**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. E109 OF 2024**

**BETWEEN**

**EDINAH NYABOKE TUMBO……**

**……APPELLANT**

**AND**

**RANA AUTO SELECTION……**

**RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kisii (P.K. Mtai, PM) delivered on 3rd June 2024 in CMCC No. 460 of 2017)*

**JUDGEMENT**

1. The appellant filed suit in *Kisii CMCC No. 460 of 2017* against the respondent for breach of contract. She averred that on 28th January 2017, the parties herein entered in a sale agreement over

the purchase of motor vehicle registration number KCH 280V Toyota axio, the suit vehicle. It was sold to the appellant by the respondent at a sum of Kshs. 1,070,000.00 paid as follows: the sum of Kshs. 500,000.00 be paid as down payment while the balance to be settled in equal monthly installments of Khs. 30,000.00 until payment in full. Furthermore, the respondent caused the appellant to pay for a comprehensive insurance policy in the respondent's name from X-plico insurance Company Limited.

2. On 6th April 2017, the suit vehicle was involved in a road traffic accident at Keragia area along the Magonga Ogembo Road. Resulting from the accident, the suit vehicle suffered extensive damage. In fact, the vehicle was towed from the accident scene to the appellant's yard. Later, the respondent towed the vehicle to *Rangi Mbili* Garage for repairs. The respondent informed the appellant that the said garage was under the panel of the X-plico Insurance Company. She contended that she was thus assured that the vehicle would be returned back to her upon repairs.

3. However, the appellant contended that the vehicle remained unrepaired since it was towed to the garage on 11th April 2017. That in fact, further inquires on the status of repairs have gone unanswered with information that the insurance company has a poor payment reputation on damaged vehicles. She accused the respondent laxity for failing to ensure that her vehicle was repaired. As a result of the non-repairs, the appellant averred that she suffered loss and damage since the vehicle provided incoming generating capacity during its use. That in fact, she suffered a daily loss of Kshs. 3,000.00.

4. The appellant contended that the respondent had threatened to repossess the vehicle on account of her failure to pay monthly instilment on the consideration amount. She accused the respondent of malice for failing to ensure that the vehicle is promptly repaired. For those reasons, the appellant sought the following reliefs:

1. ***A declaration that the defendant herein is liable for frustrating the sale of motor vehicle agreement dated 20th January 2017 entered between the parties herein;***
2. ***That subsequent to grant of prayer 1 above, this Honourable Court be pleased to order compelling the defendant to reschedule repayment of balance of consideration;***
3. ***Special and general damages as shall be assessed by this Honourable Court;***
4. ***Costs of and incidental to this suit;***
5. ***Any other remedy this Honourable Court may deem fit to grant in the interest of justice.***



5. The respondent opposed the suit in its entirety praying that the same be dismissed with costs as per its statement of defence and counterclaim dated 13th December 2017. In this counterclaim, the

respondent averred that the parties entered into an agreement for the purchase of the suit vehicle on 20th January 2017. The purchase price was Kshs. 1,070,000.00 wherein the appellant paid a deposit of Kshs. 500,000.00 leaving a balance of Kshs. 570,000.00. It was agreed that the balance would be paid in ten equal monthly installments of Kshs. 57,000.00 each from 20th February 2017.

6. The respondent averred that in spite of the above, the appellant paid Kshs. 30,000.00 on 1st March 2017 defaulting on amount and time of payment. That on 30th March 2017, the appellant further defaulted by paying Kshs. 50,000.00. The respondent lamented that the appellant only paid a total of Kshs. 580,000.00 leaving a balance of Kshs. 490,000.00. It therefore sought that amount of Kshs. 490,000.00 together with costs and interest.

7. By judgment of the trial court dated 3rd June 2024, the trial court dismissed the appellant's suit for lacking merit and dismissed the

counterclaim for want of prosecution. Each party was to bear their own costs of the suit.

8. The appellant is partially aggrieved by those findings. She filed her memorandum of appeal dated 20th June 2024. The appellant raised 8 grounds disputing the findings of the learned magistrate. Those grounds can be summarized as follows: the trial court misconstrued the evidence and resultantly failed to filed that the respondent frustrated the sale agreement; the court failed to consider that the appellant discharged her obligation when she took out a policy o insurance; and she opined that it was incumbent on the respondent to follow up on the status of repairs of the suit vehicle since the policy of insurance was in the name of the respondent as the policy holder. In view of the foregoing, the appellant prayed that the appeal be allowed, the judgment of the trial court be set aside and be substituted with an order allowing her plaint dated 4th October 2017 and costs of this appeal.

9. By consent, the appeal was disposed of by way of written submissions. The appellant filed written submissions dated 1st September 2025. She submitted that the respondent frustrated the performance of the contract dated 28th January 2017. She abridged her facts as set out at trial to submit that the respondent was responsible for ensuring that the repairs on the suit vehicle had been carried out. This is because it compelled her to obtain a policy of insurance from an insurance company of the respondent's choosing. By its failure to thus follow up on the status of repairs, it had frustrated the contract.

10. The appellant submitted that the respondent's failure to act while continuing to demand that she fully paid for the suit vehicle was a remonstration that the respondent was not acting in good faith. In its view, that amounted to unjust enrichment. She thus faulted the findings of the trial magistrate. She regurgitated that since the policy cover was taken under the name of the respondent, an imposed duty arose to follow up on the repairs. She stated that as a matter of fact, she was not privy to the insurance contract

based on that fact. That she had no *locus standi* to compel the respondent to repair the vehicle based on the correspondence exchanges between the respondent and the insurer.

11. In conclusion, the appellant submitted that the dismissal of her case was against the weight of her evidence and therefore a misnomer. She was emphatic that she had demonstrated on a balance of probabilities that she was entitled to the reliefs sought in her plaint. She urged this court to ensure that the contract is enforced in good faith in a manner that produces no unjust or oppressive results. She therefore prayed that her appeal be allowed with costs.

12. The respondent filed its written submissions dated 5th September 2025. It summarized the facts giving rise to the suit to submit that the appellant failed to demonstrate the principles of frustration of contract subsisted in the agreement between the parties in line with the decision of ***Kenya Airways Limited vs. Satwant Singh Flora*** [2013] eKLR. Drawing a distinction between the

contract of sale and contract of insurance, the respondent submitted that it had fully discharged its obligation in line with the terms of contract. *Contra*, the appellant mischievously sought to rewrite the contract urging this court to reschedule her payment plan as she was admittedly indebted to the respondent.

13. Perusing through the appellant's documentary evidence, the respondent submitted that it was the appellant who filed the insurance proposal form. Though the name of the insurance policy was in its name, the respondent submitted that the sale contract was not avoided or frustrated. It in any event discharged its obligation by releasing the vehicle to the appellant as she continued to settle the balance of the purchase price. That she was under obligation to follow up with the status of repairs as she was the one that paid for the premiums of insurance. For those reasons, the appellant prayed that the suit be dismissed with costs.

14. I have considered the submissions, examined the record of appeal and analyzed the law. The Court in ***Selle and another vs.***

***Associated Motor Board Company and Others*** [1968] EA 123 established our role as a first appellant court in the following certain terms:

> ***".. This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."***

15. The record before me shows the evidence captured as follows: PW1 the appellant testified that she entered in a sale agreement over the purchase of motor vehicle registration number KCH 280V Toyota axio with the respondent. The same was adduced in evidence. According to the terms of engagement, the purchase price for the motor vehicle was Kshs. 1,070,000.00 paid as

follows: the sum of Kshs. 500,000.00 be paid as down payment while the balance to be settled in equal monthly installments of Khs. 30,000.00 until payment in full.

16. Furthermore, the respondent caused the appellant to pay for a comprehensive insurance policy in the respondent's name from X-plico insurance Company Limited. The insurance company was selected by the respondent. She produced a copy of the insurance cover. Her evidence was that she used the vehicle for a couple of months before it was involved in a road traffic accident on 6th April 2017. She was issued with a police abstract.

17. Arising from the accident, the vehicle suffered extensive damage. Upon consulting the respondent, she was advised to tow the vehicle from the accident scene to the police station. Later, the vehicle was taken to the respondent's yard and finally at *Rangi Mbili* Garage for repair works. When making follow ups on the status of repairs, the appellant was advised that it was upon the insurance to fix the vehicle. However, that was never actioned.

18. PW1 testified that the motor vehicle was inspected and was issued with a certificate of insurance. She contended that it was the respondent's responsibility to follow up on the repairs but it failed to do so. The basis of this argument stemmed from the fact that the respondent was the policy holder irrespective of the fact that she was the one who paid for the insurance cover. She lamented that she suffered damages for loss of user of the vehicle which was to be utilized for her business. That in fact, she suffered a daily loss of Kshs. 3,000.00. She thus sought the prayers embedded in her plaint. She also admitted that she owed the respondent the sum of Kshs. 490,000.00. She denied that she was running away from settling her dues.

19. PW2 Francis Gwaro a mechanic and assistant manager at *Rangi Mbili* Garage testified that when the suit vehicle was involved in a road traffic accident, it was brought to the garage for repairs. They would receive instructions from X-plico Insurance Company Limited to repair the said vehicle. However, it was never repaired

for the reasons that the insurance company did not settle a sum of Kshs. 300,000.00. As at the time of his testimony, the vehicle was still in the garage. He produced a bundle of correspondence and a valuation form and report in evidence.

20. DW1 Sultan Ali Khan, the respondent's director, testified that the appellant approached them to purchase the suit vehicle. An agreement dated 20th January 2017 was executed between the parties. The purchase price was agreed at Kshs. 1,070,000.00. Thereafter, a deposit of Kshs. 500,000.00 was settled and the balance of Kshs. 570,000.00 was to be paid in ten equal monthly installments of Kshs. 57,000.00 each. However, the appellant only paid Kshs. 30,000.00 on 1st March 2017 and Kshs. 50,000.00 on 30th March 2017. It thus sought a sum of Kshs. 490,000.00 from the appellant.

21. Turning to the accident that occurred regarding the motor vehicle, DW1 submitted that the accident occurred when the appellant was using the said motor vehicle. He invited the court to

scrutinize the provisions of paragraph 14 of the sale agreement to conclude that it was her responsibility to take out an insurance cover. He stated that the appellant was issued with the logbook of the suit vehicle to enable her take out an insurance cover. However, she dishonestly took out a cover under the respondent's name. He was therefore of the view that it is for that reason the vehicle was not repaired.

22. DW1 observed that from the claim form dated 18th April 2017, the appellant filed that the respondent was the policy holder yet she signed off as the policy holder. DW1 maintained that the respondent was not culpable for any of the events subsequent to the accident as the appellant paid for the insurance herself and was in charge of the vehicle when the accident occurred. He adduced the sale agreement, the claim form dated and the two deposit slips for the sums of Kshs. 30,000.00 and Kshs. 50,000.00 respectively.

23. It is not in dispute that the appellant and the respondent entered into a sale agreement dated 28th January 2017 for the purchase of motor vehicle registration number KCH 280V Toyota axio. It was agreed by the parties that the respondent would sell the vehicle to the appellant at a consideration sum of Kshs. 1,070,000.00. It is also not disputed that the sum of Kshs. 500,000.00 was paid by the appellant as down payment. The agreement further contended that the balance of the purchase price would be settled in ten equal monthly installments of Kshs. 570,000.00.

24. According to the appellant, the suit vehicle was involved in a road traffic accident on 6th April 2017. It was subsequently taken to *Rangi Mbili* Garage, one of the garages in the panel of Xplico Insurance Company Limited, the insurance company the appellant took out a policy cover under. The basis of the appellant's complaint is that she took out an insurance cover under the behest of the respondent. It is for that reason that it was registered in its name. The appellant urged this court to find that it was the respondent's responsibility resultantly to ensure that

the suit vehicle was prepared; which as testified by PW2, was yet to be repaired on account of an outstanding debt from the insurance company.

25. The old adage that parties are bound by their contractual terms has never been reversed. So that parties must remember that they cannot depart from a bad bargain. A court cannot in the circumstances rewrite a contract but only give effect to its meaning. Having said that, my attention is drawn to two clauses of the contract in a quest to unearth the meritoriousness or otherwise of the appellant's claim:

> Clause 14. ***"That upon assuming possession of the motor vehicle and during subsistence of this agreement, the purchaser shall take out a comprehensive insurance cover against risks or damage with a reputable insurance company equivalent to the full value of the motor vehicle, ensure that the road license is valid and motor vehicle is maintained at***

***all times in the sound mechanical conditions."***

Clause 16. ***"That if the said vehicle is involved in a road accident the seller shall not be responsible for any claims even if the logbook is not formally transferred to the buyer's name."***

26. While the comprehensive cover indeed reveals that it was taken under the name of the respondent, it is not clear under what circumstances that took place. What is apparent however is that it was incumbent on the appellant to take out a comprehensive insurance cover. Be that as it may, the contract clearly expressed that the respondent was not responsible for claims arising from a road accident. Further, the appellant was responsible for taking out a policy cover. I therefore agree with the trial judge that the appellant was solely responsible for ensuring that the vehicle was repaired. That responsibly never shifted to the appellant.

27. It is also mysterious why the appellant did not sue or enjoin the insurance company in this case. It was evidently a necessary party to the proceedings. As had been demonstrated by her very own witness, the repairs were not done because of an outstanding debt by the insurance company. It would have laid credence on why the repairs had not been done; the holdout ostensibly emanating from that insurance company.

28. Accordingly, I find that indeed the appellant failed to prove his case on a balance of probabilities. The court further confirmed that the respondent's claim was not established for reasons that it was not prosecuted. In addition to this, I find that the respondent failed to adduce cogent evidence to establish the appellant was indebted to the respondent. It only adduced evidence of payment but failed to demonstrate by way of statements of accounts what amount was indebted to it. It was thus rightfully dismissed. In the circumstances, I find that the appeal herein lacks merit. It is dismissed with costs to the respondent.

It is so ordered.

**Judgement delivered Virtually, dated and signed this 5th day of November, 2025.**

**.....**

**HON. J.K.NG'ARNG'AR**

**JUDGE**

**Judgement delivered in the presence of;**

**Siele (Court Assistant).**

**Atika for the Appellant**

**Siwolo for the Respondent**