



**Wanjiru v Kikombo (Civil Appeal E398 of 2022)  
[2024] KEHC 7052 (KLR) (Civ) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7052 (KLR)

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

**CIVIL**

**CIVIL APPEAL E398 OF 2022**

**JN MULWA, J**

**JUNE 12, 2024**

**BETWEEN**

**ZIPPORAH WANGOI WANJIRU ..... APPELLANT**

**AND**

**CHRISTINE KATHINI KIKOMBO ..... RESPONDENT**

**JUDGMENT**

1. This Appeal is against the Small Claims Court Judgment dated 18/05/2022. The factual background may be summarized as hereunder: -

By an undated agreement between the Claimant and the Respondent the Claimant hereinafter referred to as the purchaser the seller agreed to sell and the purchaser agreed to purchase motor vehicle registration No. KCY 963K then registered in the seller's name for a sum of Kshs 380,000/= which sum was duly paid to the seller in full on 10/01/2022.

2. After the payment possession and control of the subject vehicle remained with the seller pending transfer of ownership to the buyer. Before this could be actualized the vehicle was involved in a self-involving accident and was damaged. The purchaser refused to take possession of the vehicle with the damages and insisted on it being repaired before she could take possession but the seller refused to repair the same as well as to co-corporate with the vehicle insurer. As a result the dispute found its way to the small claims court for resolution.
3. In the Small Claims Court the purchaser filed the suit as the claimant demanding refund of the purchase price by the Respondent.



She denied the claim on grounds that the claimant had breached terms of the sale agreement particularly that it was agreed that the remainder of the Insurance Policy Cover was to remain with or under the seller until it expired and ownership had already passed to the purchaser.

Before the adjudicator the parties agreed that they would proceed by way of documentation as filed by each without calling the makers and upon written submissions which they both filed.

4. In his judgment the trial Magistrates/adjudicator made findings of both facts and law as hereunder; -
  - a. That the subject vehicle ownership did not pass to the Claimant/purchaser immediately by mere payment of the purchase price as transfer to the purchaser had not been effected and particularly by the 7/03/2022 when it was damaged in an accident while in the possession and control of the seller.
  - b. That the vehicle was in the possession and control of the seller at all material times who admitted having hired and was paying the driver of the vehicle.
  - c. That a sum of Kshs 6,000/= paid to the seller by the purchaser was for compensation of unutilized insurance premiums.
  - d. Breach of legal obligations and duty does not amount to breach of the agreement.
  - e. The Claimant/purchaser was entitled to a refund of the purchase price of the subject vehicle, being Kshs 380,000/= plus costs and interest by the seller.
5. Being dissatisfied with the adjudicator's judgment the seller lodged this appeal by a Memorandum of Appeal dated 9/06/2022 upon the following grounds:
  1. That the Honourable court erred in law and in fact in finding that there was no transfer of Ownership of Motor Vehicle Registration number KCY 963K at date of accident
  2. That the Honourable court erred in law and in fact in finding that the appellant was the one in physical possession the motor vehicle registration KCY 963K
  3. That the Honorable court erred in law and in fact in failing to consider the appellant's evidence.
  4. That the Honorable court erred in law and in fact in determining that the Appellant should pay a Kshs 380,000/= equivalent to the Purchase price of the Motor vehicle which was not in her possession.
  5. That the Honorable court erred in law and fact in finding that the claimant had proved her case on a balance of convenience.
6. It is proposed that the judgment of the Magistrate/Adjudicator be set aside and the original suit (before the small claims court) be dismissed with costs.

The parties filed submission. They are dated 20/09/2023 and 10/10/2023 respectfully.

I have considered the same together with the documentary evidence produced before the trial court.

### **Analysis And Determination**

7. Section 38(1) of the *Small Claims Court Act* limits High Court's jurisdiction to entertaining matters of law only. It states: -

38(1) a person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.



38(2) an appeal from any decision or order referred to in sub-section (1) shall be final.

8. Section 30 thereof provides that: - Subject to agreement of all parties to the proceedings, the court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the court.
9. The parties in this Appeal having opted to take advantage of the provisions above filed documents and relied on them fully. That being the case they are bound by their pleadings statements and the documents they filed. In the impugned judgment that I have perused the trial magistrate referred to, and cited the Respondent's documents, particularly the claimant's (sellers) statement of claim dated 22/03/2022 and her witness statement dated 11/04/2022, as well as the Respondent's (purchasers) statements and witness statement dated 11/04/2022 and 4/05/2022 to the effect that despite having paid the full purchase price for the vehicle, full control and possession remained with the seller including hire and payment of the driver on the material date of accident. It is also instructive that it is the seller/Respondent who towed the vehicle to a private garage without informing the purchaser confirming that she had not parted with physical possession and control of the vehicle.
10. The above material facts are well captured in the Adjudicator's Judgment that I have carefully considered and re-evaluated as demanded of an appellate Court as held in the case *Selle* among others.

Issues for Determination.

1. Whether ownership of the motor vehicle KCY 963K had passed to the claimant/purchaser at time of the accident.
  2. Whether the trial court's judgment ought to be set aside and the claim therein be dismissed.
  3. Who bears costs for this Appeal.
11. I have cited the provisions of Section 38(1) of the [Small Claims Act](#) which underpins the jurisdiction of this court.

As clearly evident from the grounds of Appeal the appellant was aggrieved by both matters of law and fact.

According to *Black's Law Dictionary* 4<sup>th</sup> Edition, a "matter of fact" -is a matter that involves a judicial inquiry into the truth of the alleged facts.

"Matter of Law" – is a matter involving a judicial inquiry into the applicable law.

12. Distinction of what amounts to matters of law and matters of fact are well captured in the case *Bracegirdle v Oxley* (2) [1947] 1 ALL E.R 126 when Lord Denning J rendered thus: -

"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witness and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact.....

The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law.



..... the court will always interfere if the conclusion cannot reasonably be drawn from the primary facts.....”

13. The above reasoning as to determine and distinguish matters of law and matters of facts have been adopted in Kenyan jurisdiction in numerous decisions among them *M'ringu & Others v R.* [1982-88] I KAR 360; *Kenya Breweries Ltd vs Godfrey Odongo*, Civil Appeal No. 127 of 2007 and *Stanley N. Murithi & Another v Bernard Munene Ithiga* [2016] eKLR; *Mwangi Wambugu v Wambugu* [1984] KLR 453.
14. The principles cutting across the above decisions is that matters of law or points of law only limit the appellate jurisdiction of the court, and particularly, in the *M'ringu v. R.* (*Supra*) that “Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law”.
15. Considering the appellant’s submissions I hold the view that they are largely matters and findings on facts, which in my view are not contested. The only matters of law or question of law based on the analysis of the material facts and conclusions by the trial court are based on the application of Sections 3 of the *sale of goods Act* as to whether ownership of the goods (vehicle) had passed to the purchaser upon payment of the full purchase price despite the physical control remaining with the seller.
16. It is trite that transfer of goods or property means and implies transfer of ownership of the said goods. As to possession it refers to the goods being taken away from the original owner and given to the new owner by virtue of the sale agreement meaning that such ownership takes effect the moment the goods (vehicle) is given to the purchaser by the seller and the purchaser takes physical possession and control of the vehicle. This in my considered view means that the person in physical control and possession is the only one who would drive the vehicle or hire and/or authorize a driver to drive the same.
17. The Appellant submissions that the vehicle was sold and delivered to the Respondent(purchaser) on the 10/01/2022 upon payment of the purchase price and therefore the property in the goods (vehicle) passed to the purchaser on the same date does not support either the facts that are undisputed nor the law underpinning the same. I therefore disagree with the Appellant’s submission that the trial Magistrate erred and failed to appreciate that the motor vehicle ownership and property had passed to the purchaser at the time it was involved in an accident and damaged.
18. The court of Appeal case of *Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 others* [1966] eKLR cited by the appellant confirms my considered view clearly expressed therein that ownership of a vehicle passes to the purchaser at the point of delivery and that the registration book of the vehicle is only evidence of the title and not always of actual possession and control.
19. Additionally, the Court of Appeal in *Mutisya v. Reuben Musyoki Muli & Joel Muga Opinja v East Africa sea Foods Ltd* [2013] eKLR supports the above holding that registration of a motor vehicle is not conclusive proof of ownership but it can be rebutted where other compelling evidence exists to prove otherwise.
20. Having considered the primary facts placed before the trial court by documents only without any oral evidence adduced, I am bound to accept the findings of facts as found by the trial court and resist the temptation to treat such findings as findings of law so as to assign myself jurisdiction to entertain matters of facts or mixed matters of law and facts, as stated in the *M'iriungu v. R.* (*supra*).
21. The trial court in its judgment clearly expressed itself on both issues and pronounced rightly on both the issues of possession and passing of ownership of the subject motor vehicle from the seller to the



purchaser which I fully agree with that the ownership of the vehicle registration No. KCY 938 despite the purchase price having been paid to the seller in full possession did not pass to the purchaser at any one time and therefore liability could not be transferred to the purchaser who never assumed actual possession and control of the subject vehicle despite having paid the full purchase price.

22. For the foregoing I find no merit whatsoever in the appeal. It is dismissed with costs to the Respondent.  
Orders accordingly.

**DATED SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF JUNE, 2024.**

**JANET MULWA**

**JUDGE**

