Okiki v Dakkena Motors Limited (Civil Appeal E388 of 2024)
[2026] KEHC 4336 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4336 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E388 OF 2024

F WANGARI, J

MARCH 19, 2026

BETWEEN

STEVE ORANGI OKIKI ..... APPELLANT

AND

DAKKENA MOTORS LIMITED ..... RESPONDENT

(Being an appeal against the Judgment of Hon. Mwangi (RM) delivered on 16th October 2023 in Mombasa Small Claims Court Civil Suit No. E772 of 2024, Dakkena Motors Limited v Steve Orangi Okiki)

JUDGMENT

1. The background of the appeal is a Statement of Claim dated 7th August 2024 filed in the Small Claims Court. The Claimant in their Witness Statement stated that they entered into a contract on 22nd April 2024 to lease a motor vehicle to the Respondent on hire and reward basis for a period of 69 days amounting to Kshs. 207,000. That however, the Respondent paid Kshs. 15,000 leaving a balance of Kshs. 192,000.

2. The Respondent was served, they entered appearance and filed his Amended Response to Statement of Claim dated 30th September 2024. The Respondent stated that he did not owe the Claimant any money and that the Respondent only hired the Claimant's alleged motor vehicle for a single day with Gentle man's agreement that he would extend the days if need be. The Respondent made a counterclaim against the Claimant for the sum of Kshs. 12,000 being sums not utilized as the motor vehicle was only in use for one day as per the agreement. The Respondent prayed for dismissal of the claim with costs to them.

3. This suit was heard in the trial court where the Claimant and Respondent tendered their evidence and judgment delivered on 16th October 2024 where the court judgment in favour of the Claimant against the Respondent, and the counterclaim was dismissed with costs.

4. Being dissatisfied, the Appellant appealed the judgment through the Memorandum of Appeal dated 11th November 2024 on the following grounds: -

    1. That the honourable trial court erred in fact and in law by finding that the claim before it was properly instituted when the reality was to the centrally.

    2. That the honourable trial court erred in fact and in law in failing to find that the case before it was subjudice to criminal case No. MCCR/E1319/2024 which case was of similar nature and was pending before the criminal court.

    3. That the honourable trial court erred in fact and in law by dismissing the appellant's counterclaim even when the Respondent had not filed any response in rebuttal to the same.

    4. That the honourable trial court erred in fact and in law in failing to consider the appellant's evidence that the subject motor developed a mechanical problem hence it was not in use with effect from the 2nd day of its hire and therefore the monetary claim by the respondent was untenable.

    5. That the honourable trial court erred in fact and in law in allowing the Respondent's claim on the basis of hearsay evidence that is not admissible in law.

    6. That the honourable trial court erred in fact and in law in dismissing the appellant's claim on the basis of procedural technicalities as opposed to substantive law.

    7. That the honourable trial court erred in fact and in law by misinterpreting the cited case of Republic v Registrar general and 13 others Misc., Application 67 of 2005) eKLR and other cases cited in the judgment appealed from.

    8. That the honourable trial court erred in fact and in law in finding that the Respondent's case was meritorious and proceeded to award a sum of Kshs. 192,000 in favour of the Respondent.

    9. That the honourable trial court erred in fact and in law in failing to find that the respondent had no locus stand to institute the claim in the trial court as no evidence was tendered to prove the motor vehicle/car in question belonged to the respondent.

    10. That the honourable trial court erred in fact and in law in failing to consider the appellant's credible evidence and submissions that were on record.

    11. That the honourable trial court erred in fact and in law by finding that equity had suffered a wrong that required a remedy.

    12. That the honourable trial court erred in fact and in law by whimsically misdirecting itself on issues that were brought for determination before it.

5. The Appellant prayed for orders that the appeal be allowed, that this court be pleased to set aside judgment of the trial court delivered on 16th October 2024 and proceed to allow the Appellant's counter-claim as filed in the trial court, that cost of this appeal and of the claim in the trial court be awarded to the Appellant, and that this court grants any other relief that it deems fit and just to grant for the interest of justice.

6. The Appellant in their submissions dated 28th April 2025 argued that the claim in the trial court was improperly instituted because the registration number of the motor vehicle was unclear in the Respondent's statement of claim and written statement. They argued that the charge sheet identified

the vehicle as KDC 511P Toyota Fielder, while a motor vehicle search showed the registered owner to be Darson Trading Limited.

7. The Appellant contended that the Respondent did not explain the relationship between itself and Darson Trading Limited, nor demonstrate that the vehicle had been transferred or registered in its name. As such, the Appellant maintained that the Respondent and Darson Trading Limited are separate legal entities, each with the capacity to sue and be sued. In support of this argument, the Appellant relied on the decision in Apex Finance International Limited & another v Kenya Anti-Corruption Commission, KNUHC JR No. 64 of 2011 (2013) eKLR.

8. The Appellant submitted that the claim before the trial court was sub judice under Section 6 of the *Civil Procedure Act* because the issues were also the subject of Criminal Case No. MCCR/E1319/2024. They argued that if the criminal court were to find that the Appellant did not commit the alleged acts, it could lead to conflicting decisions, thereby amounting to an abuse of the court process. The Appellant further contended that the Respondent failed to oppose the Appellant's counterclaim despite being served, and argued that where a claim is not controverted, it should be allowed.

9. The Appellant submitted that in the amended response to the Statement of Claim, it was indicated that the Respondent had only hired out the motor vehicle to the Appellant for one day, with the possibility of extension if necessary, and therefore no monies were owed. The Appellant further argued that the Claimant in the trial court did not file a response to dispute these averments. They also relied on the further statement of Dennis Otieno in the criminal case, which allegedly indicated that the vehicle was not in good condition.

10. Additionally, the Appellant testified during examination-in-chief that he initially leased the vehicle for one day at Kshs. 3,000, later requested a five-day extension and paid Kshs. 12,000. He stated that after five days the vehicle developed a mechanical problem, which he reported to the Respondent, who authorized him to continue using it, after which he parked the vehicle at Likoni Viwanjani.

11. The Appellant submitted that the evidence in chief by CLI claiming that the car had been hired to the Respondent for 69 days amounted to hearsay. They argued that the trial court's finding was consistent with the Appellant's evidence that he had paid Kshs. 15,000 on the same date. The Appellant further contended that the Respondent failed to prove that Dennis Otieno had authority to sign court documents or conduct court proceedings on their behalf.

12. Additionally, the Appellant argued that the Respondent's case contained inconsistencies, noting that while the alleged agreement dated 22nd April 2024 indicated the car was leased for 69 days, the Respondent was claiming payment for only 64 days. Relying on Section 107 of the *Evidence Act*, the Appellant maintained that the burden of proof lay with the Respondent and that the balance of convenience favoured the Appellant.

13. The Respondent in their submissions dated 15th May 2025 argued that the suit was properly instituted, arguing that the Appellant did not deny that the Respondent's witness, Dennis Otieno Amaso, signed the car lease agreement dated 22nd April 2024. They contended that if the Appellant did not require a resolution at the time of leasing the vehicle, it was questionable for him to raise the issue only after allegedly breaching the agreement.

14. The Respondent further argued that parties are bound by their pleadings and that the Appellant did not raise the issue of improper institution of the suit in their pleadings, and therefore it could not form a basis for the appeal. In support, the Respondent relied on Eye Company (K) Limited v Erastus Rotich T/A Vision Express [2021] eKLR. The Respondent also submitted that the affidavit sworn by

their witness confirming authority to institute the suit was sufficient, particularly since the Appellant did not adduce any evidence to challenge that authority.

15. The Respondent submitted that the existence of Criminal Case No. 1319/2024 did not render the trial suit sub judice, arguing that the pendency of a criminal case does not bar the institution or continuation of a civil suit, and vice versa. Regarding the dismissal of the counterclaim, the Respondent contended that it had been filed without leave of the court and that the parties had agreed it would be addressed during the hearing to avoid further delays.

16. The Respondent maintained that the counterclaim was an afterthought and was therefore rightly dismissed. They further argued that it was incorrect to claim that the Respondent failed to respond to the counterclaim, as the court properly considered it and found it to be without merit.

17. The Respondent submitted that the Appellant failed to produce any evidence to support the allegation that the vehicle had mechanical problems. They argued that the Appellant's testimony contained inconsistencies. Although he claimed to have returned the vehicle to the Respondent after noticing the mechanical issues, he also stated that upon meeting the Respondent at the pickup point, the Respondent informed him that there was no replacement vehicle available.

18. As a result, the Appellant took the same allegedly defective vehicle back and parked it at a friend's place. The Respondent contended that if the vehicle had truly been mechanically unsound, the Appellant would not have paid the additional Kshs. 12,000.

19. The Respondent submitted that the trial court did not rely on hearsay evidence, arguing that they had filed documentary evidence and that the Appellant did not deny entering into the car lease agreement or that the vehicle was recovered after 69 days. They further stated that additional evidence was produced showing that the matter had been reported to the police, leading to the Appellant's arrest and subsequent charges.

20. The Respondent contended that, in contrast, the Appellant failed to provide evidence to support his denials, including proof of the alleged mechanical problems, evidence that he returned the vehicle, or testimony from the friend in whose compound the vehicle was allegedly parked for 69 days. The Respondent also noted that the Appellant did not present any phone call records or text messages to show that he informed them about the vehicle's problems, and instead sought to rely solely on uncorroborated testimony.

21. The Respondent submitted that the appeal should not succeed, arguing that it was undisputed that the parties entered into a car lease agreement on 22nd April 2024 for one day at a daily rate of Kshs. 3,000. They noted that the Appellant paid Kshs. 3,000 on the day of signing the lease and later made an additional payment of Kshs. 12,000.

22. The Respondent further argued that the Appellant failed to return the vehicle and it was only recovered after 69 days when he was arrested and charged with misuse of a motor vehicle. The Respondent maintained that they proved their case on a balance of probabilities, explaining that out of the 69 days only 5 days had been paid for, leaving 64 unpaid days amounting to Kshs. 192,000.

Analysis

23. 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 ..."

24. I have considered the Record of Appeal dated 17th February 2025 and submissions by the parties. The issues for determination are: -

    a. Whether the suit before the trial court was improperly instituted and whether the Respondent had locus standi

    b. Whether the suit was sub judice by virtue of the pending criminal proceedings

    c. Whether the Respondent proved their claim on a balance of probabilities

    d. Whether the Appellant proved the counterclaim

    e. Whether the trial court erred in its evaluation of evidence and application of the law

25. On proper institution of suit in the trial court and locus standi, the Appellant challenged the Respondent's locus standi on grounds that ownership of the motor vehicle was not proved and that a different entity was reflected in the search.

26. It is trite law that parties are bound by their pleadings, and issues not pleaded cannot ordinarily be raised on appeal. In Eye Company (K) Limited v Erastus Rotich t/a Vision Express [2021] KEHC 4556 (KLR), the court emphasized that: -

> " The issue has been raised in submissions; if this issue had been raised in defence or if the defendant had filed preliminary objection, I believe the plaintiff would have addressed the court on it. In my view parties should be bound by their pleadings."

27. Further, locus standi in contractual disputes is primarily determined by privity of contract. The Appellant did not deny entering into the lease agreement with the Respondent. In Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] KECA 58 (KLR), the court affirmed that: -

> " ... As it stated in Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:
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> "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

28. Accordingly, the challenge to locus standi is without merit.

29. On the second issue, the Appellant contended that the suit was sub judice under Section 6 of the *Civil Procedure Act* due to the existence of a criminal case. This argument is legally untenable. Civil

and criminal proceedings can run concurrently as they serve different purposes and require different standards of proof. In Kuria & 3 Others v Attorney General [2002] 2 KLR 69, the court held that: -

> " ... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings, commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal process."

30. The plea of sub judice therefore fails.

31. On whether the Respondent proved their claim on a balance of probabilities, the Respondent's claim was based on a car hire agreement dated 22nd April 2024. It was not disputed that the Appellant hired the motor vehicle, that the agreed daily rate was Kshs. 3,000, that the Appellant paid Kshs. 15,000 in total, and that the vehicle was not returned promptly and was only recovered after a prolonged period. The trial court found that the vehicle remained in the Appellant's possession for 69 days and that only 5 days had been paid for, leaving a balance of Kshs. 192,000.

32. Under Section 107 of the *Evidence Act*, the burden of proof lies on the party who asserts a fact. In Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR), the court held that: -

> " In making such a determination we need to examine whether the appellant discharged its burden of proof on a balance of probability to prove ownership of the motor-vehicle. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

33. The Appellant's defence was that the agreement was for one day and that the vehicle developed mechanical issues. However, no documentary or independent evidence was produced to prove the alleged mechanical defect, no evidence was tendered to show that the vehicle was returned, and the Appellant's testimony was inconsistent as noted by the trial court.

34. The Respondent's evidence remained largely uncontroverted and was supported by documentation. I find no error in the trial court's conclusion that the claim was proved on a balance of probabilities.

35. On whether the Appellant proved the counterclaim, the Appellant sought Kshs. 12,000 as a refund, alleging the vehicle was used for only one day. A counterclaim is in the nature of a cross-suit and must

be proved to the required standard. In M. P. Shah Hospital v Rose Kasema & 2 others [2010] KEHC 3935 (KLR), the court held that:

> " A party who asserts must prove the assertion to the required standard (that standard being on a balance of probabilities in civil cases) unless the assertion is admitted by the opposite party."

36. The Appellant failed to adduce evidence to support the alleged one-day agreement, the return of the vehicle, and the basis for refund. In the absence of such evidence, the trial court correctly dismissed the counterclaim.

37. On whether the trial court erred in its evaluation of evidence and application of the law, the Appellant argued that the trial court relied on hearsay evidence. However, the record shows that the Respondent produced documentary evidence and called a witness who testified on the agreement and the events surrounding the transaction.

38. An appellate court will not ordinarily interfere with findings of fact unless they are based on no evidence or on a misapprehension of the evidence. In Peters v Sunday Post Limited [1958] EA 424, it was held that: -

> " i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
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> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
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> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

39. There is no demonstration that the trial court misdirected itself or relied on inadmissible evidence.

40. On costs, in order bring litigation to an end, each party to bear its own costs.

Determination

41. Accordingly, this court orders as hereunder;

    a. The appeal lacks merit and is hereby dismissed.

    b. The judgment of the Small Claims Court delivered on 16th October 2024 is hereby upheld.

    c. Each party to bear its own costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MARCH, 2026

.....

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

N/A by the Appellant

Mr. Omollo Advocate for the Respondent

Ms. Getrude, Court Assistant