



REPUBLIC OF KENYA



Moja Expressway Limited v Darson Trading Limited & another (Civil Appeal E1384 of 2023) [2025] KEHC 7461 (KLR) (Civ) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1384 OF 2023

AC MRIMA, J

MAY 30, 2025

BETWEEN

MOJA EXPRESSWAY LIMITED APPELLANT

AND

DARSON TRADING LIMITED 1ST RESPONDENT

JAMES MAINA 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. W. C. Keter (Adjudicator) delivered on 16th November, 2023 in Nairobi SCCC No. E3208 of 2023)

JUDGMENT

1. At the heart of this appeal is the legality of a hire purchase agreement where the registered owner of a motor vehicle, through an Agent, executes the said hire purchase agreement towards the sale of the motor vehicle and delivers possession to the buyer, but which vehicle is involved in an accident before the full realization of the agreed purchase price.
2. In this matter, the trial Court found that the registered owner was not liable and thereby dismissed the Appellant's claim in Nairobi [Milimani] Small Claims Court in SCCC No. E3208 of 2023 [hereinafter referred to as 'the suit'] thereby prompting the instant appeal. In the suit, the Appellant, who was the Claimant, Moja Expressway Limited [now Appellant], sued the 1st Respondent herein, Darson Trading Limited, as the registered owner of a motor vehicle registration number KCU 614G [hereinafter referred to as 'the car'] and the 2nd Respondent, James Maina, as the driver of the car, in respect of an accident along the Nairobi Expressway Road out of which the car hit the sides of the road and caused damage. The Appellant repaired the damage at a cost of Kshs. 68,553/27 which it claimed from the Respondents in the suit.



3. The suit was heard under Section 30 of the *Small Claims Court Act* where the parties' statements were adopted as evidence and documents produced as exhibits without receiving viva voce evidence. However, the claim against the 2nd Respondent was dismissed on 26th October 2023 for want of service. Judgment was then rendered on 16th November, 2023 where the suit was dismissed with costs to the 1st Respondent. It was that judgment that prompted the instant appeal.
4. In a Memorandum of Appeal dated 5th December 2023, the Appellant proposed the following four grounds of appeal: -
 - i. The Honourable Magistrate erred in law by holding that the Respondent sufficiently proved on a balance of probabilities that it was not the beneficial owner of motor vehicle KCU 614 G at the time of the accident.
 - ii. The Honourable erred in law by failing to appreciate that by dint of Section 8 of the Hire Purchase Act, legal and beneficial ownership of the said motor vehicle did not pass from the Respondent to the purported purchaser/hirer since the evidence of the Respondent was that, at the time of the accident, the purported purchaser/hirer had not paid instalments in full and/or exercised the right to purchase.
 - iii. The Honourable Magistrate erred in law by relying on Hire Purchase Agreement dated 23/3/2022, Deed of Indemnity and Consent dated 23/3/2022 and Affidavit of Liability sworn by James Wangombe as evidence to prove that at the time of the accident one James Maina Wangombe was the beneficial owner of motor vehicle KCU 614G since,
 - a. No certificate of registration of hire-purchase agreement was adduced to certify the contents of the alleged Hire Purchase Agreement dated 23/3/2022 as required under Section 5(3) of the Hire Purchase Act.
 - b. The Deed of Indemnity and Consent dated 23/3/2022 and Affidavit of Liability sworn by James Wangombe were not sworn before a Commissioner for oaths contrary to Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya.
 - iv. The Honourable Magistrate erred in law by reaching the wrong conclusion of fact that the 1st Respondent had sufficiently proved that it was not in possession of the said motor vehicle at the time of the accident since the 1st Respondent did not adduce any evidence notifying the National Transport Safety Authority (NTSA) of the change in possession within the required 14 days contrary to Section 9(5) of the *Traffic Act*, Cap 403 Laws of Kenya.
5. Pursuant to the directions of this Court, the appeal was canvassed by way of written submissions. The parties filed their rival submissions wherein they referred to several decisions in a bid to firm their respective positions. The gist of these submissions will be ingrained in the latter part of this judgment.
6. Section 38 of the *Small Claims Court Act* [Cap. 10A of the Laws of Kenya, hereinafter referred to as 'the Act'] provides for appeals from decisions and/or orders of the Small Claims Court. Under that provision, a party may appeal to the High Court only on matters of law and that the decision thereof is final. Whereas there has been no universally accepted definition of the term 'matters of law', there has been some working definitions thereto.
7. The term 'point of law' may also be referred to as 'matter of law'. There has been no universally accepted definition of the term 'point of law' or 'matter of law'. However, there has been some working definitions thereto. The Black's Law Dictionary defines 'a matter of fact' and 'a matter of law' as follows: -



Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law.

8. Lord Denning, J in *Bracegirdle vs. Oxley (2)* [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

.... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

9. Drawing from the above, the Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR sated as under: -

.... That reasoning has been adopted in this jurisdiction. In *A.G. Vs. DAVID MURAKARU* [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also *PATEL Vs. UGANDA* [1966] EA 311 and *SHAH Vs. AGUTO* [1970] EA 263.

10. The foregoing was reiterated in *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR. Further, in *Peter Gichuki King'ara vs. IEBC & 2 others*, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. The Supreme Court of Kenya in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR held that 'jurisdiction is a pure question of law and should be resolved on priority basis'.
11. Applying the said dichotomy in this case, it is this Court's finding that since the matters in contention in this appeal relate to the interplay between the legality and validity of a hire purchase agreement and the liability of the registered owner of the car, then such issues transcend the borders of matters of fact into the realm of matters of law.
12. Therefore, this Court is properly seized of jurisdiction over this appeal.
13. Returning to the main issue at hand, there is no doubt that the 1st Respondent remains the registered owner of the car. The point of departure between the parties in this appeal is the validity of the hire purchase agreement entered into between the 1st Respondent's authorized Agent, Moiz Motors Limited, and one James Wang'ombe Maina on 23rd March 2022 in respect to the sale of the car. In the



said agreement, James Wang'ombe Maina undertook to pay the sum of Kshs. 920,000/= as the purchase price. He made a deposit of Kshs. 300,000/= and the balance of Kshs. 620,000/= was to be spread out for payment from July 2022 to July 2023. James Wang'ombe Maina was also granted the possession of the car and allegedly executed an Affidavit of Liability and a Deed of Indemnity and Consent.

14. The parties to this appeal have made elaborate submissions on the foregoing issue and referred to several decisions. It is now for this Court to determine the aspect of liability of the 1st Respondent in the circumstances of this matter. Since the gist of the 1st Respondent's defence is the hire purchase agreement, then the starting point is a look at the law on that subject which is the Hire Purchase Act, Cap. 507 of the Law of Kenya [hereinafter referred to as 'the Act']. The Preamble to the Act has it as an Act of Parliament to make provision for the regulation of certain hire-purchase agreements, and for the licensing of hire-purchase concerns, and for purposes connected therewith. Part VII of the Act deals with the licensing of hire-purchase businesses. Section 18 of the Act requires one to acquire a licence to engage in a hire purchase business. The provision states as follows: -
 18. Licence required to carry on hire-purchase business:
 1. No person after the appointed day shall carry on hire-purchase business, except under and in accordance with the terms of a current licence authorizing him to do so.
 - (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.
15. In this matter, the Hire Purchase Agreement was entered between Moiz Motors Limited and one James Wang'ombe Maina. This Court has carefully perused the record, but did not come across any evidence that the said Moiz Motors Limited had any licence to carry out a hire purchase business. Further, the said agreement was not registered as required under Section 5 of the Act. Additionally, the Affidavit of Liability and a Deed of Indemnity and Consent were not attested to under oath as provided for therein. Having failed to satisfy the prime and requisite legal requirements of licensing and registration, then the only reasonable inference a Court of law can make is that the said Moiz Motors Limited engaged in the hire purchase business against the law. Obviously, such engagements cannot claim legal protection.
16. This Court, therefore, finds and hold that the Hire Purchase Agreement in issue did not pass the legal muster as to shield the 1st Respondent from any liability relating to the car. As such, and with tremendous respect, the Learned Arbitrator erred in finding that the 1st Respondent was not liable on the basis of that agreement.
17. Having so found and held, the next consideration is whether the suit was proved. There is credible evidence that the damage caused to the Nairobi Expressway road was by the car and that the damage attracted repair costs. There is further evidence that the Appellant incurred the said costs and thereafter filed the recovery suit. The 1st Respondent's ownership of the car was also proved by a copy of Motor Vehicle Records from the National Transport and Safety Authority. In view of the evidence on record, this Court is satisfied that the Appellant discharged its evidential burden of proof and that the said burden shifted to the 1st Respondent for rebuttal. As the 1st Respondent reliance on the hire purchase agreement did not legally hold, then the 1st Respondent failed to discharge that evidential burden of proof. The upshot is that the Appellant's claim was proved and the 1st Respondent was liable to satisfy it. Needless to say, the 1st Respondent reserves the option to pursue its agent and the alleged purchaser for a recourse more so having opted not to enjoin them or any of them as third parties in the suit.
18. It is on the basis of the foregoing discussion that this Court hereby makes the following final orders: -



- (a) The appeal is merited and is hereby allowed.
- (b) The judgment in Nairobi [Milimani] Small Claims Court in SCCC No. E3208 of 2023 delivered on 16th November 2023 dismissing the Appellant's claim is hereby set-aside and quashed. It is substituted with a finding allowing the claim as prayed.
- (c) The 1st Respondent shall also bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wanjohi, Learned Counsel for the Appellant.

Ms Cherop, Learned Counsel for the 1st Respondent.

Amina/Abdirazak – Court Assistants.

