**Thomas Ondiba Aosa t/a Automaxx Motors v Otieno (Civil Appeal 81 of 2020) [2025] KEHC 7152 (KLR) (Civ) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7152 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL 81 OF 2020**

**REA OUGO, J**

**MAY 14, 2025**

**BETWEEN**

**THOMAS ONDIBA AOSA T/A AUTOMAXX MOTORS ..... APPELLANT**

**AND**

**JOSEPH WILLIAM OTIENO ..... RESPONDENT**

***(Being an Appeal against the judgment of Honourable G. A. Mmasi (Mrs) Senior Principal Magistrate dated 23rd January 2020 in the Chief Magistrate's Court at Nairobi Milimani Commercial Courts in Civil Suit No. 5528 of 2012)***

## JUDGMENT

1. The respondent filed suit against the appellant seeking judgment for the sum of Kshs 2,0002,500/- being monies he paid to the appellant for the importation of a vehicle. The trial court entered judgment for the respondent for the sum of Kshs 2,002,500/- plus the costs of the suit. This appeal is against the said judgment. The appeal is premised on the following grounds;-

    1) That the learned magistrate erred in law and in fact in finding liability on the part of the Appellant without sufficient evidence having been tendered by the Respondent to prove his claim to the standard required by law;

    2) That the learned magistrate erred in law and in fact in finding that there was a legally valid contract binding between the Respondent and the Appellant capable of enforcement by the Respondent;

    3) That the learned magistrate erred in law and in fact in failing to objectively critically and fairly analyze the subject contract documents which did not ascribe or place any liability on the Appellant in the circumstances of the case;

4) That the learned magistrate erred in law and in fact in disregarding, discrediting and dismissing the consistent, unshaken and truthful evidence of the Appellant that he had not breached any contract between him and the Respondent;

5) That the learned magistrate erred in fact and in law in disregarding, discrediting and dismissing the consistent, unshaken and truthful evidence of the Appellant that the contract between him and the Respondent, if any, had been frustrated through force majure and or factors beyond Appellant's control;

6) That the learned magistrate erred in law and in fact in failing to map out and isolate the issues for determination in the judgement and thus arrived at erroneous findings in the judgement;

7) That the learned magistrate erred in fact and in law in shifting the burden of proof to the Appellant;

8) That the learned magistrate erred in law and in fact in failing to consider and take into account the written submissions of the Appellant thereby deprived the Appellant of the fundamental right to a fair trial of the suit.

2. The respondent sued the appellant for Kshs 2,002,500/-.The respondent approached the appellant on 14 May 2011 and sought to import an ex-Japan Toyota Surf CC 2000 (used). The respondent paid the appellant the agreed sum in two instalments, and the appellant acknowledged receipt of the same. The first vehicle he wanted was not available, and the appellant offered the respondent another vehicle, and he agreed to pay the additional sum. The vehicle was to arrive after 28 days but it did not. By an agreement dated 27.2.2011, the appellant drew up a formal agreement giving the motor vehicle details as well as the terms and conditions of payment. The agreement was signed by both parties. Mr. Kira Mishael was a witness to the agreement as he was known to both parties. The appellant suggested that the fees and/or charges for his services were to be discussed and agreed upon arrival of the vehicle at Mombasa Port, together with the taxes payable as established by the laws of Kenya. Upon signing the agreement, the respondent deposited Kshs. 895,000/- into the appellant's account. 3 days after the respondent deposited the sum, the appellant informed the respondent that the first vehicle he identified was not available and he had identified another vehicle with the exact specification at a cost of Kshs. 2,002,500/-. The respondent made a further payment to the appellant of Kshs.1,107,500/-.The appellant assured the respondent that the shipment had been done and that he had sent the respondent's details to the Japanese dealer from invoicing and for Bill of lading. A month passed and there was no communication. The appellant finally told the respondent that the shipment was not done due to a problem between the Japanese dealer and a Trade Association in which the Japanese dealer and the vehicle meant for him and other customers were unilaterally intercepted by the Trade Association at the loading port in Japan to recover the previous debt from the Japanese dealer. The appellants kept telling the respondent that he was following up on the matter with Interpol and that the Japanese dealer had promised to refund the cash. The promise was endless indefinite and the appellant appeared to suggest that it was not his mistake so the matter should end there. The appellant thereafter went silent. The respondent in his plaint averred that the appellant breached the contractual agreement between the parties.

3. The appellant in his defence averred that there no period during which the appellant was to deliver the vehicle and the respondent was not present when he signed the agreement in the presence of Mr. Kira Michel. He averred that he was to obtain the vehicle from a seller in Japan by the name Seven Sea, to whom he sent the monies and duly received. Before the vehicle would be delivered, differences arose between the seller and Trade Car and the vehicle could not be shipped. He procured the services of Interpol to investigate the matter. For Interpol and the Criminal Investigations Department to

investigate and intervene in the matter the respondent had to prove his source of monies, which he used to procure the vehicle lawfully, which the plaintiff refused, neglected to do, further frustrating the efforts of the defendant to procure the delivery of the vehicle. In his witnesses statement, he stated further that because of the pedestrian manner in which Mr. Otieno treated the contract led to the frustration of the contract and that had Mr. Otieno cooperated with him and made a statement with the police early they may have recovered the money he paid Seven Seas Company.

4. The appellant filed written submissions dated 24th March 2024. The appellant raised six issues for determination; on issue No1, on whether the trial court isolated the issues for determination, it was argued that the trial court failed to do so and therefore the court did not critically analyse the dispute and arrived at an erroneous judgment. On issue No. 2, on whether there was a valid contract between the respondent and appellant capable of enforcement, it submitted that there was no valid contract as the parties did not provide for a consideration, and there were no fees or charges provided for services by the appellant. The appellant was merely an agent of the respondent in the importation of the vehicle. Clause no. 2 of the agreement was explicit that the amount remitted to the appellant was for the cost of the vehicle, insurance, and freight (C.I.F) only and the amount was for the benefit of the seller, consequently, there was no consideration. That the parties have not provided for consideration payable to the appellant there was no valid contract. The agreement was gratis on the part of the appellant. It was submitted that assuming the consideration was to be agreed upon later, the agreement was merely executory and not legally binding on the appellant until the respondent had passed consideration to the appellant. Reliance was made on the case of Charles Mwirigi Miriti vs Thananga Tea Growers SACCO Ltd & another [2014] eKLR where the court of appeal held the three essential elements for a valid contract is an offer, acceptance and consideration and that a contract is said to be executory so long as anything remains to be done under it by any party and executed when it has been wholly performed by all parties. On issue No. 3, on whether there was a breach of contract by the appellant, it was submitted that since there was no valid contract with the respondent there no contract capable of being enforced and that he remitted the monies to the seller as an agent of the respondent since the respondent was fully aware that the appellant did not have the vehicle in his possession. On issue No. 4 , on whether the agreement was frustrated and the trial court shifted the burden of proof to the appellant, it was submitted that after remitting the money to the seller the contract was frustrated by the de-listing of the seller Seven Seas before shipment of the vehicle. The principle of frustration releases parties from all obligations. Reliance was made on the case of Charles Mwirigi Miriti vs Thananga Tea Grower SACCO Ltd & Another ( supra), the court held that;

In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-

"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some

outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

5. It was further submitted the Court of Appeal held that the defence of frustration can be defeated by proof and the burden of proof is on the party alleging fault. That the appellant pleaded frustration in his defence, there was no reply to the said defence and the respondent evidence to approve default on the part of the appellant and therefore the defence of frustration was admitted. It was further admitted that the respondent's witness admitted that the contract had been frustrated.

6. The respondent submitted that the following issues are for determination;

    1. Whether the learned magistrate erred in law and in fact in finding that there was a legally valid contract binding the Respondent and the Appellant;

    2. Whether the learned magistrate erred in law and in fact in disregarding, discrediting and dismissing the evidence of the Appellant that he had not breached the contract between him and the Respondent;

    3. Whether the learned magistrate erred in fact and in law in disregarding, discrediting and dismissing the evidence of the Appellant that the contract between him and the Respondent had been frustrated through force majure and or factors beyond the Appellant's control;

    4. Whether the learned magistrate erred in law and in fact in finding liability on the part of the Appellant; and

    5. Who should bear the costs of the appeal and in the Chief Magistrate's Court?

7. On issue No. 1 it was submitted that, the sale agreement meets the criteria for the formation of a contract.There was a distinct subject matter which is the importation of a Toyota Hilux Surf motor vehicleand there was a consideration that was paid by the Respondent in the sum of US $22,500 towards the fulfillment of the obligations under the contract by the Appellant. Both the Appellant and the Respondent intended to be bound by the terms of the agreement when they voluntarily appended their signatures and proceeded to perform their respective obligations under the contract. There exists a legally valid contract binding both the Appellant and the Respondent and is therefore enforceable. On issue No. 2 it submitted that the failure by the Appellant to comply with the terms and conditions of the agreement provoked the Plaintiff to make numerous calls and send demand letters to the Appellant demanding the performance of the agreement or the refund of the amounts paid to him together with interest which the Appellant has never honoured. It is a principle of law that the court cannot rewrite a contract unless coercion, fraud or undue influence are pleaded and proved. The Appellant has neither pleaded nor proved undue influence, coercion, or fraud. The Respondent proved his case that the Appellant breached the sale agreement and as such the trial magistrate court did not error either in law or in fact in disregarding, discrediting, and dismissing the evidence of the Appellant that he had not breached the contract between him and the Respondent. The respondent relied in the case of Wamuyu Decorators Company Limited vs. Mugoya Construction & Engineering Limited [2014] eKLR where it was held inter alia that: "[13] As a good beginning point, it is profitable to state what a breach of contract entails. I will borrow from the decision in a Ugandan case of Hajo Asadu Lutale vs. Michael Ssegawa HCT-OO-CC-SS-292-2006 that a breach of contract entails – 'A breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract 6 or makes performance impossible or totally or substantially fails to perform his promises". On issue No.3 it was submitted that the Appellant simply denied liability. The only defence which was raised by the

Appellant was the fact that the sale agreement was frustrated by acts beyond his control; however, he did not plead the force majeure circumstances. The Appellant, however, did not in his defence identify the factors which contributed to the alleged frustration save for is pleaded in paragraphs 7, 8 and 9 of the defence. Force majeure would refer to those situations outside the control of both the Appellant and the Respondent consequently preventing them from performing the obligations assumed under the sale agreement. These events have been held to include the destruction of the subject matter, unavailability of the subject matter, death of a person, performance impossibility among others. The sale agreement did not expressly or impliedly create a clause excluding the Appellant from liability with respect to any acts of force majeure. That in the ordinary course of commercial transactions, agreements would contain a clause on force majeure to provide specifically that parties will not be liable for any delay in the performance or non-performance of his obligations upon the occurrence of certain extraordinary events. In addition to the force going, the doctrine of force majeure cannot be said to be applicable in the circumstances of this case since the supervening event as alleged by the Appellant is his defence cannot be said to have been unforeseeable, insurmountable and external. The Appellate ought to have done his due diligence in selecting which other third party could he engage with to import the motor vehicle to avoid or mitigate the circumstances which allegedly led him to breach the contract. On the issue of privy of contract referring to paragraph 7 of the defence it was submitted that the sale agreement was strictly between the Appellant and the Respondent. The fact that the Appellant entered into another agreement with Seven Seas does not bind the Respondent since the Respondent is neither privy to the said agreement nor was he aware that the Appellant had entered into a subsequent agreement with a third party. As such, the Respondent was neither a party to it nor was he intended to be a beneficiary of the said agreement. The Appellant did not produce any agreement entered into between him and Seven Seas to determine if the Respondent was entitled to benefit from the contract. Without any evidence to the contrary, the Respondent was not bound by the actions of the Appellant with other parties. On issue No.4 it was submitted that it is not in dispute that the Appellant and the Respondent executed a sale agreement for importation of a motor vehicle. It is not denied by the Appellant that he received the entire purchase amount of the motor vehicle from the Respondent. The Appellant also does not deny the fact that he has failed to deliver the motor vehicle to the Respondent. In the circumstances, it is clear that the Appellant is in utter breach of the agreement for sale. On the issue of costs, it was submitted that, it is trite law that costs follow the event and that it is at the discretion of the Honourable Court to be exercised depending on the peculiar circumstances of each case. The Honourable Court should not interfere with the trial court's discretion in awarding costs to the Respondent. Further, the Appellant should be condemned to also pay the Respondent the costs of this appeal since he has kept the Respondent away from enjoying the fruits of the judgment in the trial court by filing an otherwise frivolous appeal that had no probability of success. The Appellant has further put the Respondent through the strenuous court process and expenses of enforcing his rights when the Respondent ought to have known that he had contractual obligations which he was bound to fulfil.

**Analysis And Determination**

8. This Court is required to analyze and reassess the evidence on record and reach its own conclusion in the matter ( see Selle vs. Associated Motor Boat Co. [1968] EA 123).

9. I have considered the evidence presented before the subordinate court, the pleadings, the opposing submissions, and the law governing contracts. The issues for determination in this appeal are: whether a valid contract existed between the appellant and the respondent that is capable of enforcement, whether there was a breach of that contract, and whether the agreement was frustrated.

10. On the first issue there is no dispute that the parties entered into an agreement. The sale agreement provided for the duties and responsibilities of the Appellant to be as follows: the Importer shall import a Toyota Hilux Surf 2700CC, year of Manufacture: 2004, at a latter cost of US $ 20,300 only (Kshs. One Million Seven Hundred and Eighty-Six Thousand, Four Hundred Shillings only –Exchange rate being Kshs.88.00 for 1 USD) this amount being only C.I.F or any amount as may be agreed upon by all the parties. The first instalment of 50% of C.I.F – Kshs. 893,200.00 and the last instalment of 50% of C.I.F – Kshs. 893,200 (before shipping).

11. The first vehicle was unavailable, and the respondent provided an additional sum to the appellant. The agreement signed by both parties indicates that the appellant was the importer and was to sell and purchase a Toyota Hilux Surf 2700 cc, manufactured in 2004, at a later cost of US 20300, this amount being only C.I.F or any amount that may be agreed upon by all parties. The instalments to be paid were specified, and the transaction was to commence upon submission of the first instalment fee by the purchaser as a sign of commitment. One of the conditions of the contract was that it would become operational when both parties signed. This was done. By this agreement dated 27th May 2011, the parties had a common understanding of their respective obligations, which was reflected in their agreement. The parties had a binding contract based on the terms they agreed upon. The appellant cannot now claim that the agreement was invalid. It formed the basis of the contract he had with the respondent. There was an offer to import a vehicle for the respondent, acceptance, and the parties had a common intention regarding the consideration of when it would be paid. The appellant signed the agreement and acknowledged the money on 10th June 2011. The respondent fulfilled his part of the contract. The appellant did not plead in his defence that there was no consideration.

12. Regarding whether there was a breach of contract, the parties had a valid agreement. The appellant states that he remitted the money he received to the shipping company. The respondent was not privy to the contract in question. The appellant failed to demonstrate that he had taken any legal action against the third party. He also failed to deliver the vehicle to the respondent as agreed. It is the appellant who is in breach of the agreement, having failed to deliver the vehicle or refund the money he received from the respondent.

13. On the final issue whether the agreement was frustrated. Did the appellant plead frustration or force majure in his defence? I have perused the defence. The appellant averred as follows in paragraphs7, 8, 9 and 10

> " 7. Further in reply to the Plaint the defendant avers he was to obtain the vehicle from a seller in Japan by name Seven Sea to whom he sent the monies to and were duly received. That before the motor vehicle could be delivered there rose differences between the seller and the Trade car view a car selling association which licences exporters of vehicle from Japan and therefore could not ship the vehicle in time.
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> 8. The defendant avers that having not received the vehicle from Seven Seas it procured the services of Interpol to investigate the matter.
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> 9. The defendant in addition avers that Interpol and the Criminal Investigation Department to investigate and intervene in the matter the Plaintiff had to prove his sources of monies he used to procure the vehicle were lawful, which the Plaintiff has refused, neglected and/or ignored to do.

10. Further frustrating the efforts of the Defendant to procure the delivery of the vehicle as soon as practically possible"

14. This leads me to the communication the appellant relied on in his evidence before the trial. To support this allegation, he relied on the letter he had written to Interpol. The Referal form is dated 13.9.021. It refers to a Complaint from Thomas Aosa, the appellant and the nature of the complaint was a follows;

> "Nature of Complaint: He reports that in the month of June 2011 he communicated through internet with a company called Seven Seas motors in Japan over the purchase of a car which he intended to import for his client namely Joseph William Otieno. After a lengthy negotiation he ended up sending the agreed money to account No. 470xxx held at Scimtomc Mutual Banking Corporation Itam branch which totalled to 16,000 U.S dollars. Since then they have refused to release the car and he now requests for investigation"

15. This is the only communication attached to his report to Interpol. The appellant alleged that the respondent failed to provide the information Interpol needed regarding the source of his money. No such correspondence or demand was presented in evidence. His allegation of frustration was therefore not proven. Even if the respondent failed to address this in his pleadings, it was the appellant's responsibility to demonstrate frustration on the part of the respondent. Furthermore, there was no clause in the agreement that foresaw or expected a situation that could be termed force majure. The appellant was bound by the terms of the agreement the parties signed, which constituted a valid contract. The respondent's claim in his plaint was for special damages amounting to Kshs. 2,002,500/-, representing the money the appellant received and acknowledged. I cannot fault the trial court for entering judgment for the respondent, as the respondent did prove his case based on the evidence presented. The appeal has no merit and has been dismissed with costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 14TH DAY OF MAY 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Appellant - Absent

Mr. Wakiaga -For the Respondent

Wilkister C/A