REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E645 OF 2023

OTIENO LYSANIASH ONJWAYO……APPELLANT
VERSUS
AUTO CATS INTERNATIONAL LIMITED……. 1ST RESPONDENT
LLOYD M. MUTHOKA
t/a GIRMAT AUCTIONEERS……. 2ND RESPONDENT

(Appeal from the judgement and decree, of Hon. Wendy K. Micheni, Chief Magistrate, (CM) delivered on 16th June 2023, in Milimani MCCC No. 6291 of 2019)

JUDGEMENT

1. The suit, at the trial court, was by the appellant, against the respondents, and it was for release of the original registration book, logbook, for motor vehicle registration marks and numbers KCQ 368P and KCQ 369P; exemplary and punitive damages; and costs. The case was that the appellant had bought the 2 vehicles from the 1st respondent, via hire purchase, and had paid in full for them, with an over payment on KCQ 369P. The problem was that, he alleged, the 1st respondent had caused the 2nd respondent to repossess the vehicles, despite the fact that the 2 had been fully paid for. He also claimed that, despite full payments, the 1st respondent had never released to him the registration books for the 2 vehicles.

2. The respondents filed a joint defence and counterclaim. The hire purchase agreements were conceded, where 8 vehicles were involved, but the rest of the allegations, in the plaint, were denied. The counterclaim was for Kshs. 12,700,000.00, with interest, at court rates, being the balance outstanding on the agreed purchase of the 8 vehicles, the subject of the hire purchase agreement. There was also a prayer for general damages and costs.

3. A trial was conducted. Each side called a witness. Judgement was delivered, on 16th June 2023. The trial court dismissed the claim by the appellant, and the counterclaim by the respondents, for lack of proof, and the parties were urged to reconcile their accounts.

4. The appellant was aggrieved, hence the appeal herein. The grounds, in the memorandum of appeal, dated 15th July 2023, revolve around the trial court erring in not finding the appellant had proved his case; delivering a judgment that was at variance with the pleadings and the evidence; over relying on the case presented by the 1st respondent; ignoring the case presented by the appellant; wrongly framing the issues; misapprehending hire purchase law; among others.

5. The respondents filed a cross-appeal. The same is undated, but it was filed herein on 12th March 2025. It revolves around the dismissal of the counterclaim without assigning reasons, and despite adequate evidence having been adduced to support it; ignoring admission of liability and proof of indebtedness by the appellant; and disregarding the compelling evidence adduced, on the basis that courts do not re-write contracts.

6. Directions were taken, on 2nd May 2025, for the disposal of the appeal by way of written submissions.

7. In his written submissions, the appellant submits around several issues: proof of his case to the required standard; his evidence being uncontroverted; the respondents' own documents establishing that the vehicles had been paid for in full; and the trial court misapprehending the evidence.

8. On establishing his case beyond reasonable doubt, the appellant argues that his case should have succeeded, as it was unchallenged, for the defence amounted to no defence, and should have been dismissed. He avers that his defence that he had paid fully for the vehicles was not controverted, and the receipts he produced were unchallenged. He avers that the defence and counterclaim were incompetent, for they were not verified by an affidavit. He avers that the defence had conceded that he had paid for the vehicles, separately and in full. He submits that the finding, by the court, that the payments were on account of all the 8 motor vehicles, was a misapprehension. He submits that the respondent's defence and counterclaim were not substantiated, as no evidence was adduced to support them. He submits, finally, that his case, at trial, was only meant to address the case for 2 of the vehicles, and not 8 of them. He cites *Mark Otanga Otiende vs. Dennis Oduor Aduol* [2021] eKLR (Aburili, J) and *Mohammed Guyo Boru vs, Richard Mwilaria Aritho* [2022] eKLR (Cherere, J).

9. The respondents submit on the dismissal of the counterclaim without reasons being assigned; failing to consider the appellant's indebtedness, and disregarding proof of the same; disregarding the principle that the courts cannot re-write contracts for the parties; failure to consider the fact that the appellants had enjoyed the motor vehicles, and failure to acknowledge payment obligations; and failure to exercise judicial discretion, and delivering an unjust and inequitable judgment.

10. The case, by the appellants, as I understand it, from the pleadings, was that he paid a deposit of Kshs. 600,000.00, for 1 vehicle, each; towards purchase of 2 specific motor vehicles, being KCQ 368P and KCQ 369P, after which he paid the balance for the purchase price in full, in instalments. The total purchase price for each vehicle was Kshs. 2,200,000.00, but he paid Kshs. 2,725,000.00 for each of the 2, which meant that there was an overpayment of Kshs. 505,000.00, in respect of each vehicle. He sought to be issued with the registration books for the 2 vehicles, a refund of the full purchase price of Kshs. 2,275,000.00, in respect of KCQ 368P, and a refund for the excess of Kshs. 505,000.00, paid in respect of both vehicles.

11. The reaction, to that case, by the 1st respondent, as I understand it, from the pleadings, was that the alleged overpayment, of Kshs. 505,000.00, was in fact a deposit towards the purchase of the vehicles, while the Kshs. 2,200,000.00 was for the consignment of 8 vehicles. The case, by the 1st respondent, was that the total contract price was Kshs. 23,700,000.00, for 8 vehicles; the appellant paid an undisclosed amount, leaving a balance of Kshs. 12,199,000.00. The 1st respondent counterclaimed for that alleged balance, of Kshs. 12,199,000.00.

12. The issues, for trial, were whether the appellant had proved the case as alleged, and whether the respondents proved their counterclaim. The matter boiled down to the terms of the alleged contract of sale, and whether the appellant had met his obligations, under the contract, with respect to the 2 vehicles the subject of the suit.

13. From what I see from the record, specifically from the documents placed on record by the appellant, there were separate

sale agreements for the 2 vehicles, specified in the plaint. The payment particulars were a full price of Kshs. 2,200,000.00 for each; an initial deposit of Kshs. 600,000.00 for each; leaving a balance of Kshs. 1,600,000.00 for each vehicle. The balance was to be liquidated in 14 monthly instalments. The default clause was that, in the event of default in 1 instalment, the deposit of Kshs. 600,000.00 was not refundable, and that whatever amount was due and owing, as at the date of the default, became payable forthwith, attracting a penalty charge of 10%, until payment in full. The right, of the 1st respondent, to repossess the vehicles, was reserved, and it was exercisable without prior notice, or court order.

14. Were the 2 vehicles, the subject of the suit in the plaint, paid for in full? The appellant did not exhibit any receipts, issued to him by the 1st respondent, in respect of what he paid for the 2 vehicles. What he attached were bank documents, showing various amounts deposited at diverse times. None of them indicated what the payments were for. The deposits were by cheque. One batch totalling to Kshs. 2,725,000.00; and the second batch to Kshs. 2,27250,000.00.

15. At the trial, the appellant adopted his witness statement, which was aligned to his plaint, and produced the documents in his list of documents, including the 2 sales agreements for KCQ 368P and KCQ 369P, and the bank documents. He asserted that each vehicle had its own sale agreement, and the terms were the same for all the 23 vehicles, that he had bought from the 1st respondent. According to him, his suit was only on 2 vehicles, KCQ 368P and KCQ 349P which he had paid for in full.

16. The 1st respondent filed a bundle of documents, from what I see, in the record of appeal. There were 8 sale agreements for 8 vehicles, including the 2 the subject of the plaint. There were also 3 bank receipts, and 1 delivery note. The 3 bank receipts were in respect of 2 vehicles, which were not the 2, the subject of the plaint, and the delivery note was not in respect of any of the 2 vehicles, specified in the plaint. The 3 bank receipts were in respect of receipt of Kshs. 600,000.00, 600,000.00 and Kshs. 500,000.00, respectively. The delivery note was in respect of a motor vehicle registration mark and number KCR 848A. The 8 sales agreements were in similar general terms, but the terms, on the sales prices and deposits, for the 8 vehicles, were different, depending on the types and ages of the vehicles.

17. The counterclaim was for Kshs. 12,700,000.00. It was averred that the total agreed price, for the 8 vehicles, was Kshs. 23,700,000.00. I have added up the figures, in the 8 sales agreements, and they total to Kshs. 23,700,000.00. The only record of payments, submitted by the 1st respondent, was the 3 documents from the bank, for Kshs. 600,000.00, Kshs. 600,000.00 and Kshs. 500,000.00, totalling Kshs. 1,700,000.00. I do not see material that demonstrates that the appellant owed Kshs. 12,700,000.00. Indeed, I see no material showing that he paid Kshs. 11,000,000.00, which would be the difference between Kshs. 23,700,000.00 and Kshs. 12,700,000.00. No receipts, totalling to Kshs. 11,000,000.00, were in the bundle that was filed at the trial court, and no accounts, of one form or other, were filed.

18. At trial, the respondents called 2 witnesses, all officers from the 1st respondent. DW1, Mercy Kavengo, was a secretary with the firm. She had made a witness statement, dated 24th November 2021. In it, she detailed how the appellant bought 8 vehicles, said to be registration marks and numbers KCM 241G, KCN 00P, KCQ 368P, KCQ 369P, KCQ 641N, KCQ 250Z, KCQ 520Y and KCR 848A, and what was paid in respect of each. She conceded that the appellant paid deposits for the vehicles, and other payments, details of which were documented. When shown documents, relating to the vehicles to be attached, she conceded that no figure was indicated against KCQ 369P. She testified that KCQ 368P was not in the list of the 6 vehicles to be attached, and that the 1st respondent still had the logbooks for the vehicles. She said KCQ 368P had been paid for.

19. DW2, Lorna Makena Kamungwa, had recorded her statement, on 15th November 2022. Her written statement was largely a regurgitation of the written statement of DW1, in terms of the vehicles sold to the appellant, and the payments. She wrote that it was agreed that since the appellant was a regular customer, he would have 1 account for the vehicles, that he had bought. During cross-examination, she asserted that the appellant owed the 1st respondent Kshs. 12,199,000.00. She gave a breakdown of what was owed against KCR 848A, KCM 241G, KCC 461 and KCQ 250Z, but not against KCQ 368P and KCQ 369P. She stated that all those vehicles were sold, after re-possession, except for 2 which included KCQ 368P. She put the value of KCQ 368P at Kshs. 2,200,000.00.

20. Did the appellant establish his claim in the plaint, as amended? I believe he did. He produced 2 sale agreements for the 2 vehicles in his plaint. He produced documents to support the fact that he made payments in respect of the 2 vehicles, evidencing full payment, for both, and an excess for 1. The pleadings, in the plaint, were not effectively specifically countered or challenged, in the defence and counterclaim. The documents filed, with the defence and the counterclaim, as evidence, and which DW1 produced at trial, did not controvert that material either. Indeed, at trial, the 2 witnesses, DW1 and DW2, conceded that there was no evidence that the appellant owed any money to the 1st respondent, in respect of KCQ 368P and KCQ 369P. They mentioned amounts that he allegedly owed, with respect to the other vehicles. The material, the appellant placed on record, established his case to the required standard or threshold, for civil cases. That material was not adequately challenged in defence, after the burden shifted to the respondents.

21. Did the respondents establish the counterclaim, for Kshs. 12,199,000.00, against the appellant? I do not think so. In the first place, that counterclaim was very weakly drafted. At paragraph 13, it alleged that the appellant had bought 8 vehicles from the 1st respondent at Kshs. 23,700,000.00. He part-paid that purchase price, leaving a balance of Kshs. 12,199,000.00. Yet, details of the alleged 8 vehicles were not disclosed in the counterclaim, and so was the amount of money allegedly part-paid, leaving the balance that was being claimed. The details of the vehicles were disclosed in the witness statements and the documents filed with the counterclaim.

22. The witness statements and the documents were not part of the pleadings. They were mere unproven evidence. At the time of filing, they were not proven facts. They only amounted to advance disclosure of evidence. They could only become of some evidential value upon witnesses bespeaking them, and producing them as exhibits, to support the case. Witness statements and documents cannot seal gaps or cure weaknesses, in the pleadings. The only exception to that, would be where the pleadings specifically refer to them, and the incorporation by reference principle applies. That was not the case here. The pleadings made very general statements, yet the witness statements and the documents went into details that were not pleaded. There was no alignment between the facts, as pleaded, and the evidence attached.

23. In the defence, at paragraph 4, it was pleaded that the appellant had made a deposit of Kshs. 505,000.00, towards the purchase of each of the 8 vehicles, that he bought, and a further deposit of Kshs. 2,220,000.00, for consignment of the 8 vehicles. The respondents did not adduce any evidence to support those allegations. No evidence was led, that the appellant was required to pay a standard deposit for each of the 8 vehicles, and a deposit for consignment of the 8 vehicles. No document, carrying terms to that effect, was produced.

24. The material, the appellant placed on record, relating to KCQ 368 P and KCQ 369P, which tallied with the documents filed and produced by the respondents, pointed to the appellant entering into separate contracts, to buy each of the vehicles, the subject of the suit. The deposits, from what I see in those documents, were paid separately, for KCQ 368P and KCQ 369P, being Kshs. 600,000.00, for each of the 2 vehicles, pleaded in the plaint, and not the Kshs. 505,000.00 pleaded in the defence. According to the 2 sales agreements, for KCQ 368P and KCQ 369P, Kshs. 2,200,000.00 was the sales price for each of the 2 vehicles, and there was evidence that that amount was paid, for each of the 2 vehicles. Those sales agreements did not have the figure Kshs. 2,220,000.00; and did not require payment for any consignment.

25. The respondents did not adduce any written or oral evidence, to support the pleading, in paragraph 4 of the defence. That pleading appears to be an attempt to depict the appellant as not understanding the contracts he entered into, and the purposes of the payments that he was making. However, it would appear that it was the respondents who did not quite understand the contracts, or they were attempting to explain them away.

26. The counterclaim, as I understand it, attempted to lump together several contracts, and to justify re-possessing various motor vehicles, acquired in separate and independent contracts. Yet, the respondents did not adduce evidence to demonstrate that that was permissible under the contracts that they had executed with the appellant. None of the documents, filed by the respondents, carried a term, signed into by the appellant, which allowed the 1st respondent to lump all the 8 contracts together, and consolidate all the amounts, for which the appellant was in default, and recover them, through re-possession of all the 8 vehicles, including those where no moneys were outstanding, or the purchase price had been paid in full. The

parties had between them individual separate contracts, which could only be enforced separately and independently. The appellant did not owe the 1st respondent an amount of Kshs. 12,199,000.00, in respect of any one of those individual contracts. There was no justification for the respondents to re-possess vehicles where nothing was outstanding.

27. Various other issues were raised in the appeal, but I believe that what I have discussed above were the key issues. The trial court did not, in my view, direct and address its mind to those issues. It addressed itself to taking of accounts, but that was never an issue before it, for the facts and pleadings did not disclose a dispute on accounts.

28. Consequently, I do find that the appeal herein is merited. I shall, accordingly, allow it. The result shall be that the order, in the judgement of 16th June 2023, in Milimani CMCCC No. 6291 of 2019, dismissing the claim by the appellant, is hereby set aside, and substituted with orders, in terms of prayers (a), (a1), (a2), (c) and (d) of the amended plaint, dated 28th June 2021. The order, on the release of the logbook, shall relate only to KCQ 368P. The appellant shall have costs of this appeal. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 4TH DAY OF NOVEMBER 2025.

WM MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.
Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.
Ms. Eva Adhiambo, Legal Researcher.

Advocates
Mr. Odhiambo, instructed by Odhiambo & Kathyaka, Advocates for the appellant.
Mr. Osoro, instructed by Osoro Juma & Company, Advocates for the respondents.