

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. 232 OF 2023

GREAT RIFT VALLEY SERVICES LTD.
APPELLANT

=VERSUS=

RAPHAEL KIMANI NGA'NG'A
RESPONDENT

*(Being an appeal from the decree emanating from the Judgment of the
Small Claims Court in Eldoret SCC E762 of 2022: Great Rift shuttle vs
Raphael Kimani Ng'ang'a delivered on 17th November, 2023)*

Coram: Before Justice R. Nyakundi
Chimei & Malenya Company Advocates
Mathai Maina & Company Advocates

JUDGMENT

Background

- 1.** The brief background of this appeal is that the Appellant sued the Respondent herein in SCC E762 of 2022 for a refund of a purchase price of an engine number 1KD1743256 it had bought for motor vehicle registration KCE 098B belonging to the Respondent.
- 2.** The Respondent denied the claims and put in a counterclaim for the release of the said motor vehicle and payment of loss of income in the sum of Kshs. 920,400 due to unlawful seizure. While the matter was still ongoing, on 19th January, 2023 the Appellant removed and took the engine belonging to the Respondent's Motor Vehicle Registration Number KCE 098B hence rendering the appellant's case moot. The court then proceeded to consider the counterclaim by the

Respondent where the court ordered the Appellant to pay a sum of Kshs. 920,400/= being the loss of income suffered by the Respondent herein.

3. The Court considered the claim and spoke as follows:

“Turning to the counter claim, the Respondent testified that the claimant’s unlawfully held his motor vehicle in their yard resulting to his loss of income in the sum of Kshs. 920,000/=. He produced in court daily delivery notes in support of his claim. The Claimant testified that the Respondent’s vehicle was being held at the yard for repair purposes. They however did not lead any evidence to confirm that the subject vehicle was under repairs. This court has perused the daily delivery notes and is inclined to find that the Respondent was able to prove its counter claim against the Claimant the sum of Kshs. 920,000/= which is awarded. The Respondent shall have the costs of the counterclaim.”

4. Aggrieved by the said the decision, the appellant approached this court vide a Memorandum of Appeal dated 19th November, 2023 in which the following grounds were raised:

- a. The Learned Adjudicator erred in law by allowing the Respondent’s Counter-Claim specifically that the Appellant had seized the Respondent’s motor vehicle KCE 098B when no evidence of seizure was produced by the Respondent;
- b. The Learned Adjudicator erred in law by allowing the Respondent’s Counter-Claim specifically when there is no evidence that the Respondent asked for or went for his motor-vehicle KCE 098B from the Appellant’s garage.
- c. The Learned Adjudicator erred in law by disregarding the witness statement and evidence of Rachael Wamboi and Paul Gichohi who was the driver of KCE 098B who testified that he

voluntarily that he voluntarily took motor vehicle KCE 098B to the Appellant's garage.

d. The Learned Adjudicator erred in law by dismissing the Appellant's claim when in essence the Claim was overtaken by events when auctioneers came for motor-vehicle KCE 098B and the Appellant retrieved its engine from motor-vehicle KCE 098B. The only reason why the claim was subsisting was because of the Counter-claim.

5. As a result, the Appellant sought orders as follows:

a. *The Appeal be allowed.*

b. *The Decree and Judgment of the Small Claims Court be set aside.*

c. *The Costs of the Small Claims matter and this Appeal be awarded to the Appellant.*

6. The appeal was canvassed by way of written submissions, which have endeavored to summarize as hereunder:

Appellant's written submissions

7. Learned Counsel Mr. Malenya started by giving a background and submitted that the Appellant was dissatisfied with the Decree and Judgment of Hon. T.W. Mbugua delivered on 17th November 2023 in Eldoret Small Claims Commercial Case No. E762 of 2022, against which the entire decree was being appealed. He outlined that the trial court had dismissed the Appellant's statement of claim for want of a cause of action, awarded costs to the Respondent, and additionally allowed the Respondent's counter-claim in the sum of Kshs. 920,000/= together with costs.

8. On the background facts, Counsel submitted that the Appellant had filed a claim dated 16th December 2022 seeking Kshs. 350,000/= being the cost of Engine Number IKD1743256 purchased from Waweru General Auto Spares and fitted onto Motor Vehicle Registration Number KCE 098B belonging to the Respondent, which

amount the Respondent had failed to reimburse. The Respondent in turn filed a counterclaim dated 12th January 2023 seeking release of the motor vehicle KCE 098B, loss of income of Kshs. 920,400/= due to alleged unlawful seizure, and costs.

- 9.** Counsel then addressed the four grounds of appeal raised in the Memorandum of Appeal. On the first ground, that the learned Adjudicator erred in law by allowing the Respondent's counter-claim premised on alleged seizure of motor vehicle KCE 098B when no evidence of seizure was produced, Counsel submitted that the burden of proof lay squarely on the Respondent as the party asserting the counter-claim. He relied on Section 107(1) of the Evidence Act for the proposition that he who alleges must prove, and further on Sections 109 and 112 of the Evidence Act on the evidential burden of proof. Counsel supported these provisions with the authority of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, which affirmed that the legal burden lies upon the party who invokes the aid of the law and asserts the affirmative of the issue, and **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**, which further reinforced that the burden lies on the party asserting any particular fact and that the burden would fail if no evidence at all were given on either side. Counsel argued that the Respondent produced no evidence whatsoever of any act of seizure, no demand for release of the vehicle, and no refusal by the Appellant to release it. It was submitted that the Respondent's statement merely asserted that the vehicle was impounded without specifying where, when, or producing any witness or document to confirm the same.
- 10.** On the second ground, that the Adjudicator erred by allowing the counter-claim when there was no evidence that the Respondent asked for or went to collect his motor vehicle from the Appellant's garage, Counsel submitted that detention as a legal concept can

only arise upon demand and refusal, and that the Respondent, who bore the burden, wholly failed to demonstrate any such demand or effort to recover the vehicle. Counsel relied on the **Kimweli v Kimweli (Civil Appeal 660 of 2019) [2022] KECA 1394 (KLR)** decision, which held that a court of law can only weigh proved facts and cannot speculate on evidence never adduced or inferences that do not follow from proved facts. It was further submitted that the trial court's award of Kshs. 920,400/= for alleged loss of income was erroneous, as the Respondent merely extrapolated daily delivery earnings into a lump sum without proving actual loss over the claimed duration, and failed to demonstrate any mitigation of his alleged loss. On the duty to mitigate, Counsel placed reliance on **Farah Awad Gullet v CMC Motors Group Limited 2014KEHC64(KLR)** and the Court of Appeal's observations in **Kiptoo v Attorney General (2010) 1 EA 201**, which held that a plaintiff owes himself a duty to take all reasonable steps to mitigate loss and cannot claim as damages any sum attributable to his own neglect.

- 11.** Regarding the third ground, that the Adjudicator erred by disregarding the witness statements and evidence of Rachel Wambui and Paul Gichuhi, the driver of KCE 098B, both of whom testified that the vehicle was voluntarily taken to the Appellant's garage, Counsel submitted that an appellate court is entitled to interfere where a trial court fails to consider material evidence and that such failure constitutes a ground for appellate intervention. He cited **Momentum Credit Limited v Oduor [2025] KEHC 5739 (KLR)** for the duty of the first appellate court to re-evaluate the evidence afresh and reach an independent conclusion, and further relied on **Ephantus Mwangi & Another v Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278**, in which the Court of Appeal held that an appellate court is not bound by a trial

judge's findings of fact where the judge has clearly failed to take account of particular circumstances or probabilities material to an estimate of the evidence. Counsel urged the Court to find that voluntary delivery of the vehicle by the Respondent's own driver negated any claim of unlawful seizure or detention.

12. On the fourth and final ground, that the Adjudicator erred in dismissing the Appellant's claim when it had essentially been overtaken by events, specifically that auctioneers had come and attached the vehicle in satisfaction of a debt, the Appellant had thereafter retrieved its engine, and the claim only subsisted on account of the counter-claim. Counsel submitted that where the subject matter of a claim is no longer in dispute or has been resolved by supervening events, the claim becomes moot. He relied on **Evans Kidero v Speaker of Nairobi City County Assembly & Another [2018] eKLR**, which held that a matter is moot if further legal proceedings with regard to it can have no practical effect, the controversy between the parties has ceased, and courts will decline jurisdiction over such matters. Counsel submitted that it was both legally and equitably unjust for the Appellant's claim to be dismissed as a corollary of an unproven counter-claim, particularly given the undisputed fact of payment for the engine and the absence of any unjust enrichment on the Appellant's part.

13. In conclusion, Counsel respectfully submitted that the decision of the Small Claims Court could not be sustained either in law or on the evidence, and prayed that the appeal be allowed as prayed.

Respondent's submissions

14. Learned Counsel Mr. Mathai started by giving a background and submitted on the role of the first appellate court, citing the cases of **Selle & Another v Associated Motor Boat Co. Limited & Others [1968] E.A 123** and **Peter v Sunday Post (1958) E.A 424**, to the effect that this Court is required to re-assess, re-

evaluate and re-analyze the evidence on record and make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses testify. He further relied on **Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR**, where the Court of Appeal stated that an appeal is by way of retrial and the 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 allowances in that respect. Counsel emphasized that the first appellate court has jurisdiction to reverse or affirm the findings of the trial court, and that the whole case is open for rehearsing on both questions of fact and law.

- 15.** Counsel then raised a preliminary but substantive point, submitting that the appeal as filed was incompetent. He relied on Section 38 of the Small Claims Court Act, which provides that appeals from the Small Claims Court to the High Court lie only on matters of law, and submitted that the Appellant had not challenged any matter of law but had grounded its appeal purely on factual issues relating to production of documents, thereby rendering the appeal incompetent. Despite this incompetence, Counsel submitted that the appeal equally lacked merit on the facts.
- 16.** On the evidence of the Appellant's witnesses, Counsel subjected each witness to scrutiny. Regarding **CW1 Rachel Wambui**, a Director of the Appellant company, Counsel pointed out several damaging concessions made on cross-examination: that she admitted the Appellant had taken the engine and had no claim from the Respondent thereafter; that she confirmed they were not in possession of any record showing the vehicle was taken to the yard due to mechanical problems on 15th September 2022 and critically, that she had no company resolutions authorizing the filing of the suit or the appointment of advocates for purposes of commencing

the proceedings. On this last point, Counsel cited the Ugandan case of **Rubega Building Company Ltd v Gospel Devki Vekaria & Another, Civil Suit No. 0534 of 2024**, where Kawesa J observed that it is trite law that a suit instituted in the name of a company without the authority of the directors is incompetent. Counsel also relied on **Bugere Coffee Growers Ltd v Sebadduka & Anor (1970) IEA** and **Masaka Tea Estate Ltd v Samalia (Kiganja) Tea Ltd & Anor, HCMA No. 505 of 2004**, where it was held that a suit instituted in the name of a company without the authority of the directors is not maintainable in law and ought to be struck off.

- 17.** Regarding **CW2 Hellen Kibware**, who claimed to be a supervisor at the Appellant's yard, Counsel noted that on cross-examination she admitted she had no document to prove her employment, no document to show the Respondent's vehicle was at the yard due to wiring problems, and no other supporting records, which fatally undermined her evidence. Regarding **CW3 Paul Gichohi**, who claimed to have been employed by the Appellant, Counsel pointed out that he too confirmed on cross-examination that he had no evidence of his employment and that there was nothing before the court to prove the vehicle was taken to the yard on 15th September 2022 due to a mechanical problem. Counsel further raised the telling question that if the procedure at the yard was for the owner to be called upon completion of repairs, why was the Respondent never called, and why was the vehicle never repaired?
- 18.** Counsel then turned to the Respondent's own evidence and submitted that it fortified the counter-claim. The Respondent had testified that on 15th September 2022, his motor vehicle KCE 098B was at Nairobi and was supposed to travel to Kimilili, but on that material day he was orally terminated by one of the Appellant's directors, Mr. Mwaura, who changed the office padlocks. When he called his driver to confirm the vehicle's whereabouts, he was told

the driver had been instructed by Mr. Mwaura to take the vehicle to the Appellant's yard without the Respondent's knowledge. The vehicle remained there until it was repossessed by auctioneers because he could not service a loan, having been rendered unable to generate income by the impoundment of his vehicle. Counsel submitted that the absence of any record of mechanical problems on the part of the Appellant's witnesses actually fortified and corroborated the Respondent's account.

- 19.** On the award of damages, Counsel submitted that the Respondent was able to produce documents clearly demonstrating that he earned Kshs. 7,800/= per day, and on the basis of those documents he demonstrated a daily loss from 15th September 2022 to the date of filing his counterclaim, resulting in the loss of Kshs. 920,000/= which the trial court properly awarded.
- 20.** In conclusion, Counsel submitted that the judgment by the trial Adjudicator could not be faulted, that the appeal lacked merit, and humbly prayed that the same be dismissed with costs to the Respondent.

Analysis and determination

- 21.** This is an appeal originating from the Small Claims Court. By dint of **Section 38(1)** of the Small Claims Court Act, this Court's appellate jurisdiction is confined strictly to questions of law. It is now well settled that where an appellate court's jurisdiction is so circumscribed, it must accord due deference to the findings of fact made by the trial court. Interference with such findings is only warranted where it is demonstrated that the trial court overlooked or disregarded material evidence, rendering its decision so perverse or unreasonable that no court properly directing itself on the law and the evidence could have arrived at the same conclusion.
- 22.** In **Kamau v Matunda (fruits) Bus Services (2024) KEHC 4829 (KLR)**, Honorable Justice DS Majanja held that:

“A court limited to matters of law is not permitted to substitute the Subordinate Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.”

23. In **Fidelity Insurance Co. Ltd vs. Korir [2024] KEHC 3365 (KLR)**, the Court stated that: -

“...the High Court while handling an appeal from the Small Claims Court, is not permitted to substitute that court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.”

24. Moreover, and of particular significance in this matter, the Court of Appeal has underscored the unique character of appeals from the Small Claims Court. In **Directline Assurance Co. Ltd v Nyawa [2023] KEHC 20201**, the Court held that:

“However, appeals from the small claims court are different. This is the first and last appeal. It is an appeal on points of law. This then takes the same turn as an appeal to the Court of Appeal, where the court gives deference to finding of fact. Only when findings of fact are based on no evidence will the same be seen as a point of law.”

25. The foregoing is instructive. This Court is the first and last port of call for the parties herein. No further appeal lies beyond this forum. That finality compels this Court to examine the record with greater care and satisfy itself that justice has been done. It is for this reason that I shall proceed to consider the substance of the Appellant's

grounds to determine whether any legal error of consequence arises from the impugned judgment.

- 26.** Having said that, the following issues commend themselves for determination:
- a. *Whether the trial court misapplied the burden of proof in allowing the Respondent's counterclaim;*
 - b. *Whether the trial court disregarded material evidence, specifically the evidence of Paul Gichohi;*
 - c. *Whether the award of Kshs. 920,000/= was legally sustainable*

Whether the trial court misapplied the burden of proof

- 27.** The Appellant's first and foremost grievance is that the Respondent produced no evidence of seizure of motor vehicle KCE 098B and that the trial court therefore erred in allowing the counterclaim. Counsel for the Appellant relied heavily on Sections 107, 109 and 112 of the Evidence Act, Cap 80, and the authority of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, for the settled proposition that he who alleges must prove.
- 28.** That legal proposition is not in dispute and requires no elaboration. What the Appellant is truly contending, however, is not that the trial court stated the wrong legal standard, but that it arrived at the wrong factual conclusion when applying it. That is a materially different complaint. The question whether a party has discharged the burden of proof imposed upon it by Section 107 of the Evidence Act is answered by examining and weighing the evidence on record, which is an exercise that is by its very nature, a matter of fact and not of law. Framing a factual grievance in legal language does not transform its character. As the Court of Appeal trenchantly observed in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] KECA 677 (KLR)**:

"A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts...A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts being admitted or when the query invites calibration of the whole evidence considering mainly the credibility of the witness..."

- 29.** The Appellant is in truth inviting this Court to find that the Respondent's account of seizure was not credible. That is an exercise in re-evaluating testimony and weighing evidence, the very territory that is foreclosed to this Court under Section 38(1) of the Small Claims Court Act. The trial court was in the best position to assess the credibility of the witnesses who appeared before it and to draw inferences from the totality of the evidence on record.
- 30.** Even proceeding on the merits, the Appellant's contention is unsustainable on the facts. The Respondent's evidence was that on 15th September 2022 the same day he was orally terminated by Mr. Mwaura, a Director of the Appellant, who also changed the office padlocks, the Appellant's Director instructed the Respondent's own driver to deliver motor vehicle KCE 098B to the Appellant's yard without the Respondent's knowledge or consent. This account is not mere assertion. It is corroborated, fatally for the Appellant, by the Appellant's own witnesses. CW1 Rachel Wambui, a Director of the Appellant company, admitted on cross-examination that the Appellant had no record whatsoever showing that the vehicle was taken to the yard due to mechanical problems on 15th September 2022. CW2 Hellen Kibware likewise admitted she had no document to prove her employment or to demonstrate any wiring or mechanical problem with the vehicle. CW3 Paul Gichohi similarly conceded he had no evidence of his employment and no record to prove the vehicle was brought in for repair.

31. The complete absence of any repair records, workshop job cards, or even a basic log entry recording the alleged mechanical problem is in itself concerning. It fundamentally undermines the Appellant's narrative that the vehicle was in its yard voluntarily and for legitimate repair purposes. The trial court was fully entitled to draw such an inference and to conclude that the vehicle was not in the Appellant's yard for mechanical repairs, but was unlawfully detained.

Whether the trial court disregarded material evidence, specifically the evidence of Paul Gichohi

32. The Appellant contends that the trial court disregarded the evidence of Paul Gichohi, the driver of KCE 098B, who testified that he voluntarily took the vehicle to the Appellant's yard. Disregard of material evidence is a recognized legal error that can ground appellate intervention even within the restricted jurisdiction under Section 38(1) of the Small Claims Court Act. However, disregard must be distinguished from rejection. A trial court does not disregard evidence merely because it does not refer to a witness by name in its judgment, nor because it reaches a conclusion adverse to that witness. In **South Nyanza Sugar Co. Ltd v Omwando [2011] eKLR**, the Court held that:

*“Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the **Civil Procedure Rules** which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision.”*

33. In the case at hand, I should first mention that a judgment need not be lengthy but must simply address the issues raised and state the reasons for its conclusions. The trial court addressed the central

issue being, whether the vehicle was unlawfully detained and resolved it against the Appellant. The trial court in its concluding paragraph spoke as follows:

“Turning to the counter claim, the Respondent testified that the claimant’s unlawfully held his motor vehicle in their yard resulting to his loss of income in the sum of Kshs. 920,000/=. He produced in court daily delivery notes in support of his claim. The Claimant testified that the Respondent’s vehicle was being held at the yard for repair purposes. They however did not lead any evidence to confirm that the subject vehicle was under repairs. This court has perused the daily delivery notes and is inclined to find that the Respondent was able to prove its counter claim against the Claimant the sum of Kshs. 920,000/= which is awarded. The Respondent shall have the costs of the counterclaim.”

- 34.** In my considered view, that is sufficient. Beyond that, Paul Gichohi's evidence was not of a quality that demanded express engagement. He admitted on cross-examination that he had no document evidencing his employment with the Appellant. A witness who cannot establish, by any document, even the basic fact of his relationship to the party on whose behalf he testifies is a witness whose evidence the trial court was entitled to treat with circumspection and whose omission from the judgment cannot, in the circumstances, constitute a legal error warranting interference. I find that the trial court committed no error of law in accepting the Respondent's account as proved.

Whether the award of Kshs. 920,000/= was legally sustainable

- 35.** The Appellant submits that the award of Kshs. 920,000/= was excessive and that the Respondent failed to prove actual loss and failed to mitigate. Reliance was placed on ***Farah Awad Gullet v***

CMC Motors Group Limited [2014] KEHC 64 (KLR) and Kiptoo v Attorney General (2010) 1 EA 201, for the duty to mitigate.

- 36.** I have carefully considered this ground. The Respondent produced daily delivery notes demonstrating earnings of Kshs. 7,800/= per day. This documentary evidence was not challenged on value by the Appellant at trial the Appellant did not produce any evidence to contradict it. The trial court perused the delivery notes and was satisfied that they supported the claim. That satisfaction is a finding of fact.
- 37.** On mitigation, the Appellant's argument that the Respondent ought to have taken steps to recover the vehicle or hire an alternative is difficult to sustain on the facts. The Respondent's vehicle was in the Appellant's physical possession throughout. It was ultimately not returned to the Respondent. It was repossessed by auctioneers because the Respondent, having been deprived of his means of income, could no longer service a loan secured against the vehicle. In those circumstances, the question is: what reasonable steps of mitigation were available to the Respondent? He had no vehicle to deploy and no income with which to hire an alternative. The duty to mitigate does not demand the impossible. A party cannot be faulted for failing to take steps that, by reason of the very wrong visited upon him, were beyond his practical reach.
- 38.** I therefore find no legal error in the trial court's award of Kshs. 920,000/=. The figure was grounded in documentary evidence, was computed over a defined period from 15th September 2022 to the date of filing the counterclaim, and was not effectively contradicted by the Appellant.
- 39.** In the premises, the following order do hereby issue:
- a. The appeal is hereby dismissed in its entirety for want of merit.*

b. The judgment and decree of Hon. T.W. Mbugua delivered on 17th November 2023 in Eldoret Small Claims Commercial Case No. E762 of 2022 is hereby affirmed.

c. The Appellant shall bear the costs of this appeal.

40. Orders accordingly.

**DATED SIGNED AND DELIVERED VIA E-MAIL AND CTS AT ELDORET
THIS 10TH DAY OF APRIL, 2026**

.....
R. NYAKUNDI
JUDGE