



**CMC Motors Group Limited v Odero (Civil Appeal E196 of 2021)
[2024] KEHC 14380 (KLR) (Civ) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14380 (KLR)

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

**CIVIL
CIVIL APPEAL E196 OF 2021**

TW OUYA, J

NOVEMBER 18, 2024

BETWEEN

CMC MOTORS GROUP LIMITED APPELLANT

AND

MICHAEL OTIENO ODERO RESPONDENT

*(Being an appeal from the judgment of M.W. Murage (SRM)
delivered on 30.03.2021 in Nairobi CMCC No. 9319 of 2017)*

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 31.03.2021 (and not 30.03.2021 as referenced in the appeal) in Nairobi CMCC No. 9319 of 2017. The lower court suit was commenced by way of the plaint dated 19.12.2017 filed by Michael Otieno Odero the plaintiff (hereafter the Respondent) against CMC Motors Group Limited, the defendant (hereafter the Appellant). The Respondent sought the sum of Kshs. 418,000/-, being a refund on an overpayment allegedly made in respect of the motor vehicle registration number 959T Suzuki APV Panel Van motor vehicle (the subject motor vehicle).
2. It was pleaded in the plaint that the Respondent entered into an agreement with the Appellant on 3.10.2016 (the agreement), for purchase of the subject motor vehicle at a consideration of Kshs. 1,750,000/-. It was further pleaded in the plaint that the Respondent's purchase thereof was financed by NIC Bank (hereafter the Financier) which consequently paid a sum of Kshs. 2,168,000/- to the Appellant towards the purchase, which sum constituted an overpayment on the purchase price to the tune of Kshs. 418,000/-.



3. The Respondent pleaded that he wrote to the Appellant vide the letter dated 8.10.2016 seeking a refund of the abovementioned sum, which letter did not elicit a response. The Respondent further pleaded that vide a subsequent letter dated 17.07.2017, the Appellant admitted to owing the abovementioned sum and indicated that it would refund the same to the Financier, but did not. That in the premises, the Respondent is entitled to a refund on the sum of Kshs. 418,000/-, plus costs of the suit.
4. The Appellant entered appearance and filed the statement of defence dated 14.02.2018 and amended on 27.11.2018 (the amended defence) denying the key averments in the plaint and liability. The Appellant whilst admitting to the existence of the agreement on the terms set out in the plaint as well as receipt of the sum of Kshs. 2,168,000/-, averred that the Respondent subsequently caused to be issued to the Appellant a letter dated 1.08.2016 setting out the following terms:
 - “ a) That NIC Bank Ltd had approved a hire purchase finance of Kshs. 2,168,000/= to finance the purchase of the motor vehicle.
 - b) That the total cost of the motor vehicle inclusive of the insurance was Kshs. 2,710,000/=.
 - c) That the deposit payable directly to the defendant by the plaintiff was Kshs. 542,000/=.
 - d) That the net sum payable by NIC Bank Ltd was Kshs. 2,168,000/=.
 - e) That NIC Bank Ltd required inter alia an antitheft certificate, comprehensive insurance cover for the full value of the motor vehicle being financed, a vehicle inspection report, a tracking device to be fitted for the full loan tenure and a receipt of full payment of the tracking service charges from the tracking company.”
5. The Appellant averred in its amended defence that while the Financier paid a sum of Kshs. 2,168,000/- towards purchase of the subject motor vehicle thereby resulting in an overpayment of Kshs. 418,000, the Respondent on his part did not pay the sum of Kshs. 542,000/- pursuant to the terms of the aforementioned letter, to the Appellant. The Appellant further averred that the above sum of Kshs. 2,168,000/- was subsequently utilized for the benefit of the Respondent and at his request, in the following manner particularized under paragraph 6 of the amended defence:
 - a. Purchase price of the motor vehicle Kshs. 1,750,000/-
 - b. Inspection fees paid to National Transport And Safety Authority (NTSA) Kshs. 2,400/-
 - c. Payment made to APA Insurance Ltd For a comprehensive insurance cover Kshs. 136,150/-
 - d. Payment to SOO-Inter Motors for Accessories fitted on the motor vehicle Kshs. 169,450/-
 - e. Payment to Geo-Sat Solutions Ltd for a Tracking device fitted on the motor vehicle Kshs. 110,000/-Total Kshs. 2,168,000/-
6. In view of the foregoing, the Appellant denied that the Respondent was entitled to a refund on the sums sought in the plaint.



7. The suit proceeded for full hearing with the Respondent's testimony, while the Appellant on its part relied on the testimony of one (1) witness. Upon close of submissions, the trial court by way of the judgment delivered on 31.03.2021 allowed the Respondent's claim, thus awarding him the sum of Kshs. 418,000/- sought plus costs of the suit.

The Appeal

8. Aggrieved by the aforementioned decision, the Appellant preferred the present appeal by way of the memorandum of appeal dated 24th May, 2021 which is based on the following grounds:
- I. The Learned Magistrate erred in law and in fact in proceeding to determine the case on the basis of the Appellant's statement of defence filed on 16th February 2018 when the Appellant had with leave of the court granted on 19th November 2018 filed an amended statement of defence on 28th November 2018.
 - II. The Learned Magistrate erred in law and in fact in ignoring or failing to consider the Appellant's amended statement of defence.
 - III. The Learned Magistrate erred in law and in fact in failing to take into account that NIC Bank Limited required the Appellant to fit the motor vehicle with a tracking device and take out a comprehensive insurance cover.
 - IV. The Learned Magistrate erred in law and in fact in failing to find and hold that the Appellant utilized the sum of Kshs. 418,000/= for the benefit of the Respondent by paying for inspection fees (Kshs. 2,400/=), comprehensive insurance (Kshs. 136,150/=), accessories fitted on the motor vehicle (Kshs. 169,450/=) and a tracking device (Kshs. 110,000/=) against the weight of the evidence on record.
 - V. The Learned Magistrate erred in law and in fact in holding that there was no agreement that the sum of Kshs. 148,000/= be utilized on payment for fittings in the motor vehicle when there was clear evidence on record to the contrary.
 - VI. The Learned Magistrate erred in law and in fact in holding that the Appellant had admitted in its defence that it was holding the sum of Kshs. 418,000/= and insisting that it belongs to NIC Bank Ltd against the facts pleaded in the amended statement of defence and the evidence on record.
 - VII. The Learned Magistrate erred in law and in fact in holding that the Appellant was continually holding the sum of Kshs. 418,000/= when as per the evidence on record the same had been utilized and paid out for the Respondent's benefit.
 - VIII. The Learned Magistrate erred in law and in fact in holding and finding that the Respondent paid Kshs. 250,000/= in cash for the comprehensive insurance and tracking device on the vehicle against the weight of the evidence on record.
 - IX. The Learned Magistrate erred in law and in fact in holding that the sum of Kshs. 418,000/= was received by the Appellant on behalf of the Respondent when there was no evidence on record to support this finding.
 - X. The Learned Magistrate erred in law and in fact in finding and holding that the Respondent had proved his case on a balance of probability without any basis.



- XI. The Learned Magistrate erred in law and in fact in failing to make a finding that the Respondent's suit was dishonest and meant to unjustly enrich the Respondent.
 - XII. The findings, holding and judgement of the Learned Magistrate were not supported by the evidence on record and were against the weight of the evidence on record. (sic)
9. The Appellant consequently seeks the following orders:
- I. That this Honourable Court be pleased to allow this appeal.
 - II. That the judgement and decree of the Hon. M.W. Murage (Ms) Senior Resident Magistrate in Nairobi CMCC No. 9319 of 2017 Michael Otieno Odero-vs-CMC Motors Group Limited delivered on 30th March, 2021 be set aside.
 - III. That the Respondent's suit being Nairobi CMCC No. 9319 of 2017 Michael Otieno Odero-vs-CMC Motors Group Limited be dismissed with costs to the Appellant.
 - IV. That the Appellant be awarded the costs of this appeal.
 - V. Such orders as this Honourable Court may deem fit to grant. (sic)

Submissions on the Appeal

10. The appeal was canvassed by way of written submissions. Counsel for the Appellant whilst citing the decision in *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] KEHC 998 (KLR) submitted that the trial court erred in ignoring or otherwise failing to consider the amended defence which was filed with leave of the lower court that had been granted on 19.11.2018. That instead, the trial court relied on the original statement of defence which contained paragraphs that were later struck out by way of the amended defence. That consequently, grounds II and III of the appeal ought to succeed.
11. Regarding ground III of the appeal, counsel submitted that in arriving at its decision, the trial court did not take into account the fact that the Financier required the Appellant to satisfy certain requirements for financing, including fitting the subject motor vehicle with a tracking device and further taking out a comprehensive insurance cover in respect thereof vide the letter dated 1.08.2016, which requirement the Appellant complied with thereby incurring further costs namely the sum of Kshs. 2,400/- towards motor inspection fees for the subject motor vehicle; Kshs. 136,150/- towards obtaining the insurance cover for the subject motor vehicle; and Kshs. 110,000/- towards installing a tracking device on the said vehicle, which sums constitute part of the monies sought in the suit.
12. The Appellant's counsel in echoing the above sentiments, further submitted that the trial court erred in not holding that the Appellant utilized the balance of Kshs. 418,000/- for the benefit of the Respondent herein, as set out under grounds IV, V and VII of the appeal. Similarly, and in support of grounds VI and IX of the appeal, it is the contention by counsel that at no point did the Appellant admit to holding the aforementioned sum of Kshs. 418,000/- on the Respondent's behalf.
13. Regarding ground VIII of the appeal, it is also the contention by counsel that the trial court erred in finding that the Respondent paid a sum of Kshs. 250,000/- towards obtaining the insurance cover and tracking device for the subject motor vehicle, yet no evidence was tendered at the trial, to that effect. In submitting so, counsel cited the decisions in *Chalicha Farmers' Co-operative Society Limited v George Odhiambo & 9 others* [1987] KECA 70 (KLR) and *World Explorers Safaris Limited v Cosmopolitan Travel Limited & Gideon Kipkoech Kimaiyo* [2021] KEHC 4130 (KLR) where the respective courts



concluded that a court ought to address itself on the issues raised by way of the pleadings and evidence placed before it.

14. Last but not least, counsel for the Appellant advanced grounds X, XI and XII submitted that the Respondent's suit was purely aimed at unjustly enriching himself since he sought to recover monies that had been paid to the Appellant for purposes of making the necessary additional payments in respect of the subject motor vehicle. That in the circumstances, the Respondent had failed to discharge the burden of proof in his claim and hence the suit ought to have been dismissed in its entirety. On those grounds, the court was urged to allow the appeal accordingly.
15. Counsel for the Respondent on his part anchored his submissions on the decisions in *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR) and *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [[2020] KEHC 9956 (KLR) on the duty of a first appellate court.
16. On the merits of the appeal, the Respondent's counsel submitted that contrary to the assertions being made on behalf of the Appellant, the trial court in making its finding considered the amended defence. He equally submitted that no agreement was entered into between the parties herein as concerns utilization of the overpaid sum of Kshs. 418,000/- in settling the services provided by third parties. That the letter dated 1.08.2016 referenced in the amended defence and whose particulars have been set out hereinabove, was solely between the Appellant and the Financier, and does not involve the Respondent. That in any event, the said letter does not instruct the Appellant to utilize the overpaid sum in the manner alleged or at all. According to counsel, the sum of Kshs. 418,000/- ought to have been refunded to the Respondent.
17. Further to the foregoing, counsel contended that the admission by the Appellant of receipt of the overpaid sum vide the letter dated 17.07.2017 was made on a 'without prejudice' basis and is therefore binding upon it, citing the case of *Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited* [2014] KEHC 3619 (KLR) where the court reasoned that parties are bound by the terms of their contract. That in addition, while the purchase price for the subject motor vehicle was paid by the Financier directly to the Appellant and on behalf of the Respondent, the same was done as a loan facility with the understanding that the Respondent would repay the entire sum financed, which includes the overpaid amount.
18. On the issue raised in the Appellant's submissions regarding payment of the sum of Kshs. 250,000/- towards the insurance cover and tracking device for the subject motor vehicle, it is the submission by counsel that contrary to the assertions being made on behalf of the Appellant, the said payments were made by the Respondent to one Mercy, an agent of the Appellant at the time.
19. Ultimately, counsel maintained that the Respondent was entitled to a refund on the overpaid sum and hence the trial court acted correctly in finding in his favour. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.

Analysis and Determination

20. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account



of circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
22. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the award made by the trial court in favour of the Respondent, thereby allowing his prayer for refund of the sum of Kshs. 418,000/-. As such, the court will consider the 12 grounds of appeal contemporaneously.
23. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).
24. The following constitutes the oral evidence tendered at the trial. The Respondent who was PW1 stated that he is a businessman by profession and adopted his executed witness statement filed on 21.12.2017 as part of his evidence-in-chief and produced his list and bundle of documents equally filed on 21.12.2017 as P. Exhibits 1-12.
25. He then proceeded to state that on the material date, he bought the subject motor vehicle at a consideration of Kshs. 1,750,000/- which amount was financed by the Financier at Kshs. 2,168,000/-. That it therefore follows that an overpayment of Kshs. 418,000/- was made to the Appellant and on which he was entitled to a refund. The Respondent further stated that pursuant to an agreement made between himself and one Mercy Kambua (an employee/agent of the Appellant), he personally catered for the insurance policy and motor vehicle inspection costs in respect of the subject motor vehicle, as



- well as ensuring the installation of the tracking device therein, at his expense, thereby incurring a total expense of Kshs. 250,000/-. That the requisite documentation was tendered as part of his exhibits. That the mentioned Mercy was later sacked from the Appellant company for alleged theft.
26. In cross-examination, the Respondent testified that going by the evidence on record, the cost of purchasing the subject motor vehicle was Kshs. 1,750,000/- whereas the Financier paid a sum of Kshs. 2,168,000/- to the Appellant, upon his application. The Respondent further stated that he did not pay a sum of Kshs. 542,000/- to the Appellant. That the cheque being relied on by the Appellant indicating payment of the sum of Kshs. 136,150/- by itself to APA Insurance Company Limited (the Insurer) relates to a motor vehicle (namely KCH No. 959H) which is different from the subject motor vehicle. That upon his payment of the sum of Kshs. 250,000/- to Mercy who is mentioned hereinabove, he did not receive a receipt acknowledging the same. He further stated that the onus is on the owner of a motor vehicle to fix a tracking device therein.
 27. During re-examination, it was his testimony that the Financier did not authorize the Appellant to utilize any of the monies paid to procure any of the documents purported to have been obtained by the Appellant. It was equally his testimony that at no point in time did he instruct the Appellant to use the part of the monies paid to cater for the additional expenses relating to the subject motor vehicle, adding that he was to repair the entire loan sum to the Financier.
 28. For the defence, Michael David Omamo Juma who was DW1 stated that he is a Branch Manager at the Appellant's Kisumu Branch and proceeded to adopt his witness statement dated 8.03.2019 as part of his evidence. The witness also produced the Appellant's list and bundle of documents dated 26.10.2018 as D. Exhibits 1-10 before proceeding to testify that the Appellant is engaged in the business of selling motor vehicles and that indeed, the consideration for the subject motor vehicle was Kshs. 1,750,000/-. He stated that the Respondent was to pay a part sum of Kshs. 542,000/- towards the purchase of the subject motor vehicle but did not. He also stated that the Appellant paid a sum of Kshs. 136,150/- to the Insurer, for the purpose of obtaining an insurance cover for the subject motor vehicle. That the Respondent then paid a sum of Kshs. 110,000/- for the purpose of installing the tracking device on the said vehicle. That the Appellant further paid a sum of Kshs. 169,450/- for additional fixes on the said vehicle.
 29. In cross-examination, DW1 stated inter alia, that he began working for the Appellant in the year 2015 but was not directly privy to matters concerning the transaction; rather, he was relying on the documents tendered and on record. He testified that there was no material on record indicating that the Respondent had issued instructions to the Appellant, to utilize the overpaid sum of Kshs. 418,000/- but that he could confirm that the said sum was utilized. It was his testimony that he had no way of disputing the Respondent's testimony that he gave a sum of money to Mercy.
 30. In re-examination, the witness gave evidence inter alia, that there are receipts on record by the Financier regarding the undertaking of fittings on the subject motor vehicle.
 31. Having earlier summed up the contents of the pleadings which were relied on by the parties and set out the respective oral testimonies, the trial court after restating and analyzing the evidence reasoned that it was not in dispute that pursuant to the agreement entered into between the parties herein for the purchase of the subject motor vehicle at a consideration of Kshs. 1,750,000/-, the Respondent obtained a loan to the tune of Kshs. 2,168,000/- from the Financier. The trial court further reasoned that it was not in dispute that said loan amount was paid directly to the Appellant by the Financier. The trial court went on to reason that there was no material on record to indicate that the overpaid sum was to be utilized in undertaking fittings on the abovementioned motor vehicle. The trial court concluded



that the Respondent was therefore entitled to a refund on the overpaid sum of Kshs. 418,000/- and entered judgment accordingly, thereby precipitating the present appeal.

32. That said, the applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

33. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden 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... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



34. Upon re-examination of the pleadings and material on the lower court record, the court concurs with the position taken by the trial court that it is not controverted that the parties herein entered into an agreement for the purchase of the subject motor vehicle by the Respondent and from the Appellant, at a consideration of Kshs. 1,750,000/-. This is evidenced by the Retail Vehicle Order issued the Appellant and dated 3.10.2016, tendered as both P. Exhibit 12 and D. Exhibit 1.
35. While it is noted that reference was made to a separate sum of Kshs. 2,710,000/- which allegedly constituted the cost of the subject motor vehicle, upon perusal of the record, the court noted that the said sum is actually said to be the estimated value of the said vehicle at the time, as indicated in the insurance policy schedule issued by the Insurer (P. Exhibit 6 and D. Exhibit 3). It is therefore noteworthy that the aforesaid sum is distinct from the purchase price agreed upon by the parties.
36. Suffice it to say that, the court further concurs with the finding by the trial court that it is not controverted that pursuant to the above, the Respondent sought and obtained financing from the Financier, to the tune of Kshs. 2,168,000/- which amount was paid directly to the Appellant. A correspondence dated 1.08.2016 was tendered as D. Exhibit 2 to that effect. The said correspondence indicates that the Respondent was thereafter required to repay the loaned amount in 59-60 monthly instalments.
37. Further to the foregoing, the court concurs with the reasoning by the trial court that it is not in dispute that the abovementioned financed sum of Kshs. 2,168,000/- constituted an overpayment on the subject motor vehicle by a sum of Kshs. 418,000/-. It is apparent from the record that the Appellant admitted to utilizing the overpaid sum towards undertaking further works or obtaining relevant documents in respect of the subject motor vehicle. The crux of the appeal therefore lies in whether the said expenditure was done at the request or with the approval of the Respondent, for his benefit.
38. Upon its re-examination of the pleadings and material tendered at the trial, the court observed that no credible material or evidence was tendered to support the Appellant's allegation and defence that the Respondent had approved and/or requested the utilization of the overpaid sum for his benefit. If anything, it is apparent from the record that contrary to the averments made by the Appellant that the said sum was applied in obtaining a tracking device and settling the insurance premiums for the subject motor vehicle, the evidence tendered shows that the Respondent catered for the said costs; as seen in copies of the cheque dated 14.11.2016 (D. Exhibit 5) for the sum of Kshs. 136,150/- issued by the Respondent to the Insurer and being the premium payment for the insurance cover policy; and the receipt dated 10.11.2016 (both P. Exhibit 8 and D. Exhibit 9) issued to the Respondent by Geo-Stat Solutions Limited for the sum of Kshs. 110,000/- incurred in obtaining a tracking device. The question whether or not the Respondent paid the above sums directly or through Mercy Kambua; as alleged at the trial stage; is neither here nor there. It is apparent that the said costs were incurred by the Respondent.
39. While it is alleged that the Appellant incurred additional costs towards the subject motor vehicle, upon perusing the material in the lower court record, the court is of the view that it could not be ascertained whether the two (2) cheques each dated 10.11.2016, drawn in favor of the Insurer and SOO-Inter Motors in the respective sums of Kshs. 136,150/- and Kshs. 169,450/- and tendered as D. Exhibits 5 and 6 respectively, relate to the subject motor vehicle. As it stands, the court did not come across any credible material proving that the overpaid sum of Kshs. 418,000/- was utilized for the benefit of the Respondent and at his request, as alleged by the Appellant.
40. Flowing from the foregoing therefore, the question remains whether the trial court acted correctly by finding that the Respondent was entitled to a refund on the sum of Kshs. 418,000/-. Upon its finding



that the said sum had previously been paid to the Appellant by the Financier pursuant to a loan advance facility offered to the Respondent, and which sum constituted an overpayment on the purchase price for the subject motor vehicle, it follows that the Respondent was naturally entitled to a refund of the said monies.

41. In the premises and in the absence of any material to the contrary therefore, the court is of the view that the trial court rightly awarded the sum of Kshs. 418,000/- being the refund sought by the Respondent on the basis of the overpayment made on his behalf by the Financier.
42. Separately and on the subject of whether the trial court ignored or otherwise failed to consider the Appellant's amended statement of defence, upon perusing the impugned decision, the court did not come across anything to infer that the trial court in any manner overlooked the said defence. The mere reference to the wordings by the trial court that: "The defendant filed a statement of defence" in its decision does not connote that the amendments made were overlooked.

Disposition

43. Consequently, the appeal is dismissed for want of merit, with costs to the Respondent. The judgment delivered by the trial court on 31.03.2021 in Nairobi CMCC No. 9319 of 2017 is hereby upheld.
 - a). The appeal is hereby dismissed
 - b). The judgment delivered by the trial court on 30.03.2021 in Nairobi CMCC No. 9319 of 2017 is hereby upheld.
 - c). Costs to the Respondent

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....ms Awori Hb Mr. Ombati

For 1st Respondent.....na

Court Assistant.....martin

