



**Mathenge v Musoni Microfinance Limited & 2 others (Civil Appeal
E012 of 2023) [2024] KEHC 9217 (KLR) (Civ) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9217 (KLR)

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

CIVIL

CIVIL APPEAL E012 OF 2023

BM MUSYOKI, J

JULY 24, 2024

BETWEEN

NICHOLAS NGATIA MATHENGE APPELLANT

AND

MUSONI MICROFINANCE LIMITED 1ST RESPONDENT

GREYPOST LIMITED 2ND RESPONDENT

NAIROBI CHANNELS AUCTIONEERS 3RD RESPONDENT

*(Being an appeal from judgement and decree of Honourable J.W. Munene dated
16-12-2022 in Small Claim Courts at Milimani case number E1783 of 2022)*

JUDGMENT

1. This is an appeal from the Small Claims Court at Milimani commercial case number E1783 of 2022. In the said case, the appellant had sued the respondents for unlawful sale of his motor vehicle registration number KCR 528Y. The appellant's claim was that the 1st respondent had unlawfully sold his motor vehicle through the 2nd and the 3rd respondents.
2. According to the proceedings availed to this court, the matter came for first mention on July 25, 2022 on which date the respondents had not filed their responses to the claim. Counsel for the 1st respondent asked for 7 days to file its response which was granted and the matter placed for further mention on 4-08-2022.
3. On August 4, 2022, the 1st respondent had not filed his response and asked for more time which request was once again granted. At the same time, the court entered interlocutory judgement against the 2nd respondent in respect of prayers (a) and (c) and final judgment for Kshs 850,000.00 which was subject



of prayer (b) of the statement of claim. The matter was ordered to be listed for formal proof against the 2nd respondent and hearing of the claim against the 1st respondent on September 1, 2022. For purposes of clarity of prayers (a) and (c) for which the matter was to go for formal proof were, which I quote verbatim for obvious grammatical errors;

- a. Specific performance for the return of motor vehicle registration number KCR 588Y Toyota Sienna NCP 81; and
 - c. Loss and damages for the period denied the (motor vehicle) tool of income.
4. The proceedings do not show what happened on September 1, 2022 but on September 7, 2022, the matter appeared before the adjudicator where Mr. Gaita appeared for the 2nd respondent, Mr. Juma for 1st respondent and Ms Munene for the claimant. On this date, the advocate for the claimant came up with an application for amendment. The application was allowed and matter fixed for mention on September 28, 2022. On this date, Mr. Gaita appeared for the 2nd and 3rd respondents, Ms Munene for the claimant and Mr. Juma for the 1st respondent. On this date, the claimant stated that he had amended his claim and the court fixed the matter for hearing on October 27, 2022 and the same was ordered to be heard by way of submission under Section 30 of the [Small Claims Court Act](#). On the same date, the 2nd and 3rd respondents were given leave to file their witnesses' statements and supporting documents by close of business that date. The court further ordered the claimant to file submissions within seven days from September 29, 2022 and the respondents were to file their submissions within 7 days of service. The court reserved the matter for judgement on October 27, 2022.
5. In the proceedings that followed show that the court was not able to see the respondent's documents from the CTS. The court even at some point directed the parties to bring their documents to court physically. In her judgment, the court indicated that the respondents did not file their responses as purported save for the 3rd respondent's witness statement which the court treated as its defence. The court proceeded to dismiss the claimant's case and the 1st respondent's counter claim.
6. Section 38(1) of the [Small Claims Court Act](#) limits this court's appellate jurisdiction to matters of law only. I have looked at the memorandum of appeal filed by the appellant and the cross appeal filed by the 1st respondent. The appellant has pleaded the following grounds of appeal;
- a. The learned resident magistrate erred in law and in fact by holding that the suit motor vehicle registration KCR 528Y Toyota Sienna NCP 81 was lawfully sold by the 1st respondent a fact not borne by the evidence and proceedings before her.
 - b. The learned resident magistrate erred in law and in fact by ignoring the documentary evidence and submissions of the appellant and in particular on liability and the fact that the appellant had adduced evidence that the suit motor vehicle was unlawfully sold by the respondents by failing to follow the statutory provisions.
 - c. The learned resident magistrate erred in law and in fact by dismissing the appellant's claim against the respondents.
7. The 1st respondent who is the cross-appellant has raised the following grounds of appeal;
1. The learned adjudicator/magistrate erred in law and fact by failing to acknowledge that on December 10, 2022 upon the honourable court's request, the appellant delivered physical copy of the response to the statement of claim dated 11th August 2022 which the cross appellant relies on to respond to amended statement of claim dated 18th August 2022.



2. The learned adjudicator/magistrate erred in law and fact by failing to direct the 1st respondent to serve the appellant with a judgment notice or mention date to clarify the issue of pleadings.
3. The learned adjudicator/magistrate erred in law and in fact by failing to consider the appellant's pleadings which were duly filed and served.
4. The learned adjudicator/magistrate erred in law and fact in failing to acknowledge the appellant's documentary evidence and submissions.
5. The learned adjudicator/magistrate erred in fact and law by finding that the cross-appellant's counter claim had been erroneously raised in the submissions.
6. The learned adjudicator/magistrate erred in law and in fact by dismissing the appellant's counter claim yet the same was specifically pleaded and proved.
7. The learned adjudicator/magistrate erred in law and fact in that the award of damages in the judgment is unsupported by the evidence on record.
8. Without saying much, the grounds raised by the appellant are all on issue of the strength of evidence adduced by the appellant. They are to me obviously issues of facts which I cannot delve into by virtue of Section 38(1) of the *Small Claims Courts Act*. Be that as it may, I have reproduced the proceedings above as I noted an issue of law which may have bungled the proceedings before the adjudicator. As narrated above, final judgment of Kshs 850,000.00 was entered against the 2nd respondent and the matter was to go for formal proof against the said respondent in respect of the other prayers. Once a final judgment has been entered, there is no need of a formal proof. In that case, the claimant's duty was to prove his entitlement to prayers (a) and (c) and even if this failed, he already had a judgment for Kshs 850,000.00 which should not have been subjected to a formal proof. I however note that the parties proceeded in ignorance of this fact. It may not be clear why the parties and the court proceeded as if there was no final judgment.
9. The fact that the court's procedures have been relaxed in order to achieve the purposes for which they have been set does not give a ticket to parties and courts to breach established legal principles, position and rules. They still remain courts of law which are bound to enforce the rights of those appearing before it in a manner that follows the provisions of the law. I will come back to this after dealing with the cross appeal.
10. The first ground of the memorandum of cross appeal faults the adjudicator for failing to acknowledge receipt of documents delivered to her. I have no reason to doubt the adjudicator's observation that she did not have the documents. I am not linked to the lower court system and I am not able to check the date the documents were filed. The adjudicator is seen in the judgment complaining about her inability to access the CTS which was down on two occasions. I choose to believe the adjudicator. If she had reason or desire of deliberately locking out the parties, she would not have deferred the judgment twice to allow parties to deliver their physical copies. It also beats logic how the adjudicator could access submissions which should obviously have been filed after the response to the claim and fail to access the response if indeed it was in the system. If I were to disturb the lower court's judgment, I would do so on this ground.
11. Grounds 2, 3, 4, 6 and 7 have in my opinion no basis. Service of judgment notice would not have changed the position that the magistrate was not able to access the documents. In any event, I have already made my decision on this issue of accessibility of documents as claimed in the 1st ground. If the adjudicator had not seen the counter claim, she was right to decline to grant the counter claim.



12. The 7th ground does not comment itself to me as a ground of appeal in this matter. Despite the same being based on issues of fact, I have not seen any damages awarded by the adjudicator. The ground has no basis for my consideration.
13. Having found that there was a lapse and gaps in proceedings, I find it fair to give the parties another chance to ventilate their case before the court. Letting the final judgment of Kshs 850,000.00 to stand against the 2nd respondent when the parties seem to have proceeded in ignorance of the position of the matter would not serve the purpose of justice. In order to give credibility to the proceedings, I have come to conclusion that the best thing to do is to refer the file back to the trial court for regularisation of the proceedings.
14. In the circumstances, I hereby order as follows;
 - a. The judgment of the trial court dated 16th December 2022 is hereby set aside.
 - b. The mater is referred back to the trial court for retrial.
 - c. I make no orders as to costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

