Mose v Cooperative Bank of Kenya Limited & another (Civil Appeal E146 of 2023) [2025] KEHC 7238 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7238 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E146 OF 2023

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

JOHN NYAOKO MOSE ..... APPELLANT

AND

COOPERATIVE BANK OF KENYA LIMITED ..... 1ST RESPONDENT

TRISHUL VIJAY T/A AUTO EXTREME ..... 2ND RESPONDENT

(Being an appeal from judgment and decree of the Small Claims Court at Kisumu (G.C. Serem RM/Adjudicator) in claim number E235 of 2023 dated 22nd August 2023)

JUDGMENT

1. The 2nd respondent was the claimant in the trial court where he had sued the 1st respondent for recovery of Kshs 760,050.00 being a sum total of Kshs 597,300.00 as the cost of repairs and Kshs 162,750.00 for storage charges for motor vehicle registration number KCZ 468X. Upon being served with claim documents, the 1st respondent joined the appellant as a third party on the basis that the appellant had received the money which was due to the 2nd respondent for onward transmission to him.

2. The short background of the matter was that the appellant in or about September 2020 bought motor vehicle registration number KCZ 468X through financing by the 1st respondent. As it is normal with asset financing, the motor vehicle was registered in the name of both the appellant and the 1st respondent in order to protect the 1st respondent's interest in the motor vehicle. Part of the terms of the financing agreement was that the motor vehicle was to be comprehensively insured against all the risks for the duration of the finance facility and pay premiums when they fell due. The insurance was taken out with Madison General Insurance Company Limited through the 1st respondent's agency.

3. On 22-08-2022, the motor vehicle was involved in an accident and was taken to the 2nd respondent for repairs and as it is common the insurer was informed. The 2nd respondent did the repairs to the

satisfaction of the appellant and the 1st respondent but it turned out that the 2nd respondent was not in the panel of motor vehicle repairers of the insurance company and as such the insurer could not deal with him. In order to regularize and settled the issue, the appellant was paid Kshs 592,300.00 in lieu of repairs and signed a discharge voucher to that effect. The appellant never paid the said amount to the 2nd respondent despite collecting the motor vehicle.

4. The appellant's defence in the trial court which he has also propagated in this appeal was four-fold. The first one was to the effect that, he had no contract with the 2nd respondent and as such he had no obligation to pay the said amount. The 2nd line of defence was that he had not been informed that Madison General Insurance Company was the insurer of the motor vehicle while the third one was that the said amount in the discharge voucher was not paid to him in full despite him signing the voucher. Tied to the third issue was the appellant's argument that the amount deposited in his account by the insurance company was not in full because the 1st respondent deducted Kshs 77,276.00 and Kshs 77,254.00.

5. The trial court found that that appellant had received the money from Madison Insurance Company Limited which was meant for payment to the 2nd respondent and proceeded to enter judgement against the appellant for Kshs 597,300.00 being costs of repairs and held that the storage charges had not been proved hence this appeal.

6. This is an appeal from the small claims court and pursuant to Section 38(1) of the Small Claims Courts Act, this court's jurisdiction is limited to matters of law only. The only issues of law I can see from the memorandum of appeal dated 29th August 2023 is whether the contract between the 1st and 2nd respondent which is not disputed was enforceable against appellant and whether the discharge voucher was an enforceable contract. The issue of whether the money was received from the insurance company and whether the discharge voucher was executed by the appellant are issue of facts which this court will not get into.

7. It is true that the appellant did not enter into a contract with the 2nd respondent. The motor vehicle was taken to the 2nd respondent's garage by the 1st respondent. The claim was filed by the 2nd respondent against the 1st respondent because the contract was between the two. However, I hold opinion that the appellant, in making submissions that he had no enforceable contract with the 2nd respondent, is missing the point and purpose of third-party proceedings.

8. Third party proceedings are instituted by a defendant who claim that the third party is bound to indemnify the defendant of any judgement against it. They are not necessarily predicated upon contract between the plaintiff and the third party. This is the scenario in this matter. The 1st respondent had a right of indemnity from the appellant in that the appellant had received compensation money in respect of the motor vehicle they jointly owned and by virtue of discharge voucher dated 9-09-2022. The discharge voucher is clear that the appellant received the money in respect of the repairs in question.

9. The appellant did not deny signing the discharge voucher but claims that he did not know what it pertained and that it was for a different amount. The discharge voucher was for Kshs 647,300.00 but only Kshs 597,300.00 was transferred to his account and this is what was sought to be recovered from him. The argument that he did not receive the full Kshs 647,300.00 and therefore not bound to pay the cost of repairs does not hold water. When he received the money, the appellant did not return or refund it to the insurance company or the 1st respondent. I therefore find that whereas there was no contract between the appellant and the 2nd respondent, the appellant was under obligation to indemnify the 1st respondent of the judgment to the extent of the money paid to him.

10. The appellant claims that the discharge voucher was not an enforceable contract. This is a far-fetched argument. The wording for the discharge voucher cannot be interpreted otherwise than a contract between the parties. In Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited (2015) KECA 793 (KLR), the Court of Appeal when faced with similar issue held that;

> 'The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.'

11. Even if the discharge voucher was not an enforceable contract, the amount would still be payable and refundable under the doctrine of unjust enrichment. The vehicle was in the hands of the appellant when it was involved in an accident. He enjoyed the use of insurance cover which was obviously known to him. He took the motor vehicle from the 2nd respondent's garage after it was repaired to his satisfaction and has not to date raised protest on the quality of repairs. He received money which was not meant for him but for transmission to the 2nd respondent. He now wants to continue enjoying both the repaired vehicle and the money paid by the insurance company. The doctrine of unjust enrichment posits that a person should not be allowed to keep that which is intended for another and that would be against conscience and morals to keep and the same should be restored to its rightful owner. In Stephen Karanja Kibuku v Safaricom Limited (2018) KEHC 1367 (KLR) it was held that;

> 'The principle of unjust enrichment requires that a party has received a benefit unjustly, and such party is required to make restitution to the other party. It presupposes that
>
> a) A party has been enriched by the receipt of a benefit
>
> b) That he has been so enriched at the expense of the giver and
>
> c) That it would be unjust to allow him to retain the benefit.'

12. Based on the above, it is my finding that this appeal lacks merits and the same is dismissed with costs to the respondents.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

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B.M. MUSYOKI

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JUDGE OF THE HIGH COURT.

PARA 13.

Judgment delivered in presence of Mr. Muma for the appellant, Mr. Kipinde for the 1st respondent and Miss Akinyi of the 2nd respondent.