



**Khushi Motor Limited v Obuya (Civil Appeal 313 of 2023)  
[2024] KEHC 3757 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 313 OF 2023  
DKN MAGARE, J  
APRIL 4, 2024**

**BETWEEN**

**KHUSHI MOTOR LIMITED ..... APPELLANT**

**AND**

**JULIUS OMONDI OBUYA ..... RESPONDENT**

*(Appeal from the Judgment and Decree of the Honourable V. Muthoni made on 14/9/2023 in Mombasa SCCOM No. E472 of 2023)*

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of the Honourable V. Muthoni made on 14/9/2023 in Mombasa SCCOM No. E472 of 2023.
2. The Appellant is substantially on the ground that the Learned Trial Court erred in finding that the Appellant did not prove his case on a balance of probabilities despite the overwhelming evidence adduced by the Appellant.

**Pleadings**

3. In the Statement of Claim dated 13<sup>th</sup> July 2023, it was pleaded that Appellant sold Motor Vehicle Registration No. KCN 381K by hire purchase.
4. The Appellant also pleaded that the purchase price for the suit motor vehicle was Kshs. 1,070,000/- and the Respondent was to pay Kshs. 520,000/= as deposit and the balance would be settled in 10 monthly installments of Ksh. 55,000/- each.
5. However, the Respondent fell in breach of the agreement by not paying any of the instalments. The Appellant sought Judgment for Kshs. 550,000/- with costs and interest.



6. On the part of the Respondent, he entered appearance. It was his defence that the initial agreement was meant for a Toyota townace car. That for the suit motor vehicle, he paid Kshs. 550,000- deposit and not Kshs. 520,000/-.
7. He also prayed for a counterclaim of Kshs. 940,000/- being the deposit paid together with the repair costs. It was clear that he still has the car. The agreement, though described as hire purchase, it is a sale agreement with postponed payments for 11 months.
8. It was stated in defense that the motor vehicles broke down and failed to assist the Respondent in the intended use of the transport business. There was however no pleading that the same vehicle was returned. It was sold on as is where is basis.

### **Evidence**

9. During trial, the Appellant's witness, one Abdulsatar Mohamed relied on his witness statement and documents dated 13<sup>th</sup> July 2023 which he produced in evidence. It was his case that the Respondent paid Kshs. 520,000/- as deposit. Kshs. 20,000/= out of it was for the car tracker.
10. He stated that the Appellant usually gives customers one year to repay failure of which they repossess the motor vehicle. He also testified that they did not repossess the car because they opted to claim the balance. On the part of the Respondent, he testified and relied on his witness statement and receipts produced in court.
11. It was his case that he paid a deposit of Kshs. 550,000/=. That he had not completed the payment after paying the deposit. The witness statements by the Respondent's witnesses were, by consent of the parties, adopted in evidence without calling them to testify. They reiterated the Respondent's testimony.
12. The Trial Court considered the Appeal and rendered its Judgement on 14<sup>th</sup> September 2023 dismissing the claim and also counterclaim. Aggrieved, the Appellant who was the Claimant lodged this appeal.

### **Submissions**

13. The Appellant submitted that the Trial Court erred in dismissing the suit.
14. It was submitted that this was a valid hire purchase agreement under Cap 507 and the court ought to have treated it as such. It was thus submitted that only Ksh. 520, 000 was paid when the sum was Ksh. 1.070,000/ ought to have been paid.
  1. On the part of the Respondent, it was submitted that the Trial Court was correct in its determination. I was urged to dismiss the Appeal.
16. I have considered the authorities relied upon by the parties and it is not for their lack of value that I do not restate them herein.

### **Analysis**

17. This being an Appeal from the small claims court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth: -
  - (1) A person aggrieved by the decision or an order Appeals. 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.



18. This is based on the age old decision in the case of Mbogo and Another vs. Shah [1968] EA 93 where 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.”

19. Being an Appeal on points of law, it is similar to the court of Appeal on a second Appeal. The duty of a second Appeal was set out in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR: -

This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).

20. The next question is what constitutes a point of law. In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

“4. Although the phrase ‘a matter of law’ has not been defined by the Elections Act, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, M’inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484.”

21. In Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal held as follows: -

“it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

22. analysis ss The main issue for determination in this case is whether the Trial Court erred in law in dismissing the Appellant’s suit.

23. The Trial Court stated that Section 5(4) of the Hire Purchase Act disentitled the Appellant from recovering the balance on the hire purchase price since there was no evidence that the subject Agreement was registered as required under the said Act.



24. The impugned Section 5 (4) of the Hire Purchase Act provides doth;

“Unless a hire-purchase agreement has been registered under subsection (2) –(a) no person shall be entitled to enforce the agreement against the hirer or to enforce the contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer; and

(b) no security given to the hirer in respect of money payable under the agreement, or given by a guarantor in respect of money payable under a contract of guarantee relating to the agreement, shall be enforceable against the hirer or the guarantor by any holder thereof.

25. This was a misconstruction of the contract between the parties. The document describes itself as a sale agreement. Whether the parties described it by any other name, it remained a sale agreement for a specified consideration payable over 11 months. The court proceeded on florics of its own and deviated from pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows:-

“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.”

26. 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 respect to the essence of pleadings 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.....”



27. A rose by any other name smells sweet, the Bard in Romeo and Juliet. The court was duty bound to read the relationship and interpret it as such. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKL*, 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...”
28. The agreement was a sales contract stipulating payment by installments and the impugned motor vehicle was sold on as is basis. The Trail Court proceeded and create a different contract between the parties and proceeded to rule on it. It was not a duty of the court to help parties escape a bad bargain. Parties are bound by contracts they enter into.
29. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*, the court of Appeal was of the considered position that: -
- “in our view, is a serious misdirection on the part of the learned judge. 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”.
30. The court must be able to distinguish between a sale agreement with postponed payments and hire purchase. A Hire Purchase Agreement in my view pertains an Agreement in which the owner of goods allows a person, known as the hirer, to hire goods for a period of agreed time by paying agreed installments. The Installments are preceded by an agreed initial deposit which the hirer must pay beforehand.
31. The hirer has an option to buy the goods at the end of the Agreement if all installments are paid. As was stated by the Court in *Eunice Kanugu Kingori v NIC Bank Limited [2018] eKLR*,
- Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying installments. The hirer has an option to buy the goods at the end of the Agreement if all installments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner.”
32. Even if it had been a hire purchase agreement however, failure of registration would not render the agreement unenforceable. In the case of *Taawawa Supermarket Limited Vs Fina Bank Limited*, Civil



Appeal NO. 118 OF 2002, the Court of Appeal stated as follows concerning a hire-purchase agreement that had not been registered:

“We may add that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement. It retained its validity as a contract inter se and was enforceable as such.”

33. Justice Ochieng, as he then was, in the case of *Henry Chama Chama v Sammy Traders Limited* [2021] eKLR stated as follows:

“In the light of the said findings, it is clear that the contract between the Hirer and the Owner was not illegal. The non-registration of the hire-purchase agreement did not render the agreement illegal: it only rendered it unenforceable in the specific terms as stipulated in Section 5 (4) of the Hire Purchase Act.

34. The parties herein entered into a sale agreement stipulating payment by installments. There was no factual contestation on the payments and balances. The case turned on non-registration. There was no contestation that the Respondent never paid any installments. This was part of the counterclaim raised.

35. The Trial Court was thus wrong. Its finding was contrary to law and equity. In finding that the Respondent was in breach of the contract but the Appellant could not enforce the contract, the court allowed the Respondent to escape with its breach of contract. In *Kenya Wildlife Service v Awuor* (Civil Appeal E013 of 2022) [2023] KEHC 3721 (KLR) (26 April 2023) (Judgment) the court stated as doth: -

“Under common law there cannot be a wrong without a remedy - or in other words, ‘Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium). The Respondent suffered a wrong; he went to the appellant seeking relief and he was repulsed’

36. The Appellant was thus entitled to claim for payment of the balance on the agreed purchase price of Ksh 550,000/=. The court did not find that the same was paid. There were no pleadings on why it was not payable. In absence of that, the balance is payable. In *The case of Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”



37. The court proceeded to deal with technicalities that ended driving the Appellant from the seat of justice. The court found breach but relied on alleged illegality. This could be useful if the dispute was on repossession. It was not. It was on the balance that was proved in the court below. The Appellant cannot have the money and the vehicle.
38. The court was right in dismissing the Counterclaim. Amounts for fuel and repair of a motor vehicle belong to the person repairing. No party resiled on the contract of sale. Consequently, there was no basis for repair charges. The counterclaim remains dismissed with no order as to costs.
39. Therefore, I find merit in the Appeal. On costs, there are 2 aspects. Costs in the lower court and costs for the Appeal herein. Section 33 of the Small claims court provides that the court may award costs to a successful party. The Appellant is a successful party. There is nothing stopping the court from awarding them costs.
13. Award of costs in this court are governed by section 27 of the *civil procedure act*. They are discretionally. The Supreme Court has 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.
40. Since costs follow the event, the Appellant is entitled to costs of the Appeal. A sum of Ksh 50,000/= will be right and just. It is so awarded.

### **Determination**

41. In the upshot, I make the following Orders:
- i. Judgment and Decree of the Honourable V. Muthoni made on 14/9/2023 in Mombasa SCCOM No. E472 of 2023 is hereby set aside. In lieu thereof, I substitute with an order, entering Judgement for the Appellant against the Respondent for a sum of Ksh. 550,000/=, being the balance of the purchase price.
  - ii. The Appellant shall have costs of the Small Claims Court and interest at court rates from the date of filing the Small Claims Court.
  - iii. The Appellant shall have the cost of this Appeal of Ksh. 50,000/=.



iv. 30 days stay of execution.

v. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4<sup>TH</sup> DAY OF APRIL, 2024.  
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Mr. Yose Edwin for the Respondent

Ms Otuya for the Appellant

Court Assistant - Norah

