



REPUBLIC OF KENYA



KENYA LAW
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**Nandwa v CFC Stanbic Bank Limited (Civil Appeal 133 of 2017)
[2022] KECA 488 (KLR) (25 March 2022) (Judgment)**

Neutral citation: [2022] KECA 488 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 133 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MARCH 25, 2022**

BETWEEN

MORDEKAI MWANGA NANDWA APPELLANT

AND

CFC STANBIC BANK LIMITED RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kakamega,
(Njagi, J.) dated 5th October, 2017 in H.C.C. NO. 114 OF 2011)*

JUDGMENT

1. JUDGMENT OF KIAGE, JA

This is a second appeal by the appellant. His first appeal, against the judgment of the Chief Magistrate's Court at Kakamega that dismissed his suit and allowed the respondent's counterclaim of Ksh. 499,329 with costs of the suit and interests, was dismissed by the High Court (Njagi, J) on 5th October, 2017.

2. That dismissal followed a suit by the appellant against the respondent arising from a dispute over monies owing under a Hire Purchase Agreement. It was common ground that the respondent financed the appellant's purchase of motor vehicle registration No. KAX 248U Mitsubishi Pickup whose purchase price was Ksh. 1,496,972. The appellant alleged that despite making an overpayment totaling Ksh. 1,596,376, the respondent sent its agents, Shelfo Auctioneers, on 18th September, 2009 to attach and repossess the motor vehicle in question. He thus sought a permanent injunction restraining the respondents from repossessing the vehicle, a refund of the said overpayment, and taking of accounts.

3. The respondent, while admitting the existence of the agreement, contended that the hire purchase price was Ksh. 1,285,164 payable in 35 monthly installments of Ksh. 35,699 each and one final installment of Ksh. 38,699. Contrary to the agreement, the appellant often made payments irregularly, late, and sometimes failed to pay the agreed monthly installments, attracting default interest. In the result, the



respondent counterclaimed against the appellant for Ksh. 499,329.80 and interest thereon at the rate of 19% per annum from 24th November, 2010 until payment in full.

4. Aggrieved by the judgment of the High Court, the appellant lodged a memorandum of appeal charging that the learned Judge erred by; Not finding that the appellant had overpaid the amount due. Not taking into account the admission by the respondent that there were payments that were not reflected in the schedule of payments. Failing to discern that there was material non-disclosure of facts on the part of the respondent. Not resolving the apparent discrepancies in the amount owed. Allowing the respondent's counter claim when the same had not been proved.
5. During the hearing, the appellant appeared in person and sought to rely on his written submissions dated 30th July, 2020. The respondent was represented by learned counsel Mr. Manda, who submitted orally.
6. The appellant submitted that the learned judge erred by finding that the amount of Ksh. 248,044 referred to as 'hire charges' did not bind the appellant but failing to deduct the same from the amount claimed. This Court's attention was drawn to its role not to interfere with findings of fact by the trial court except where those findings are based on no evidence or on a misapprehension of the evidence or the judge is shown to demonstrably have acted on wrong principles in reaching the findings he did, as held in various decisions. The appellant repeatedly disputed the debt as counter-claimed by the respondent, protesting that the 'hire charges' were included in the debt despite the learned judge's finding that the appellant was not liable to pay the 'hire charges'.
7. For the respondent, Mr. Manda submitted that this being a second appeal the court should confine itself to matters of law only, citing *Maina -vs- Mugira* [1983] KLR 78. While admitting that the High Court found the appellant not liable for the 'hire charges', as they were not part of the agreement, counsel asserted that those charges were not included in the sum due.
8. I have evaluated the record of the appeal and the submissions by Counsel. I am aware our duty as the second appellate court is limited to matters of law. I am also persuaded by the dicta of Onyango Otieno, JA (as he then was) in *Kenya Breweries Ltd -vs- Godfrey Odoyo* [2010] eKLR;

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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 *Mrao Ltd versus First American Bank of Kenya Ltd & 2 others* [2003] KLR 125)

9. The threshold of what constitutes matters of law has been well settled by the Supreme Court in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 3 Others* [2014] eKLR;

“[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

- a. the technical element: involving the interpretation of a constitutional or statutory provision;
- b. the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record;



- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

10. From the arguments made before us, I distil that the substratum of this appeal lies in the contestation over the amount due and owing to the respondent under the hire purchase agreement. We can only interfere with factual conclusions as a matter of law under the evidentiary element, if those conclusions are based on no evidence. The appellant is aggrieved that despite the High Court finding that he was not liable to pay the ‘hire charges’ fee, it did not proceed to deduct the same from the total sum due. The respondent rejects that claim asserting that the ‘hire charges’ were not included in the sum due.
11. A review of the High Court judgment reveals that the learned Judge considered the payments due, and while at it noted that the appellant had not challenged the counter-claimed amount. The Judge observed;

“The schedule shows how the claimed counter-claim of Ksh. 499,329.80cts was arrived at as of 24th November, 2010. The appellant did not challenge the schedule. I therefore find that the amount owing was as per the said schedule, save that the schedule did not include the sum of Ksh. 25,000 that the respondent had paid. The sum of Ksh. 25,000 has to be deducted from the sum of Ksh. 499,329.80cts leaving a balance of Ksh. 474,329.80cts. That is the amount that should have been entered as judgment against the appellant”. (My emphasis)

12. As the appellant did not dispute the counter-claimed amount at the High Court, he cannot do so at this point. I thus find no reason to interfere with the learned Judge’s decision. There is no indication that he misapprehended the facts nor applied wrong principles of law in allowing the counter-claim.
13. The upshot of my consideration of this appeal is that it is bereft of merit and I would dismiss it with costs.
14. As Mumbi Ngugi and Tuiyott JJ.A. agree, it is so ordered

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

P.O KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI, JA

I have had the advantage of reading in draft the judgment of my learned brother Kiage, JA and I am in full agreement, with nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF TUIYOTT, JA

I have had the advantage of reading in draft the judgment of my learned brother Kiage, JA and I am in full agreement, with nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

