

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E092 OF 2021

MAUREEN AKOTH LIHANDA 1ST APPELLANT

MALEEN INVESTMENT LIMITED 2ND APPELLANT

- VERSUS -

BBOX CAPITAL KENYA LTD RESPONDENT

**(Being an appeal from the judgment and decree of Hon. L. Akoth RM
delivered on the 19/7/2025 in Kisumu CMCC No. 139 of 2019, Maureen Akoth
Lihanda & Maleen Investment Limited v Bbox Capital Kenya Ltd)**

J U D G M E N T

1. The appellants sued the respondent seeking an order to compel the respondent to compensate the 1st appellant with a new motor vehicle to replace the one leased to the respondent by the 2nd appellant or in the alternative, the respondent pays the 1st appellant **Kshs. 1,280,000/-** being the purchase price of the lost motor vehicle.
2. The defendant denied the appellants' claims and counterclaimed against them seeking orders dismissing the appellants suit, a declaration that the appellants were in breach of the Car Rental Agreement between them as a result of which it was exonerated from all liabilities flowing from the loss of the motor vehicle.

3. The matter proceeded to trial and by a judgment delivered on **19/7/2021**, the trial court found that the appellants had failed to prove their case against the defendant and proceeded to dismiss the same.
4. Being dissatisfied with the said Judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated **27/7/2021** which raised six (6) grounds of appeal as follows: -

- a) *The learned trial magistrate erred in law and in fact in holding that the appellants had not proved their case on a balance of probabilities.*
- b) *The learned trial magistrate erred in law and fact in dismissing the appellant's case when evidence on record showed that the suit motor vehicle was lost while in possession and use of the respondent and that liability of loss of the motor vehicle fell on the respondent.*
- c) *The learned trial magistrate erred in law and fact in holding that the appellants were in breach of Article 4 Clause 4.1 of the Contract which finding was not supported by any evidence before court.*
- d) *The learned trial magistrate erred in law and in fact by failing to consider and analyze the entire evidence on record and thereby arriving at wrong findings on the issues before court.*

e) The learned trial magistrate erred in law in exercising its discretion wrongly in the circumstances.

f) The learned trial magistrate erred in law and in fact in failing to consider the appellants' submissions and judicial authorities thus leading to resultant miscarriage of justice to the appellants.

5. The appeal was disposed of by way of written submissions however at the time of writing this judgement only the respondent's submissions were on record. The respondent submitted that the evidence before the trial court showed that the 2nd appellant failed to fulfill their contractual warranty to have appropriate insurance in place as they did not disclose the full insurance policy document, despite it being the only proof that could provide comprehensive details of what risks were covered (or excluded). That consequently, the appellants failed to prove they had obtained the very insurance cover required by Article 4.1 of the Car Rental Agreement.
6. That the appellants' pleadings did not particularize any negligence or wrongdoing by the part of the respondent and thus there being no proof of negligence against it, no liability could attach to it. That the respondent's liability was conditional upon the appellants fulfilling their own contractual duties thus the appellants' prior and material breach of **Article 4.1 of the Rental Agreement** fundamentally altered the contractual relationship between the parties.

7. That to allow the appellants to recover for the vehicle's loss despite their breach would reward them for neglecting their obligations contrary to the findings in **Benjamin Kaburi Kamuruci v Stanbic Bank Limited [2014] KEHC 1326 (KLR)** where it was held that no court of equity will aid a man to derive advantage from his own wrong. That the appellants' claim for **Kshs. 1,280,000/-** is in the nature of special damages but was not proven.
8. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**
9. The 1st appellant testified as **Pw1**. She adopted her statement filed on the **21/3/2019** as her evidence in chief. It was her testimony that the respondent hired her motor vehicle registration number **KCJ 562B**. That the respondent hired the car through her company, the 2nd appellant, and subsequently the car disappeared on the **10/12/2017** whilst in the possession of an employee of the respondent.
10. That she reported the incident at Kondele Police Station and to the insurance company too. That the driver who had the car at the time also reported the same. That she thus wanted to be compensated by the respondent.
11. In cross-examination, she testified that her company, the 2nd appellant, entered into a contract with the respondent over hiring of the suit vehicle. That the vehicle was

insured as per Article 4 of the contract and the vehicle was in sound condition as per Article 5. That she took out a comprehensive cover over the vehicle. That if the vehicle had a tracker, it would have been tracked. That when she hired the suit vehicle out, she knew it had no tracker or alarm. That she did not issue the respondent with policy details. That there was negligence on the part of the respondent though she had not demonstrated the negligence.

12. **Rose Owuor**, an employee of the respondent testified as **Dw1**. It was her testimony that the vehicle was lost whilst under her care. That on the **9/12/2017**, she parked the vehicle at home but the next day found it missing. That she called the 1st appellant and informed her of the loss. That the respondent subsequently met the 1st appellant over the issue but the 1st appellant failed to provide insurance details for the vehicle. That the vehicle was parked besides the apartment she resided in. That it had no alarm and that there was no attempt made to track it.

13. It is based on this evidence that the trial court rendered its decision. From the foregoing, the grounds of appeal may be summarized into one, viz, ***Whether the trial court erred in dismissing the appellants suit.***

14. The appellants case before the trial court was rather simple. Through her company, the 2nd appellant, the 1st appellant hired out her motor vehicle registration number **KCJ 562B** Toyota Fielder to the respondent. The said vehicle was under the care

of Rose Owuor, an employee of the respondent. That it was subsequently stolen and as such, the appellants sought compensation therefor.

15. Conversely, the respondent denied any claims made by the appellants including allegations of negligence leading to the loss of vehicle. It counterclaimed against the appellants for a declaration that the appellants breached **Article 4 of the Car Rental Agreement** between themselves.

16. The law is settled, that, he who alleges must prove. **Section 107 of the Evidence Act (cap 80) of the laws of Kenya** provides: -

“1) 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.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. There was no dispute that the vehicle was lost while in the possession of the respondent’s employee. In the amended plaint dated **16/11/2020**, the appellants sought compensation for the loss to the tune of **Kshs. 1,280,000/-** or with a vehicle of the same make.

18. In its further amended statement of defence and counterclaim dated **26/3/2020**, the respondent denied the appellants claims and counterclaimed for a declaration that the y had breached their contractual duty to insure the vehicle for loss and thus it was exonerated from liability over its loss.
19. In her testimony, the 1st appellant testified that the vehicle was comprehensively insured. However, she only produced a Certificate of Insurance and when called upon to produce the Insurance Policy, she failed to do so.
20. The record reveals that the agreement between the parties was codified in an agreement dated **13/9/2016**. In Article 4 thereof, the appellant warranted that the vehicle was insured with a cover over personal injury to the respondent's employees, third parties, the vehicle itself and property of others.
21. The appellants failed to produce the Policy Document so as to enable the court determine whether the suit vehicle was insured as provided for in Article 4 of the agreement or not. To this Court's mind, the Certificate of Insurance merely indicated that the suit vehicle was covered, the details of the policy therein were to be contained in the Policy Document which was not availed. The court was thus not able to determine whether the suit vehicle was insured or not. To this end the appellants were in breach of ***Article 4 of the Car Rental Agreement***.

22. The respondents further contended that the appellants breached Article 5 of the agreement as the car was not fitted with an alarm or tracker despite being in the car hire business.
23. At **Article 5 of the Car Rental Agreement**, the appellants warranted that the vehicle was in sound condition and free from any known faults or defects that would affect its safe operation under normal use.
24. It makes rational sense that a vehicle being used hire business ought to have a tracker and an alarm as security features. This is so because such vehicle will in most cases not be in the possession of the registered owner. Those would be security features to safeguard such chattel.
25. In this case, the evidence of **Dw1** was that she did not hear any alarm go off after parking it besides the apartment she lived in. That after reporting the disappearance of the vehicle to the appellants and the police, the appellants failed to make any effort in tracking the same.
26. This Court is of the view that the failure to put a tracker or install an alarm on the vehicle constituted a breach of Article 5 of the Car Agreement. The suit vehicle was not in *sound and safe condition*, for the work it was set out to do.
27. The appellants in their claim sought compensation in the form of either a similar vehicle or in the alternative, a sum of **Kshs. 1,280,000/-** being the value of the said

vehicle. It is noteworthy that the Car Rental Agreement did not provide for instances of compensation in case of loss. It is trite that parties are bound by their contracts and a Court cannot rewrite the same for the parties. See **National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR.**

28. In the circumstances, this Court is in agreement with the trial court that the appellants did not prove their case to the required standard. The judgment of the trial court of **19/7/2021** is hereby upheld.

29. The appeal is found to be without merit and is hereby dismissed with costs to the respondent.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 25th day of **March, 2026.**

A. MABEYA, FCI Arb

JUDGE