



**Otieno v Equity Bank Limited (Civil Appeal 182 of 2019)
[2024] KECA 811 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KECA 811 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 182 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 5, 2024**

BETWEEN

PATRICK JO OTIENO APPELLANT

AND

EQUITY BANK LIMITED RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisumu
(E. Maina, J) delivered on 19th April 2018 in HCC Appeal No. 3 of 2017)*

JUDGMENT

1. The appeal before us arises from the judgment of the High Court sitting at Kisumu (Maina, J.) delivered on 19th April, 2018 in which the learned Judge, in a first appeal, set aside the judgment of the Magistrate’s Court for want of jurisdiction and ordered the matter to go for retrial before a court with competent jurisdiction.
2. The suit in the Magistrate’s Court was initiated by Patrick J Otieno, the appellant herein, against Equity Bank Limited (the Bank). The appellant claimed that on 18th November 2011, in a public auction conducted by an auctioneer, Pambo Investments Ltd as the Bank’s agent, he successfully bid for a motor vehicle Registration Number KBK 268J, a Nissan Diesel Tipper, which had been repossessed by the Bank from a defaulting client. The appellant duly paid the bid price of Kshs. 3,500,000 and the subject motor vehicle was released to him. Thereafter, he entered into a hire agreement dated 15th March, 2011 to hire the motor vehicle to a third party.
3. According to the agreement, the appellant was to receive Kshs. 20,000 per day for 20 days every month, as hire charges. However, the agreement failed to take effect because the Bank refused to release the log book for the motor vehicle to the appellant, maintaining that the appellant had not paid the purchase price and, therefore, the sale was never completed. The appellant blamed the Bank for the frustration



of the agreement, because without the log book he could not obtain the requisite inspection certificate for the lorry, which was a prerequisite for the hire agreement.

4. In his suit the appellant sought an order directing the Bank to release the log book for the motor vehicle to him, as well as payment of a sum of Kshs. 20,000 per day from 1st March 2011 until payment of the amount, together with costs of the suit, and interest.
5. The Bank filed a defence in which it denied the appellant's claim. It admitted having instructed Pambo Investment Ltd to repossess and sell the subject motor vehicle through public auction, and having received information from the Auctioneer that the appellant was the highest bidder at the auction carried out on 8th November 2010. The Bank contended that the Auctioneer did not act in accordance with its instructions as it did not receive 25 percent of the bid price at the fall of the hammer or 75 % of the bid price within 7 days as required by law, but only received Kshs 875,000 on 2nd December 2010 and further intermittent payments all totalling Kshs. 3,075,000 only. The Bank also pleaded that the court lacked pecuniary jurisdiction to entertain the appellant's claim.
6. On 18th June, 2014, the Bank raised a preliminary objection which was heard by a Chief Magistrate who overruled the objection finding that the preliminary objection did not raise a pure point of law as it was dependant on evidence which was yet to be adduced, and that the value of the subject matter as pleaded was ascertainable, and was within the Chief magistrate's jurisdiction which then stood at Kshs 7, 000,000.
7. Subsequently, the suit proceeded to full hearing before a Principal Magistrate during which the appellant testified in support of his case and one Gabriel Okuku Nyambok, who was the Bank's Credit Manager, testified on behalf of the Bank. Upon considering the evidence, the Principal Magistrate found that the appellant was the highest bidder at the auction at a bid price of Kshs 3,500,00; that he paid kshs 1,000,000 at the fall of the hammer and kshs 2,500,000 thereafter; that he was issued with payment receipts and a certificate of sale; that the sale was complete and could not be retracted; and that the Bank was under an obligation to surrender the log book to the appellant. As regards the claim for loss of earnings the magistrate assessed the appellant's loss at Kshs 10,000 per day for 70 months and gave judgment for Kshs 10,500,000.
8. Aggrieved by the judgment of the Principal Magistrate, the Bank appealed to the High Court, raising 6 grounds. It faulted the Principal Magistrate for erring in law and fact, in finding that a lawful auction was held and that the appellant was issued with a valid certificate of sale; in finding that the appellant paid the purchase price in full and within the required time; in failing to find that he lacked jurisdiction to hear the appellant's claim; in failing to find that the respondent had a duty to mitigate his losses; in making an award for loss of earnings over a period of 35 months when this was neither pleaded nor supported by evidence; and in taking into account extraneous matters in making an award to the appellant.
9. The learned Judge of the High Court (Maina J), having heard the appeal, delivered a judgment in which she only addressed the issue of jurisdiction. The learned Judge differed with the earlier ruling of the Chief Magistrate that the magistrate's court had monetary jurisdiction to entertain the appellant's suit. She found that the appellant's claim for loss of earnings was not a claim for damages at large but a claim for specific amount of money capable of being ascertained; and that the claim was, therefore, in excess of the monetary jurisdiction of the trial magistrate. Consequently, the learned Judge held that the proceedings and judgment of the magistrate court were a nullity; set aside the judgment and ordered the matter to be remitted for retrial before a court with competent jurisdiction.



10. The appellant is now before us in an appeal from the judgment of the High Court, in which he faults the learned Judge for allowing the appeal and setting aside the judgment of the trial court. Although he has listed five grounds in the memorandum of appeal, in effect the grounds are three. These are that the learned Judge erred in fact and law, in holding that the trial magistrate lacked pecuniary jurisdiction to handle the suit in the lower court; in reopening the issue of jurisdiction to which the lower court had made a Ruling which was not appealed against; and in taking into account extraneous matters in setting aside the judgment of the trial court.
11. In his submissions in support of the appeal, the appellant contends that the issue of jurisdiction was raised by the Bank in a preliminary objection, but the trial court dismissed it, and that the Bank never appealed against the Ruling on the preliminary issue. The appellant relied on Section 68 of the *Civil Procedure Act* which bars any party from raising an appeal on an issue that has been preliminarily determined, where an appeal was never preferred in regard to the preliminary determination. The appellant, therefore, argued that the Bank was estopped from raising the issue of jurisdiction at the trial, and the learned Judge erred in reopening the same.
12. Secondly, the appellant argued that the High Court, having determined that the trial court lacked jurisdiction, it ought to have exercised its jurisdiction by substituting the judgment of the trial court, with an award within the limit of the trial court's pecuniary jurisdiction in accordance with this Court's decision in *Joseph Muthee Kamau v David Mwangi Gichuru* [2013] eKLR and *Pelezia Bakari Salim v Somoire Keen & 2 others* [2020] eKLR in which the Court of Appeal upheld the High Court's decision in capping an award at the trial court's limit of pecuniary jurisdiction, and accordingly reduced the amount awarded. The Court was, thus, urged to allow the appeal.
13. The Bank opposed the appeal through written submissions dated 11th April 2023, which were duly highlighted by its counsel during the hearing of the appeal. The crux of the submissions was that the trial magistrate erred by clothing himself with jurisdiction that he did not have by awarding the appellant the sum of Kshs. 10,500,000 for loss of earnings, when his maximum jurisdiction was Kshs 10 million. *Owners of Motor Vessel ('Lilian S') v Caltex Oil (K) Ltd* (1989) KLR 1 was cited for the proposition that where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. It was submitted that the trial court having awarded more than his pecuniary jurisdiction his entire judgment was a nullity and the learned Judge was right in setting it aside. The Court was therefore urged to dismiss the appeal.
14. We have considered the appeal, the contending submissions and the law, being mindful of the fact that this is a second appeal in which this Court's jurisdiction is limited to matters of law only. We reiterate what was stated by this Court in *Charles Kipkoeb Leting v Express (K) Ltd & another* [2018] eKLR which was cited by the Bank's advocates:

“Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that,



on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

15. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, the Court reaffirmed that:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied”

16. In the instant case, it is not disputed that the appellant’s claim was in two parts: a claim for delivery of the log book for the motor vehicle, and a claim for loss arising from frustration of a contract entered into by the appellant due to the Bank’s failure to release the log book for the motor vehicle to the appellant. It is the latter claim which the appellant particularized as 20,000/ per day, that is at the heart of the issue of jurisdiction which has been raised before us.

17. In accordance with the Ruling of the Chief Magistrate, which was never appealed, the Chief Magistrate asserted that she had jurisdiction to hear the appellant’s claim stating as follows:

“At paragraph 3 of the plaint and from the annexures by both plaintiff and the defendant, the value of the subject matter is Kshs 3,500,000 (Three million, five hundred thousand only). This falls within the jurisdiction of this court. The claim for Kshs 20,000 (Twenty thousand only) per day is anticipatory. It is not the subject matter. The court has to determine whether the plaintiff is entitled to the award claimed.

As the pleading stands, the court has jurisdiction to entertain the suit. The issues raised by the applicant are both law and facts. The Court has discretion to determine the awards after the suit is heard on merits ...The question of monetary jurisdiction will only arise at the point when the court will give its final award.”

18. In his judgment, the trial magistrate acknowledged that the issue of jurisdiction had been dealt with as a preliminary objection by the Chief Magistrate. This is what the trial magistrate stated:

“The defendants have (*sic*) raised an issue which (*sic*) the court does not have the pecuniary jurisdiction to handle this matter. I have perused the file and observe that, that issue had been raised as a preliminary objection on a (*sic*) part of law and the court had actually made a ruling that the preliminary objection was misplaced as it was speculative.

The defendant did not appeal against the said Ruling on the issue of jurisdiction. I therefore make an observation that the court has the requisite jurisdiction to handle the case.”

19. The issue that arises from the above is whether the issue of jurisdiction of the trial court was open for determination by the learned Judge, the Ruling on the preliminary objection not having been subjected to an appeal, and taking note of Section 68 of the *Civil Procedure Act* which states that:

“where any party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree”



20. In order to appreciate how the learned Judge dealt with this issue we find it necessary to reproduce the salient part of her judgment:

“In this case when the issue of jurisdiction was raised by way of a preliminary objection the same was heard by Lucy Gitari Chief Magistrate, as she then was, and finding that the value of the subject matter was kshs 3,500,000 and that the claim for Kshs 20.000 per day was anticipatory but not a liquidated one she concluded that she had jurisdiction to hear the case. She observed that the question of monetary jurisdiction would only arise at the point when the court would give its final award and that the court would not award what was beyond its jurisdiction and that it was not expected that a party could file a suit in a court and expect to be awarded an award in excess of the jurisdiction of that Court. ...

In his judgment the trial magistrate commented that as the ruling on the issue of jurisdiction had not been appealed then he had the requisite jurisdiction to handle the matter.

I however, with due respect, beg to differ with that ruling. In my opinion the subject matter of the case was not the lorry whose value was Kshs 3,500,000 being what the respondent alleges to have paid at the auction but his claim for frustration of the Hire agreement which was particularized and pleaded.....”

21. The learned Judge also referred to a Ruling in an application for summary judgment in the same matter, wherein Chief Magistrate (J.N. Nyaga) declined to grant the appellant’s application, finding that the period of loss standing at four years brought the appellant’s claim to Kshs 23,040,000 and therefore there was an issue as to whether the court could try the case. The learned Judge thereafter concluded:

The learned trial magistrate should have taken the cue from this ruling and not heard the matter which clearly was in excess of his monetary jurisdiction

22. From the above it is apparent that the learned Judge revisited the issue of the jurisdiction of the trial court, and came to a different conclusion from the one that had been arrived at by the Chief Magistrate in the preliminary objection. With due respect, the learned Judge erred in revisiting the issue of the jurisdiction of the trial court to hear the appellant’s suit. This was a matter that had already been determined in the Ruling in the preliminary objection. Since no appeal was preferred against the Ruling, section 68 of the *Civil Procedure Act* was applicable, and both the High Court and the Bank were bound by that Ruling. The issue was not therefore open for determination by the learned Judge.
23. The issue that was actually before the learned Judge which she ought to have considered but failed to do so, was not whether the trial magistrate had jurisdiction to hear the suit, but whether the amount awarded by the trial court was proper and in accordance with the pecuniary jurisdiction of the trial court. But before we go to the issue of the award, we must first point out that although the issue of liability was an issue before the learned Judge, she did not address it. Notwithstanding the finding on jurisdiction, it was incumbent upon the learned Judge to address and determine all the issues before her. Had she addressed the issue of liability, she would have found that the Bank did not deny having instructed the auctioneer to sell the motor vehicle, and in fact admitted that the auctioneer confirmed to it that the appellant was the highest bidder.
24. The appellant produced evidence at the trial court which showed that he bought the motor vehicle at the public auction and paid the bid price in full and was issued with a certificate of sale. This evidence was not controverted. The only reason the Bank gave for failing to release the log book to the appellant was an allegation that it did not receive the full purchase price from the auctioneer, and therefore maintained that the appellant did not pay the purchase price as required. That contention



did not provide any adequate defence to the appellant's claim, because the Auctioneer was an agent of the Bank, and the appellant having paid the auctioneer, he had fulfilled his obligation to the Bank. Moreover, the Bank did not initiate any third-party proceedings against the auctioneer. It must, therefore, be held fully liable to the appellant who had bid for the motor vehicle, paid the bid price and was entitled to possession of both the motor vehicle and the log book.

25. Coming back to the award, in considering whether the award made by the trial magistrate was proper and in accordance with his pecuniary jurisdiction, we revert to the plaint wherein the appellant pleaded that he anticipated to use the motor vehicle for hire and had entered into an agreement with a third party for hire of the motor vehicle at the rate of Kshs 20,000 per day. The appellant produced the written agreement signed between him and the third party, and maintained that the agreement was frustrated by the Bank's failure to release the log book to him.

26. At paragraph 7 of the plaint, the appellant claimed

“recovery of kshs 20,000 per day from 1st March 2011 to date being losses incurred as a result of the defendant's breach to avail to the plaintiff the log book of the Motor vehicle...”

The appellant's claim as pleaded was, therefore, for damages in the form of loss incurred due to the Bank's failure to release the log book of the motor vehicle. The relationship between the appellant and the Bank was a contractual relationship underpinned by the *Sale of Goods Act* Cap 31. The log book of the motor vehicle was a document of title which the appellant was entitled to pursuant to the contract of sale.

27. In her judgment the learned Judge stated that:

“In essence the respondent was making a claim for loss of user, not even loss of earnings. Even then a claim for loss of earnings is in the nature of special damages, as unlike general damages it is capable of being ascertained by simple arithmetic.”

28. The above statement was a misdirection as it did not differentiate the appellant's claim which was arising from a contractual breach, from a claim for loss of income or loss of earnings under the law of tort which is common in claims arising from road traffic accidents involving motor vehicles. The appellant's claim was a claim for damages for loss of income/profits under a contract or what can be described as lost profit damages where the loss arises from a transaction that is separate from the contract but dependant on the contract. This was loss that was not remote, but was directly consequential and flowing from the Bank's breach in failing to release the motor vehicle log book, when it was within the Bank's knowledge that without the log book, which was the evidence of ownership, the appellant's use of the motor vehicle for business would be hindered. The appellant's redress was to be restored to the position he would have been if the Bank had not withheld the log book. A party to a breached contract is entitled to recover an amount that will put him in as good a position as he would have been had the contract been performed.

29. The loss was proved by the appellant through the production of the written agreement between the appellant and the third party, which clearly showed that the appellant would have earned Kshs 20,000 gross per day for the hire of the motor vehicle. As observed by the trial magistrate in his judgment, the amount of Kshs 20,000 was the gross expected income per day and not the loss which was the expected net income. The trial magistrate correctly addressed this and came to the conclusion that the expected net income was Kshs 10,000 per day, and we have no reason to depart from this finding.

30. The appellant claimed the loss for the period of “1st March 2011 to date”. There was no justification for the appellant claiming the loss from 1st March 2011 when according to the agreement the hire was to be



effective from 15th March 2011. Secondly, the appellant has not given any explanation as to why it took him three years to file suit, but that notwithstanding, we appreciate that although he had possession of the motor vehicle, he could not have it inspected or procure the necessary licences without the log book, and this made it difficult for him to put the motor -vehicle to any proper use. The Bank having failed to release the log book, it is liable for the appellant's damages for lost profit from 15th March 2011 up to the date of judgment of the trial court on 16th December 2016, which is 69 months.

31. We find a period of 36 months reasonable, having deducted as the trial magistrate did, about half the period, as the period that the vehicle may not have been in operation due to maintenance, thereby reducing the period from 69 months to 36 months. The net loss would therefore be 6 days in a week or 24 days in a month for 36 months: calculated as follows:

24 x 10,000 x 36 = Kshs. 8,640,000. It is evident that the trial magistrate made a mistake in his calculation, and came to a figure of Kshs 10,500,000, which was beyond his pecuniary jurisdiction. As the trial magistrate's monetary jurisdiction at the time of the judgment was Kshs 10 million, we find that Kshs 8,640,000 was appropriate, and within the magistrate's monetary jurisdiction. Had the learned Judge properly directed her mind, she would have substituted the judgment of the trial magistrate with this amount thereby bringing the award within the monetary jurisdiction of the trial court.

32. Accordingly, we allow this appeal, set aside the judgment of the learned Judge remitting the appellant's suit for retrial, and substitute thereto judgment in favour of the appellant as follows:

- i. Damages for lost profit in the sum of Kshs 8,640,000 together with interest thereon from the date of the judgment of the trial court until payment in full.
- ii. The Bank shall release the log book to the appellant within 30 days from the date hereof.
- iii. The appellant shall have the costs of the suit in the lower courts and before this Court.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

