeal in The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR held:-

> For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That the former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

32. From the foregoing, it is clear that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

33. The issue then arises as to whether a suit amounts to res judicata when the initial suit was struck out by the court. This principle was addressed in the case of Enock Kiaro Muhamnji vs Hamid Abdalla Mbarak [2013] eKLR where the court held:-

It is true, as argued by the applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.

It is therefore incumbent that when a court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck out, the court should look at the circumstances of each case to arrive at a decision.

For me to determine if the current suit is res judicata, the only question that I have to ask myself is whether the issues which were before the lower court between the plaintiff and the defendant herein were determined by the court.

34. In the instant case, the suit in Thika CMCC No. 165 of 2019 was struck out on the basis of defective pleadings. The trial court in the said matter did not hear the matter on its merits and no final determination was made on the merits. Thus, the doctrine of res judicata does not apply as the issues in the previous suit were not heard and determined to finality by a competent court.

Whether the appellant breached the loan agreement.

35. From the record, the appellant conceded that it entered into a loan agreement with the respondent whereby the appellant would advance Kshs. 500,000/- and the respondent would deposit the log book of motor vehicle registration number KAU 205B as security for the loan. Further, upon the respondent repaying the loan amount, the appellant would release the security which was a logbook herein. The respondent cleared the loan in the year 2016 but the appellant failed to release the log book to her on the basis that it was lost and that they could not replace it as the respondent did not avail the registered owner of the motor vehicle.

36. I have further perused the record and noted that the appellant blames the respondent for failure to replace the log book claiming that she was not the registered owner of the suit vehicle and further she did not avail the registered owner for purposes of replacing it. From the onset, it is clear that the appellant when entering into a loan agreement with the respondent was fully aware that the suit motor vehicle was not registered in the respondent's name. The log book she deposited with the bank bore the name Ann Wangari but the appellant did not ask for the said owner to be brought before them and neither did they decline to use the log book as security or hold the loan for the reason that the log book was in the name of Ann Wangari. The appellant accepted the sale agreement the respondent provided to them and held the log book as collateral for the loan that was advanced to her. From the conduct of

the bank, it is not in dispute that the bank conceded to the respondent's beneficial ownership of the suit motor vehicle before accepting it as collateral.

37. Upon the respondent clearing the loan in 2016, the appellant did not release the logbook to the respondent. However, the appellant through their witness DW1 conceded that they had misplaced the log book. The witness stated that they had reported it missing at Thika Police Station and produced a police abstract to that effect. Looking at the police abstract, the name on the document is that of Ann Wangari Gitonga the registered owner whose address was given therein. It is noted that the name of the appellant bank was not included in the abstract and neither was that of the registered owner. Additionally, the appellant's witness on cross examination testified that he could not confirm whether the said Anne Wangari went to the police station to report loss of the log book. It is clear that the log book was placed in the safe custody of the appellant and as such, the appellant owed a duty of care to the respondent to keep it in safe custody. The appellant said that it is the bank that reported the loss of the log book. The bank ought to have communicated to the respondent of the loss of the log book even before they applied for replacement. The failure to do that was a breach of duty of contract by the bank. The bank did not take the necessary steps to inform the respondent once they discovered that they had misplaced it and proceeding to take the steps in replacing it with a duplicate. Instead the appellant blamed the respondent for being indolent and frustrating the process of obtaining a duplicate by not availing the registered owner. It is therefore my considered view that the appellant breached the terms of the loan agreement.

Did the Respondent Mitigate her loss?

38. He appellant raised the issue of the respondent having failed to mitigate her loss. It is not in dispute that the logbook the respondent presented as a collateral was not in her name but the bank gladly accepted it without bothering to call the owner of the vehicle or to demand that the vehicle be transferred to the name of the borrower before advancing the loan. This omission led to the bank breaching the terms of the agreement upon loss of the logbook.

39. The respondent did not deny that she did not vail the registered owner of the vehicle for purpose of issue of a new log book which was a legal requirement. Had she taken this responsibility, it would have gone a long way in mitigating her loss. The replacement of the logbook would have taken a shorter period and reduced the loss incurred by her. Considering that the respondent was incurring expenses of hiring transport every day for the period she could not use her vehicle due to the missing logbook, did she take steps to follow up the issue of replacement of the logbook through obtaining a police abstract and pursuing the issue with National Transport and Safety Authority (NTSA) this would have been another reasonable action of mitigating loss. The respondent did not plead any loss mitigation of give any evidence to that effect.

40. The principle of loss mitigation is a common law principle applied in civil cases. It was held in the case of Mombasa H.C. Civil suit No.137 of 2006 that it is the duty of the plaintiff to take all reasonable steps to mitigate loss consequent upon the wrongful act. This duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best as he may, not only in his own interest but also in the interest of the defendant.

41. In this case, what was reasonable for the respondent to do? The respondent would have availed the said Anne Wangari who was unknown by the bank but know to the 2nd respondent and present her to NTSA for replacement of a logbook, among other things. The respondent failed to mitigate her loss and waited to claim compensation or expenses of hiring transport after several years. This indolent act of the respondent ought to have been take into consideration by the magistrate in awarding damages.

42. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

43. Similarly in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

44. In the instant case, the appellant faults the court below for awarding excessive damages for loss of user by applying wrong principles and urged the court to award loss for a period of six months. The court below awarded compensation thus:

> 5000 x 52 weeks x 6 days X 3 years = KSh.4,680,000. In my considered view, the damages awarded for three years were excessive. Had the respondent mitigated her loss by joining hands with the appellant to follow up replacement of the logbook, it would not have taken more than six (6) months to replace the said logbook. Instead, the respondent was indolent and did nothing about it.

45. In my considered view, the respondent ought to have been awarded damages of a period of not more than one (1) year. She produced a few receipts of the year 2014, the year that she borrowed the loan. This raise doubt as to whether the plaintiff was using the vehicle in 2015 – 2016 before she cleared the loan. Had she been using the vehicle, it would have been expected that the respondent would have produced receipts for the years after clearing of the loan.

46. That notwithstanding, I hereby award damages for a period of one year after clearing of the loan and forwarding correspondence of the parties on the loss of the logbook for reason given in the aforementioned paragraphs.

KSh.5000 X 6 days X 36 weeks = 1,080,000/=

The damage award by the magistrate of KSh.4,680,000 /= are hereby set aside.

47. This court awards the respondent damages for loss of user of Sh.1,080,000/=

48. I find this appeal partly successful and it is hereby allowed.

49. Each party to meet its own costs of this appeal.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE