



Kiruthu t/a Varoma-Tech Enterprises v Executive Superrides Limited (Civil Appeal E302 of 2023) [2025] KEHC 12746 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E302 OF 2023
DKN MAGARE, J
SEPTEMBER 17, 2025**

BETWEEN

MARTIN KIRUTHU T/A VAROMA-TECH ENTERPRISES APPELLANT

AND

EXECUTIVE SUPERRIDES LIMITED RESPONDENT

(An appeal from the Judgment and decree of Hon. H.M. Ng'ang'a (PM) delivered on 16.03.2023 in Nairobi CMCC No. 4836 of 2016)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. H.M. Ng'ang'a (PM) delivered on 16.03.2023 in Nairobi CMCC No. 4836 of 2016. The Appellant was Plaintiff in the lower court. After hearing the parties, the court dismissed the suit with costs.
2. The Appellant was aggrieved and filed this appeal vide a Memorandum of Appeal dated 17.04.2023. The memorandum of appeal raised seven grounds of appeal as follows:-
 - a. The learned magistrate erred in making a determination which was against the weight of the evidence adduced in court.
 - b. The learned magistrate erred in law and in fact by failing to find that the Plaintiff executed a Deed of Guarantee and Indemnity which provided at clause 17 that the plaintiff should ensure that the subject motor vehicle is comprehensively insured.
 - c. The learned magistrate erred in law and in fact by finding that the plaintiff breached the agreement for the sale of the subject motor vehicle by not paying the full purchase price yet no evidence was led to that finding.
 - d. The learned magistrate erred in law and in fact by failing to find that the defendant did not prove that the plaintiff has not paid the full purchase price of the subject motor vehicle.



- e. The learned magistrate erred in law and in fact by failing to find that the plaintiff had discharged its burden of proof on payment of the purchase price by showing copies of cheques presented to the defendant.
- f. The learned magistrate erred in law and in fact by failing to find that the defendant should be compelled to release the original log book of the subject motor vehicle as there is no justification to withhold it.
- g. The learned magistrate erred in law and in fact by failing to grant the prayers sought by the plaintiff despite the weight of evidence presented by him.

Pleadings

3. Appellant filed suit on 25.07.2016 against the respondent and Fastways Solutions Ltd. The Appellant stated that on 3.12.2014, he entered into an agreement to purchase the first defendant's motor vehicle registration number KCB 150B, Toyota Land Cruiser. There was a deed of guarantee dated 9.3.2016 and a statement of account. The agreement was set at Kshs 7,651,000/= . The said vehicle was involved in an accident on 2.05.2016 and was written off by the insurer.
4. The insurer required the original log book to be able to pay. Paragraphs 17 and 18 of the agreement provided for the indemnity to the Respondent. The respondent and Fastways Solutions Ltd filed a joint defence. They stated that the appellant bought a total of three vehicles. Some had balances including the subject motor vehicle. They stated that the postdated cheques were returned hence the purchase price remained unpaid. They stated that the Appellant breached the contract by failing to inform them of the accident.
5. They stated that Fastways Solutions Ltd was a clearing and forwarding agent who cleared the vehicle and registered it in the Respondent's name. Finally, Fastways Solutions Ltd was removed from the proceedings.
6. The court made its decision on 16.03.2023. The court held that the plaintiff failed to involve the defendant in taking a cover. This could have allowed any indemnity money to be paid to the lender.

Submissions

7. The Appellant filed submissions dated 26.11.2024. They submitted that they had overpaid. The claim could have by now been concluded. They stated the payments and a new vehicle could have been given by now.
8. The Appellant submitted that there was no justification for the respondent's failure to release the log book to enable payments be made to the parties. The log book is jointly registered. The respondent did not file a counter claim. It was their submissions that they had paid fully for the said vehicle. It is their case that a sum of Ksh. 7,782,194/= had been paid over and above the purchase price of Ksh. 7,651,000/=.
9. It was their case that the burden of proof was on whosoever alleged. In this case they did not find any evidence of why the log book was not being released. Reliance was based in the case of *Munya v Kithinji & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) (30 May 2014) (Judgment), where the supreme court posited as follows:

The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On



the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. “The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” PARA Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124).

10. They stated that section 107 of the *Evidence Act* guided their submissions. The said section provides as follows:

- “107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (1) exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

11. They also relied on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR, where the court of appeal [O’kubasu, Githinji & Waki, JJ.A] held as follows:

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

- “107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
- (1) liability dependent on the existence of facts which he asserts must prove that those facts exist.”

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The two sections carry forward the often repeated evidential adage: “he who asserts must prove”.

12. They stated that the respondent failed to show that the purchase price was not paid. It was their submissions that clauses 17 and 18 gave impetus to insuring at a full purchase price.

13. On the other hand, the Respondent filed lengthy submissions that the appellant acted in bad faith by taking out an insurance policy that deliberately excluded the Respondent’s interest as a financier in the insured subject matter. It was contended that the exclusion was calculated to prevent the Respondent



from recovering its losses in the event of an accident. The Appellant, therefore, did not approach the court with clean hands, but instead sought to unilaterally rewrite the terms of a contract freely entered into by both parties.

14. They submitted that the Appellant and Respondent entered into a hire-purchase agreement on 3/12/2014 for the acquisition of a Toyota Land Cruiser, registration number KCB 150B, at a purchase price of KES 7,651,000/=. Pursuant to the agreement, the Appellant paid a deposit of KES 5,932,194/= and issued post-dated cheques for the balance. The Respondent contends that the cheques were not fully honoured. Subsequently, on 10.03.2016, the parties executed a Deed of Guarantee and Indemnity, which set out the terms governing the transaction, including an express requirement that the vehicle be insured jointly in the names of both the Appellant and the Respondent.
15. It was their case that on 02.05.2016, the vehicle was involved in a road traffic accident and was declared a total loss by AIG Insurance, which issued a discharge voucher valuing the vehicle at KES 6,900,000. The Respondent declined to release the original logbook and transfer documents, citing the Appellant's failure to settle the outstanding balance under the agreement.
16. They submitted that the agreement for the purchase of motor vehicle registration number KCB 150B, together with the Deed of Guarantee and Indemnity dated 10th March 2016 constitutes a binding contract between the parties. In particular, clauses 17 and 18 of the Deed are of critical relevance to the present dispute:
 - a. Clause 17 imposes an obligation to comprehensively insure the vehicle in the joint names of the Respondent (as Lender) and the Appellant (as Debtor) for its full value.
 - b. Clause 18 stipulates that all insurance proceeds shall be payable directly to the Respondent for the purpose of offsetting any unpaid portion of the purchase price, as well as any other sums owed by the Appellant.
17. They submitted further, that the Appellant had failed to demonstrate compliance with the contractual obligation to insure the vehicle in the joint names of both parties, as expressly required under Clause 17 of the Deed of Guarantee and Indemnity. This failure shifts the evidential burden to the Appellant to justify the breach and which an obligation the Appellant did not discharge. It was their submissions that the sanctity of contracts remains a fundamental principle of commercial law. In *J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School* [2018] KEHC 8304 (KLR), Mativo J. emphasized:

The courts do not make contracts for the contracting parties. No. It is a matter purely between them See *Eguasa David Odiase v. Auchu Polytechnic, Auchu* (1998) 4 N.W.L.R. (Pt. 546) 477 at 492. This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties. When a contract is clear and unambiguous, a Court's role is to apply the parties' contract as written and not rewrite the contract.
18. They also relied on the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another* [2001] eKLR. They also stated that the property of the vehicle did not pass pursuant to Sections 3(4) of the *Sale of Goods Act*. They conveniently forgot the unpaid seller's lien and their rights under sections 39, 40 and 41 of the *Sale of Goods Act*.
19. They concluded that further, the Deed of Guarantee and Indemnity expressly provides for the accrual of interest on overdue payments. The Appellant's delay in settling the outstanding balance accordingly entitles the Respondent to claim such interest in accordance with the contractual terms. They relied



on the case of Highway Furniture Mart Limited v Permanent Secretary & Another [2006] 2 EA 94, where the Court of Appeal affirmed that:

“Interest is claimable either where it is expressly stipulated in an agreement or where it may be implied from the course of dealing between the parties.”

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

21. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

22. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

23. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the magistrate who had the advantage of seeing and hearing the witnesses. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



24. The burden was on the Appellant to prove his case. On this subject, Section 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(1) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

25. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

26. This was further enunciated in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions* [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, G.G. Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

27. The dispute was totally unnecessary. With all due respect to the court, the decision he made was not before him. The question before the court was whether or not paragraphs 17 and 18 of the agreement are in situ. I am alive to the question that the only issue the court was to deal with is the effect of the accident. The accident caused the subject matter not to exist. The insurer were willing to pay. How the respondent can stick to a piece of paper that is not useful to them, is beyond my understanding.



Nevertheless, it is not my duty to change a contract between the parties. The two clauses gave priority payment to the Respondent. They only required the original log book. In the case of National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR it was held as follows: -

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

28. It is not the duty of this court to get the Appellant out of a bad bargain. Appellant entered into an agreement with the respondent containing clauses stating as follows:

17. Insurance: Always ensure the motor vehicle is comprehensively insured to the full value thereof against all risks without restrictions or excess and shall pay punctually all premiums due for such insurance; and at all times, while this Guarantee is in force; more particularly in the joint names of the Lender and the debtor; The Debtor further agrees that on any default on him under this clause the Lender shall without prejudice to any of its rights under this deed insure the Motor Vehicle with such an insurance company as it may deem fit, and/or may pay the premiums and expenses of such insurance, and the Debtor shall on demand reimburse the Lender for any sums by way of premiums, expenses or otherwise paid or incurred by the Lender; Until such repayment, the said sums shall be a charge upon the Motor Vehicle from the date of demand by the Lender;

18. Claims from Insurance: All insurance monies payable under the policy of insurance referred to in clause hereinabove shall be paid to the Lender the unpaid balance of the price specified in the agreement and Guarantee and all other sums payable by the Debtor/Guarantor;

29. From this agreement, it was clear that the Appellant took out insurance. The balances due are payable to the respondent. The balance that came out in evidence was Ksh.3,112,250/=. There was no counterclaim over the amounts. However, section 18 is self-explanatory. The court was not under duty to enter into the arena of whether, there was breach or not. The court was faced with a simple issue; an accident had occurred and there was money due from the insurance.

30. Before concluding, I note that there was an attempt to claim interest from the Appellant at the appeal level. The filings were the basis that there was a sale agreement for Ksh 7,651,000/=. There was evidence of payment over and above this amount. There was no evidence of any of the cheques being returned unpaid. The question of interest on the purchase price was not part of the issues left for the court to determine.

31. Parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in



consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by



their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

32. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

33. The question then is whether, the court can deal with an un-pleaded issue at an appeal level. There was no counterclaim in the lower court. The court cannot, outside the agreement start dealing with phantom issues. If the Respondent wished the court to determine and interpret the agreement, they should have filed a counterclaim for any amount over and above the purchase price. The only issue the respondent had was that the suit was untenable. At the end of the day the respondent was acting in bad faith. There was money due and owing from the insurance. The insurance was willing to pay subject to a log book being given. No legal explanation was being proffered by the respondent. The respondent cannot claim the log book and the salvage. If they wished to have the salvage, they should have laid claim to it. The fact that the respondent was not involved in the insurance is irrelevant now that payment was fully made. Even if it was not, the condition precedent was taking full insurance.
34. If the respondent was acting without mala fides, they could have laid claim to part of the amount from the insurance, as an unpaid seller. An unpaid seller has a lien over the balance pursuant to section 40 of the *Sale of Goods Act*. This does not apply when the subject matter changed its character. It is now salvage and the seller’s lien was lost pursuant to Sections 41 and 42 of the *Sale of Goods Act*. Section 41 of the *Sale of Goods Act* provides for the seller’s lien as follows:
1. Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases-
 - a. where the goods have been sold without any stipulation as to credit
 - b. where the goods have been sold on credit, but the term of credit has expired.
 2. Seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer
35. The seller did not have possession and there was stipulation as to credit. Ipso facto, there was no lien placed on the goods. Payments by post dated cheques meant that the entire purchase price was covered. The respondent could only claim for unpaid balance, which they did not claim. They are now nonsuited.



36. A court may deal with a ground other than those that are pleaded. This must however be under very strict parameters. In the case of *Bore v Spire Bank Limited & Another* (Civil Case 8 of 2020) [2024] KEHC 1034 (KLR) (8 February 2024) (Ruling), A.C. Mrima posited as follows:

As a general rule, there are, of course, exceptions thereto. Such have been considered judicially. The Court of Appeal for Eastern Africa in *Vyas Industries v Diocese of Meru* [1976] eKLR stated as follows: -.... The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in *Odd Jobs v Mubia* [1970] EA 476 in which it was held that: - a). Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the Court for decision; b). on the facts the issue had been left for decision by the court as the Advocate for the Appellant led evidence and addressed the Court on it.

19. In *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR), the Court of Appeal at Malindi in Civil Appeal No. 32 of 2018 held as follows: -As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] EA 476, D.E.N. v. P.N.N. (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a court which in law it does not have.
20. The above position had been affirmed in *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* [2016] eKLR by the very Court of Appeal in Civil Appeal No. 1 of 2016 at Nairobi. The Court expressed itself thus: -The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] 476, D.E.N. v. P.N.N. (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410.
37. The issue of specific performance was not addressed. In this case, it related to clauses 17 and 18 of the agreement. This is a discretionary remedy. It was not shown that the lack of completion had an effect on the insurance claim. The concept was well addressed in the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR, where, D.K. Maraga, (as he then was) stated that:-

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.



The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

38. This matter was also addressed extensively in the case of PKA Limited v Kenyatta Hospital Association (KHA) t/a Nairobi Hospital (Civil Case E648 of 2021) [2021] KEHC 282 (KLR) (Commercial and Tax) (18 November 2021) (Judgment), where, WA Okwany, J, posited as follows:

9. On the prayer for specific performance, the plaintiff submitted that it had a valid contract with the defendant and that it had fulfilled its obligations under the said contract. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court held that: -“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

10. In *Gurder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti*, Civil Appeal No. 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

11. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd* 2015 eKLR, the court stated that:

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

39. The court below did not find any breach on part of the Appellant. There was no requirement to take insurance in the name of Respondent. They no longer had an insurable interest. In the case of *UAP Insurance Company Limited v Maina & another* (Civil Appeal E078 of 2021) [2024] KECA 392 (KLR) (12 April 2024) (Judgment), the court of appeal [P Nyamweya, FA Ochieng & WK Korir, JJA] stated as follows in regard to insurable interest:

15. Since most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of an event which is uncertain and upon which the insurer’s liability arises, it follows the assured is required to have an interest in the subject matter of the insurance, for otherwise he will incur no



loss through the happening of the insured event. This insurable interest is discernable from the assured's relationship with the subject matter of the insurance, and is explained in Chitty on Contracts, Volume Two -Specific Contracts 32nd Edition at paragraph 42-006 thus: "...That relationship may have a particular nature or certain manifestations which render the assured's interest insurable. For example, the assured may be prejudiced by the loss of or damage to the subject matter of the insurance (or may benefit from its preservation), because he has a legal or equitable right pertaining to the subject matter, or because he will thereby become subject to a liability by reason thereof or because he will thereby be deprived of an opportunity to earn income or a profit in respect of the subject matter. Quite apart from such considerations, it may be that the assured's insurable interest arises out of commercial convenience. There are no fixed criteria which will determine the existence of an insurable interest. Each interest and each case must be analyzed on its own..."

40. Therefore, requiring the seller to take out or be involved in insurance for a vehicle for which they had no insurance interest is not tenable. The best the court was to do was to enforce an agreement already in place especially clauses 17 and 18.
41. The details of the other two vehicles are not relevant to the specific contract relating to this particular contract involving motor vehicle registration number KCB 150B, Toyota Land Cruiser. Upon being written off, it was incumbent upon the parties to cooperate to conclude the matter. In that respect the court erred in failing to determine the case before him.
42. In the circumstances, the appeal is allowed. The order dismissing the suit is set aside. In lieu thereof, it is substituted with an order allowing the appeal.
43. The next issue is costs. Costs are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.
44. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.



45. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

46. The appellant has won the appeal and the case in the court below. He is entitled to costs. A sum of Ksh. 105,000/= for this appeal shall suffice.

Determination

47. In the upshot, I make the following orders:

- a. The appeal is allowed. The judgment of the court below is set aside and in lieu thereof, I order as follows:
- b. The Respondent is restrained from transferring the log book for motor vehicle Registration number KCB 150B, Toyota Land Cruiser.
- c. The log book be released to the appellant’s advocates for onward transmission to the insurance company to facilitate release of the insured sum for motor vehicle Registration number KCB 150B, Toyota Land Cruiser.
- d. Costs of Ksh 105,000/= for the appeal.
- e. Should the Respondent not transfer within 14 days, the Appellant is at liberty to invoke forced transfer and the log books held by the Respondent shall become inoperative and otiose.
- f. The Appellant shall have costs in the subordinate court.
- g. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -



Ms. Wairimu for the Appellant
No appearance for the Respondent
Court Assistant – Michael

