**Otieno v Oyeyo (Civil Appeal E067 of 2024) [2025] KEHC 5599 (KLR) (Commercial and Tax) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5599 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL APPEAL E067 OF 2024**

**RC RUTTO, J**

**MAY 2, 2025**

**BETWEEN**

**ERICSNOW ONYANGO OTIENO ..... APPELLANT**

**AND**

**HELLEN SIRIMA OYEYO ..... RESPONDENT**

***((Being an appeal from the judgment and decree of the Small Claims Court sitting in Nairobi by Hon. Wamae E. M. Mundi, Resident Magistrate at Small Claims Court Commercial Case No. E8509 of 2023 on 22nd February 2024))***

## JUDGMENT

1. This is an appeal against the award of compensation of Kenya Shillings 300,000- awarded to the Respondent in respect of breach of contract relating to sale of a motor vehicle.

2. The Appellant being aggrieved by this Judgment, lodged this appeal on the following grounds: that the Learned Magistrate erred in law and in fact in holding that the Appellant repossessed the motor vehicle before the completion date; in holding that the Appellant facilitated all the repair costs without involving the Respondent; in holding that the Appellant should have sought the approval of the Respondent; in holding that the Appellant ought to have returned the motor vehicle to the Respondent without giving due regard that the Respondent had pulled out of the sale agreement; in holding that the Appellant refunds the Respondent a sum of Kshs.300,000- despite the Respondent paying a sum of Kshs.297,500-; in dismissing the Appellant's counterclaim despite tendering sufficient evidence in support and despite it not being opposed; in failing to consider the evidence and submission tendered by the Appellant; in holding that there was no basis for car hire yet the parties had agreed to car hire terms when the Respondent pulled out of the sale agreement; in not awarding the Appellant the

repair costs despite having noted that the car was sold on an as is basis and in awarding the Respondent costs.

3. The Appeal was canvassed by way of written submissions.

**Appellant's submissions.**

4. The Appellant relied on his submissions dated 9th September, 2024 wherein he amalgamated the grounds of appeal into five issues.

5. On the first issue, the Appellant submitted that the Respondent took the car to the garage and abandoned it. This necessitated the Appellant to send his brother to go and collect it so as to mitigate further losses. That a party who abandons an agreement cannot later seek to benefit from the very terms hehas repudiated. Further, that the agreement did not have a provision for revocation and the Respondent did not plead to the purported breach.

6. Secondly, on ground 2 and 3 it was submitted that the Respondent took possession of the vehicle on an 'as is basis' as per the terms of the agreement and knowingly accepted all associated risks including potential defects. That the Respondent conducted thorough inspection, which confirmed the vehicle was mechanically sound and subsequently abandoned the vehicle.

7. Thirdly, on ground 4, he stated that the evidence on record showed that the Respondent paid the Appellant a sum of Kshs.200,000- on 19.08.2023 and Kshs.97,500- on 25.08.2023 and no evidence has been submitted to the contrary. That this was the amount paid as deposit for the purchase as per the sale agreement.

8. Fourth, on grounds 5, to 11 he submitted that the counterclaim filed was unopposed as the Respondent did not file a response to it and that he provided receipts for the repairs occasioned by the Respondent's action of exposing the car engine to water. To buttress this point, he relied on the India Supreme Court case of Sh. Jag Mohan Chawla & Another vs Dera Radha Swami Satsang & Others that was echoed in Haco Industries Limited and another vs Doshi Iron Mongers Limited and another [2018] eKLR where it was held that a counterclaim is a cross suit and a defence or response to the counterclaim has to be filed. Further, that the parties had agreed that the Respondent would hire the car at a rate of Kshs.9,000- per day for the 13 days she used it. Lastly, on ground 11 it was contended that the Respondent took the car to the car wash where it developed mechanical problems thus, she should have taken care of the repair costs as the vehicle was sold on an as is basis. He urged that the appeal be allowed as prayed.

**Respondent's submissions.**

9. The Respondent relied upon her submissions dated 3rd October 2024 and submitted on three issues. First of them, was whether the Appeal was unmerited. It was submitted that it was not in dispute that the Appellant received Kshs.300,000- as deposit for purchase of motor vehicle registration number KCF 226K which vehicle he later repossessed and thus the agreement became extinct entitling the Respondent to a refund. The Respondent denied abandoning the vehicle and contended that it was picked by the Appellant's brother from the garage. In addition, no evidence had been placed to support the allegation that the motor vehicle malfunctioned during cleaning at the car wash.

10. It was also submitted that when the Appellant repossessed the motor vehicle, he automatically rescinded the agreement and any repairs undertaken thereafter were done for his own benefits. Further, that it was a car sale agreement and not a car hire, that the Appellant repossessed the car on the 13th

day of execution of the agreement and went ahead to repair it but did not return it to the Respondent yet completion was in 50 days.

11. Secondly, it was submitted that the motor vehicle sale agreement was frustrated and the Respondent could not perform her duties under it. Reliance was placed on the case of Davis Contractors Limited vs Farehum UDC [1956] AC 696.

12. Lastly, on costs it was submitted that costs should be awarded to the Respondent as it took time to research the law, attend all mentions, peruse the record of appeal and file submissions. Reliance was placed on the case of Cecilia Kamru Ngayu vs Barclays Bank of Kenya and anor [2016] eKLR

**Analysis and Determination**

13. Section 38 of the Small Claims Act provides for appeals from the Small Claims Court as follows;

> "
>
> "38. Appeals
> (1)A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2)An appeal from any decision or order referred to in subsection (1) shall be final." (Emphasis mine)

14. After a careful consideration of the evidence adduced before the trial court, the grounds of appeal, the judgment of the adjudicator and the written submissions filed by the Appellant and the Respondent together with the authorities cited, the issues of law arising for determination are;

    a. Whether the trial court erred in awarding compensation to the Appellant

15. To begin with, it is not contested that the parties entered into an agreement for sale of a motor vehicle whereby the respondent was to pay a deposit of Kshs.300,000-. The Appellant confirms receiving Kshs.297,500- leaving a balance of Kshs.2,500- and thus challenges the sum total of Kshs.300,000- awarded by the Adjudicator.

16. This court notes that the Respondent, by her own admission as contained in her demand letter dated 4th October 2023 made a demand for payment of Kshs.327,000- tabulated as follows; Kshs.297,000- down payment upon assuming possession and Kshs.30,000- repair costs upon the motor vehicle exhibiting mechanical malfunctions. It is evident that the sale of the vehicle did not materialize and the Appellant, whether by repossession or through abandonment by the Respondent, regained possession of the car on one hand and the Respondent was no longer keen to complete the sale transaction.

17. Notably, the Appellant in his response to statement of claim acknowledges receipt of Kshs.297,500- and not Kshs.300,000- as alleged by the Respondent. Flowing from the above, it therefore follows that there is no basis established for the award of Kshs.300,000- by the adjudicator. As shown by the Respondent's demand note as well as the Appellant's admission, the amount paid by the Respondent and received by the Appellant as a deposit for the purchase of the motor vehicle is Kshs.297,500-, the adjudicator was therefore wrong in finding a figure of Kshs.300,000- and the same is set aside and replaced with a sum of Kshs.297,500-.

18. This court also notes that the Appellant in his response to the claim filed a counter claim dated 15.11.2023. At paragraph *5* he set out a counterclaim seeking the costs of repair, towing expenses, car hire costs for 13 days, legal fees and general damages for breach of contract. The appellant's position

was that the respondent repudiated the agreement by renouncing her obligations. No response to the counter claim was filed.

19. Notably, in the judgment, the adjudicator held that the sale agreement was to be completed within 50 days but the respondent repossessed the motor vehicle on the 13th day when it had mechanical repairs. That there was no basis for the car hire cost as the same was an agreement to sell a motor vehicle and not a car hire agreement. The adjudicator proceeded to hold that the Appellant was in clear breach of the sale agreement and the counter claim was dismissed, the Appellant was then directed to refund the deposit paid to the Respondent amounting to Kshs.300,000-.

20. Since no response in opposition to the counter claim was filed, the Appellant submitted that the same ought to be allowed as prayed since it remained unopposed. Order 3 and 7 rule 11 of the Civil Procedure Rules, provide as follows;

> "
>
> " 3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.
>
> 7. Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit."
>
> In this instance it is acknowledged that the Respondent took physical possession of the car before signing the sale agreement. Upon taking over the motor vehicle, it developed mechanical problems. The respondent's position is that the agreement was frustrated by the conduct of the appellant in repossessing the motor vehicle.

21. The Appellant, in response, stated that the Respondent took the car to a garage and abandoned it there. That since the Respondent had not fully paid for the car, he collected the car for safe keeping and to mitigate further losses. Further, that it is the Respondent who repudiated the agreement by opting to pull out. The Appellant relied on text conversations between himself and the Respondent to prove this assertion. The said communication was not controverted.

22. Upon evaluating the referenced communication between the parties, indeed what existed was an intention to enter into a sale agreement for the purchase of the subject motor vehicle. This intention was frustrated when the motor vehicle developed mechanical problems which led to the Appellant recovering the motor vehicle and claiming car hire charges from the Respondent at an agreed rate of Kshs.9,000- per day for the 13 days the Respondent had the motor vehicle. The Appellant also claimed the costs incurred for repair, towing expenses and costs.

23. The Court takes note of the communication as evidenced in screenshots, which indicate, in part, as follows;

> " Hellen,
>
> ...
>
> Kindly note that a car rental charge of 9k per day shall be effected for the 13 day period (as of today) that the car has been in your possession
>
> We acted in good faith by handing over to you the vehicle with a deposit that was short of the agreed 300k."
>
> ...
>
> Does the message capture it all.?

The Response was as follows:

> " I hope it also implied that any subsequent days will be charged at the same rate. Send Lawi to pick it. Don't go yourself."

24. At this juncture, two things arise, one, the motor vehicle was not abandoned as alleged by the Appellant and secondly, the parties agreed on a rate of Kshs.9,000- per day for the use of the motor vehicle amounting to One hundred and seventeen thousand. (Kshs.117,000-) for the 13 days the vehicle was with the Respondent.

25. For this court to determine who should bear the costs of the repair as was set out in the counterclaim by the Appellant, it is upon the parties to put before the court what the "as is basis" was at the time of purchase. None has been tabled. The court cannot know how the motor vehicle was in the absence of clear evidence and description of the same. At any rate, when the transaction converted from a sale into a hire of the vehicle, the Appellant took responsibility for the repairs upon which the vehicle would either be rehired or sold to the Respondent. The vehicle was not resold on the basis of a mutual understanding between the parties. From the record, there is also no proof of towing charges and based on the Court's earlier finding that the vehicle was delivered to the garage from where the Appellant's brother picked it, the issue of towing could not arise. The counterclaim was therefore rightly found to be without merit.

26. As I pen off, the court has taken notice of the use of "the trial court erred in law and in fact..." in the memorandum of appeal but using the guiding principal to administer justice without undue regard to procedural technicalities under Article 159(2)(d) of *the Constitution*, the Court admitted and considered the appeal, albeit distilling the points of law. I expected the advocates in the matter to only appeal on matters of law when appealing to the High Court against decisions of the Small Claims court in line with the jurisdictional threshold under Section 38 of the Small claims Act.

27. In the end, this court therefore sets aside the finding of the Small Claims Court and finds that the Respondent is entitled to reimbursement of Kshs.295,700- paid to the Appellant as deposit less the sum of Kshs.117,000- on account of car hire charges at the agreed rate of Shs.9,000- per day for 13 days to be set off from the said amount. This leaves the Appellant as owing the Respondent the sum of Shs.180,500-.

28. Consequently, the appeal is partially allowed in the following terms:

a. The judgment of the Adjudicator made on 22nd February 2024 by Hon. Wamae E. M. Mundi, Resident Magistrate Adjudicator in Nairobi Small Claims Court Commercial Case No. E8509 of 2023 be and is hereby set aside in entirety.

b. The Respondent is awarded the sum of Kshs.180,500- after set off being Kshs.297,500- owed by the Appellant to the Respondent less Kshs.117,000- owed by the Respondent to the Appellant.

c. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 2ND OF MAY, 2025.**

**RHODA RUTTO**

**JUDGE**