



**Kamenchu v County Government of Embu (Civil Appeal 7 of 2023)
[2023] KEHC 25593 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 7 OF 2023
LM NJUGUNA, J
NOVEMBER 22, 2023**

BETWEEN

FELIX MWINGIRWA KAMENCHU APPELLANT

AND

COUNTY GOVERNMENT OF EMBU RESPONDENT

(Appeal arising from the decision of Hon. T.K. Kwambai SRM in Chief Magistrate's Court at Embu Civil Case No. E202 of 2021 delivered on 18th January 2023)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 20th February 2023 being dissatisfied with the abovementioned decision, now seeking orders that the judgment of the trial court be set aside and the appeal be allowed with costs. The appeal is premised on the grounds that:
 - a. The trial magistrate erred in fact and law in failing to consider the appellant's list of documents to wit the logbook for his motor vehicle registration Number KCW xxR despite being on record;
 - b. The trial magistrate erred in fact and law by finding that the appellant's failure to produce proof of ownership of his motor vehicle registration number KCW xxxR was a fatal mistake despite being on record, a fact that was not rebutted since the matter was heard ex-parte;
 - c. The trial magistrate erred in law and fact by failing to exercise his discretion judiciously hence denying the appellant his right to a fair trial.
 - d. The trial magistrate erred in law and in fact by dismissing the appellant's case on account of a procedural issue thus occasioning miscarriage of justice; and
 - e. The trial magistrate erred in law and in fact by holding that the appellant did not prove his case to the required standard.



2. Vide the plaint dated 14th December 2021, the appellant sought judgment against the respondent for general damages, special damages and costs of the suit with interest. The particulars are that the officers of the respondent impounded motor vehicle registration number KCW xxxR belonging to the appellant, on allegations that the said motor vehicle had dropped passengers at Embu Post Office. That the respondent's officers took away the ignition keys and declined to give any acknowledgment that the vehicle was being held at the respondent's yard. It was his contention that the motor vehicle had complied with the licensing requirements of the respondent and no charges have since been preferred against the appellant. He claimed damages at the rate of Kshs. 10,000/= per day for loss of user from 12th December 2021 until release.
3. The plaint was filed alongside an interlocutory application dated 14th December 2021 through which the appellant/applicant sought orders that the motor vehicle in question be released to him pending hearing and determination of the main suit. He annexed a copy of the logbook as proof of ownership. The trial court considered the application in totality and granted the orders on 17th December 2021.
4. The main suit was undefended as the respondent did not file either the appearance or statement of defence. The trial court dismissed the suit on grounds that the appellant did not adopt his witness statement as evidence in chief. Further, that the copy of logbook was not formally identified and produced by the appellant in open court regardless of the fact that the same was part of the appellant's list of documents.
5. The court directed the parties to this appeal to file their written submissions. Both of them complied.
6. The appellant argued that the trial court considered the appellant's list of documents at trial and proceeded to issue an order dated 17th December 2021 to the effect that the motor vehicle be released to the appellant. That failure to formally produce the logbook in court ought not to have warranted a dismissal as the same was duly filed thereby forming part of the court's record. He relied on the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* [2015] eKLR. He stated that when the suit was filed, it was accompanied by an interlocutory application which was determined and the court gave orders that the subject motor vehicle be released. That it cannot then be the case that the ownership of the same motor vehicle was not proven.
7. The respondent, in its submissions, stated that during the trial, the appellant only produced his M-pesa statements but the proof of ownership was not formally produced in court according to sections 107 and 109 of the *Evidence Act*. It relied on the cases of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* [2015] eKLR, *Jackson Ndwiga v Elizabeth Thara Ngabu* [2021] eKLR and *East Africa Portland cement, CFC Stanbic Limited & Another v Peter Ividah Muliro* [2019] eKLR, *Socfinaf Company limited v Peter Mbugua Njoki* [2020] eKLR, *Erastus Wade Opande v Kenya Revenue authority & Another*, Kisumu HCCA No.46 of 2007 and the provisions of Order 18 Rule 2(2) of the *Civil Procedure Rules*.
8. It was its argument that the trial court exercised its discretion judiciously. Further reliance was placed on the cases of *Gitau v Kenya Methodist University (KEMU)* [2021] eKLR, *Njoro Kibutiri v Eliud Njau Kibutiri* 1KAR 60 [1983] KLR 62 [1975-1985] EA 220 and *Republic v Commission for University Education & Another ex-parte Genco University* [2017] eKLR. The respondent argued that the trial court did not base its decision on a technicality as provided in the case of *Republic v Kiambu Land Dispute Tribunal & 2 others exparte Wambui Chege Macharia & 2 Others* [2016] eKLR, and added that the appellant herein cannot rely on Article 159(2)(d) of the *Constitution*. That failure to prove ownership of the motor vehicle was fatal to the case as supported by the Ugandan case of *Osapil v*



Kaddy [2000] 1 EALA 187 where the court held that the only prima facie proof of ownership of a motor vehicle is the logbook.

9. On the issue of damages, the respondent stated that the appellant's claim for loss of user, in this case profits, can only be awarded as special damages when strictly pleaded and proved. That even after the damages are pleaded and proven, the court cannot grant such damages when the ownership of the motor vehicle has not been established. It also relied on the cases of *David Bagine v Martin Bundi* [1997] eKLR, *Douglas Odhiambo Apel & Another v Telkom (K) Limited* [2016] eKLR, *Grace Anyona Mbinda v Jubilee Insurance Company Limited* [2021] eKLR and *Ryce Motors Limited & Another v Elias Muroki* [1996] eKLR. It stated that the appellant did not prove that the motor vehicle belonged to him and that it was impounded for five days and urged the court to dismiss the claim for damages. On costs, reliance was placed on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR and section 27 of the *Civil Procedure Act*.
10. From the foregoing, the issues for determination are:
 - a. whether the trial court erred in dismissing the suit for the reason of ownership of the motor vehicle was not proven at the formal proof hearing; and
 - b. whether damages for loss of user should be awarded.
11. The suit proceeded as a formal proof after the court entered interlocutory judgment. At the hearing, the appellant demonstrated the losses that he incurred for the period when the motor vehicle was held at the respondent's yard. In the plaint, he alluded to the fact that he was the owner of the motor vehicle and therefore listed and attached a copy of the logbook in his name among his list of documents. Under Section 8 of the *Traffic Act*, the law provides that a motor vehicle belongs to the person in whose name the vehicle is registered, unless the contrary is proved. In the case of *Osapil v Kaddy* [2000] 1 EALA 187 The Court of Appeal of Uganda held that;

“Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.”
12. A copy of the logbook is proof of ownership and this position is not contested as the suit was undefended. The copy of logbook was annexed to the supporting affidavit to the application accompanying the suit and the trial court considered it when granting the orders for release of the motor vehicle. The question before me is: should the trial court have also considered the same copy of the logbook as annexed to the list of documents accompanying the plaint, in determining the main suit?
13. It is trite that at formal proof, the party must prove the allegations to the required standard. In the case of *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR the court stated:

“In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.”

In the same case, the court relied on the following decisions:

“*Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is



that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

In the case of *Rosaline Mary Kabumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

14. Further, in the case of *Alfred Kioko Muteti v Timothy Mibeso & another* [2015] eKLR, the court held thus:

“Albeit interlocutory judgment in default of appearance and defence was entered against the 1st defendant, and therefore the case proceeded by way of formal proof against him, the burden of proving that the 1st defendant was liable in negligence for the occurrence of the accident still lay on the plaintiff. Pleadings are not evidence and it is not enough to plead particulars of negligence and make no attempt in one’s testimony in court to demonstrate by way of evidence how the accident occurred.....It is trite law that he who alleges must prove and that burden does not shift to the adverse party even if the case proceeds by way of formal proof and or undefended.....”

15. I have perused the record of the trial court as well as the record of appeal and I appreciate the trial magistrate’s findings as based in law and procedure. The functionality of a civil court rests on the “oxygen” principles as laid out under Article 159(2)(d) of the *Constitution* and Section 1A, 1B and 3A of the *Civil Procedure Act*. I do also appreciate the arguments of counsel and I am indeed reminded that the above-cited provisions of the *Constitution* and statute should never be misused as a scapegoat for flaws in litigation, as was stated in the case of *Republic v Kiambu Land Dispute Tribunal & 2 others exparte Wambui Chege Macharia & 2 Others* [2016] eKLR.

16. The trial magistrate referred to the said copy of logbook to issue orders dated 17th December 2021 in favour of the appellant. In my view, the trial court should have considered the same document while determining the main suit, albeit through formal proof. The information on motor vehicle ownership cannot have been good for the interlocutory application that accompanied the suit, but not good enough for the main suit itself. I think that in the spirit of Article 159(2)(d) of the *Constitution*, the trial magistrate had undue regard to procedural technicalities.

17. On the second issue of damages for loss of user, these fall under general damages as stated by the court in the case of *Jackson Mwabili v Peterson Mateli* [2020] eKLR thus:

“... loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user.”



18. Comparatively, in the case of *Team for Kenya National Sports Complex & 2 others v Chabari M'Ingaruni* (Civil Appeal No. 293 of 1998), a claim for loss of use of a vehicle, a matatu, which had apparently been written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts had been produced upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff. Also, in the case of *Peter Njuguna Joseph & Another v Anna Moraa* (Civil Appeal No. 23 of 1991), the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced. (See also *Jebrook Sugarcane Growers Co. Limited v Jackson Chege Busi*, (Civil Appeal No. 10 of 1991).
19. In the present case, it was the appellant's case that the motor vehicle remained impounded as the offices of the respondent for five days. I have perused the M-pesa statement produced and the amounts received from the Sacco staff who usually remit the moneys to the appellant. The amount ranges between Kshs. 8,000/= to Kshs. 10,000/=. Therefore, I shall award a sum of Ksh. 9,500/= for each day that the motor vehicle was out of business as the same was pleaded in the body of the plaint.
20. In the end, I find that the appeal has merit and is hereby allowed with orders as follows:
- a. The judgment of the trial court is hereby set aside;
 - b. The respondent to pay the appellant Kshs. 47,500/= as general damages for loss of user, together with interest at court rates from the date of the judgment of the trial court.
 - c. Each party to bear its own costs of the appeal.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

.....**for the Appellant**

.....**for the Respondent**

