



REPUBLIC OF KENYA



**KENYA LAW**  
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**Brital Shine Investments Limited v Tarus & 2 others (Civil Appeal  
127 of 2019) [2022] KEHC 12217 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 127 OF 2019  
RN NYAKUNDI, J  
JULY 28, 2022**

**BETWEEN**

**BRITAL SHINE INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**RICHARD KIPSOIMO TARUS ..... 1<sup>ST</sup> RESPONDENT**

**KERICH STEPHEN ..... 2<sup>ND</sup> RESPONDENT**

**CRATER AUTOMOBILE (NBI) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the Judgment and decree dated 16th August 2019 in Eldoret Chief Magistrate's Court Case No. 1004 of 2017 before Hon. Emily Kigen Senior Resident Magistrate)*

**RULING**

1. The appeal herein arises from the judgment of Honorable Emily Kigen in Eldoret CMCC No. 1004 of 2017 delivered on 16<sup>th</sup> August 2019. The Appellant was the 1<sup>st</sup> defendant, the 2<sup>nd</sup> respondent had been sued as the 2<sup>nd</sup> defendant, the 2<sup>rd</sup> respondent was joined as a 3<sup>rd</sup> party in the lower court whereas the 1<sup>st</sup> Respondent, Richard Kipsoimo Tarus was the plaintiff. The plaintiff had filed the suit seeking for;
  - a. A declaration that Motor vehicle registration No. KBS 263K, Mitsubishi Lorry Engine No. 6D14A41729 Chassis No. BAVFH215JBSA07253 belongs to the plaintiff.
  - b. Loss of user from the date of purchase till judgment
  - c. Damages and breach of contract
  - d. Costs of the suit and interest
2. The 1<sup>st</sup> defendant now the Appellant filed a defence and a counter claim for orders that; a declaration that the lorry registration no KBS 263K was wrongly and illegally registered in the name of the plaintiff;



- a declaration that the 1<sup>st</sup> defendant is the legal owner of the said lorry and an order for cancellation of lorry registration no. KBS 263K as registered in the name of the plaintiff among other reliefs.
3. The matter proceeded to full trial and thereafter the lower court made a determination vide its judgment delivered on August 16, 2019 made a finding and declared the suit Motor vehicle as belonging to the 2<sup>nd</sup> respondent. Costs were also awarded to the 2<sup>nd</sup> respondent.
  4. Aggrieved by the said judgment and decree, the appellant herein filed this appeal setting out the following grounds of appeal:
    - i. The learned trial magistrate erred in law and fact by deciding against the appellant contrary to the evidence on record.
    - ii. . The learned magistrate erred in law and fact in applying the wrong principles of law in arriving at her judgment.
    - iii. . The learned magistrate erred in law and fact in failing to consider the evidence and submissions by the appellant.
    - iv. The Learned magistrate erred in law and fact in failing to find the appellant had through evidence in court proved his case to the required standards.
    - v. That the learned trial magistrate erred in law and fact in failing to consider the appellants cross and counter claim in her judgment when it was specifically pleaded and evidence tendered.
    - vi. The learned magistrate erred in law and fact in making a wrong finding as to ownership and wrongfully conferring ownership of KBS 263K to the 1<sup>st</sup> respondent.
    - vii. The learned magistrate erred in law and fact in disregarding timelines of the registration of the lorry thereby arriving at a wrong decision.
    - ix. That the learned magistrate erred in fact and in law in failing to give due regard to the expert testimony from the officer from National Transport and Safety Authority that the logbook was unsupported by records in their possession.
    - x. That the learned magistrate erred in law and fact in declaring the respondent(sic) as the rightful owner of the lorry.
    - xi. That the learned magistrate erred in law and fact in awarding costs to the 3<sup>rd</sup> party.
    - xii. That the learned magistrate erred in law and fact in her final decision thereby arriving at an unjust finding thereby occasioning injustice to the Appellant.
  5. The appellant prayed that this appeal be allowed, the judgment of the trial court be set aside and the respondent be condemned to pay costs in the appeal and in the lower court.
  6. At the hearing of this appeal, directions were taken to have the parties file their respective submissions.
  7. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses when they testified as was held in the case of *Selle V Associated Motor Boat Co.* [1968] EA 123 and *Kiruga V Kiruga & Another* [1988] KLR 348.
  8. I have perused at length the evidence before the trial court. The plaintiff testified as PW1 on 21<sup>st</sup> November 2018. He adopted his witness statement recorded on 15<sup>th</sup> September 2017 as his evidence in chief and stated that he bought the subject lorry on 21<sup>st</sup> July 2016 from the 2<sup>nd</sup> defendant, Mr Stephen



Kerich vide a sale agreement dated 21<sup>st</sup> July 2016. He maintained that thereafter both parties signed all the relevant forms and that the 2<sup>nd</sup> defendant surrendered to him the inspection report, the logbook and other relevant documents which were produced as PEx. 2. It was the plaintiff's evidence that the 2<sup>nd</sup> defendant informed him that prior to selling him the lorry to him, the said lorry was doing transport business for diamond company where the 2<sup>nd</sup> defendant was getting Kshs. 285,000 per month. The said parties then agreed that the lorry could continue with the transport business to Diamond Company although the money would be transferred to the 2<sup>nd</sup> defendant's account where he would forward Ksh 270,000 per month to the plaintiff and the 2<sup>nd</sup> defendant would retain Kshs. 15,000 as commission. According to the plaintiff, the 2<sup>nd</sup> defendant never remitted any monies to his account as agreed and that he went ahead and transferred the said lorry to his name and was issued with a logbook.

9. In their defence, a total of five witnesses testified in support of the defence case. The 1<sup>st</sup> defendant called Patrick Shamalla, DW1, who introduced himself as the director of the 1<sup>st</sup> defendant. He stated that he bought the subject Motor-vehicle from the 3<sup>rd</sup> party sometimes in June 2012 and was the first registered owner. It was his testimony that he collected the said Motor vehicle on 22/6/2012. DW1 contended that he was to receive the logbook through registered mail after the 3<sup>rd</sup> defendant had done registration on their behalf. It was his evidence that the said logbook could not be traced and that's when they wrote a letter to the registra of Motor Vehicles requesting for a duplicate copy of the logbook on 11<sup>th</sup> July 2013. According to DW1, he had always had possession of the lorry and was earning Kshs 80,000 per week from the date he purchased the same until 2016 when the lorry had gone to Mombasa to collect rice and he established that there was similar lorry with the same registration number. According to DW1, he followed up the matter and even sent flying squad to inspect the other vehicle but no legal step was taken and later on his lorry was impounded by the police at the instance of the plaintiff on allegation of having been registered twice.
10. DW2 was Bonface Rapando Wambani the 1<sup>st</sup> defendant's transport manager. He stated that the subject motor vehicle was used by the 1<sup>st</sup> defendant for transport business earning Kshs 80,000 per week and that his duties entailed supervision of the transport department which included ensuring that all vehicles belonging to the 1<sup>st</sup> defendant were NTSA compliant. On cross examination by Counsel Isiaho, he conceded that the subject motor vehicle had no logbook as he had never followed up its issuance since 2012 when it was purchased.
11. The 2<sup>nd</sup> defendant testified as DW3. He adopted his statement recorded on 6<sup>th</sup> November 2017 as his evidence in chief. He told the court that he bought the subject motor vehicle in 2016 at a car bazaar in Nairobi from one Edward Murui Gathu then sold it legally to the plaintiff vide the agreement dated 27<sup>th</sup> July 2016. He maintained that after the plaintiff completed making the payments, DW3 transferred the vehicle to the plaintiff. He maintained that he was in possession of the said motor vehicle after he bought the same. On cross examination by Counsel Isiaho, he stated that the plaintiff inspected the subject vehicle in his home before purchasing the same and that further, he surrendered the relevant documents to the plaintiff. He told the court that he has never been arrested over the matter nor been contacted to clarify on the issue of double registration. On being cross examined by counsel Maritim, he stated that he sold motor vehicle registration number KBS 263K to the plaintiff of Chasis No. BABFH215JBSA07253 to the plaintiff. Upon being cross examined by Counsel Mawenzi, he denied having any relation with the interested party nor ever doing business together.
12. Mr Joel Ihugu Karanja the manager of the interested party 1<sup>st</sup> defendant testified as DW4. It was his testimony that the 3<sup>rd</sup> party sold the subject motor vehicle to the 1<sup>st</sup> defendant in June 2012. He gave a chronology of how vehicles are purchased from them. That an invoice is issued to a potential buyer and after payment of the purchase price registration is initiated where the buyer is then handed over all the



- relevant documents and that the customer follows up the issue of log book issuance personally. DW4 distanced himself with the 1<sup>st</sup> defendant's position that the 3<sup>rd</sup> party was to facilitate issuance and delivery of the said logbook to it and maintained that they don't receive logbooks on behalf of the clients. On cross examination, he contended that the transaction with their clients ends at the release of motor vehicles and they would not know if a client decides to sell to a third party or otherwise
13. DW5 was Duncan David Odekeyo an officer from National Transport System Authority records section. He stated that the subject motor vehicle from the original file was imported by the 1<sup>st</sup> defendant who have been the owner to date. In cross examination, DW5 confirmed that the logbook at the time he gave evidence was duly registered in the name of the plaintiff.
  14. Parties then closed their cases and the court gave directions for parties to file written submissions.
  15. In his written submissions in the lower court dated 22/7/2019, the 1<sup>st</sup> Respondent reiterated his claim as pleaded and testified on and urged the trial court to grant the prayers sought. He relied on the case of *Thuranira Karauri vs Agnes Nchebe* (1995-1998)IEA 57 where the court held that a party must place before the Judge a Certificate of search signed by the Registrar showing the registered owner of the lorry.
  16. On the part of the appellant, its counsel filed submissions on 3<sup>rd</sup> July its pleadings and evidence adduced by DW1 Patrick Shamalla and Boniface Muyendo who testified as DW2. The appellant submitted that at no time did they ever sell their lorry and that from the evidence of DW5, the officer from the National Transport and Safety Authority, there are no records to support the certificate of registration bearing the name of the plaintiff. It was submitted that from the said evidence, DW5 maintained that from the records, the motor vehicle belonged to the 1<sup>st</sup> defendant.
  17. The 2<sup>nd</sup> defendant filed his submissions on 23<sup>rd</sup> July 2019 reiterating his evidence in court.
  18. In her judgment delivered on 16<sup>th</sup> August 2019, the trial Magistrate Hon. Kigen found that the plaintiff had proved that he is the legal owner of the motor vehicle. The learned trial magistrate thus held that the plaintiff was thus entitled to the prayers sought.
  19. It is that judgment which the appellant is aggrieved by and which is the basis of this appeal.

### **The Appeal**

20. On February 15, 2021, the court directed that the appeal be canvassed by way of written submissions.
21. The Appellant filed its submissions dated February 11, 2022 on February 15, 2022. I have perused the record and I seem not to find submissions for the respondents.
22. The Appellant in its submissions based its argument on the question of who is the legal owner of the vehicle registration no. KBS 263K the subject motor vehicle. It argued that the burden of proof was on the appellant to prove that the ownership of the subject lorry which he discharged his responsibility. It was submitted that from the corroboration of evidence tendered before the trial court, the testimony of DW1, DW3 and DW4 was sufficient to confirm ownership of the subject motor vehicle as being the 1<sup>st</sup> defendant's. Counsel for the appellant cited the case of *Ezra Natubwa Nambuch vs Women Finance Trust*(2017)eklr where the court held that there are circumstances or situations where the registered owner may not be the owner. Reliance was also placed on the case of *Securicor Kenya Ltd V Kyumba Holdings* Civil Appeal No. 73 of 2002 where it was held,

“ Our holding finds support in the decision in *Osapil Vs Kaddy* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only



prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

23. In buttressing the position that the appellant had discharged the burden of proof as the evidence adduced on its behalf corroborated that it was the owner of the subject lorry, counsel cited section 107(1) of the Evidence Act which provides that whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
24. The court was then urged to set aside the judgment of the trial court and allow the appeal as prayed.

### **Determination**

25. I have considered the grounds of Appeal, the evidence and submissions presented by both parties before the trial court and the written submissions on record canvassing this appeal and I find that the only issue for determination in this appeal is the ownership of Motor Vehicle registration No KBS 263K Mitsubishi Lorry, Engine 6D14A41729 Chasis no. BAVFH215JBSA07253.
26. The appellant in its memorandum of appeal faulted the trial magistrate for making a finding that the 1<sup>st</sup> respondent was the legal owner of the subject motor vehicle despite there being overwhelming evidence to the contrary. The appellant argued that he bought the subject motor vehicle from the third respondent and was issued with the necessary documentation upon paying the purchase price.
27. On the other hand, the 1<sup>st</sup> respondent maintained he is the legal owner of the subject motor vehicle having purchased the same for consideration from the 2<sup>nd</sup> respondent and transfer was effected thereafter.
28. The question that I must resolve is who is the real legal owner of subject motor vehicle.
29. It is not disputed that the 1<sup>st</sup> respondent is registered as the legal owner of the subject Motor-vehicle as evidenced by the logbook that was produced in the bundle of documents as PEXB 2.
30. I have perused the said bundle and particularly the logbook with the name of the 2<sup>nd</sup> respondent and I am convinced that at some point there was transfer of ownership of the subject motor vehicle from the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent going by the logbook that was produced in the same bundle that was registered prior in the name of the 2<sup>nd</sup> defendant.
31. In trying to unravel the fiasco about this issue, I have perused all the documents produced by the rival parties in this suit and I have come to the conclusion that either the 2<sup>nd</sup> respondent or the Appellant was being very economical with the truth.
32. From the evidence tendered in court, it was not clear whether there were two different vehicles with same registration number being KBS 263K.
33. DW1 while giving his testimony mentioned that sometimes in 2016 when their lorry was transporting rice to Mombasa, he was called by his supervisor and informed that there was a lorry with a similar registration and that he even sent flying squad to investigate the matter and no step was taken as everything went back to normal until his lorry was impounded by police officers.
34. This then begs the question, how was it possible for the appellant to be comfortable with the fact that there was a similar car with same registration number as his lorry and not take any legal action so as to safeguard his interests?



35. DW5 the officer from National Transport System Authority did not shed more light on the issue of ownership of the subject motor vehicle as would have been expected. It was incumbent on him to explain the issue of double registration as alleged but he failed to discharge that duty.
36. The Traffic Act under section 8 provides that,  
“If the licensing officer has reason to believe that a motor vehicle or trailer in respect of which registration has been applied for is or may be of a type not previously registered under this Part, or is of a type so registered but constructed according to different specifications, he may refuse to register the vehicle or trailer until plans or specifications thereof have been submitted to and approved by the Authority.”
37. In the case of Jared Magwaro Bundi & Another v Primarosa Flowers Limited [2018] Eklr, the Court of Appeal stated thus-  
“.. It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered”.
38. From the foregoing, it evident that a logbook is always considered as proof of ownership of a motor vehicle unless proved otherwise.
39. It is important to appreciate that the subject motor vehicle was registered in the name of the 1<sup>st</sup> respondent as evidenced by the logbook that was produced as P. Exb 2.
40. It therefore follows that from the evidence tendered in court and the exhibits particularly the logbook registered in the name of the 1<sup>st</sup> respondent produced as P. Exb 2, the 1<sup>st</sup> respondent did indeed prove his case on a balance of probabilities and as such this court cannot interfere with the findings of the trial court and as such the appeal is thus dismissed.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**

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**In the presence of:**

1. Mr Maritim for the appellant

