Equity Bank of Kenya Limited v Mugenya & another (Civil Appeal 19 of 2022) [2025] KEHC 5979 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 19 OF 2022

RK LIMO, J

MAY 14, 2025

BETWEEN

EQUITY BANK OF KENYA LIMITED ..... APPELLANT

AND

FREDRICK OCHIENG MUGENYA ..... 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

(Appeal against the judgment delivered on 6/6/22 by Hon. S.K. Mutai (SPM) in Kitale CMCC No.129 of 2012.)

JUDGMENT

1. This is an appeal against the judgment delivered on 6/6/22 by Hon. S.K. Mutai (SPM) in Kitale CMCC No.129 of 2012.

2. In that suit, the appellant sued the 1st respondent for breach of contract. The appellant pleaded that the 1st respondent had defaulted in repayment of a loan facility and sought judgment for the sum of Kshs.589,176.40 and interests of 24% per annum thereon.

3. The 1st respondent on the other hand denied the sum claimed pleading that the appellant repossessed his motor vehicle Reg No.KAX 8X3C and Isuzu NQR 66R and sold it at a throw away price of Kshs.1,300,000/- without relevant notice to him.

4. He further pleaded that the appellant also repossessed his other motor vehicle Reg No. KAV 5X6P and sold it at Kshs.1,500,000/- without accounting for it.

5. He also blamed the 2nd respondent who he pleaded had insured his motor vehicle for failing to bail him out after his motor vehicle Reg No.KAX 8X3C was involved in accident. He averred that he

incurred substantive amount of Kshs.983,850/- to repair the motor vehicle (KAX 8X3C) and a further Kshs.970,000/- to buy parts and replace them.

6. He counter claimed for value of motor vehicle Reg No. KAV 5X6P of Kshs.1,500,000/- or restoration of the motor vehicle to him. He further counter claims for restitution of motor vehicle KAX 8X3C or its value which he assessed at Kshs.2,400,000/-.

7. He further sought general damages for defamation (being referred to CRB) and mental anguish.

8. He also sought damages for loss of user totaling Kshs.2,315,200/-.

9. The trial court upon trial found no merit in the appellant's case and dismissed it. It then found favour in the 1st respondent's counter-claim and entered judgment as sought in the counter-claim as follows:-

    i. A refund of Kshs.983,850/- repair charges of motor vehicle Reg KAX 8X3C.

    ii. Kshs.970,000/- for cost of parts replaced in motor vehicle Reg No.KAX 8X3C.

    iii. Restoration of motor vehicle Reg No.KAV 5X6P to the 1st respondent or value of Kshs.1,500,00/-.

    iv. Towing charges of Kshs.26,500/-.

    v. Kshs.153,179/- for stolen alternator.

    vi. Kshs.2,315,200/- for loss of user.

    vii. A declaration that repossession and sale of motor vehicle Reg No.KAX 8X3C without notice was illegal null and void.

    viii. Removal of 1st respondent in the CRB.

    ix. Restitution of motor vehicle Reg No.KAX 8X3C to the 1st respondent or its worth of Kshs.2,400,00/-.

    x. Costs and interests at commercial rates.

10. The appellant felt aggrieved and filed this appeal raising the following grounds namely;-

    i. That the learned magistrate erred in law and fact by entering judgment against the appellant for a refund of Kshs.983,850/- and Kshs.970,000/- being the repair and replacement charges respectively for motor vehicle Reg No.KAX 8X3C despite evidence that the 2nd respondent as the insurer was wholly and solely responsible for indemnifying the 1st respondent.

    ii. That the learned magistrate erred by granting the 1st respondent prayer for restoration of motor vehicle Reg No.KAV 5X6P or in the alternative its monetary value of Kshs.1,500,000/- despite acknowledging the evidence showing that the motor vehicle was provided as a collateral to the appellant and was sold to offset the 1st respondent's loan balance of Kshs.1,970,500/-.

    iii. That the learned magistrate erred by entering judgment against the appellant for towing charges of Kshs.26,500/- despite lack of evidence showing that the appellant was obligated to indemnify the 1st respondent over the same.

    iv. That the learned magistrate erred by entering judgment against the appellant for the cost of stolen alternator despite evidence that the same was stolen in the hands of a 3rd party (Central Farmers Garage).

v. That the learned magistrate erred by awarding the 1st respondent damages for loss of user to the tune of Kshs.2,315,200/- despite lack of evidence to justify it.

vi. That the learned magistrate erred by declaring that the repossession and sale of motor vehicle Reg No.KAX 8X3C and KAV 5X6P was illegal and void for lack of notice despite the fact that the 1st respondent was issued with proclamation notices.

vii. That the learned magistrate erred by ordering that the 1st respondent be removed from CRB despite being indebted to the appellant to the tune of Kshs.589,176.40.

viii. That the learned magistrate erred by ordering restitution of motor vehicle Reg No.KAX 8X3C to the 1st respondent or in the alternative Kshs.2,400,000/- despite the fact that the motor vehicle was used as a security for loan of Kshs.1,971,000/- advanced to the 1st respondent.

11. In its written submission through learned counsel KOMM Associates dated 14/11/23, the appellant has given a summary of the origin of the case and how the 1st respondent applied and obtained a loan facility from the appellant's Bank to purchase a motor vehicle Reg No.KAX 8X3C. It further gives a summary of the transactions and further restructuring of the loan facility with a view of giving more time to the 1st respondent to repay the loan on a further collateral of motor vehicle KAV 5X6P.

12. The appellant then gives an outline of the 1st respondent's case with regard to how the default occurred and the fault on the manner in which the 2 motor vehicles were sold without transparency and accountability with respect to how much the sale of motor vehicles raised and how it was applied in servicing the outstanding loan.

13. The appellant contends that the 1st respondent's claim arose from an insurance policy between him and the 2nd respondent. The appellant submits that it was not a party to the insurance policy adding that there was no evidence tendered showing that it was connected with the policy in any way.

14. It submits that it was not obligated to pay the repair charges incurred by the 1st respondent in repairing motor vehicle Reg NO.KAX 8X3C. It contends that it only financed the purchase of the motor vehicle and since the motor vehicle bought was to be used as a collateral it was in its interest to have the motor vehicle insured as a term of the conditions of the facility.

15. It submits that it cannot be held liable to refund any money to the 1st respondent on expenses related to the insurance policy citing Halsbury's Laws of England. The appellant states that as a rule of common law, a contract cannot confer or impose obligations on strangers to it or persons who are not party to it. It relies on the decision in Afroplast Industries Ltd –vs- Sanlam Insurance Co. Ltd & Anor (2021)eKLR to buttress that point.

16. It submits that it was not responsible to refund or indemnify the 1st respondent for repair damages and that the 2nd respondent as the insurer was solely liable to indemnify the 1st respondent and refund Kshs.983,850/- and 970,000/- being repair and replacement charges respectively incurred with respect to motor vehicle Reg No.KAX 8X3C.

17. On the question of restoration or payment of monetary value of Kshs.1,500,000 in respect to motor vehicle Reg No.KAV 5X6P, the appellant submits that the 1st respondent offered his 2 motor vehicles Reg No.KAV 5X6P and KAX 8X3C as chattels mortgage to secure the loan facility and that when he defaulted, it was forced to repossess the said motor vehicles.

18. It denies the 1st respondent's claim that it did not issue notice to proclaim the motor vehicles. It relies on the proclamation notice with respect to motor vehicle Reg No.KAV 5X6P.

19. It points out that a bank official namely Ngeno Kipkorir Wesley testified that motor vehicle Reg No. KAV 5X6P was sold to offset the 1st respondent's loan and that the sale did not clear the loan and left a balance of Kshs.589,176. It submits that it is unfair to order that the value of the motor vehicles be paid to the 1st respondent when the vehicle was sold to recover the money advanced to 1st respondent which were in arrears.

20. The appellant contends that the 1st respondent never denied his indebtedness to the appellant and faults the trial court's decision to order for restitution when the appellant was exercising its legal right to recover Kshs.1,971,500/- loan arrears.

21. The appellant submits that there was no valuation report tendered by the 1st respondent that indicated that motor vehicle Reg No. KAV 5X6P was valued at Kshs.1,500,000/-. It faults the trial court for basing a refund on unsubstantiated value.

22. On the question of repossession and sale of motor vehicle KAX 8X3C, the appellant contends that the repossession and sale was lawful and that the 1st respondent was duly served with proclamation notice. It relies on the notices at pages 107-111 of the Record of Appeal to support the said contention.

23. It faults the trial court for finding that the repossession was void ab initio.

24. It submits that there was no dispute that the 1st respondent was indebted to the appellant to the tune of Kshs.1,971,500/- and that the two motor vehicles Reg No.KAX 8X3C and KAV 5X6P were provided as security.

25. It contends that the evidence tendered at the trial court shows that motor vehicle Reg No.KAX 8X3C was sold through a public auction where a sum of Kshs.1,300,000/- was realized.

26. It contends that the 1st respondent confirmed that the amount realized from the auction was deposited in his loan account. It further contends that Kshs.1,200,000/- was deposited while Kshs.100,000/- covered incidental charges. It denies the 1st respondent's claim that Kshs.100,000/- was unaccounted for.

27. The appellant submits that the sale of motor vehicle Reg No.KAX 8X3C did not clear the debt which necessitated them to repossess motor vehicle Reg No.KAV 5X6P and sale it. It claims that the value of the motor vehicle was only Kshs.200,000/- which it submits left a balance of Kshs.589,176.

28. The appellant faults the 1st respondent for not supplying the valuation of motor vehicle KAX 8X3C to demonstrate that it was valued at Kshs.2,400,000/-.

29. On the towing charges of Kshs.26,500/- and the cost of a stolen alternator, the appellant submits that it was only a financier and did not provide cover for accidents or theft of parts.

30. It submits that there was no evidence tendered showing its responsibility over towing charges or theft of parts of the motor vehicle. It faults the judgment ordering it to meet the towing charges and cost of stolen alternator because on their view there was no contractual obligations placed on it to indemnify the 1st respondent over the same.

31. On the decision on damages for loss of user to the tune of Kshs.2,315,200/- the appellant submits that there was no evidence to support the decision. It contends that loss of user is a claim under special damages which must be proved. It relies on Grace Anyona Mbinda –vs- Jubilee Insurance Co Ltd where the court held that loss of user is a claim under special damages which must be specifically pleaded and proved.

32. The appellant submits that there was no proof shown to show that the 1st respondent got an income of Kshs.14,470 daily and cites the evidence tendered by the 1st respondent during trial. It submits that the trial court had no basis to award the 1st respondent Kshs.2,315,200/- for loss of user.

33. The 1st respondent has opposed this appeal vide written submissions dated 20/11/23 by learned counsel M/s Mabonga & Co Advocates. The 1st respondent maintains that his counter-claim was uncontroverted and supports the decision of the trial court in that regard.

34. He contends that he pleaded his case and substantiated his counter-claim through evidence. According to him, his counter-claim was proved to the required standard in law.

35. He submits that the appellant failed to challenge his counter-claim and failed to prove its case. He contends that the appellant never adduced evidence or called a witness to controvert his counter-claim. He relies on Daniel Kenga Katana & 4 Others –vs- Dzitu Toto Bokole & 3 Others (2022) eKLR and Chino General Merchants Xtreem Ltd v-s- Chen Zhebit & Anor (2022)eKLR.

36. The 1st respondent further submits that having failed to controvert his counter-claim during trial, the appellant cannot do so at this appellate stage.

37. The 1st respondent contends that the appellant charged him some amount to pay for insurance premium adding that the 2nd respondent was a service provider to the appellant.

38. He submits that he met the entire cost of repairing his insured motor vehicle after it was involved in an accident and that the 2nd respondent did not indemnify him. He submits that he was subjected to back and forth by both the appellant and 2nd respondent making him suffer loss yet he had comprehensive insurance cover for the motor vehicle that was involved in an accident.

39. He submits that he fulfilled his part of the obligation to get cover but blames the appellant and 2nd respondent for failing to rescue him at a time of need thereby breaching the terms of the contract. He relies on the case of Kenindia Associates Co Ltd –vs- Wangungu (.C.A. 155 of 2017) (2021) KECA 10 (KLR).

40. He submits that there was no dispute that he incurred costs towing his vehicle to Central Farmers Garage for repairs and whilst there the vehicle was vandalized making him incur further expenses. He submits that he was entitled to be compensated.

41. He submits that it is not contested that he took a loan from the appellant for purposes of purchasing a motor vehicle Reg No. KAX 8X3C. He concedes that the loan was rescheduled or restructured and he handed a further collateral in form of motor vehicle Reg No. KAV 5X6P. He contends that the appellant repossessed both vehicles after he had incurred huge costs in repairs and that the appellant rubbed salt on the wound by suing him for a further Kshs.589,176.40.

42. He faults the appellant for acting in secrecy in the manner it repossessed his 2 vehicles and sold them without disclosing the amounts the motor vehicles fetched on sale and how much was outstanding before and after the sale of the repossessed motor vehicles. He submits that the appellant did not specify if the motor vehicles were sold with any reserve price if at all. He describes the process of disposal as malicious and utter impunity by the appellant.

43. He contends that the appellant breached his right under Article 46(1) of *the Constitution*. He submits that as a consumer of banking services his economic interests were entitled to be protected. He contends that the repossessed motor vehicles ought to have been sold at the right best possible market price and the appellant had an obligation to ensure that those rights were protected but it failed.

44. He further submits that there was no evidence indicating that the appellant's interests were registered against the 2 motor vehicles in question contrary to Section 4 & 5 of the Chattels Transfer Act.

45. He submits that there is no evidence that the motor vehicles were valued prior to the sales and that there are no indications that the appellant placed a reserve price as required. He submits that in the face of such illegalities, the appellants' claim should not be validated. He relies on the cases of Oakpark Apartments Mombasa Ltd v-s- Kenya Revenue Authority (2018)eKLR and J.N. Kinoti T/A Max Auctioneers –vs- Dr. Christopher Luusa (2009)eKLR and Amaco Ltd –vs- Hezron Getuma Onsongo (2019)eKRL.

46. He further submits that he was entitled to the restitution because he was grounded by the actions of the appellant which he terms malicious and intended to defeat his right of redemption.

47. He submits that it was wrong for the appellant to cause him to be listed in CRB yet it had been paid fully upon repossession and sale of the two motor vehicles.

48. He submits that he was entitled to loss of user adding that the loss could also be awarded under general damages which would mean that he needed not to strictly proof the same but merely prove it on a balance of probabilities. He relies on the case of Jackton Mwabili –vs- Peterson Mateli (2020)eKLR. He also cites the case of Wambua –vs- Patel & Anor (1986)KLR 336 to buttress his case that loss of user is a claim in the nature of general damages. He maintains that he suffered loss and that he should not be denied a remedy because of difficulty in quantification. He relies on an unreported case of Team for Kenya National Sports Complex & 2 Others –vs- Chabari M'Ingaruni (C.A NO.293 of 1998). He prays that this appeal be disallowed.

49. This court has considered this appeal and the response made by the 1st respondent. As a first appellate court this court's role is to re-evaluate the evidence tendered with a view to drawing own conclusions regarding the issues at hand.

50. This appeal has raised less contested issues and highly contested issues. I will begin with the less contested ones and gradually move to determine the highly contested ones.

51. It is not disputed that the 1st respondent applied for a loan facility of Kshs.1,971,500 from the appellant sometime in May 2008 for the purpose of purchasing a motor vehicle. It is also not contested that the loan facility was indeed extended to the 1st respondent who then purchased motor vehicle Reg No. KAX 8X3C Isuzu NQR 66.

52. The evidence tendered by the appellant indicates that the 1st respondent started defaulting on 29/12/2008. The 1st respondent blamed the default on an occurrence of an accident involving the motor vehicle Reg No. KAX 8X3C.

53. The 1st respondent concedes that he defaulted and that he asked for restructuring of the loan which meant advancement of a further facility and offered motor vehicle KAV 5X6P as collateral.

54. It is not disputed that there was a further default to the restructured arrangements and though the 1st respondent claims he was tricked into agreeing to the said arrangements, there was no proof that the appellant acted maliciously with respect to restructuring of the loan. The 1st respondent stated that he requested in writing for rescheduling of payments owing to financial challenges facing him at the time.

55. The trial court upon trial entered judgment as prayed in the counter-claim and the appellant felt aggrieved against the whole judgment and for ease of reference I will deal with each relief as granted by the trial court.

56.

a. Whether the appellant was liable to refund Kshs.983,850/- being repair charges to motor vehicle Reg No.KAX 8X3C.

It is uncontested that the 1st respondent took out comprehensive insurance cover from the 2nd respondent herein over motor vehicle Reg No.KAX 8X3C. It is also not disputed that the motor vehicle was involved in an accident and the 1st respondent was forced to meet the costs of repairs at Central Farmers Garage after the 2nd respondent failed to indemnify him by meeting the cost of repairs.

57. What is disputed is whether the appellant was privy to the contract of insurance between the 1st respondent and the 2nd respondent (Invesco Insurance Co Ltd). The 1st respondent insists that the appellant cannot run away from the insurance contract because the 2nd respondent was its service provider. But this court has re-assessed the evidence tendered and there is no evidence indicating that the appellant was privy to the said insurance contract. In the absence of evidence of privity of contract between the 2nd respondent and the appellant, there was no basis to hold the appellant liable to indemnify the 1st respondent in the event of an accident affecting a motor vehicle that had been used as a collateral of the loan advanced.

58. The trial court fell into error by holding the appellant was liable to meet the costs of repairs of motor vehicle Reg No.KAX 8X3C. The fact that the appellant gave a condition that the said motor vehicle be comprehensively insured by a reputable firm listed as one of its service providers did not mean that it was assuming responsibility of any breach of contract between its customer (1st respondent) and the service provider (2nd respondent). The appellant was only exercising caution by ensuring that the collateral was insured against loss. Any breaches of contract between the 1st respondent and the 2nd respondent was an issue to be settled between the 1st respondent and 2nd respondent.

59.

(b) Whether the appellant was liable to meet the costs of Kshs.970,000/- being cost of replacement of parts.

Again there is no dispute that the 1st respondent incurred costs to replace parts of motor vehicle KAX 8X3C damaged as a result of the accident. The insurer or the 2nd respondent had given a comprehensive cover to the 1st respondent and it was fully responsible to meet the costs of repairs. The appellant in my view had nothing to do with the repairs because there was no privity of contract showing that it was liable. The trial court fell into error by finding that the appellant was liable. There was no evidence tendered that connected it to the responsibility of paying for costs of damaged parts.

60.

(c) Whether the appellant was liable to pay Kshs.26,500/- towing charges and Kshs.153,176 costs of stolen alternator.

The above costs were incurred by the 1st respondent after the accident involving motor vehicle Reg No.KAX 8X3C. He towed the said motor vehicle to Central Farmers Garage for repairs. The alternator was unfortunately stolen in the garage. The responsibility in view fell on the insurer (2nd respondent). There was no evidence linking the appellant with any liability in that regard and the trial court erred to hold contrary view.

61.

(d) Whether the repossession of motor vehicles KAX 8X3V and KAV 8X6P was carried out without notice.

The 1st respondent maintains that his motor vehicles were repossessed without notice. He however admits that he had used the 2 vehicles as collateral to the loan facilities extended to him. The appellant tendered proclamation notices from the auctioneer who carried out repossession and what is more glaring is the omission by the 1st respondent to sue the auctioneer if he had issues with the way repossession was done. This is because the auctioneer upon receiving instructions is required by law to follow procedures stipulated under Auctioneers Rules. The proclamation notice is an imperative under Rule 12 of the Auctioneers Rules. The said Rule provides;

1. Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods or a perishable nature and livestock-

    a. record the court warrant or letter of instruction in the register;

    b. prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;

62. The 1st respondent should have sued both the appellant as the principal and the Auctioneer as the agent if he had issues with service of notice to proclaim the said motor vehicles because it is the Auctioneer that should issue such notices pursuant to the above cited Rules.

63. In absence of the Auctioneer the 1st respondent could not fault the appellant for failure to issue notice and the trial court misdirected itself when it found that repossession of the motor vehicles was illegal null and void for want of requisite notice. That issue could only be determined if the party mandated to issue the said notices had been sued. The omission by the 1st respondent to sue the Auctioneer was fatal to his claim based on want of notice.

64.

(e) Whether the trial court erred in awarding loss of user

The trial court found that the 1st respondent had been unfairly deprived loss of user of his 2 motor vehicles due to illegal repossession.

65. This court finds that loss of user is a claim under special damages because a claimant is required to specifically plead the actual amount he lost over a specified period and provide actual proof. I am persuaded by the decision cited of Grace Anyona Mbinda –vs- Jubilee Insurance Co Ltd (supra). I am also well guided by the court of Appeal in Ryce Motors Ltd –vs- Elias Muroki (1996)eKLR.

66. The 1st respondent in his defence and counter-claim dated 5/8/2019 failed in the body of the counter-claim to plead or give particulars of the claim on loss of user. He only included the claim as a relief in paragraph (vi) of the reliefs sought. The provisions of Order 2 Rule 4 of the Civil Procedure Rules required the 1st respondent to not only plead it but give specifics of the claim. The relief sought by 1st respondent was unsupported by the pleadings and the trial court erred by making the award in the absence of specifics.

67. Secondly, the 1st respondent during trial did not tender any evidence in terms of bank statements or tax returns indicating the amount of income he lost per day to base his claim on loss of user.

68. This court finds the trial court fell into error by awarding the 1st respondent an award on loss of user without proof or specific particulars in the body of the counter-claim.

69.

(f) f) Whether the trial court erred in ordering restoration of motor vehicle KAV 5X6P or payment of monetary value of Kshs.1,500,000/-

It is not disputed that the appellant repossessed motor vehicle KAV 5X6P and had it sold through public auction. The said motor vehicle Reg No.KAV 5X6P was a collateral to the loan facility extended to the 1st respondent upon restructuring of his loan.

70. The 1st respondent's complaint is that his motor vehicle was sold and the appellant kept him in the dark about the amount realized from the auction.

71. I have perused through the proceedings and I note that the appellant through its witness namely Ngeno Kipkorir Wesley (PW1) appeared also to be in the dark regarding the amount realized in the auction because when pressed by 1st respondent's counsel during cross-examination he stated;

> " The vehicle (KAV 5X6P) was repossessed and sold..... I do not have the amount raised from the sale of the said motor vehicle. I do not know how much was credited to the defendant's (1st respondent) account..."

72. The above information coming from a senior bank official not less than a Credit Manager Equity Bank, Kitale Branch, is an indictment on the appellant's mode of operation and diligence in the manner they acted in regard to sale of the 1st respondent's motor vehicle. They owed a duty to its customers and the 1st respondent was their customer. That duty included transparency and accountability. While they duly exercised their statutory power of sale they ought to have been transparent and show respect to the Constitutional rights of the 1st respondent under Articles 40 and 46(b) of *the Constitution*. The 1st respondent may have defaulted in loan repayments but that notwithstanding, he still had his economic rights intact and should have been protected. When a bank states that a collateral was sold but does not share information on how it was sold and how much the sale fetched, it is being rather casual and should be held accountable.

73. I have perused through the proceedings from the trial court and I have noted that the 1st respondent never tendered any valuation to show the value of motor vehicle Reg No.KAV 5X6P. He just pleaded that it was worth Kshs.1,500,000/- and though he claims that the same was unrebutted, I find that he failed to establish the value of the said motor vehicle.

74. The 1st respondent also failed to apply for valuation of the said motor vehicle before sale pursuant to the provisions of Rule 10 Auctioneers Rules which stipulates that a debtor may apply that an independent valuer does give valuation of seized property.

75. This court finds that the 1st respondent failed to proof the actual valuation of the motor vehicle but because of my finding that he suffered a wrong in the hands of the appellant who was better placed to place a reserve price when instructing the auctioneer. There can never be a wrong without a remedy. This court finds that an award on general damages will cover for the loss the 1st respondent may have suffered and in that regard and offer a remedy. I will exercise my discretion and award him Kshs.800,000/- general damages.

76.

(g) g) Whether the trial court erred in ordering restitution of motor vehicle KAX 8X3C or payment of its valued of Kshs.2, 400,000/-

This court has again gone through the evidence tendered and finds that unlike in the case of motor vehicle Reg No. KAV 5X6P, the appellant gave evidence that motor vehicle Reg No.KAX 8X3C was sold in a public auction at Kshs.1,300,000/- and that Kshs.1,200,000/- was credited to the loan account while Kkshs.100,000/- was used to meet expenses of repossession and auction. The appellant was transparent in that regard and the 1st respondent cannot complain of being put in the dark. The trial court's decision to order for restitution or payment of Kshs.2,400,000/- lacked basis because at the time of repossession the 1st respondent was in arrears and was obligated to pay his debts.

77.

(h) h) Whether the trial court erred in declaring that repossession and sale of motor vehicle Reg No.KAX 8X3C and KAV 5X6P was illegal.

As I have already observed above, the appellant had the right to repossess the said motor vehicle because the 1st respondent had defaulted. Furthermore as I have already found above, the issue of proclamation notice was handled by the auctioneer who was not sued or faulted by the 1st respondent. The trial court therefore fell into error in that regard.

78.

(i) Whether the appellant was wrong to refer the 1st respondent to CRB

This court finds that in the absence of the actual amount the sale of motor vehicle Reg No.KAV 5X6P fetched it was not fair for the appellant to refer the 1st respondent to CRB. The appellant ought to have demonstrated the amount owed before sale of both motor vehicles and after the sale. It did not clearly demonstrate that the 1st respondent's debt was not cleared by the sale of the said motor vehicles. In that regard this court upholds the lower court's decision on removing the name of 1st respondent from CRB.

79 (j) Whether the appellant's claim against the 1strespondent was proved.

In light of the findings above with regard to secrecy or lack of accountability on the amount realized from the sale of KAV 5X6P, the appellant's claim that the 1st respondent still owed it Kshs.589,176.40 was not proved to the required standard. The trial court's finding in regard to the appellant's claim is upheld.

In summary therefore, this appeal is partly allowed to the following extent;

a. The trial court's findings on prayers (i) (ii) (iii) (iv), (v) (vi) (vii) (ix) and (xvi) of the defence counter-claim dated 5/8/2019 are set aside and the reliefs as sought are dismissed.

b. The 1st respondent is awarded Kshs.800,000/- general damages for wrong committed against him by the appellant who sold motor vehicle Reg NO.KAV 5X6P without transparency and accountability.

c. Prayer (viii) of the counter-claim as given by the trial court is upheld.

d. In view of the findings of this court which shows that the results of this appeal is sort of a draw, I will make no order as to costs but the appellant will pay costs and interest of general damages awarded herein in the lower court from date of judgment in the lower court.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment read in open court

In the presence of;

Mugenya holding brief for Mabonga for 1st Respondent

Ms Misiko for Appellant

Duke/Chemosop – Court assistants