



Jinnah v Jhanda & another; Mo Sound Entertainment (Interested Party) (Civil Suit 350 of 2011) [2023] KEHC 18409 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 350 OF 2011
AN ONGERI, J
MAY 29, 2023**

BETWEEN

NAZIR JINNAH PLAINTIFF

AND

ZAHEER MERLAHI JHANDA 1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA 2ND DEFENDANT

AND

MO SOUND ENTERTAINMENT INTERESTED PARTY

JUDGMENT

1. The Plaintiff in this case NAZIR JINNAH (hereafter referred to as the Plaintiff only) has sued the two Defendants ZAHEER MERLAHI JHANDA and COOPERATIVE BANK (hereafter referred to as the 1st and 2nd Defendants) and the Interested Party (hereafter referred to as the Interested Party (IP) seeking the following remedies

- i. THAT this honourable court to hereby issue an order against the above named Defendant ZAHEER MERLAHI JHANDA to surrender and deliver up to this honourable court motor vehicle whose details are as follows;-

Make Mercedes Benz

Model E20 Advantgarde auto

Year of manufacture :2002

Colour Silver metallic

Chasis no. WDB2110652A110183



Engine no. 11294931360773

Engine cc 3199cc

To enable this court to inspect the said movable property to ensure it is being maintained in top quality mechanical and body condition.

- ii. THAT this honourable court do hereby issue an order against the above named Defendant ZAHEER MERLAHI JHANDA to surrender and deliver up to this honourable court a motor vehicle whose details are as follows:

Make Mercedes Benz

Model E20 Advantgarde auto

Year of manufacture 2002

Colour Silver metallic

Chassis no. WDB 2110652A110183

Engine no. 11294931360773

Engine cc 3199cc

And such motor vehicle to be thereupon to the Plaintiff/applicant NAZIR JINNAH.

- iii. A declaration that the Plaintiff is the owner of the motor vehicle forming the subject of this suit and that any claim thereof by the Interested Party is null and void.

- iv. A declaration that the 2nd Defendant acts or omission with respect to the Plaintiff's property was negligent.

That this honourable court do hereby issue an order against the above named 2nd Defendant to furnish the Plaintiff with the proceeds of the sale of the motor vehicle.

- v. Damages for breach of contract by the 1st Defendant
- vi. General damages
- vii. Damages of loss of user and wear and tear.
- viii. Costs and interest

2. The Plaintiff avers in the said further amended plaint that by an agreement entered between the Plaintiff and the 1st Defendant, the 1st Defendant purchased a motor vehicle from the Plaintiff whose particulars were as contained in paragraph 1 above.
3. Further that the purchase price was ksh.2,300,000 excluding import duty and registration which were to be paid for by the Defendant.
4. The Plaintiff further contends that it was an express term of the said agreement that upon execution of the sale agreement the 1st Defendant would pay the Plaintiff a deposit of kshs.500,000 in cash and give to the Plaintiff postdated cheques for the balance of ksh.1,800,000.



5. It was also agreed that the motor vehicle would only be used in the vicinity of Nairobi. There was also a default clause of payment of kshs.25,000 in case of breach of contract.
6. The Plaintiff stated in the further amended plaint that the Defendant defaulted and in payment of the deposit. He issued the Plaintiff with a cheque for kshs.500,000 which was dishonoured.
7. Further, that the Defendant removed the motor vehicle from Nairobi to an unknown place and illegally modified it and caused it to be transferred to 3rd parties.
8. The Defendant filed a defence dated 28/10/2014 denying the Plaintiff's claim and put him to strict proof.
9. The case proceeded by way of viva voce evidence. The Plaintiff who testified as PW 1 adopted his witness statement dated 2/8/2011 as his evidence in chief. In it he stated that by an agreement entered between the plaintiff and the defendant dated 11th February 2010 the defendant purchased a metallic silver Mercedes Benz Chassis No. WDB 2110652A110183. The purchase price was Kshs. 2,300,000 excluding import duty and registration which was to be paid by the defendant. That upon the execution of the sale agreement the defendant was to pay Kshs. 500,000 in cash and give the applicant a post-dated cheque in the amount of Kshs. 1,800,000.
10. Instead, the defendant gave a cheque of Kshs. 500,000 which was dishonored and the postdated cheques for the balance of 1.8 million were also dishonored and never replaced. The defendant took the car out of Nairobi and hid it. Drove it with fake number plates and registration documents. He additionally refused to surrender the motor vehicle despite his failure to settle the payment due.
11. The Plaintiff made a complaint at Kilimani Police Station and the 1st defendant was arrested. The officers in charge conducted a dialogue between the parties to resolve the issues between them but the defendant adamantly refused to disclose the location of the subject vehicle. He however promised the officers that the vehicle would be returned the following morning. The defendant failed to do so and was released from custody the next day. On Monday the plaintiff went back to the police station where he spoke to Mr. Mwenda who discussed the complaint with him and informed the plaintiff that it was not in his mandate as it was a civil matter.
12. The plaintiff further stated that the accused issued other cheques of Kshs. 600,000 from the exact same bank which was returned as 'unpaid' and marked 'refer to drawer'. The accused has since paid Kshs.700,000 which accounts for costs, interest and penalties and the principle balance remains unpaid to date.
13. In his evidence in court the Plaintiff said when he returned to Kenya from UK as a returning resident, he brought the subject motor vehicle.
14. The Plaintiff said he met the Defendant who persuaded him to sell the motor vehicle to the Defendant for ksh. 2.3 million.
15. The Plaintiff said they entered into an agreement dated 11/2/2010 which the Plaintiff produced as an exhibit in this case.
16. The Plaintiff said he delivered the motor vehicle to the Defendant but the Defendant failed to pay a deposit of cash ksh.500,000 as agreed and instead issued a cheque that was dishonoured.
17. After the cheque was dishonoured the Plaintiff found it difficult to find the Defendant. The Plaintiff said two of the postdated cheques were also dishonoured for insufficient funds.



18. The Plaintiff said he spotted the car at Karen being driven by young people. He was unable to repossess it.
19. The Plaintiff said he reported the matter to the police and on 22/8/2011 he obtained repossession orders from court.
20. Finally, on 26/1/2012 he saw the motor vehicle at Naivasha and repossessed it after making a report to the police.
21. In cross-examination the Plaintiff said he sold the motor vehicle when it did not have a Kenyan registration.
22. The 1st Defendant testified as DW 1. He adopted his supporting affidavit dated 28/10/2014 as his evidence in chief. In it he stated that the allegations by the plaintiff are unfounded as there is no connection whatsoever between him and the subject motor vehicle. Therefore, the suit filed by the plaintiff against him was malicious and aimed at abusing court process and should be dismissed with costs.
23. The 1st Defendant said he never signed any agreement for the sale of any motor vehicle. He said he knew the Plaintiff who was introduced to him by a friend.
24. The 1st Defendant said he knows WALL STREET Company which issued the cheques produced by the Plaintiff but said there was no company resolution to buy any car.
25. The 1st Defendant relied on his statement of defence and his affidavit.
26. In cross-examination, the 1st Defendant said he has never seen the sale agreement. He said he may have signed the cheques in relation to other transactions.
27. The Interested Party (IP) called one witness IPW 1 KEVIN MUSAU MULEI who said that he bought the subject motor vehicle at a public auction conducted by Baseline Auctioneers.
28. PW 1 said he is a director of the IP herein. He adopted his witness statement dated 5/10/2015 as his evidence in chief. In it he stated that in June 2012 he was personally involved in the purchase of motor vehicle KBN 900F on behalf of Mo sound Entertainment Company from Co-operative Bank of Kenya. He expressed interest to purchase the motor vehicle which the bank was selling to recover a loan advanced to Dakika Ltd. This was after Baseline Auctioneers put up a notification for the sale of KBN 900F.
29. He did a search of the said motor vehicle and established that the motor vehicle was registered in the joint names of Co-operative Bank of Kenya and Dakika Limited in the year 2010. He purchased the said motor vehicle on 27th June 2012 as per the agreement and paid the entire purchase price of Kshs. 2,500,000 vide three bankers cheques were two where of Kshs. 900,000 and the third was of Kshs. 700,000.
30. Early in 2013 while driving the motor vehicle he was approached by police officers who informed him that the court had ordered confiscation of the said car on grounds that the car was subject matter of an ongoing case to which he complied.
31. IPW 1 said he conducted due diligence from NTSA and confirmed that the motor vehicle was good to buy. He said he is now seeking damages for loss of user in his counterclaim.
32. In cross-examination IPW 1 said he got to know the 1st Defendant when the motor vehicle was impounded.



33. IPW 1 said he is not seeking anything from the 2nd Defendant. He said the auction where he bought the motor vehicle was auctioned by the 2nd Defendant. He said he did not know the Plaintiff in this case.
34. The 2nd Defendant did not call any witnesses. The parties filed written submissions as follows; the plaintiff submitted that as general rule a person is estopped by his signature from denying his consent to be bound by provisions contained in a deed or an agreement. That the plaintiff has aptly demonstrated that he entered into a sale agreement with the 1st defendant.
35. The plaintiff maintained that the 1st defendant had no authority to sell the subject motor vehicle to any third party. That as a general principle goods sold by a person who is not the owner or who is not under the authority of the owner, the buyer acquired no better title to the goods than the seller. That in *Daniel Kiprugut Maiywa v. Rebecca Chepkurgat Maina* [2019] eKLR it was held as follows;
- “The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract.”
36. The plaintiff argued that the court ought not to be an avenue for enforcement of an illegal contract. That the contract between Dakika Limited and the 2nd defendant and the interested party were illegal at formation as neither of the parties acquired rights under those contracts. That the 2nd defendant acted negligently by granting Dakika Limited a facility using the plaintiff's vehicle and failing to confirm from the documents the chassis number, model number, year of manufacture and rating.
37. The plaintiff submitted that the interested party is not an innocent purchaser for value. This is because the interested party holds a fraudulent log book; he purchased motor vehicle bearing Chassis No. WDB2111O652A110183 and not the plaintiff's vehicle bearing Chassis No. WDB2110652A110183, he had knowledge of the fraud before he purchased the car and the vendors had a fraudulent title.
38. The 2nd defendant in its submissions contended that the proceeding against the 2nd defendant were time barred as the alleged sale occurred on or about 27th June 2012 and the plaintiff's claim lapsed three years after that. That therefore the claim against the 2nd defendant should be dismissed as it is a complete defence that affords an automatic remedy. That the plaintiff agreed on cross examination that they were aware of the bank selling the said motor vehicle as at July 2013 when they filed their amended defence.
39. The 2nd defendant submitted further that the plaintiff has not proved a claim against it for negligence. It was its argument that they owed no duty of care to the plaintiff in this matter and as a result cannot be liable. That the only duty of care owed by banks in relation to the operation of customer account or in banker/customer relationship is to the customer alone.
40. The interested party in its submission argued that the doctrine of bona fide purchaser of value without notice has been invoked by courts to protect commercial transactions where the purchaser undertakes all humanly possible due diligence. That in *Katana Kalume & another v. Municipal Council of*



Mombasa & Another [2019] eKLR the court cited with approval the holding in Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd (1949) 1KB 322 at pp. 336-337 where it was held; “the person who takes in good faith and for value without notice should get a good title”

41. The interested party submitted that when it expressed interest in purchasing the motor vehicle the seller had a genuine logbook whose authenticity had not been challenged or otherwise impugned by the plaintiff or any of the defendants and therefore it had no knowledge of the fraud occurring.
42. It was the interested party’s submission that Section 8 of the *Traffic Act* provides that the person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle. That since the subject motor vehicle was registered jointly to the 2nd defendant and Dakika Limited at the time the vehicle was sold and later transferred to the interested party; the subject motor vehicle is without a doubt the property of the interested party.
43. It was the interested party’s submission that it is reasonable expected that it is due to benefit for the loss of use of the motor vehicle and in support cited Martha Wangari Njoka v. Nairobi City Commission [1992] eKLR where it was held that where a rightful owner of a motor vehicle is deprived of the right to use the vehicle they are duly entitled to damages. That therefore the impounding and detention of the motor vehicle in question was without a just cause and it should be paid costs.
44. I have considered the evidence adduced by the parties in this case together with the pleadings filed herein and the submissions filed by the parties. I have also perused the documents relied on by the parties.
45. It is the duty of the Plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
46. The issues for determination in this case are as follows;
 - i. Whether the Plaintiff entered into an agreement with the 1st Defendant for the sale of the Plaintiff’s motor vehicle.
 - ii. If so, whether the 1st Defendant was in breach of the said sale agreement.
 - iii. If so, whether the plaintiff is entitled to damages for breach of contract.
 - iv. Whether the Interested Party has proved its counterclaim against the Plaintiff.
 - v. Whether the Plaintiff is entitled to the remedies he is seeking against the Defendants and the Interested Party.
 - vi. Who pays the costs of this suit?
47. On the issue as to whether the Plaintiff entered into a sale agreement with the 1st defendant for sale of the subject motor vehicle, I find that there is evidence that the Plaintiff agreed to sell his motor vehicle to the 1st Defendant on “as is” basis.
48. The agreement which was produced is dated 11/2/2010 and it contains the particulars of the subject Motor Vehicle as follows;

Make Mercedes Benz

Model E20 Advantgarde auto

Year of manufacture :2002

Colour Silver metallic



Chasis no. WDB2110652A110183

Engine no. 11294931360773

Engine cc 3199cc

49. The Plaintiff's testimony is believable that the 1st Defendant agreed to pay the motor vehicle in instalments.
50. The first instalment was ksh. 500,000 which was to be paid in cash but the 1st Defendant gave him a cheque instead.
51. There is also evidence that the 1st Defendant issued the Plaintiff with three postdated cheques of kshs .600,000 each and that all of them were dishonored.
52. There is also evidence that the 1st Defendant while in breach of the said contract sold the motor vehicle to 3rd parties without the knowledge or consent of the Plaintiff.
53. I find that the 1st Defendant's defence and evidence in court is a mere denial.
54. The 1st Defendant is not a truthful witness. He denied having bought the motor vehicle and said he may have signed the cheques in connection with a different transaction.
55. I believe the plaintiff's evidence and I find that the Plaintiff has established on a balance of probabilities that he entered into the said agreement with the 1st Defendant.
56. The elements of a valid agreement were highlighted in the case of Stancom Sacco Society Limited v Alliance One Tobacco Limited MGR Civil Case No. 10 of 2015 [2018] eKLR, where the court reiterated the essential elements of a valid contract, that is that, there has to; an offer, acceptance of the offer, consideration and intention to create legal relations.
57. On the issue as to whether the 1st Defendant was in breach of the agreement, I find that the answer is in the affirmative.
58. The 1st Defendant not only defaulted in payment of the instalments, but he also disposed of the motor vehicle to 3rd parties fraudulently and in unclear circumstances and in a manner inconsistent with the plaintiff's ownership of the said motor vehicle.
59. The Plaintiff finally impounded the motor vehicle at Naivasha when it was already in an altered mode using the spare key and it has been at the court premises since that time following a court order.
60. I find that the 1st Defendant was in breach of the sale agreement and therefore the ownership did not pass to him.
61. On the issue as to whether the plaintiff is entitled to damages for breach of contract, I find that the answer is in the affirmative.
62. In the case of Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) Justice Majanja had the following to say;

“As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages



is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

63. I find that the 1st Defendant is liable to pay the plaintiff damages for breach of contract and also to abide by the default clause.
64. The 1st Defendant having breached the contract entered into between the plaintiff and himself dated 11th February 2010, the title in the subject Motor Vehicle did not pass to the 1st Defendant.
65. On the issue as to whether the Interested Party has proved its counterclaim against the Plaintiff, I find that he 1st Defendant did not have a title capable of passing to any 3rd party.
66. In the case of *Republic vs The Registrar of Titles, Mombasa & 2 Others ex parte Emfil Limited* (2012) eKLR the Court stated as follows:

“Moreover, the private law principle of *nemo dat quod non habet* (see *Brown's Legal Maxims*, (1939) 10th at p. 546) is only a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller and it has important exceptions including sale by apparent owner of the goods and usage of the market and the buyer acquires good title if he buys in a market overt, in good faith and without notice of defect or want of title on the part of the seller.”

67. The 1st Defendant did not have any title in the subject motor vehicle capable of passing to any 3rd party. In *Katana Kalume & another vs Municipal Council of Mombasa & another* (2019) eKLR the court cited with approval the holding in *Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd* (1949) 1 KB 322, at pp. 336-337 where it was held as follows:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.”

68. I find that in the current case, the 1st Defendant did not have the right to deal with the plaintiff's Motor Vehicle in the way he did and therefore this case does not fall in the exceptions to the *nemo dat* principle.
69. Therefore, on the issue as to whether the Interested Party has proved its counterclaim, I find that the Interested Party did not acquire ownership since the seller did not have the right to sell the Motor Vehicle.
70. The only situation IP would qualify to be an innocent purchaser for value without notice of defect in title is when the case falls in the exception to the *nemo dat* rule. This was discussed in *Lawrence P.*



Mukiri vs Attorney General & 4 Other (2013) eKLR where the court cited with approval the holding of the Court of Appeal of Uganda in *Katende vs Haridar and Company Limited* and held as follows:

“... A bona fide purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner”.

71. I find that the M.V the Interested party purported to purchase was bearing Chassis No. WDB2111O652A110183 and not the plaintiffs vehicle bearing Chassis No. WDB2110652A110183.
72. I find that the interested party is not an innocent purchaser for value since he holds a fraudulent log book.
73. In the circumstances, I find that the IP has not established his claim against the plaintiff and the same is accordingly dismissed at this stage with costs to the plaintiff.
74. The IP is not without remedy since it can pursue its claim against the 2nd Defendant who authorized the sale of the motor vehicle by public auction.
75. On the issue as to whether the Plaintiff is entitled to the remedies he is seeking, I find that the answer is in the affirmative. The Plaintiff is entitled to the following remedies;
 - i. The Plaintiff is entitled to take possession of the motor vehicle at the court premises having proved that he is its rightful owner.
 - ii. A declaration be and is hereby issued that the said motor vehicle belongs to the Plaintiff and not to the Interested Party.
 - iii. The Plaintiff is also entitled to the Kshs. 25,000 contained in the default clause in the sale agreement dated
 - iv. The plaintiff is also entitled to damages for wear and tear of the motor vehicle and general damages for breach of contract.
76. On the issue of loss of user, I find that the same is not pleaded and proved to the required standard and the same is dismissed.
77. The Motor Vehicle was deposited at the court premises by an order of the Court and it has since deteriorated.
78. The duty of this court under Article 159 of *the constitution* is to do substantive justice.



- 79. As stated in the case of Barclays Bank of Kenya Limited v Mema(supra) it is a general principle of law that the purpose of damages for breach of contract is, subject to mitigation of loss, to put the plaintiff as far as possible in the same position he would have been if the breach complained of had not occurred.
- 80. I find that the M.V is no longer in the state it was when it was deposited in court. Article 159 of [the constitution](#) espouses this court to render substantive justice.
- 81. The plaintiff asked this court to allow an independent assessor to assess the motor vehicle in order to ascertain its current mechanical condition.
- 82. This court visited the scene where the M.V has been lying for years and found that its condition is wanting.
- 83. Since the M.V was detained by the court pending determination on the issue of ownership, I direct the parties to file submissions before this court makes a decision on the issue of quantum of damages.
- 84. The matter will be mentioned on 27th June for submissions and a ruling date.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 29th day of May, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

- for the Plaintiff
- for the 1st Defendant
- for the 2nd Defendant
- for the Interested Party

NAIROBI HIGH COURT CIVIL SUIT NO. 350 OF 2011	0
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