



**Kenya Women Micro-Finance Bank v Alio & 2 others (Civil Appeal  
266 of 2018) [2023] KEHC 27545 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 266 OF 2018  
F WANGARI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**KENYA WOMEN MICRO-FINANCE BANK ..... APPELLANT**

**AND**

**MOHAMED IBRAHIM ALIO ..... 1<sup>ST</sup> RESPONDENT**

**EDWIN MARK WAMALWA ..... 2<sup>ND</sup> RESPONDENT**

**CATHERINE WAMALWA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgement of Honourable J.M. Nangea (C.M) delivered  
on 12th November, 2018 in Mombasa Chief Magistrate's Civil Case No. 2151 of  
2016 Mohamed Ibrahim Alio v Kenya Women Micro-Finance Bank & 2 Others)*

**JUDGMENT**

1. This is an Appeal against the judgement delivered by Hon. J.M. Nangea, Chief Magistrate in Mombasa CMCC No. 2151 of 2016 on November 12, 2018. The 1<sup>st</sup> Respondent had filed a suit against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents seeking amongst other orders a declaration that he was the legal owner of motor vehicle registration number KCD 047W and further that the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be ordered to execute the transfer and handover the logbook to the 1<sup>st</sup> Respondent within two (2) weeks.
2. Contemporaneously with the suit, the 1<sup>st</sup> Respondent filed an application seeking an order of injunction seeking restraining orders against the 1<sup>st</sup> Respondent, its employees, servants, agents particularly Autoland Auctioneers from alienating and/or selling motor vehicle registration number KCD 047W. They further sought for an order for the return of the motor vehicle to the 1<sup>st</sup> Respondent. I note that prayers 1 and 2 of the application were granted in the interim.



3. The matter was defended by the Appellant. It is instructive to note that there was no participation by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent both before the Trial Court (other than cross examination by their counsel) and this court. Be that as it may, the matter went through the normal motions and was finally fixed for hearing. Several other applications including one for contempt were filed but from the record, it appears that there was compliance on the earlier orders thereby rendering the application on contempt otiose.
4. The Trial Court having heard the matter delivered its judgement on 12<sup>th</sup> November, 2018 wherein it allowed the 1<sup>st</sup> Respondent's claim with costs to be paid by the Appellant. Dissatisfied with the judgement, the Appellant has preferred the present appeal. The Appellant set out eleven (11) grounds of appeal in urging the appeal to be allowed with costs.
5. Directions were taken that the appeal be canvassed by way of written submissions. Both the Appellant and the 1<sup>st</sup> Respondent duly complied with the court's directions by filing submissions and cited various authorities in support of their rival positions.
6. I have duly considered the said submissions as well as the authorities cited by the parties. For the Appellant it was submitted that the Trial Court erred in law and in fact in allowing the 1<sup>st</sup> Respondent's suit when the evidence before it was clear that the person who sold the motor vehicle had no right to sell the same and that the chattels mortgage and loan agreement between the Appellant and the Borrower restricted the borrower from selling or transferring ownership or possession of the motor vehicle until the loan had been paid in full.
7. For the 1<sup>st</sup> Respondent, it was submitted that the appeal was not merited and it amounted to abuse of court process. It was contended that the Appellant participated and/or authorised the selling of a motor vehicle used as a collateral for a loan. The full purchase price was paid and thus the loan was fully repaid and ownership of the motor vehicle shifted to the 1<sup>st</sup> Respondent.
8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
9. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

10. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

:“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are



that this court must 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 allowances in this respect”

11. The 1<sup>st</sup> Respondent testified as PW1. He stated that he saw an advertisement of sale of motor vehicle registration number KCD 047W on OLX internet platform. The 2<sup>nd</sup> Respondent was the seller. The purchase price offered was Kshs. 840,000/= and that he negotiated the price with the 2<sup>nd</sup> Respondent whom he met at Cooperative Bank, Makupa Branch where he was said to be working. The 2<sup>nd</sup> Respondent told him that the motor vehicle’s log book was being held by the Appellant over a loan.
12. He obtained a search certificate showing the owners of the motor vehicle and he went to the Appellant’s Mombasa branch in the company of the 3<sup>rd</sup> Respondent who was said to be the 2<sup>nd</sup> Respondent’s wife. After his meeting with the Appellant’s official, the Appellant demanded another motor vehicle’s log book in order to release the log book for KCD 047W.
13. He agreed to buy the car at Kshs. 930,000/= which he withdrew the whole amount at his Cooperative Bank account. The sum was given to the 2<sup>nd</sup> Respondent and the same was deposited in a joint account with the 3<sup>rd</sup> Respondent and domiciled at the Appellant’s bank. The Appellant had consented to the deposit and thereafter, a sale agreement was prepared. It was to be executed by the Appellant’s manager, one Isaac Muhoro.
14. When the agreement was presented, Isaac was not in and his deputy Felix Mureithi signed the agreement. He was thereafter given the vehicle’s log book and past transfer as well as an inspection report. The Appellant had promised to deliver the original log book in a week as it was said to be in Nairobi. He used the vehicle for matatu business.
15. The 1<sup>st</sup> Respondent later met Isaac over the log book and he was asked to wait. On 29/9/2016, Isaac told him that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had withdrawn the sale proceeds without paying the Appellant the loan balance. He thus complained to the police and the 2<sup>nd</sup> Respondent’s employer. The 2<sup>nd</sup> Respondent promised to regularize the transaction in the presence of his bosses.
16. On 9/11/2016, he learnt that the motor vehicle had been detained by Isaac and others in Mombasa. He protested to the 2<sup>nd</sup> Respondent’s bosses and the 2<sup>nd</sup> Respondent promised to prevail upon the Appellant to release the motor vehicle. He also obtained records of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ account with the Appellant and it was confirmed that the Appellant had deducted Kshs. 111,494/= from the account after the deposit was made. Later, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents withdrew Kshs. 646,000/=. The statement showing the transactions was signed by Felix Muriithi.
17. He thus instructed his advocates to claim the motor vehicle and an order to that effect was issued. As a result of the detention, he lost business which was earning him Kshs. 5,000/= daily. He concluded that the Appellant allowed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to withdraw the money and later unlawfully took his motor vehicle. He thus prayed for grant of the orders as sought in his plaint.
18. On cross examination by Counsel for the Appellant, he denied seeing any agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the one hand and the Appellant on the other. He denied ever borrowing from the bank. He stated that he had been told that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent had bought the motor vehicle with a loan from the Appellant and that this was known to him before buying the vehicle.
19. When referred to the sale agreement, he confirmed that the Appellant’s name was not in it. He thus stated that he was defrauded by the Appellant through Isaac Kihoro and Felix Muriithi. He confirmed that the money was deposited in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ bank account and Isaac had told him



- that the bank would recover its loan balance from the account thus according to him, the bank was part of the agreement. He concluded that he was not ready to accept refund of the purchase price since he bought the motor vehicle which was in his possession.
20. On cross examination by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, he stated that he had spoken with the Appellant's officials before purchasing the motor vehicle and that the Appellant had consented to the sale of the motor vehicle for Kshs. 930,000/=. On re-examination, he stated that he did not have to know the arrangement between the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as to how the money owed was to be recovered. That marked the close of the 1<sup>st</sup> Respondent's case.
  21. The Appellant called one witness, Susan Kyeti Kyambati. She adopted her statement and produced documents. In brief, she stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents borrowed a loan of Kshs. 3,000,000/= and which loan was never repaid. They held two log books that were collateral for the loan and that a chattels mortgage was signed. They traced and sold one of the motor vehicles and that there was an outstanding loan of Kshs. 1,270,000/=.
  22. On cross examination by the 1<sup>st</sup> Respondent's Counsel, she confirmed that the loan was applied for in the Appellant's Mombasa Branch where she was then based. She confirmed that Isaac Kihoro was the Branch Manager while Felix Muriithi was a Customer Service Officer. She denied the Appellant's participation in the sale of the motor vehicle and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not approach the bank for the sale of the motor vehicle.
  23. When referred to Isaac Kihoro's affidavit, the witness confirmed that indeed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had approached the bank over the motor vehicle. She stated that she was not aware if Felix Muriithi signed the sale agreement. That marked the close of the Appellant's case. As pointed out, though there was participation by their counsel, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not tender any evidence and their case was deemed closed.
  24. The Trial Court having considered the pleadings, evidence on record and the parties' written submissions, it framed four issues for determination. In a well-reasoned judgement delivered on 12/11/2018, the Trial Court delivered its decision entering judgement in favour of the 1<sup>st</sup> Respondent. This is what formed the crust of this appeal.

### **Analysis and Determination**

25. I have considered the pleadings, the evidence tendered, submissions, cited authorities and the law and flowing from them, the following are the issues for determination: -
  - a. Whether the trial court erred in entering judgement in favour of the 1<sup>st</sup> respondent;
  - b. If the answer to (a) above is in the affirmative, what orders ought to flow therefrom;
  - c. What is the order as to costs?
26. The answer to the first issue lies with whether the Appellant authorized and/or had knowledge of the sale of motor vehicle registration number KCD 047W to the 1<sup>st</sup> Respondent. I have looked at the sale agreement and the cash/cheque deposit slip contained at pages 18 and 19 of the record of appeal respectively.
27. I shall first deal with the sale agreement. Clauses 3, 4, 5 and 7 of the sale agreement are instructive. At the foot of the agreement, one Felix Muriithi of identity card number xxxxxxxx signed the agreement. This is the same Felix who was mentioned by the 1<sup>st</sup> Respondent as the person who signed the agreement on behalf of the Branch Manager, Isaac Kihoro.



28. Further, though the Appellant denies knowledge of the sale of the vehicle, at page 52 of the record of appeal, Isaac Kihoro, the Appellant's Branch Manager swore a supporting affidavit which at paragraph 5 stated as follows: - "That subsequently, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants approached the 1<sup>st</sup> Defendant's Officers and intimated that they wanted to dispose of the Motor Vehicle to the Plaintiff so as to discharge the loan." I thus have no hesitation to give effect to clause 7 of the sale agreement which provided inter alia; "That KWFT Bank is aware of this transaction."
29. If indeed the Appellant was forthright in its denial, nothing was easier than to call either Felix Muriithi or Isaac Kihoro as witnesses to either confirm or deny the 1<sup>st</sup> Respondent's assertions. The Appellant's witness confirmed that indeed the two individuals who were adversely mentioned by the 1<sup>st</sup> Respondent were still in its employment.
30. It is trite that when a party fails to call a relevant witness to support its case, then the court is entitled to presume that had that witness been called, his or her testimony might have been adverse to the party calling the said witness. There was no reason offered as to why the two employees who were confirmed to be on the Appellant's employment at the time the case was heard were never called as witnesses.
31. On this ground, I am prepared to hold and I do so hold that had the two witnesses been called, their testimony might have been adverse to the Appellant's case. I dismiss the argument that the actions of the two employees could not bind the Appellant herein as it was alleged to be a corporate body.
32. The two individuals were in their ordinary course of duty and no evidence was tendered to show that they were on frolics of their own when they made representations either expressly or impliedly to the 1<sup>st</sup> Respondent.
33. The standard of proof in civil cases is on a balance of probabilities. Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 while discussing proof on a balance of probabilities had the following to say: -
- "...In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred..."
34. Based on the foregoing, the 1<sup>st</sup> Respondent's testimony was more probable than the Appellant's and the Trial Court was correct in believing the 1<sup>st</sup> Respondent's version of events.
35. Before concluding on the first issue, the Appellant in its submissions stated that the Trial Court erred in failing to find that the sale agreement between the Respondents could not override or oust the terms and conditions of the Loan Agreement between the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
36. I make reference to clause 7 of the sale agreement. The Appellant having been aware of the sale agreement and having raised no issues at the point of execution, cannot be allowed to resile on their representation to the 1<sup>st</sup> Respondent. Section 120 of the *Evidence Act* provides as follows: -
- "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."



37. Lord Denman, CJ in the English case of *Pickard v Sears*, 112 E.R. 179 stated as follows: -

“...The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time...”

38. If indeed the Appellant was not privy to and that they never sanctioned the sale, they should have not allowed the 1<sup>st</sup> Respondent to alter his position to his detriment when he first paid the Appellant a visit to confirm the existence of the loan and if the amount they needed would clear the loan. I thus hold that the Appellant is precluded from raising the issue of Chattels Transfer Act to defeat the 1<sup>st</sup> Respondent’s accrued right in terms of ownership of the motor vehicle.

39. Lastly on this aspect, I note that when the 1<sup>st</sup> Respondent paid the purchase price of Kshs. 930,000/=, it was deposited in the joint account of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and which account was domiciled in the Appellant’s bank and assigned account number xxxxxx. This is the same loan account reflected at pages 21 to 23 of the record of appeal.

40. The Appellant did not offer any explanation as to why they could not deduct the amount due to them if indeed their existed a loan. It is not in dispute that the Appellant deducted a sum of Kshs. 111,494/= from the same account but allowed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to withdraw Kshs. 646,000/=.

41. The court cannot come to the aid of an indolent party. Indeed, equity aids the vigilant and not the indolent. In conclusion thus, I have no hesitation to hold that the Trial Court correctly found the 1<sup>st</sup> Respondent’s claim merited.

42. Having found as above, the second issue has been answered in the negative. Since no appeal was preferred in relation to the award of loss of user, I will refrain from addressing the same.

43. Lastly, on the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The 1<sup>st</sup> Respondent having successfully defended the appeal is entitled to costs of this appeal and I so award.

44. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The appeal lacks merit and is therefore dismissed;
- b. Costs to the 1<sup>st</sup> Respondent to be borne by the Appellant.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

.....

**F. WANGARI**

**JUDGE**

In the presence of:-

M/S Juma Advocate h/b for Mutubia Advocate for the Appellant

Jumbale Advocate for the 1<sup>st</sup> Respondent



N/A for the 2<sup>nd</sup> Respondent

N/A for the 3<sup>rd</sup> Respondent

Barile, Court Assistant

