



**Baye & another v Ligunya (Civil Appeal E185 of 2023)
[2024] KEHC 3628 (KLR) (Civ) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3628 (KLR)

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

CIVIL

CIVIL APPEAL E185 OF 2023

DAS MAJANJA, J

APRIL 16, 2024

BETWEEN

TIMOTHY WAKO BAYE 1ST APPELLANT

JAPAN JAMIL KANIYA AUTO LIMITED 2ND APPELLANT

AND

STEPHEN LIGUNYA RESPONDENT

(Being an appeal from the judgment and decree of Hon. B.J. Ofisi SRM/Adjudicator dated 3rd March 2023 at the Small Claims Court at Milimani, Nairobi SCC No. E7009 of 2022)

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the Small Claims Court dated 03.03.2023. The Respondent was awarded Kshs. 550,000.00 plus costs and interest thus precipitating this appeal.
2. The Respondent filed his claim before the Subordinate Court stating that sometime in January 2021 the 1st Appellant through the 2nd Appellant imported 14 motor vehicles from overseas with the intention selling them for profit. That the motor vehicles were held by the Kenya Revenue Authority (“KRA”) at the port of Mombasa as the 1st Appellant failed to pay the assessed import duty levied on them. On 18.01.2021, the Respondent entered into an agreement with the 1st Appellant (“the Agreement”) where the Respondent agreed to finance payment of the import duty on condition that he would be refunded the amount from the proceeds of sale of the motor vehicles. The Agreement further provided that the Respondent was entitled to a 50:50 share of all net profits obtained from the sale of the motor vehicles and that the net profit would be shared after deduction and refund of all monies paid by the Respondent under the Agreement.



3. In accordance with the Agreement, the Respondent and the 1st Appellant set up a joint bank account at Stanbic Bank Kenya in which the 1st Appellant was required to deposit all proceeds from the sale of the motor vehicles. The Respondent claimed that he paid Kshs. 2,062,624.00 directly into the KRA bank account as settlement of the import duty for 6 out of the 14 motor vehicles and an additional Kshs. 300,000.00 as clearance fees making a total of Kshs. 2,362,624.00 as the principal sum. He claimed that he was therefore entitled to refund of this amount plus his share of profits from the sale of the 6 motor vehicles.
4. The Respondent further averred that once the 6 motor vehicles were cleared from the port, the 1st Appellant handed over their logbooks to him to hold as lien as provided under the Agreement. The Respondent discovered that the 1st Appellant had sold 5 of the motor vehicles and that contrary to the Agreement, failed to deposit the proceeds of sale into the joint account. That in further breach of the Agreement, the 1st Appellant handed over a white Honda Spike License No.21MB 0****6 to his mother-in-law without the Respondent's consent thus denying him a refund of the principal sum and a share of the profits from its sale.
5. On 09.09.2021, the Respondent opted to use the monies deposited in the joint account to defray the principal sum. At the material time, the amount in the joint account was Kshs. 1,173,000.00 and upon defraying the principal sum, the Respondent was still entitled to the balance thereof, being Kshs. 1,187,000.00 as well as profits from the sale of the motor vehicles. The Respondent claimed that the 1st Appellant admitted to owing him and made intermittent payments amounting to Kshs. 157,000.00 leaving a balance of Kshs. 1,030,000.00 in addition to the profits from the sale of the motor vehicles.
6. The Respondent averred on 22.12.2021, the 1st Appellant undertook to pay Kshs. 1,030,000.00. The Respondent thereafter made payments amounting to Kshs. 475,000.00 towards settling the outstanding balance therefore leaving Kshs. 550,000.00 which the Respondent stated he was entitled to be refunded as under the Agreement and which he claimed. He further demanded Kshs. 445,000.00 being profits from the sale of the motor vehicle bringing the total sum claimed to Kshs. 1,000,000.00. In the alternative, the Respondent sought that the Appellants be ordered to deliver and transfer the ownership of the white Honda Spike License No.21MB 0****6 to the him.
7. In their response, the Appellants did not deny the Agreement or its terms including that the Respondent was to be refunded the sum of Kshs. 2,062,624.00 which was the payment of the import duty of the motor vehicles. They also did not deny that the Respondent fulfilled his obligations under the Agreement by paying the import duty for the 6 motor vehicles and that he was entitled a refund of the principal amount paid. However, the Appellants denied that they sold any of the motor vehicles clandestinely. Further, that contrary to the Respondent's claim, they averred that all the proceeds of the sale were deposited into the joint account. The 1st Appellant denied that he handed over the 6th motor vehicle to his mother-in-law as claimed.
8. The Appellants claimed that Kshs. 1,173,000.00 was transferred to the Respondent with the concurrence of the 1st Appellant since the mandate in the account was joint and the Respondent could not transfer the said funds without the consent of the 1st Appellant. The Appellants denied that the Respondent was entitled to Kshs. 1,187,000.00 as he failed to disclose that in the course of the transaction, the Respondent and the 1st Appellant agreed to reinvest Kshs. 1,500,000.00 in order to import more motor vehicles for sale. That the said funds were sent to the motor vehicle dealer in Japan from the joint account and instructively, the joint account was opened solely for handling funds from the sale of motor vehicles and therefore, the Kshs. 1,500,000.00 was part of the proceeds and certainly part of what the Respondent was entitled to.



9. The 1st Appellant denied that he admitted to owing the Respondent the balance of principal sum and that he made intermittent payments of Kshs. 157,000.00 leaving a balance of Kshs. 1,030,000.00 in addition to the profits from the sale of the motor vehicles. They further denied owing the Respondent Kshs. 550,000.00 as the payment of Kshs. 475,000.00 was made after a mediation meeting where it was agreed that these payments were meant to be full and final settlement of the amounts owed to the Respondent. The Appellants averred that the parties did not agree on the selling price for any of the motor vehicles. That the obligation to negotiate the sale price was bestowed upon the Appellants and considering that the country was still reeling from the effects of Covid-19, disposing of the cars was difficult hence the profit margins were too thin. Further, that the calculation of the expected profits done by the Respondent was impractical and based on a wrong formula considering that net profit could only be arrived at after deducting all costs incurred from the selling price. The Appellants averred that the Respondent in his calculation had failed to factor in other costs such as costs of actually purchasing the vehicles, custom warehouse fees, CFS charge and costs of transporting the vehicles from Mombasa to Nairobi. That the Appellants also incurred other overhead charges such as rent payment for the lots where the motor vehicles were showcased before the sale and invariably, the calculation of expected profit by the Respondent was not only misleading but wrong. For these reasons, the Appellants urged the subordinate court to dismiss the suit against them.
10. When the matter was set down for hearing, the Respondent testified on his own behalf (CW 1) whereas the 1st Appellant testified on behalf of the Appellants (DW 1). After the hearing, the Subordinate Court rendered its judgment on 03.03.2023. It held that the issue for determination is whether the Respondent was entitled to the orders sought. It was held that the amount pleaded by the Respondent under the claim of profit was not merited as it was unable to decipher the selling price of the motor vehicles as evidence availed by the Respondent was insufficient. The Subordinate Court held that the Respondent had proved its claim of Kshs. 550,000.00 on a balance of probabilities.
11. The Appellants are dissatisfied with this judgment and have appealed against it on the basis of their memorandum of appeal dated 15.03.2023. The appeal has been canvassed by way written submissions which are on record and which I have considered and where necessary, I will make relevant references to in my analysis and determination below.

Analysis and Determination

12. In determining this appeal, I am aware that the court's jurisdiction is limited by section 38(1) of the *Small Claims Court Act*, 2016 which provides that '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.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). Thus, the duty of this court is to determine whether the subordinate court's conclusions were supported by the evidence on record and the law.
13. It was not in dispute that under the Agreement, the Respondent paid Kshs. 2,062,624.00 directly to the KRA as import duty for the 6 motor vehicles. In as much as the 1st Appellant denied that the Respondent paid a further Kshs. 300,000.00 as clearance fees bringing the total sum financed by the Respondent to Kshs. 2,362,624.00, I agree with the Respondent's submission that in their pleadings, the Appellants did not deny that the Respondent paid the Kshs. 300,000.00. They agreed with the averment that the Respondent performed his obligations by paying the Kshs. 2,062,624.00 directly to the KRA and an additional Kshs. 300,000.00 as clearance charges, that is, the principal sum. The Appellants did not also dispute that this principal sum was to be refunded to the Respondent.



14. The Respondent averred that the Appellants made various intermittent payments leaving a balance of Kshs. 550,000.00 as at 21.07.2022. However, the Appellants contended that it had refunded the entire amount and that the intermittent payments totaling Kshs. 475,000.00 was the last of it plus profit. They further stated that the Respondent did not disclose that Kshs. 1,500,000.00 from the proceeds of sale of the motor vehicles was reinvested by the parties in a further agreement and that this sum formed part of the money the Respondent was entitled to.
15. The Subordinate Court was right to state that the resolution of this matter was one based on proof and on a standard of a balance of probabilities and that this position is anchored in law in sections 107 to 109 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). The Respondent gave evidence that he was refunded the money he had financed the Appellants less Kshs. 550,000.00. The 1st Appellant stated otherwise. At this point, the burden was on the 1st Appellant to prove that he actually paid the entire principal sum and that there was no pending balance. He even introduced another averment that the parties had a further agreement to reinvest some Kshs. 1,500,000.00. Section 112 of the *Evidence Act* provides that ‘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.’ Therefore, the burden was also on the 1st Appellant to prove that the parties had such an agreement to reinvest a sum of Kshs. 1,500,000.00 received from the sale of the motor vehicles and that he had evidence that he had paid the principal sum advanced by the Respondent. Going through the record, there is nothing to demonstrate that the 1st Appellant repaid the Respondent the entire sum financed under the Agreement. There was also no evidence by the 1st Appellant to demonstrate that the parties had agreed to reinvest the Kshs. 1,500,000.00.
16. According to the record, the 1st Appellant only admitted to paying the Respondent Kshs. 1,173,479.60 on 09.09.2021, Kshs. 250,000.00 on 22.02.2022, Kshs. 100,000.00 on 09.03.2022, Kshs. 80,000.00 on 13.07.2022, Kshs. 45,000.00 on 21.07.2022 and some payments totalling Kshs. 157,000.00. A summation of these sums brings a total of Kshs. 1,805,479.60. When this is subtracted from the principal sum of Kshs. 2,362,624.00 it gives a net sum of Kshs. 557,144.40. The Respondent was not therefore off the mark when he claimed to have been owed Kshs. 550,000.00 and the subordinate court did not err in finding that the 1st Appellant still owed the Respondent Kshs. 550,000.00. I therefore find that the Subordinate Court’s conclusion was supported by the evidence and facts on record.

Disposition

17. The Appellants’ appeal has no merit. It is dismissed. The Appellants shall pay the Respondents costs assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL 2024.

D. S. MAJANJA

JUDGE

Mr Ikua instructed by Ikua and Partners Advocates LLP for the Appellants.

Mr Wakwaya instructed by Rachier and Amollo LLP Advocates for the Respondent.

