Wamalwa v Ngugi (Commercial Case E314 of 2023) [2025] KEHC 14730 (KLR) (Commercial and Tax) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E314 OF 2023

PM MULWA, J

OCTOBER 16, 2025

BETWEEN

JOEL WAMALWA ..... APPELLANT

AND

MBUGUA NGUGI ..... RESPONDENT

(Being an appeal from the judgment of Hon B. M. Cheloti delivered on 7th November 2023 in CMCC COMMSU No. E342 of 2021)

JUDGMENT

1. The Respondent (then Plaintiff) instituted Nairobi CMCC COMMSU No. E342 of 2021 by a plaint dated 10th March 2021 seeking special damages of £10,760, costs of the suit, and interest

2. The Respondent's case before the trial court was that it imported a used motor vehicle, registration number EA0OXJ, chassis number WDB9066352S307762, make Mercedes Sprinter, from the United Kingdom for purposes of investment in the transport business.

3. It was pleaded that while the motor vehicle lay at the Port of Mombasa pending clearance, the parties entered into a Vehicle Swap Agreement dated 20th March 2015, under which the Appellant took possession and ownership of the said vehicle in exchange for another motor vehicle allegedly located at a yard in London.

4. The Respondent contended that despite travelling to London to complete the exchange, the Appellant's contact person denied having any such vehicle, and the Appellant failed to deliver or return the Respondent's vehicle, which was later sold to a third party.

5. The Appellant filed a statement of defence dated 28th May 2021, denying liability. It maintained that the arrangement was merely to assist the Respondent to avoid auction of the vehicle by the government

and that the Respondent was already familiar with one Yasin Naswa. The Appellant further denied the claim for special damages.

6. Upon hearing, the learned trial magistrate entered judgment in favour of the Respondent for £10,760, being refund of the value of the vehicle, together with interest from 11th February 2016 until payment in full and costs of the suit.

7. Aggrieved, the Appellant lodged this appeal vide a Memorandum of Appeal dated 27th November 2023, raising, inter alia, the following grounds:

    i. That the learned trial magistrate erred in law and in fact when she misdirected herself on the principles surrounding interpretation of a contract and therefore arrived at a wrong conclusion that the contract should have been performed at specific period of time.

    ii. That the learned trial magistrates erred in law and fact when she misdirected herself when she relied on the letter dated 11/ 02/ 2016 that never in its content stipulated the time within which the contract should have been performed thus arrived at wrong conclusion.

    iii. That the learned trial magistrate erred in law and fact when she misdirected herself when she failed to appreciate that the delay was due to frustration beyond the appellants control at the time of the letter dated 11/02/ 2016 thus arrived at wrong conclusion.

    iv. That the learned trial magistrate erred in law and in fact when she misdirected herself by failing to apply the principles governing the award of damages thus arriving at a wrong conclusion thus awarding special damages of £10,760.

    v. That the learned trial magistrate erred in law and in fact when she misdirected herself assuming particulars of breach that were never particularized in the plaint in strict sense of the law thus arrived at a wrong conclusion.

8. The appeal was canvassed through written submissions. The Appellant filed submissions dated 12th May 2025, while the Respondent filed submissions dated 6th and 16th May 2025.

9. The Appellant submitted that the trial court lacked jurisdiction to hear the matter by virtue of clause 5 of the vehicle swap agreement, which provided for arbitration. It further contended that the contract did not contain a specific timeline for performance and that the court erred in construing the letter dated 11th February 2016 as a demand notice. The Appellant also faulted the court for shifting the burden of proof and for awarding special damages without strict proof or consideration of applicable exchange rates.

10. The Respondent in opposition submitted that the trial court had earlier dismissed the Appellant's preliminary objection on jurisdiction vide its ruling of 10th September 2022, which ruling was never appealed. It further submitted that although the contract did not specify a timeline, the delay of six years coupled with a formal demand rendered time of the essence. The Respondent maintained that the vehicle swap agreement was clear, that the Appellant's failure to deliver the replacement vehicle amounted to breach, and that the special damages of £10,760 were specifically pleaded and proved.

Analysis and determination

11. I have carefully considered the Record of Appeal, the Memorandum of Appeal, the written submissions by both parties, and the authorities cited. This being a first appeal, the duty of this Court is to re-evaluate, re-analyze and re-assess the evidence adduced before the trial court and draw its own

independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify - see Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123.

12. It is thus trite law that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence, misapprehension of the evidence, or where the court acted on wrong principles of law.

13. Guided by the above principles, and having carefully reviewed the pleadings and the submissions, the following issues arise for determination:

    i. Whether the trial court had jurisdiction to entertain the suit in view of the arbitration clause;

    ii. Whether the trial court erred in its interpretation of the vehicle swap agreement and the finding that time was of the essence;

    iii. Whether the award of special damages was proper in law; and

    iv. Whether the trial court misdirected itself in its appreciation of the pleadings and evidence.

14. I will address these issues sequentially in the analysis that follows.

On the issue of jurisdiction

15. The Appellant argued that Clause 5 of the Vehicle Swap Agreement provided for arbitration as the mode of dispute resolution and therefore the trial court lacked jurisdiction to entertain the suit.

16. It is undisputed that the Appellant had raised this issue before the trial court through a preliminary objection dated 17th June 2022, which was determined by the ruling delivered on 10th September 2022, dismissing the objection. The Appellant did not appeal that interlocutory ruling or renew the objection at the hearing.

17. Under Section 6(1) of the *Arbitration Act*, 1995, a party who wishes to rely on an arbitration clause must apply for a stay of proceedings before taking any other step in the proceedings. The section provides:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration."

18. In UAP Provincial Insurance Co. Ltd v Michael John Beckett [2013] eKLR, the Court of Appeal held that where a party takes steps in the proceedings after raising an arbitration clause, such as filing pleadings or participating in trial, that party is deemed to have waived the right to arbitration.

19. Having failed to pursue the objection or appeal against its dismissal, the Appellant cannot now raise the issue afresh on appeal. The trial court therefore properly assumed jurisdiction over the dispute. I therefore find no merit in the jurisdictional argument.

On the Interpretation and Performance of the Contract

20. The Appellant faults the trial magistrate for finding that the contract should have been performed within a specific period, yet the written agreement was silent on timelines.

21. The trial court found that the delay in performance a period of nearly six years between execution of the agreement in 2015 and filing of the suit was inordinate and unjustified. The court observed that the

Respondent had issued a formal demand letter dated 11th February 2016 calling upon the Appellant to either perform his obligations or refund the cost of the vehicle. The said letter, in the trial court's view, constituted a valid notice of default, thereby making time of the essence.

22. In the present case, the agreement did not stipulate the exact date or period within which the Appellant was to deliver the vehicle in London. The courts must give effect to the intentions of the parties as expressed in the agreement. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal stated:

> " A court of law cannot rewrite 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."

23. I am of the view that, where no time is specified for performance, the act must be performed within a reasonable time, and what constitutes reasonable time is a question of fact to be determined from the surrounding circumstances.

24. I have carefully examined the letter dated 11th February 2016. Though the Appellant disputed its service, no evidence was tendered to controvert the Respondent's testimony that it was indeed dispatched and brought to the Appellant's attention. Section 107(1) of the *Evidence Act* places the burden of proof on he who alleges. Having denied receipt, the Appellant was under an evidential duty to rebut the presumption of service raised by the Respondent's production of the letter and its contents. This was not done.

25. The trial court was therefore correct in treating the notice as properly served and effective in crystallizing the Respondent's claim. It is settled law that, where a contract does not stipulate timelines for performance, and one-party delays unreasonably, the innocent party may by notice fix a reasonable time for completion, after which non-performance constitutes a breach.

26. In Arnacherry Limited v Attorney General [2014] eKLR, the Court observed that undue delay in performance without justification amounts to a breach, entitling the aggrieved party to compensation for the loss suffered.

27. In this case, the Appellant neither performed his obligations under the vehicle swap agreement nor offered a credible explanation for the prolonged delay. His contention that the delay was occasioned by frustration was unsupported by evidence. The doctrine of frustration, as articulated in Davis Contractors Ltd v Fareham UDC [1956] AC 696 and adopted in Kenya Airways Limited v Satwant Singh Flora [2013] eKLR, requires proof that an unforeseen supervening event rendered performance impossible. The Appellant's assertions did not meet that threshold.

28. On the contrary, the correspondence produced in evidence, including the Appellant's own letters dated 15th October 2021 and 24th November 2021, indicated attempts to alter or assign the Respondent's obligations beyond the scope of the initial contract. Such conduct, far from demonstrating frustration, constituted unilateral variation and amounted to an admission of non-performance.

29. The trial court therefore properly exercised its discretion in finding that the delay was unreasonable and that the Appellant had breached the contract. I agree with that conclusion. The issuance of the demand letter on 11th February 2016 served as a reasonable notice making time of the essence, and the Appellant's failure to act within a reasonable time thereafter justified the Respondent's recourse to litigation.

On the issue of special damages

30. The next I will consider is whether the award of £10,760 as special damages was proper in law. The Appellant argued that the Respondent neither produced receipts nor documentary proof of payment in support of the claim, and therefore failed to discharge the legal burden. It was further submitted that the trial court erred by not specifying the applicable exchange rate and the date thereof.

31. The general principle of law is that special damages must not only be specifically pleaded but also strictly proved. This position is well settled in numerous authorities.

32. In the present case, the Respondent pleaded the sum of £10,760 in paragraph 6 of the plaint as the declared value and cost of the motor vehicle, including shipping, insurance, and port charges. During trial, the Respondent testified that he paid for the vehicle, freight, and clearance charges as evidenced by the import declaration form and valuation documents produced as exhibits. Although not all receipts were availed, the Appellant neither contested the authenticity of the documents nor provided any contrary evidence challenging the value of the vehicle or the payments made.

33. Section 109 of the *Evidence Act* provides that:

> " 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."

34. In the instant suit I find the Respondent discharged the initial evidential burden by producing documentary evidence of the vehicle's value and proof of importation. The evidential burden then shifted to the Appellant to rebut the same, which he failed to do.

35. The law provides that civil cases are determined on a balance of probabilities, and even where documentary evidence is scant. The trial magistrate, having had the opportunity to assess the credibility of the Respondent's testimony and the exhibits, was entitled to find that the claim for £10,760 was sufficiently proved on a balance of probabilities.

36. As to the argument that the trial court failed to specify the exchange rate, I find no merit. The claim was denominated in pounds sterling, and judgment was entered in the same currency. The Appellant did not raise before the trial court any objection to the currency of judgment nor tender evidence of a prevailing exchange rate for conversion. In the absence of such evidence, the trial court cannot be faulted for awarding the amount in the currency claimed and proved.

37. On the alleged assumption of particulars of breach not specifically pleaded, it is clear from the record that the Respondent's claim was grounded on the Appellant's failure to deliver the replacement vehicle or refund the cost of the one taken. The breach was therefore inherent and sufficiently particularized in the plaint. The Court of Appeal in Coast Bus Service Ltd v Murunga Danyi & 2 Others [2012] eKLR held that pleadings should be read as a whole and not in isolation, and that substantial justice should not be defeated by technicality of form where the facts of breach are clear.

38. The Appellant's contention that the trial magistrate assumed un-pleaded particulars is therefore unfounded. The pleadings, evidence, and submissions all consistently pointed to a single issue, failure by the Appellant to perform the contract or refund the Respondent's money.

39. On the totality of the evidence, the trial magistrate properly directed herself on the law and the facts. The Respondent proved the existence of a valid contract, performance on his part, issuance of a demand notice, and the Appellant's failure to deliver or refund the cost of the motor vehicle. The

Appellant's defence of lack of jurisdiction, frustration, and lack of proof were unsupported by the evidence on record.

40. In the premises, I find no reason to interfere with the findings or conclusions of the learned trial magistrate. The appeal lacks merit in both law and fact and must therefore fail.

41. I thus find that the appeal is without merit. The same is dismissed with costs to the Respondent both in this court and in the trial court. The judgment of the trial court delivered on 7th November 2023 is hereby upheld in its entirety.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Kombwayo for Respondent

Court Assistant: Carlos