

KENYA / JUDGMENT

Oyange v Nyaboke t/a Lister Auctioneers & another [2026] KEHC 5543 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Civil Appeal E202 of 2025

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REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT KISUMU CIVIL APPEAL NO. E202 OF 2025 LEOPOLD OPUDO OYANGE APPELLANT MARY NYABOKE T/ A LISTER AUCTIONEERS 1ST RESPONDENT

- VERSUS - NICHOLAS ORETI 2ND RESPONDENT (Being an appeal from the judgment and decree of Hon. G.C. Serem RM/Adjudicator delivered on the 19/8/2025 in the Ksm SCCCase No. E2094 of 2025, Leopold Opudo Oyange v Mary Nyaboke T/ A Lister Auctioneers & Nicholas Oreti) J U D G M E N T 1. The appellant filed an amended claim against the respondents seeking judgment in the sum of Kshs. 345,000/- being a refund of monies sent to and received by the respondents from the appellant for a car sold at an auction by the respondents on the 4/4/2025. 2. The respondents entered appearance and filed a response in which they admitted parts of the appellant's claim and further pleaded that the trial court was bereft of jurisdiction to handle the claim. Page 1 of 9 3. The matter proceeded to trial and in its judgment, the trial court found that the appellant had failed to prove that the respondents were liable to refund him the monies claimed and as such dismissed his case.
4. Being dissatisfied with the said judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 18/9/2025 and raised eight
- (8) grounds of appeal as follows: -
- a) The learned trial adjudicator grossly misdirected himself in treating the evidence and submissions before her superficially and consequently coming to a wrong conclusion on the same.
 - b) The learned trial adjudicator did not in the alternative consider or sufficiently consider the claim of the appellant as against the respondents herein thus arriving at a wrong decision.

- c) The learned adjudicator failed to consider the documents placed and produced by the appellant in support of the claim against the respondents' documents placed before court thus arriving at a wrong decision.
- d) The learned trial adjudicator misdirected herself finding that the 1st respondent was not liable for the acts that were detrimental to the appellant thus absolving the 1st respondent from the claim wrongly. Page 2 of 9
- e) The learned trial magistrate failed to consider that the 1st respondent was to be held liable for carrying out a failed auction whereas the subject vehicle belonged to a third party, thus absolving her of any liability.
- f) The learned trial adjudicator misdirected herself in ignoring the principles applicable laws under the appellants claim.
- g) The learned trial adjudicator erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellant and the serious loss that the appellant suffered at the hands of the 1st respondent.
- h) The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law. 5. The parties agreed to dispose the appeal by way of written submissions. However, as at the time of writing this judgment, only the appellant's submissions were on record. The appellant submitted that the respondents by their own confession failed to carry out due diligence prior to conducting a public auction thus resulting in a loss sustained by the appellant. Reliance Page 3 of 9 was placed on the cases of *Kinuthia T/A Immediate Auctioneers v Murilla* (Civil Appeal No. E1470 OF 23) (2025) and *Daniel Njoroge Mbugua & Another v John Muthee T/A Tango Auctioneers* (Civil Suit No. 2121 OF 2004) (2012). 6. That as a result of the loss incurred, he was entitled to compensation from the respondents as was held in the cases of *David Muigai Wanjohi v Joyan Kariuki T/A Moran Auctioneer* (Commercial Appeal E304 OF 2024) (2025) and *Ikumu v NCBA Bank Kenya PLC* (Civil Suit E012 of 2023) (2024). 7. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See *Selles & Anor vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123. 8. Before the trial court, the respondent testified as Cw1. He adopted his statement of claim as his evidence in chief stating that he bought motor vehicle registration number KBA 547H Toyota Premio at a public auction carried out by the 1st respondent and paid Kshs. 230,000/- at the fall of the hammer. That in addition, he paid Kshs. 70,000/- for storage fees, Kshs. 20,000/- in brokerage fees and Kshs. 20,000/- in fuel and service expenses Page 4 of 9 for the vehicle. That subsequently, the vehicle was repossessed by Mogo Auto Limited on account that the said vehicle belonged to it. The appellant remained firm on his testimony in cross-examination. 9. On her part, the 1st respondent testified as Rw1. She adopted her witness statement dated 14/7/2025 as her evidence in chief and produced her list of documents as REXh1 – 15. It

was her testimony that in execution of a judgment debt, she proclaimed the suit vehicle and advertised the same for public auction wherein the appellant emerged as the highest bidder and paid the purchase price on 10/4/2025. 10. That she subsequently returned the purchase proceeds less her fees to the decree holder's advocate and applied for a vesting order in favour of the appellant. It was her testimony that the trial court lacked jurisdiction to entertain the claim as the whole enterprise was undertaken in Eldoret. 11. In cross-examination, she stated that the suit vehicle came to her vide execution proceedings undertaken in the Small Claims Court in Eldoret. That she did not always carry out a search on vehicles she intended to sell unless there was a misunderstanding. That Mogo sought to repossess the suit vehicle after she had sold the same to the appellant. Page 5 of 9 12. I have considered the evidence tendered before the trial court. This being an appeal from the Small Claims Court, it is important to point out that Section 38 of the Small Claims Court Act provides for the jurisdiction of this Court in determining appeals from the Small Claims Court. It provides thus; - "1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law. 2. An appeal from any decision or order referred to in subsection (1) shall be final." 13. It is clear from the foregoing that, jurisdiction of this Court from the Small Claims Court is only on matters of law and not factual issues. 14. A perusal of the Grounds of Appeal elucidated by the appellant reveals that they are largely raise matters of fact save for the ground wherein the appellant pleads that the learned trial adjudicator misdirected herself in ignoring the principles applicable laws under the appellants claim. 15. Judicial discretion is akin to a delicate balancing act, a solemn trust reposed in the courts to ensure justice is not only done but manifestly seen to be done. This discretion is not absolute, nor is it an open cheque to be wielded arbitrarily. The Court of Appeal in *Mbogo v Shah* [1968] EA 93 cautioned Page 6 of 9 against judicial overreach, stating that appellate intervention is warranted where a trial court has misdirected itself or considered extraneous factors. 16. Further, in *Hajar Services Limited v Peter Nyangi Mwita* [2020] eKLR, the Court reiterated that discretion must be exercised judicially, not whimsically. "This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for Page 7 of 9 extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.' 17. The appellant's case

before the trial court was rather clear that having engaged in good faith in a public auction undertaken by the 1st respondent, he was entitled to a refund of his monies when the suit vehicle was repossessed by Mogo Auto Limited who were the owners of the said vehicle. That the respondents failed to carry out due diligence prior to undertaking the public auction thus exposing him to a loss. 18. Section 23 (b) of the Auctioneers Act mandates an Auctioneer to carry out due diligence when attaching property. It provides that an Auctioneer shall; “act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written law or contract;” 19. The respondents thus had the obligation to carry out diligence when attaching the property. It is rather evident that this was not done. The trial court ignored this principle in arriving at its decision and in my view arrived Page 8 of 9 at a wrong decision by dismissing the appellant’s claim especially in view of the admission by the 1st respondent that indeed the appellant lawfully purchased the suit vehicle at the fall of the hammer and further that, she did not carry out a search for the suit vehicle prior to putting it up for public auction. 20. For those reasons, I find this to be a proper case for me to interfere with the lower court’s exercise of discretion and accordingly allow the appeal. I set aside the order of the trial Court in dismissing the appellant’s case and in its place enter judgment for the appellant as prayed for Kshs. 345,000/-. It is so decreed. DATED and DELIVERED at Kisumu this 30th day of April, 2026. A. MABEYA, FCI Arb JUDGE Page 9 of 9

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