

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
[Coram: A.C. Mrima, J.]
CIVIL APPEAL NO. E115 OF 2024

-between-

RANA AUTO SELECTION LIMITED.....
.....APPELLANT

-versus-

JOSEPH KIBII MARITIM.....
.....RESPONDENT

*[Being an appeal from the Judgment of Hon. B.M. Cheloti (PM) in Milimani Chief Magistrates
Commercial Court Case No. E611 of 2021 delivered on 8th December 2023]*

JUDGMENT

Introduction:

1. This appeal has its roots in the second-hand car dealership. *Rana Auto Selection Limited*, the Appellant herein, sold motor vehicle registration No. KCZ 849H (hereinafter referred to as '**the vehicle**') to *Joseph Kibii Maritim*, the Respondent herein. Shortly upon taking possession, the vehicle developed power failure and various mechanical defects. In the process of fixing the issues, the Respondent discovered that the mechanical defaults related to age and prolonged period of usage of the vehicle. Crucially, he learned that despite the Appellant having represented the odometer reading as 52,000Kms, at the point of purchase, its true mileage, when it left Japan, revealed that it was 225,626Kms. He also found out the vehicle belonged to a third party, not the Appellant.
2. Aggrieved, the Respondent instituted *Milimani Chief Magistrates Commercial Court Case No. E611 of 2021* (hereinafter referred to as '**the suit**'). He sought compensation in special damages of Kshs. 1,541,500/- for various fraudulent misrepresentation regarding the merchantability of the vehicle.

3. Despite the defence, the trial Court found the Appellant to have misrepresented facts about the vehicle. It ordered the Appellant to refund the pleaded sum and the Respondent to return the motor vehicle to the Appellant. That decision displeased the Appellant thereby resulting to the instant appeal which was disposed of by way of written submissions.

The Appeal:

4. Through a Memorandum of Appeal dated 26th January 2024, the Appellant urged this Court to set aside the findings of the trial Court and to allow the appeal on the following grounds: -
 1. *The Learned Trial Magistrate erred in law and in fact in making a finding that the Appellant was in breach of the Sale Agreement entered into between the Appellant and the Respondent.*
 2. *The Learned Magistrate erred in law and in fact in failing to arrange and internalize the terms and conditions of the motor vehicle sale agreement dated 7.7.2020 so as to arrive to a just and fair decision*
 3. *The Learned Magistrate erred in law and in fact in failing to appreciate that the suit motor vehicle had been sold on the “as is where is” basis and further that the Respondent had the time and chance to inspect the motor vehicle and indeed inspected the same and even conducted a test run prior to the purchase of the said motor vehicle.*
 4. *The Learned Magistrate erred in law and in fact in ordering the Appellant to refund the Respondent the sum of Kshs.1,541,500/- being monies paid and failing to appreciate that the Respondent had been in possession and use of the subject motor vehicle from the date of purchase through to the date of filing suit and during the course of proceedings and by such use, the subject motor vehicle has been subjected to depreciation.*
 5. *The Learned Magistrate erred in law and in fact in failing to appreciate and understand that the Respondent was the one in actual breach of contract having failed to comply with the terms and conditions of the agreement he entered into with the Appellant.*

6. *The Learned Magistrate erred in law and in fact in accepting and admitting evidence that was inadmissible despite objections being raised as to its admissibility by the Appellant.*
7. *The Learned Magistrate erred in law and in fact in wholly ignoring the weight of defence of the Appellant both in writing and viva voce and thus arriving at a wrong decision.*
8. *The Learned Magistrate erred in law and in fact in wholly ignoring the Appellants submissions and case laws cited therein and thereby arriving at a wrong decision.*
9. *The Learned Magistrate erred in law in fact in wholly ignoring the evidence of the Appellant.*

The submissions:

5. In its written submissions dated 10th June 2025, the Appellant argued that the vehicle was sold based on a sale agreement dated 7th July 2020, and that the Respondent had admitted in his own pleadings that the purchase was on an “as it is” basis. It highlighted several clauses of the agreement, including *Clause 8*, which stated that the purchaser was presumed satisfied with the vehicle’s soundness, and *Clauses 25 and 26*, which confirmed the vendor was not responsible for claims after delivery and that the purchaser was satisfied with the vehicle’s condition upon signing. It was further submitted that the Respondent had inspected the vehicle with a knowledgeable friend before taking possession and was, therefore, bound by the terms of the contract he voluntarily entered.
6. The Appellant relied on the Court of Appeal case of *National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, to argue that a Court of law cannot rewrite a contract between parties. It submitted that parties are bound by its terms unless coercion, fraud or undue influence are proven. The Appellant contended that the Respondent had not proven any such factors.
7. Regarding the allegation of fraudulent misrepresentation, the Appellant argued that the Respondent’s claim that the vehicle

belonged to a third party was baseless. It noted that over three years had passed since the sale, and no third-party claim had ever been made. The Appellant's witness had testified that they had an "authority to sell" from the registered owner, *M/s Chaand Motors*. Furthermore, the importation documents provided to the Respondent at the time of purchase clearly identified M/s Chaand Motors as the importer, which, the Appellant argued, negated any misrepresentation. The Appellant submitted that it had the right to sell the vehicle, satisfying the conditions of Section 14 of the Sale of Goods Act.

8. The Appellant also challenged the probative value of evidence admitted by the trial Court. It submitted that the Respondent's *Mpesa* statement should have been inadmissible. They pointed to a disclaimer on the document requiring contact with Safaricom for Court use and argued it was not attested to by Safaricom, nor did it bear the Respondent's name or phone number. The Appellant argued that it failed the admissibility test under *Sections 65, 106A, and 106B* of the *Evidence Act*. Similarly, the Appellant argued that several job cards and invoices had no probative value. They specifically noted that Job Card No. 1325 related to a different vehicle model (SHJDS25) than the one sold (Chassis No. SHJ-024036), which was relevant as the Respondent had admitted to owning another Subaru Forester.
9. Finally, on the vehicle's mileage, the Appellant argued that the Respondent's claim of being shown an odometer reading of 52,863 kilometres was unsubstantiated and put forth no evidence to support it. In contrast, the Kenya Bureau of Standards Certificate provided at the time of purchase, clearly showed the mileage was 225,626 kilometres. The Appellant also pointed out that the Respondent's own evidence claimed a mileage of 227,216 kilometres by October 2020, indicating the vehicle had covered 1,590 kilometres despite the Respondent's claim that it was stationary due to defects. The Appellant submitted this was evidence of misuse and an attempt at unjust enrichment.

10. The Appellant concluded by urging the Court to set aside the trial Court judgment with costs.

The Respondent's case:

11. *Joseph Kibii Maritim* responded to the appeal through written submissions dated 27th July 2025. At the outset, the Respondent noted that while the Appellant's defence relied on an "as is where is" clause, it also admitted to implied warranties regarding the right to sell, quiet possession, and freedom from third-party encumbrances. The Respondent highlighted that the trial Court correctly found the Appellant had misrepresented itself, as the vehicle was registered to a third party, Chaand Motors, which was not disclosed in the sale agreement. Furthermore, the trial Court found that the Appellant had misrepresented the vehicle's mileage, which was proven by KEBS pre-export verification to be 225,626 kms, and that the Appellant could not hide behind the "AS-IS" clause to escape liability for this misrepresentation.
12. The Respondent's submissions on appeal focused on three main issues: *the breach of warranties, the odometer tampering and the entitlement to the reliefs granted*. On the aspect of warranties, the Respondent argued that the Appellant breached the warranty on the right to sell. They relied on the authority of *Stephen Kilonzo Nyondo vs. Samuel Wahome Kibuthu* [2015] eKLR, which established that the "right to sell" means the power to vest full and complete rights in the buyer, and a breach entitles the buyer to recover the purchase price due to a total failure of consideration.
13. The Respondent applied the foregoing by showing that the Appellant, while a party to the agreement, was not the registered owner of the vehicle as per Section 8 of the Traffic Act. The owner was Chaand Motors Limited. He rebutted the Appellant's claim of acting as an agent for Chaand Motors. He relied on Section 98 of the Evidence Act and the case of *Deposit Protection Fund Board vs Sunbeam Supermarket Ltd & 2 others* [2004] eKLR, to argue that the oral statements contradicting the written agreement (which named the Appellant as vendor) were inadmissible. In the alternative, the

Respondent submitted that the Appellant's actions constituted misrepresentation. He drew support from the case of *Amos Karobia Gichuki -vs- Bernard Kamau Wagakoru* [2020] eKLR, where a seller assuming the owner's identity was found to have made a misrepresentation entitling the buyer to rescind the contract.

14. On the claim regarding odometer tampering, the Respondent submitted that they had proven their case. Evidence showed the vehicle was inspected with a mileage of approximately 52,000 km, but KEBS records confirmed a pre-export mileage of 225,626 km. The Respondent argued that while the "AS IS" clause might negate warranties on merchantable quality, it did not protect the Appellant from liability for misrepresenting the vehicle's description via a false mileage. They again found support in the decision in *Amos Karobia Gichuki vs Bernard Kamau Wagakoru* [2020] eKLR to define this false mileage as a "positive statement of fact, which is made... and is untrue", and which induced the Respondent to enter the contract.
15. Finally, regarding the reliefs, the Respondent argued that the trial Court's order for a refund was proper. Based on the case of *Amos Karobia Gichuki -vs- Bernard Kamau Wagakoru* (supra), they submitted that a contract rescinded due to misrepresentation is entitled to relief that flows from that rescission, specifically "the return of money paid".

Analysis:

16. Having carefully perused the record, the rival submissions and the decisions referred to, the following issues arise for determination: -
 - i. *The legal implication of the "as is, where is" clause in the sale agreement.*
 - ii. *Whether the Appellant made a fraudulent misrepresentation to the Respondent regarding the vehicle's mileage, and if so, whether it vitiated the contract.*

- iii. *Whether the Appellant breached the implied statutory condition as to the “right to sell” the motor vehicle.*
- iv. *The propriety of the trial Court’s rescission of the contract.*

17. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence tendered at the trial Court and draw its own conclusions. It, however, should bear in mind and make allowance for the fact that neither saw nor heard the witnesses testify. The foregoing was the finding of the Court of Appeal in ***Susan Munyi -vs- Keshar Shiani*** [2013] eKLR where the Learned Judges observed as follows: -

.... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions...

18. With the foregoing guidance, this Court shall now deal with the above issues in seriatim.

[a] The legal implication of the “as is, where is” clause in the sale agreement:

19. The Appellant placed significant reliance on the Sale Agreement dated 7th July 2020 [hereinafter referred to as ***‘the Agreement’***], specifically clauses 8, 25 and 26, which in essence affirmed that *‘... the purchaser is satisfied with the vehicle’s soundness and that the vendor is not responsible for claims after delivery...’*. The Appellant posited that it was, hence, absolved from liability, especially given the “as is, where is” basis of the sale.

20. The “as is, where is” clause which is generally an expression of the legal doctrine of *caveat emptor* covers defects as to the merchantable quality or fitness of an item, which a buyer could discover upon reasonable inspection. The Respondent’s complaints about power failure and a damaged radiator, which arose shortly after purchase, would ordinarily be covered by

such a clause. However, this clause does not and cannot be used as a shield to protect a seller from liability for active and fraudulent misrepresentation. A party cannot induce another into a contract based on a factual falsehood and then hide behind a contractual clause to escape the consequences of that fraud. The Respondent's case is not merely that the car was defective; it is that the car's fundamental description (its mileage) was falsely presented to him, inducing the sale.

21. The **Black's Law Dictionary**, 9th Edition defines '**fraud**' at Page 731 as: -

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.

22. Further, the **Black's Law Dictionary**, 10th Edition defines '**civil fraud**' as follows: -

.... an intentional fraud which carries only a monetary, non-criminal penalty. That "fraud" is a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. That fraud is usually a tort but, in some cases, (especially when the conduct is wilful) it may be a crime...

23. Therefore, while the Appellant's cited case of **National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (K) Ltd** case [supra] correctly states the law on binding contracts, such a legal position does not apply where the contract itself is impeached for misrepresentation, which is a vitiating factor. Indeed, the "as is, where is" clauses are disclaimers of implied warranties of merchantability or fitness, they are not *ipso facto* licenses for sellers to misrepresent or commit fraud. A Court of law ought not to shut its eyes to such an illegality and allow a party to benefit from dishonesty.

24. In **Kibathi t/a Osoro Chege Kibathi & Co Advocates -vs- Musti Investments Ltd** [2024] KECA 270 (KLR) it was observed that: -

.... Our reading of the decisions in Kenya Pipeline Co. Ltd v. Glencore Energy (UK) Ltd (supra), Lazarus Estates Ltd v. Beasley (supra), among other decisions on fraud and illegalities, leaves no doubt that the law seeks to deny a

perpetrator of fraud or an illegality from benefitting from his fraud or illegal conduct.

25. The upshot, therefore is that the “*as is, where is*” clause in the agreement did not absolve the Appellant from the duty to be truthful about the vehicle’s fundamental description.

[b] Whether the Appellant made a fraudulent misrepresentation to the Respondent regarding the vehicle’s mileage, and if so, whether it vitiated the contract:

26. The Respondent testified that he was interested in a “*clean Subaru... of low mileage*”. Upon inspection, he and his friend (PW2) “*noticed... the mileage was low, with the odometer reading about 52,000 kilometres*”. It was his evidence that he found it “*very attractive,*” as it pointed to minimal prior usage. After purchasing the vehicle, he took it for service at Amazon Motors. The next service ticket, produced as P-Exhibit 7, issued on 10th July 2020 indicated the mileage was 52,863 kilometres. It corroborated his testimony of the mileage at the point of sale.

27. Following persistent mechanical issues, the Respondent’s suspicions were aroused. An online search, produced as P-Exhibit 10(a) and, crucially, a Certificate of Roadworthiness from KEBS produced as P-Exhibit 10(b) confirmed his worst fears. They proved that the vehicle’s odometer reading at the time of importation to Kenya stood at 225,626 kilometres. The Appellant’s salesman, *Mr. Yunus Hamza*, directly contradicted the Respondent, claiming the odometer read 227,216 kilometres at the time of inspection. This figure matches the *altered* mileage the Respondent later discovered at Kylin Motors. Most outrageously, the Appellant’s own evidence, [the KEBS Certificate produced as D. Exhibit 5/6], also clearly showed the mileage at importation was 225,626 kilometres. The Appellant was, therefore, in possession of an official document proving the vehicle’s true mileage was over 225,000 km but instead presented the vehicle to the Respondent with an odometer reading of 52,000 km.

28. Before the eyes of this Court, such representation is a positive statement of fact, which is made and is untrue. It is fraud, as defined by the *Black's Law Dictionary*, discussed in the preceding issue that induced the Respondent to purchase the vehicle. Having found as such, it is imperative to say that a purchaser of a vehicle, just like that of a parcel of land and/or any other item, ought to carry out due diligence on the property before purchasing it. In this case, upon the vehicle developing persistent mechanical issues, the Respondent conducted an online search and contacted KEBS, a body tasked with ensuring standards on goods in the country, and the vehicle's correct mileage at the time of inspection and before shipment was confirmed. This Court is not sure if the Respondent could have found out the correct mileage before importation had he conducted the online search before the purchase. However, even if that was possible, still the Appellant would not be absolved of its fraudulent conduct having tempered with the odometer reading and presented the false reading to the Respondent as the genuine one. Needless to say, this Court takes judicial notice of the position that vehicles depreciate in value with use and that a higher odometer reading connotes long usage of the vehicle thereby translating to both low value and more mechanical and electrical challenges. It is also possible that the Respondent would not have bought the vehicle with an odometer reading of over 200,000 kilometres since he was intent on finding one with a low mileage.
29. On the basis of the above discussion, this Court has this to say to vehicle dealers; that a dealer who tempers with the odometer reading of a vehicle before selling it commits fraud and is liable to both criminal and civil sanctions including a possible refund of the purchase price.
30. This Court, therefore, finds and hold that the trial Magistrate did not err in fact and/or law in finding that the Appellant fraudulently misrepresented the vehicle's mileage, a fact that fundamentally vitiated the Respondent's consent to the agreement.

[c] Whether the Appellant breached the implied statutory condition as to the right to sell the motor vehicle:

31. The Sale Agreement was between the Appellant, *Rana Auto Selection Limited*, and the Respondent. The Respondent's NTSA Copy of Records as at 22nd January 2021, produced as P-Exhibit 13 revealed that the registered owner of the vehicle was a third party, Chaand Motors Limited. The Appellant admitted this fact but claimed it had authority to sell from Chaand Motors, its "sister company" which it produced it as Defence Exhibit-2.
32. Having reviewed the evidence adduced before the trial Court, a dichotomy in ownership of motor vehicles comes to the fore. On the one part is the legal ownership and on the other is beneficial/actual ownership. Going by the registration status of the vehicle cycle at the NTSA, there is no contest that Chaand Motors was the legal registered owner. The Court of Appeal in ***Nancy Ayemba -vs- Abdi Ali*** (2010) eKLR, however, recognized that in judicial practice there have arisen concepts to describe alternative forms of ownership such as actual ownership, beneficial ownership and possessory ownership. Therefore, in a contest where alternative forms of ownership of vehicles are fronted, the Court ought to carefully review the evidence in determining the issue. In this case, since there was evidence that the Appellant had been allowed in writing by the registered owner to sell the vehicle, and more so since the registered owner did not challenge the said authority, then a finding that the Appellant lacked authority to sell the vehicle on behalf of the registered owner is not supported by evidence and cannot hold in law.
33. It is, hence, this Court's finding and holding that the Appellant did not breach any implied statutory condition as to the right to sell the motor vehicle. This issue is, therefore, answered in the negative.

[d] The propriety of the trial Court's rescission of the contract:

34. The Appellant argued that ordering a full refund was unjust, as the Respondent had used the vehicle, causing depreciation. To this Court, the remedy for a contract voided by fraudulent misrepresentation and a total failure of consideration is ***restitutio in integrum***; a restoration of the parties to the position they were in before the contract was made.
35. The trial Court's order achieved the above. The Respondent returns the vehicle, and the Appellant returns the money paid. The Appellant's complaint about depreciation is disingenuous. The Respondent's evidence, including Job Cards and Invoices from Amazon Motors produced as P-Exhibits 6(a), 6(b), 8(a), 8(b), 8(c)), details the significant sums he spent trying to fix a vehicle that was plagued by defects from the outset. These defects are directly attributable to the high mileage the Appellant concealed. The Respondent cannot be penalized for the depreciation of a vehicle that he was tricked into buying. The relief flows directly from the rescission of the contract.
36. Finally, the Appellant's attempts to challenge the admissibility of the Respondent's Mpesa statement or minor discrepancies in a job card are moot. The Respondent's case on misrepresentation and ownership was overwhelmingly proven by the KEBS Certificate and the NTSA Search. As a result, this Court does not find fault in the remedies made by the trial Court.

Disposition:

37. The Appellant's appeal is premised on the sanctity of a contract that was, from its inception, vitiated by fraudulent misrepresentation as to its subject matter namely, mileage and entered into by a party with no legal right to sell. The Respondent proved these facts with clear and decisive documentary evidence.
38. The trial Court correctly identified the misrepresentations and granted the appropriate remedy of rescission. In the premises, the appeal is unfounded and the following final orders hereby issue: -

[a] The appeal is wholly without merit and is hereby dismissed.

[b] The judgment of the trial Court in *Milimani Chief Magistrates Commercial Court Case No. E611 of 2021* is hereby upheld.

[c] The Appellant shall bear the costs of the appeal.

It is ordered.

DELIVERED, DATED and SIGNED at NAIROBI this 29th day of 2026.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

No appearance for parties.

Michael/Amina - Court Assistants.