



**Lihanda & another v Broxx Capital Kenya Ltd (Civil Appeal  
E092 of 2021) [2024] KEHC 5647 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E092 OF 2021  
MS SHARIFF, J  
APRIL 30, 2024**

**BETWEEN**

**MAUREEN AKOTH LIHANDA ..... 1<sup>ST</sup> APPELLANT**

**MALEEN INVESTMENT LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BROXX CAPITAL KENYA LTD ..... RESPONDENT**

*(Being an Appeal from the judgment/decree of Hon. L. Akoth (RM)  
in Kisumu CMCC NO. 139 OF 2019 delivered on 19th July 2021)*

**JUDGMENT**

1. The Appellants filed suit in the subordinate court seeking as against the Respondent herein an order of compensation with a new motor vehicle of the same make to replace the Appellants motor vehicle that had been leased to the Respondent. The Appellants also pleaded an alternative prayer for payment of Kshs.1,280,000/- being the purchase price of the lost motor vehicle.
2. It was pleaded that the 1<sup>st</sup> Appellant was the registered owner of the suit motor vehicle registration number KCJ 562B, Toyota Fielder that was leased to the Respondent through the 2<sup>nd</sup> Appellant acting as the former's agent.
3. It was pleaded that an agreement to that effect was executed on 13<sup>th</sup> September, 2017 whereby the Respondent was to take possession and indeed took possession thereof for a period running up to 31<sup>st</sup> December 2017 at an agreed rate of Kshs.2,500/- per day. That it was further agreed that the Respondent was inter alia obligated to take good care of the same and compensate the owner in case of loss.
4. They pleaded that on or about 10<sup>th</sup> December 2017, the motor vehicle went missing from the hands of one of the Respondent's employees and efforts to trace it were futile thus the suit.



5. The Respondent in its statement of defence and counterclaim stated that the Appellants had warranted that the vehicle was insured and was therefore aware of the risk. That indeed the vehicle was stolen from one of its employees though without negligence.
6. The Respondent also preferred a counterclaim that the Appellants were in breach of the agreement for failing to take out an insurance policy to cover loss of the motor vehicle.
7. The evidence at the trial court in brief was that; PW-1 Maureen Lihanda stated that the 2<sup>nd</sup> Appellant and the Respondent entered into a car hire agreement over her motor vehicle registration number KCJ 562B. That the motor vehicle got lost while in control of the Respondent's employee. She stated that as a result of the loss, she had suffered loss and therefore sought compensation for the motor vehicle. Her testimony was that the Respondent breached the car hire agreement.
8. The Respondent called Rose Owuor, the Respondent's employee who testified as DW-1. Her evidence was that on 9/12/2017, she left work with the motor vehicle and parked it outside her house in the afternoon. That the following day, she realized the vehicle was missing. That the incident was reported at the police but the 1<sup>st</sup> Appellant did not provide insurance details and further that the owner informed them that the motor vehicle was not fitted with a tracker.
9. The trial court after considering the matter dismissed the Appellants' suit and entered judgment in terms of the counterclaim.
10. The Appellants aggrieved preferred the instant appeal raising the following grounds;
  - i. That the Learned Trial Magistrate erred by holding that the Appellants had not proved their case on a balance of probability.
  - ii. That the Learned Trial Magistrate erred by dismissing the appellant's case when the evidence on record showed that the suit motor vehicle was lost while in the possession of and use of the Respondent and that liability of loss of the motor vehicle fell on the Respondent.
  - iii. That the learned trial magistrate erred in holding that the Appellants were in breach of Article 4 clause 4.1 of the contract which finding was not supported by any evidence before the court.
  - iv. The learned trial magistrate erred by failing to consider and analyze the entire evidence on record and thereby arriving at wrong findings on the issues before the court.
  - v. The learned trial magistrate erred in exercising its discretion wrongly in the circumstances.
  - vi. The learned trial magistrate erred in failing to consider the appellant's submissions and judicial authorities thus leading to the resultant miscarriage of justice to the Appellants.
11. The appeal was disposed of by way of written submissions. Only the Appellants complied and their submissions have been considered.

### **Analysis And Determination**

12. This being a first appellate court and bearing in mind the duty bestowed on me as held in [Kenya Ports Authority -v- Kuston \(Kenya\) Limited](#) (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect.



Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

13. My perusal of the record of appeal as well as the Appellants’ submissions shows that the motor vehicle was indeed stolen in the hands of one of the Respondent’s employees and the same had not been found as at the time of filing suit. The issues thus coming up for determination are; whether the Respondent was to blame for the loss of the said motor vehicle and secondly, whether the Respondent is bound to compensate the 1<sup>st</sup> Appellant.
14. From the onset, I find the relationship between the parties herein was contractual and bound by the terms of the agreement executed on 13<sup>th</sup> September, 2016. The terms of the said agreement inter alia provided under Article 4.1 that;

The owner/agent hereby warrants to BBOX that they possess car insurance that covers personal injury to BBOX employees or other persons as well as the vehicle and the property of others.
15. It is a cardinal principle of law that the court has no business in re-writing contracts but to give effect to the parties’ wishes. This was espoused in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
16. The purpose of the above quote is that the loss of the motor vehicle herein ought to be considered in light of the article of the agreement and an interpretation of the agreement so entered into. In arriving at the decision, the trial magistrate considered the Article and at paragraph 17 held;

“In this regard, I find that the Plaintiff has been unable to prove that she took out a cover that specifically covered the items articulated in Article 4.1 of the contract. For the avoidance of doubt, loss of the vehicle is not one of the items since it is not expressly stated in the contract”.
17. In the trial court, the Respondent filed a counterclaim in terms that the Appellant had under article 4 warranted that they had insured the motor vehicle from damage or loss and thus represented a voluntary assumption and awareness of risk.
18. Having stated above that the court is merely mandated to give effect to the terms of the governing agreement and having carefully read the article under consideration, it is my finding that the clause merely referred to insurance policy covering personal injury to BBOX employees or other persons as well as the vehicle and the property of others.
19. In light of the above, I find that the trial magistrate having found that the loss of motor vehicle not being an event contemplated under Article 4.1 of the agreement, the Respondent was and is bound to compensate the Appellant for the loss of the motor vehicle. The trial court’s finding was arrived at by consideration of irrelevant factors and over-stretching the terms of the agreement governing the parties’ conduct.
20. In the circumstances, I hereby set aside the trial magistrate’s judgment in favour of the Respondent in terms of its counter claim and the dismissal of the Appellants’ suit and substitute therewith a finding that the Respondent is liable to compensate the 1<sup>st</sup> Appellant for the loss of her motor vehicle in the



sum of Kshs.1,280,000/-. The Appellants shall have costs of the suit both in the subordinate court and this appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF APRIL, 2024**

**MWANAISHA S. SHARIFF**

**JUDGE**

