

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E176 OF 2022

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

VERSUS

PETER MATHIGU GICHAMBA t/a

BROOKCEDRON ENTERPRISES.....RESPONDENT

(Being an appeal against the Judgment of Hon. E. K. Makori (CM) delivered on 14th September 2021 in Mombasa Chief Magistrate’s Court Civil Suit No. 1577 of 2012, Diamond Trust Bank Kenya Limited v Peter Mathigu Gichamba t/a Brookcedron Enterprises)

JUDGMENT

1. The Plaintiff/ Appellant through the Plaintiff dated 5th June 2012, prayed for judgment against the Defendant/ Respondent for the sum of Kshs. 1,156,831.73 together with interest thereon at the rate of 33.98% per annum from 27th April 2012 until payment in full, costs of the suit together with interest thereon at court

rates from the date of filing the suit until payment in full, and such other and further relief that the court may deem just and fit to grant.

2. It was averred that by a Letter of Offer dated 2nd September 2009 and a subsequent Hire Purchase Agreement dated 10th September 2009, the Plaintiff financed the Defendant to purchase a new Nissan Navara 4WD motor vehicle registration number KBJ 891N on hire purchase terms at a total hire purchase price of Kshs. 3,000,000. That additionally, the Plaintiff and the Defendant entered into an Insurance Premium Finance Agreement wherein the Plaintiff extended to the Defendant an Insurance Premium Finance Loan of Kshs. 203,925.
3. The Plaintiff averred that in breach of the Hire Purchase Agreement and the Insurance Premium Finance Agreement, the Defendant defaulted in payment as and when they fell due and fell into arrears. That the Plaintiff repossessed the motor vehicle and sold it off for a sum of Kshs. 2,800,000 and proceeds thereof were credited into the Defendant's loan account leaving a balance of Kshs. 1,156,831.73 as at 27th April 2012 which sum continues to accrue interest at the rate of 33.98% per annum.
4. The Defendant filed a Statement of Defence dated 22nd October 2012 and save for what was expressly admitted, the Defendant denied allegation in the Plaintiff. The Plaintiff then filed a Reply to Defence dated 2nd November 2012 reiterating the averments in the Plaintiff.

5. This suit was heard in the trial court and judgment delivered on 14th September 2021 where the court both the suit and the counterclaim were dismissed, with each party bearing its own costs.
6. Being dissatisfied, the Appellant appealed the judgment through the Memorandum of Appeal dated 12th October 2021 on the following grounds: -

(a) THAT the learned magistrate erred in law and in fact in placing undue weight to the Respondent's valuation over and above the Appellant's valuation and thereafter finding that the Appellant had undervalued the financed motor vehicle.

(b) THAT the learned magistrate erred in law and in fact in finding that there was a discrepancy in the amounts owed to the Appellant.

(c) THAT the learned magistrate erred in law and fact and further misdirected himself in going beyond what was pleaded and finding that the Appellant had failed to supply the Respondent with account statements yet the Respondent neither pleaded nor asked for the same.

(d) THAT the learned magistrate erred in law and in fact in failing to find that since the Respondent had defaulted on the facility, the Plaintiff was entitled to recover the unpaid amounts.

(e) THAT the learned magistrate erred in law and fact and further misdirected himself in applying equitable principles to displace clear contractual provisions.

(f) THAT the learned magistrate erred in failing to properly consider the Appellant's Replying Affidavit, Appellant's Submissions and the numerous binding authorities cited by the Appellant and in doing so, arrived at an erroneous conclusion.

7. The Appellant prayed for orders that the Appeal be allowed, that the decision of the court in ***Mombasa CMCC No. 1577 of 2012*** and all consequential proceedings, orders and decree be set aside and substituted with an order allowing the Appellant's suit against the Respondent as prayed in the Plaint with costs to the Appellant, that the costs of this appeal be awarded to the Appellant, and that such further or other orders be made as are just in the circumstances of this appeal.

Submissions

8. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 18th March 2025 argued that valuation of a motor vehicle in a commercial transaction is not fixed assessment but depends on market forces and professional expertise. That the Appellant, having engaged a qualified and

licensed valuer in accordance with the Auctioneers Act, obtained an independent valuation that was consistent with market rates.

9. That the valuation report by the Appellant placing the vehicle at a forced sale value of Kshs. 2,600,000 was supported by expert opinion. The Appellant stated the Appellant's valuation report dated 19th March 2010 and the Respondent's valuation report dated 7th September 2012 were produced under supervision of the same organization. That further, the condition of the motor vehicle in the two contexts was different as additional features on the body of the vehicle during the second valuation led to a difference of Kshs. 300,000.
10. The Appellant submitted that the Respondent owed the Appellant Kshs. 3,854,999.88 out of which the Respondent paid only Kshs. 321,249.99, leaving a difference of Kshs. 3,532,798.81. That taking into account the selling price for the motor vehicle, there was a balance of Kshs. 732,798.81, which amount the Respondent owes the Appellant. The Appellant *cited Section 176* of the *Evidence Act* which provides that a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.
11. That the Respondent did not at any point during proceedings at the trial court deny being indebted to the Appellant nor did he lead any evidence to dispute the figures hence the account statements ought to have been considered as conclusive proof of the Respondent's indebtedness to the Appellant. That after the auction,

the money was also utilized to cater for the repossession charges and related costs namely, the auctioneer's fees, repossession fees, inspection fees, storage fees, and valuation fees.

12. The Appellant relied on the holdings in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR**, **Malawi Railways Ltd v Nyasulu [1998] MWSC 3** and **Libyan Arab Uganda Bank for Foreign Trade and Development & another v Adam Vassiliadis [1986] UG CA 6** and submitted that it is trite law that a court cannot grant reliefs not specifically pleaded or sought by a party. That the trial court's reliance on an unpleaded issue to arrive at its decision was therefore a fundamental error of law.
13. The Appellant further argued that there being no dispute as to the amount owed to the Appellant by the Respondent and the same having been unequivocally admitted by the Respondent during cross examination in the trial court, the Appellant has a right to recover the amount owed by the Respondent. That equity follows the law and cannot override express contractual provisions as held in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (2001) eKLR**.
14. That according to the case of **Patrick Kithaka Kivuti v John Mwangi (2018) eKLR** which cited with approval the case of **Mwangi v Wambugu [1984] KLR 453**, a court must consider all the evidence and submissions presented before it in arriving at its conclusion. The Appellant in their concluding remarks stated that

the trial court disregarded the Appellant's submissions and evidence, leading to an erroneous conclusion. They therefore urged this court to review the record and find that the Appellant had presented sufficient legal and factual arguments that ought to have been considered.

15. The Respondent in their submissions dated 27th October 2025 argued that the Appellant's valuations of the motor vehicle were inconsistent whereby on 31st July 2009, the vehicle was valued at Kshs. 4,018,420, on 15th February 2010, it was valued at Kshs. 3,250,000, on 18th July 2010, the Appellant's demand letter placed the value at Kshs. 2,800,000, and that the Respondent produced a valuation report placing the motor vehicle's worth at Kshs. 3,240,000. That given the Respondent retained the vehicle for only 5 months, it is evident that no proper or consistent valuation was provided by the Appellant to establish the correct sum owing by the Respondent.
16. The Respondent cited the case of *Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716* where it was held that special damages must not only be specifically pleaded but also strictly proved and that the degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. That the burden of proof lay squarely on the Appellant to prove the amount advanced, the amount repaid, the proceeds of sale by auction, and the precise outstanding balance.

17. The Respondent argued that it is under the evidence Act that he who alleges must prove and that the trial court's finding was correct as the Appellant failed to discharge the burden. That the trial court was further correct in its finding that contractual remedies must be exercised lawfully, transparently and in good faith.

Analysis

18. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in ***Selle v Associated Motor Boat Co. (1968) E.A 123*** as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”

19. I have considered the Record of Appeal, the Supplementary Record of Appeal and submissions by the parties. The issues for determination are: -

(a) Whether the Appellant proved their case to the required standard

(b) Whether the trial court correctly evaluated pleadings and evidence on record and made a determination on what was pleaded

(c) Who should bear costs

20. On whether the Appellant proved their case to the required standard, the Appellant needed to show that the debt owed was clear and ascertainable, that any

inconsistencies in the figures were minor and explainable, and that the trial court failed to properly analyze the accounting of the debt, payments, and auction proceeds. In addition, the Appellant had to demonstrate that the repossession and auction of the vehicle was lawful, conducted in good faith and commercially reasonable manner, that the sale proceeds were properly credited, and that the claim for the outstanding balance was legally justified and in line with the parties' agreement.

21. Section **107(1)** of the ***Evidence Act, Cap 80 Laws of Kenya*** provides as follows: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

22. **Section 109** of the ***Evidence Act*** states as follows: -

“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.”

23. ***Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280*** where it was held that: -

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

24. Subject to the holding above, this court has perused the record, particularly the Appellant’s list of documents and noted that by the Letter of Offer Ref. No. MSA/CC/CM/1009/2009 dated 2nd September 2009 set out the terms and conditions for the hire purchase loan, which terms were accepted by the Respondent. The letter stated that the vehicle was valued at Kshs. 4,019,420 and the maximum aggregate amount of the Hire Purchase loan was Kshs. 3,000,000 while the down payment aggregating Kshs. 1,019,420 was to be made to the dealer by the Respondent.
25. The facility was to be paid in 36 instalments and the Respondent was to pay interest rate of 10% p. a. on each instalment not paid on the due date. The Dealer’s Invoice dated 9th September 2009 also showed the price of the vehicle as Kshs. 4,019,420, a deposit of Kshs. 1,019,420 deducted from the amount leaving a balance of Kshs. 3,000,000 payable at Ksh. 107,186.47 for 36 months.
26. The Statement of Account in the name of Brookcedron Enterprises for Agreement No. 002HPLC092550002 shows account crediting by the Respondent between

September and December 2009. However, no single instalment was paid regularly until January 2010 when the Respondent fully defaulted in repayment. The letter dated 15th February 2010 by the Appellant to Thaara Auctioneers shows that the Respondent was in arrears of Kshs. 266,544.25 plus interest as at 15th February 2010. The Invoice dated 29th March 2010 and the Respondent in their evidence in court show that the vehicle was repossessed on 25th February 2010. The letter dated 25th March 2010 by Thaara Auctioneers to the Appellant stated that a public auction of the motor vehicle was conducted on the said 25th March 2010.

27. The Demand Letter to the Respondent dated 8th June 2010 stated that the Respondent had defaulted and fell into arrears in the sum of Kshs. 879,730.47 as at 16th June 2010. The letter further stated that the vehicle was sold at Kshs. 2,800,000 leaving a balance of Kshs. 879,730.47 being the shortfall after proceeds from the sale of the subject motor vehicle was duly credited to the Respondent's account.
28. From the evidence on record as highlighted above, it is clear the Appellant financed the Respondent an amount of Kshs. 3,000,000 for purchase of the motor vehicle. It is also clear that the Respondent was required to pay Ksh. 107,186.47 for 36 months, the Respondent defaulted in repayment, the vehicle was repossessed and sold off by auction. The Respondent having defaulted, the Appellant was entitled to recover the unpaid amounts pursuant to the Hire

Purchase Agreement. However, this court is not sure how much the vehicle was sold off for.

29. The Appellant never furnished the court with evidence of proceeds of the sale. This court somehow deduced from the letter dated 25th March 2010 that the highest bid at the auction was Kshs. 2,200,000 which was far below the reserve price of Kshs. 3,250,000. The demand letter dated 8th June 2010 says the vehicle was sold at Kshs. 2,800,000 and the Appellant's witness in cross examination indicated that the auctioneers sold the vehicle at Kshs. 2,800,000 on 25th March 2010.
30. The Respondent in their pleadings and evidence in court disputed the selling price of the vehicle on auction and that there was foul play in the Appellant's valuation of the motor vehicle considering the Respondent was in possession of the motor vehicle for a duration of less than 5 months.
31. The court was also not furnished with a breakdown and/or account of how proceeds of the sale was utilized. It is only the Appellant's contention in their pleadings that proceeds of the sale were credited into the Respondent's loan account leaving a balance of Kshs. 1,156,831.73 as at 27th April 2012, which sum continued to accrue interest at the rate of 33.98% per annum.
32. The Invoice dated 29th March 2010 by Thaara Auctioneers shows their costs for the services rendered which amounted to Kshs. 51,113. However, the amounts quoted by the Appellant of how much the Respondent owes them is not clear. The

Appellant has not furnished sufficient evidence and the evidence on record does not reconcile with the amounts demanded. While the letter dated 15th February 2010 quotes Kshs. 266,544.25 plus interest, the demand letter dated 8th June 2010 quotes Kshs. 879,730.47 while pleadings on record quote a balance of Kshs. 1,156,831.73 as at 27th April 2012.

33. Subject to the foregoing, it is the finding of this court that the Appellant did not prove their case to the required standard. The trial court was right in holding that there were discrepancies in the amount owed by the Respondent and demanding more from them would be unfair.
34. On whether the trial court correctly evaluated pleadings and evidence on record and made a determination on what was pleaded, this court has perused the judgment of the trial court and noted that the court correctly evaluated pleadings and evidence of both parties. The court also looked at the Letter of Offer dated 2nd September 2009, the Hire Purchase Agreement dated 10th September 2010, the Demand Letter dated 8th June 2010, the letter to Thaara Auctioneers dated 15th February 2010, Valuation Reports by Automobile Association of Kenya, and the statement of accounts in making its determination.
35. On costs, there is no reason to deny the Respondent costs. The same is awarded.

Determination

36. In the upshot, this court makes the following orders;

a. The appeal lacks merit and is hereby dismissed.

b. Costs awarded to the Respondent.

Dated, signed and delivered virtually at Mombasa this 5th day of March, 2026

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Ms. Kavata Advocate for the Applicant

Ms. Maiga Advocate for the Respondent

Ms. Salwa, Court Assistant