REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E202 OF 2023

MOGO AUTO LIMITED…….....APPELLANT

VERSUS

NIXON KIPKEMBI ROTICH…….……..RESPONDENT

JUDGMENT

(Appeal from the Judgment dated 21/07/2023 delivered in Eldoret Small Claims Court Civil Case No. E225 of 2023 by Hon. T.W. Mbugua-Adjudicator)

1. This Appeal arises from the Judgment delivered in the said **Small Claims Court** case in which the Respondent (as the Claimant therein) sought Judgment against the Appellant for an amount of Kshs 313,713/- plus costs and interest.

2. The background of the case is that by the Statement of Claim dated 8/03/2023, and filed through **Messrs Lusinde Khayo & Co. Advocates**, the Respondent pleaded that he purchased a motor vehicle from the Appellant and was to pay in instalments up to November 2014, that the Respondent continued to pay the instalments which he did to the tune of Kshs 313,713/- as at December 2022 but the Appellant, not following any procedure, caused the vehicle to be repossessed on 9/12/2022 and sold on 23/12/2022. He thus sought a full refund. The Respondent also filed a bundle of documents.

3. The Appellant, in his Response dated 20/04/2023, and filed through **Messrs Munyaga Githaiga Advocates**, pleaded that the Respondent entered into the Asset Financing Loan Agreement AG2208608 with the Respondent to aid in purchase of the motor tri-cycle (commonly known as "***tuk-tuk***") Reg. No. KTCW 281N at a total price of Kshs 277,210/- in respect to which the Appellant financed Kshs 207,210/- while the Respondent paid the balance of Kshs 70,000/-. It was pleaded that upon purchase, the *tuk-tuk* was used as security for the full payment of the loan, but that the Respondent defaulted in the payments which were to be made on a weekly basis despite being served with reminders and notices, and which default amounted to a breach of the contract, thus prompting the Appellant to exercise its repossession rights over the *tuk-tuk*. It was further pleaded that at the time of repossession, the Respondent still owed the Appellant a sum of Kshs 126,514/-, that the *tuk-tuk* was sold to a 3rd party at a consideration of Kshs 105,000/-, the same having depreciated

in value due to tear and wear. The Appellant therefore counterclaimed for the said sum of Kshs 126,514/-. The Appellant also filed a Witness Statements and bundle of documents.

4. The matter then proceeded for trial in which each side called 1 witness.

5. The Respondent, **Nickson Kipkemboi Rotich**, in his evidence-in-chief before the trial Court, in which he testified as **CW1**, stated that the Appellant financed him on purchase of the "***tuk-tuk***" in November 2021 through a Hire-Purchase arrangement, that under the agreement, he was to pay Kshs 3,257/- over a period of 4 years, which he paid from 2021 to December 2022 but was unable to pay for 2 weeks and the Appellant repossessed the ***tuk-tuk***. He testified that he did not have any arrears and that he had paid Kshs 313,000/- as at the time of the repossession. He however then stated that he owed an outstanding balance of about Kshs 99,000/- and claimed that he was not given any notice before the repossession. He testified that he used to make the payments via Mpesa through his driver's phone but he could not recall the phone number. He also contended that he could not continue making payments after the *tuk-tuk* had been repossessed.

6. On his part, the Appellant's witness, **Erick Omondi Onditi**, testifying as **RW1**, adopted his Witness Statement and stated that he is employed at the Appellant company, with which the Respondent entered into the said Asset Financing Agreement whereof the Respondent was financed Kshs 205,210/- repayable in 156 weeks until 15/11/2024. He stated that the Respondent initially fulfilled his obligations but then missed payments for the successive weeks of 4/11/2022 and 11/11/2022. In cross-examination, he agreed that the Agreement did not have a repossession clause. He also claimed that the Appellant had copies of the notices it issued to the Respondent before the repossession but which the Court had refused to allow the Appellant to produce. He also contended that the Respondent had only paid to the Appellant a total sum of Kshs 246,213/- made via Mpesa, but conceded that the statement produced by the Appellant runs only from 1/09/2022 to 14/04/2023, although the Agreement commenced in November 2021.

7. By its Judgment delivered on 17/03/2023, the Adjudicator found that although the Appellant claimed to have notified the Respondent of the default and the intended repossession, it did not produce any evidence to confirm that such notice was indeed issued as required under **Section 67** of the **Movable Property Security Rights No. 13 of 2017**. She therefore held that the repossession was unlawful but since the *tuk-tuk* had already been sold to a 3rd party, it would not be possible to recover it. She thus entered Judgment in favour of the Respondent in terms that the Appellant refunds to the Respond the said sum of Kshs 313,713/- whose

payment, she found that the Appellant had not disputed. The Appellant's Counterclaim was thus dismissed and interest and costs also awarded to the Respondent.

Appeal

8. Aggrieved by the Judgment, the Appellant instituted this Appeal vide the Memorandum of Appeal dated 23/08/2023. The 2 grounds listed are as follows:

a) **That the learned Adjudicator erred in law and in fact in awarding the Claimant a sum of Kshs. 313,713/- plus costs and interest despite overwhelming evidence presented during trial of the sum owed to the Appellant.**

b) **That the Adjudicator erred in law by failing to consider or take into account the fact that the Respondent had only paid a paltry (*sic*) of approximately Kshs. 40,000 over and above the loan that was extended of (*sic*) a sum of Kenya Sillings Two Hundred Seventy-Seven Thousand (Kshs 277,000/=).**

9. The Appeal was canvassed by way of written Submissions. The Appellant's Submissions is dated 29/07/2025 while the Respondent's is dated 26/08/2025.

Appellant's Submissions

10. Counsel for the Appellant appreciated that under **Section 38** of the **Small Claims Act**, only matters of law can be appealed to the High Court. He then submitted that the award of 313,713/- to the Respondent was contrary to established legal principles governing contractual obligations and statutory remedies available to a secured creditor in the event of default as the Respondent had only repaid Kshs 40,000/- out of the loan amount of Kshs 277,000/-. He referred to the breakdown discernible from the Appellant' statement produced by the Appellant at the trial, and also contended that default in repayment by the Respondent was admitted at the trial.

11. Counsel then referred to the remedies availed to a secured creditor under **Section 67** of the **Movable Property Security Rights No. 13 of 2017**, particularly **Section 67(d)** and **(d)**, which allow taking of possession and selling the asset, respectively. He also submitted that the reason the Appellant was unable to produce copies of the notices served upon the Respondent was because the trial Court denied it leave to produce them, which denial, in his view, amounted to denial of fair trial and procedural irregularity. He then submitted that this appellate Court has powers, under **Order 42 Rule 27** of the **Civil Procedure Rules**, to allow

for production of additional evidence. He described the Judgment as unjustly enriches the Respondent his breaches of the contract, and also cited several authorities.

Respondent's Submissions

12. On his part, Counsel for the Respondent reiterated that his client proved that he had paid a sum of Kshs 313,713/- via Mpesa by the time of the repossession, and observed that although the Appellant claimed that the Respondent had only paid Kshs 246,213/-, it failed to produce any proof thereof, and also that the Appellant admitted that the statement it produced only ran from 1/09/2022 to 14/04/2023 yet the engagement between the parties began much earlier from 2021 and went through to December 2023. Counsel observed that in any case, even assuming that the Respondent had arrears, **Section 67** of the **Movable Property Security Rights Act No. 13 of 2017** required the Appellant to have notified the Appellant of such arrears prior to exercising its rights of recovery.

Determination

13. The one broad issue for determination in this Appeal is "***whether in entering Judgment against the Appellant, the trial Court correctly applied the law relating to a secured creditor's rights of recovery under the Movable Property Security Rights Act Properties***.".

14. As correctly pointed out by the Appellant's Counsel, since this is an Appeal from a decision of the **Small Claims Court**, the same can only be entertained on points of law. This is the import of **Section 38** of the **Small Claims Court Act**, which provides as follows:

> **"38. Appeals**
>
> **(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.**
>
> **(2) An Appeal from any decision or order referred to in subsection (1) shall be final.**

15. In respect to Appeals that are, by law, limited to only points of law, **Nyamu J**, in the case of **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR**), while dealing with a second Appeal, which is also ordinarily allowed only on points of law, and thus similar to that contemplated under **Section 38** aforesaid, stated as follows:

> **"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines**

itself to matters of law unless it is shown that the two 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."

16. In this instant Appeal, although I have not come any evidence that the transaction the subject hereof was contracted under the **Movable Property Security Rights Act No. 13 of 2017**, the parties have each referred to it both at the trial Court also before this Court. The same also features extensively in the Judgment rendered by the Adjudicator. It is therefore evident that the parties are in agreement that the said Act applied.

17. Having said so, **Section 67** of the said **Act** provides as follows:

"67. Relief for non-compliance

"(1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.

(2) The notification required under subsection (1) shall adequately inform the recipient of the following matters—

"(a) the nature and extent of default;

(b) if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and

(e) the right of the grantor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may—

(a) sue the grantor for any payment due and owing under the agreement;

(b) appoint a receiver of the movable asset;

(c) lease the movable asset;

(d) take possession of the movable asset;

(e) sell the movable asset; or

(f) pursue any of the remedies under section 65

18. In light of the foregoing, and from their respective Submissions, it is evident that both parties appreciate that in this case, even if the Respondent was in default, the Appellant could not lawfully have exercised its recovery rights, if any, to repossess the *tuk-tuk* and/or sell it to a 3rd party to recover the monies owed. There is also no dispute that no copy of any notification or prior communication issued or served upon the Respondent was produced in evidence at the trial Court. To this end alone, it is clear that the Appellant has no foundation to challenge the Adjudicator's findings that the repossession and subsequent sale to a 3rd party was carried out in breach of the requirements of the said statute and thus unlawful.

19. The Appellant claims that it sought to produce copies of the notices in evidence but the trial Court declined to allow it to do so. I have carefully perused the proceedings of the trial Court and nowhere can I find any evidence of any attempt to produce the copies, or denial thereof by the trial Court. The Appellant's "List of Documents" filed at the trial Court also does not include copies of any notification. It is only during the cross-examination of the Appellant's witness, **RW1**, that he is recorded to have made the claim that "***there was notice which court objected for production***". No basis for this statement was however laid, and the proceedings does not support it. This being an Appellate Court, it cannot act on what does not appear in the record of the trial Court.

20. In any event, even assuming that indeed the Adjudicator denied the Appellant leave to produce the copies, there is no allegation that the Appellant exercised its right to appeal against that refusal. The Appellant is therefore estopped from raising such issue at this stage. **Rule 27** of the **Order 42** of the **Civil Procedure Act** cited by Appellant's Counsel, and

which allows an appellate Court to permit production of additional evidence at the stage of Appeal cannot also aid the Appellant since no Application under that provision was made to this appellate Court before this Appeal proceeded to hearing. Raising of the issue at the stage of Submissions is therefore obviously irregular as the Court cannot rule on a matter that was never canvassed.

21. Further, the issue of the alleged denial of leave to the Appellant to produce copies of the notices was also not even raised in the Memorandum of Appeal. It cannot therefore even form an issue for determination in this Appeal.

19. Regarding the remedy of refund of Kshs 313,713/- to the Respondent, being the entire amount that the Respondent had paid to the Appellant, the Appellant has described the same as unjustly enriching the Respondent since the Respondent had possession of the *tuk-tuk* since November 2021 and the same was repossessed from him in December 2023, after about 2 years.

20. In commenting on the said contention, first, I note that the Respondent produced a certified copy of an Mpesa statement to demonstrate his payments of the aggregate sum of Kshs 313,713/-. On its part, the Appellant, despite its witness confirming under oath that the Respondent faithfully and consistently paid his instalments from November 2021 when his obligations commenced and only defaulted for 2 weeks towards December 2022, produced a statement which begins only from September 2022, a whole 1 year later. According to the Appellant, this statement only shows a total payment of Kshs 246,213/- as the amount received from the Respondent. Clearly, that statement relied on by the Appellant does not reflect the instalments admittedly paid by the Respondent between November 2021 and August 2022, and the Appellant has not at all addressed that omission. The Adjudicator was therefore right in disregarding the Appellant's statement and finding that it had failed to disprove the evidence that the Respondent had paid a total of Kshs 313,713/- for the 2 years period.

21. Regarding the claim of unjust enrichment, The Appellant not having presented any valuation Report for the ***tuk-tuk*** before selling it to the 3rd party, it cannot now fault the Adjudicator for ordering a refund of the entire amount of Kshs 313,713/-. The Adjudicator had no material before her to verify the Appellant's claim that the ***tuk-tuk*** had depreciated, and if so, to what extent, or the true value of the ***tuk tuk*** at the point when it was sold. The Appellant was obviously the author of its own misfortune.

22. Nonetheless, since the Respondent admits to have had possession of the ***tuk-tuk*** for a period of about 2 years, from about November 2021 and utilized it for business before it was repossessed in December 2023, I find that it will be wholly unfair for him to also enjoy interest on the refund amount of Kshs 313,713/-. He definitely derived a huge benefit from it and which Court cannot ignore. I also consider that he admits to defaulting in his obligation to pay the instalments for about 2 weeks, which is what prompted the repossession, even if carried out irregularly. I therefore set aside the award of interest on the Judgment amount of Kshs 313,713/-.

Final Orders

23. The upshot of my findings above is as follows:

i) Entry of Judgment for the sum of Kshs 313,713/- in **Eldoret Small Claims Court Commercial Case No. E225 of 2023** in favour of the Respondent plus costs thereon is upheld. The award of interest on the said amount is however set aside.

ii) The Respondent is awarded costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Mbugu for the Appellant

Ms. Khayo for the Respondent

Court Assistant: Brian Kimathi