REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Appeal 193 of 2008

KENYA REVENUE AUTHORITY……..APPELLANT
VERSUS
PETER OBARA ONDARI……...…RESPONDENT
JUDGMENT

This appeal arises from the judgment and decree of **Mr. D. Kimei**, the Senior Resident Magistrate at Rongo. On 25th July, 2007, the respondent then as the plaintiff filed civil suit number 101 of 2007 in the Senior Resident Magistrates court at Rongo against the appellant then as the defendant praying for:-

"a) The release of motor vehicle registration No. KAG 620Y.

b) A permanent injunction to restrain the defendant, its employees, servants and or agents from disposing off the motor vehicle Registration No. KAG 630Y.

c) A declaration that the said seizure was/is illegal, wrongful unlawful and void abinitio.
d) General damages
e) Costs of the suit
f) Interest at court rates as from the date of filing in this suit…..."

The suit was informed by the following facts as can be gathered from the plaint filed through **Messrs Omwenga & Company Advocates**. Apparently, the respondent was the registered owner and entitled to the possession of motor vehicle registration number **KAG 620Y.** However on 2nd May, 2007 the appellant through its employees, servants and or agents unlawfully seized the said` motor vehicle together with the original registration documents for no apparent reason(s). The respondent's case was that the said seizure was wrong, illegal, unlawful and without any basis at all in law. Being a prominent farmer the aforesaid acts of the appellant greatly damaged his credit and reputation as it portrayed him as a person who could not pay taxes hence lowered his reputation in the mind of ordinary right thinking members of the public. He therefore suffered loss and damage, hence the suit.

Through **Twahir Alwi Mohammed**, **Esq**, learned counsel, the appellant filed a defence. In the main, the appellant claimed that it had lawfully seized the subject motor vehicle due to the fact of the presence of another motor vehicle with similar registration numbers and whose owner had also applied for a duplicate registration book. It further claimed that the respondent had obtained a duplicate registration book for his said motor vehicle fraudulently and gave the particulars of fraud thereof. In the premises the seizure was lawful as it is allowed to do so for uncustomed goods under the East African community customs management Act, 2004. It denied that the respondent in the circumstances suffered any loss or damage. Finally it averred that an injunction cannot issue against it pursuant to the provisions

of Section 16 of the Government Proceedings Act as well as Section 3(2)(a) of the Kenya Revenue Authority Act.

On 18th October, 2007 the hearing of the suit commenced before the learned magistrate. The respondent testified that he was the registered owner of the subject motor vehicle which he bought in April, 2006 from one, **Samson Kariu Waweru**. Initially he had intended to buy from the same person motor vehicle registration number **KAA 436C** which he had initially fully paid for. However **Waweru's** wife objected to the transaction forcing **Waweru** to look for alternative motor vehicle. That is how he came by the instant motor vehicle. However since the money he had paid for the initial motor vehicle was more than the purchase price for the instant motor vehicle, they agreed to keep the motor vehicle at the police station as **Waweru** went about looking for the difference to reimburse the respondent. **Waweru** however never surfaced and after six months, the respondent went to court and obtained an order to take possession of the motor vehicle. Three months after he took possession thereof, appellant's officers came for the same and ordered him to produce documents in respect thereof. He did so and on 2nd November, 2006 he was issued with a log book to the vehicle in his name.

On 2nd May, 2007, the appellant's officers again came for the vehicle claiming that there was another motor vehicle with similar registration number and seized it. They duly issued him with a seizure notice. Despite repeated demands for the release of the motor vehicle, the appellant had since refused thereby precipitating this court action.

Cross-examined by **Mr. Mohammed**, learned counsel for the appellant, the respondent stated that he had paid Kshs.35,000/- for the purchase of motor vehicle **KAA 436C** but the seller's wife objected to the transaction. It was then that he was offered the subject motor vehicle as an alternative. It had a logbook. Initially, the vehicle had been impounded on the grounds that the logbook was fake. It was thereafter that he was issued with a new logbook. He conceded that he went to Kisumu and saw a vehicle with similar registration numbers. He did not know that his vehicle had been stolen. The respondent then closed his case and thereafter it was set down for defence hearing.

However on 20th November, 2007 parties entered consent order re-opening the respondent's case. In his renewed evidence the respondent merely produced documents to show that he had paid Kshs.6500/- to the appellants and also the options given to him by the appellant if he was to secure the release of his motor vehicle. The appellant had insisted that the respondent either sues it or agree to its demands. He had no intention however of suing the appellant since all he was interested in was to get his motor vehicle back. As far as he was concerned he paid kshs.6,500/- to cater for storage charges and not as a fine due to the appellant.

On its part, the appellant called a total of seven witnesses. **John Owiti Odiah** testified first. He was an employee of the appellant in the road transport department. It was his evidence that in early September, 2006, one **Benson Mogeni** presented to him a logbook and an application form for purposes of obtaining A TLB Licence for motor vehicle registration number KAG 620y. The logbook looked suspicious. It differed in details from what they had in their systems. The seal, print, fonts and material used as well as signatures thereon were suspect. He then reported the matter to the police who commenced investigations. In April, 2007, one, **Makori** came to him with a payment receipt for transfer of ownership of the subject motor vehicle. He handed over that person to the police for further investigations. After, about 6 months, his boss **Francis Kamau** asked him to identify two vehicles he had in his custody. They were to vehicles with similar registration numbers, KAG 620Y. He checked the number plates and found one had stickers but had no numbers and this was the vehicle that the respondent claimed to be his. The other vehicle belonged to one, **Chiluka** and had stickers and numbers which showed that they had been issued by the appellant. It was his evidence that it was not possible for two vehicles to share the same registration numbers.

Cross-examined by **Mr. Omwenga**, learned counsel for the respondent he maintained that the respondent's documents were not properly obtained from the appellant.

The 2nd witness called by the appellant was Chief Inspector, **Francis Kamau.** He recalled that in September, 2006, DW1 came with one, **Benson Mogeni** to his office with a logbook he suspected not to be genuine. After interrogating **Mogeni,** he led him to the respondent. They found him with the subject motor vehicle. The respondent was ordered to avail proper documents in support of his ownership of the vehicle but he did not do so immediately. He then ordered for the detention of the motor vehicle at Awendo. In or about November, 2006, the respondent brought a duplicate logbook for the vehicle and was found to be genuine. The vehicle was accordingly released to him. In April, 2007 DW1, again came to his office in the company of another person. He had in possession a receipt issued by the appellant for transfer of the vehicle. He interrogated the person who claimed that the owner of the vehicle was **Stephen Chiluka.** He ordered **Chiluka** to produce the vehicle. From the records the chassis and engine number tallied and the owner was Fabritex of Mombasa as at 13th April, 2007. It seems a transfer took place around this time. The two vehicles were later taken to Kisumu. Scenes of crime personnel were called in and they found that the respondent's vehicle numbers had been interfered with. Following further investigations he issued a seizure notice of the respondent's vehicle. By then he had confirmed that proper procedure was not followed in the obtaining of the duplicate logbook and it was irregularly procured.

Cross-examined he confirmed that the two vehicles were of the same make. Investigations had revealed that the respondent's claim to ownership of the motor vehicle was not genuine. He confirmed that the respondent had paid some monies before the vehicle was released to him. The payment was in respect of warehouse charges and not penalty. He maintained that the respondent's claim to the vehicle was fraudulent.

Kenneth Nyamichoba Moenga worked for the appellant in the records section. He had records for the vehicle. The current owner was **Peter Ondar**i. However there was a caveat to the effect that there should be no dealings pending investigations. According to the records the first owner of the vehicle was **Rajem H. Maide** followed by **Fabritex Ltd** of Mombasa.

Under cross-examination he hesitated that the transfer section indicates the respondent as the registered owner of the vehicle. It is however impossible for two different owners to be registered over the same motor vehicle. He confirmed that he was the one who had imposed the caveat. The caveat was registered due to investigations to establish the real owner of the motor vehicle.

Rameshchandrra Meaji of **Fabrietex** testified that he previously owned the motor vehicle. He later traded in for another motor vehicle from **Auto Selection Motors**. He was the 2nd owner of the motor vehicle. Auto Selection Motors later sold it to a **Mr. Katana**. Having seen the photographs taken of the vehicle, he denied that it was the vehicle he had sold to **Auto Selection motors**. The logbook was genuine though.

DW5, **Ismael Mohammed Farah** worked for the appellant and his duties included approvals and inspectorate. He had seen a logbook belonging to the vehicle which appeared fake. He rejected the application for transfer and referred the case to the police for investigation. Though eventually, the respondent obtained a duplicate logbook the proper procedure was not followed.

Cross-examined, he conceded that the duplicate logbook emanated from the appellant's offices and was genuine but it was obtained fraudulently. The respondent was the third owner. They were unable to release the vehicle to the respondent because of irregularities in the transaction.

Daniel Ngugi Mwenje testified as DW6. His evidence was to the effect that he bought the vehicle for kshs. 300,000/= through his brother, **Andrew Kenda of Mtwapa**. The vehicle was then delivered to him. He was given a photocopy of logbook from **Fabritex** who had sold the vehicle to **Jothan Katana** who in turn sold it to him. On 14th June, 2008 officers from the appellant visited him and demanded the vehicle. The same was photographed. He genuinely believed that he owned the motor vehicle and did not know how the other vehicle came into existence.

The last witness called by the appellant was, **Stepten Asena Asiachi,** Senior Assistant Commissioner in charge of records, road transport department of the appellant. He was aware that the first owner of the motor vehicle was **Fabritex**. Currently, the owner was the respondent. The respondent came into the picture through an application for a duplicate logbook. This could be done if original logbook got lost or was defaced or through police auctions or court orders. The respondent sought and obtained a duplicate

logbook through a court order. The duplicate logbook issued to the respondent was genuine but the procedure followed was not proper. It is not possible for three motor vehicles to have one registration number.
Cross-examined, he stated that the respondent came with a court order and an application form for a duplicate logbook. The application was duly considered and approved, thereafter a duplicate logbook was issued on 31st October, 2006. However Katana's application was received earlier than the respondent. Proper procedure was not followed with regard to the approvals. He had seen the two vehicles but not the third one which was in Nanyuki. It was not possible for him to vouch for the genuineness of each of the vehicles.

The learned magistrate having carefully considered the pleadings, the evidence led by both the respondent and the appellant, the written submissions filed by the respective parties came to the conclusion that the respondent had proved his case on the balance of probabilities and granted the prayers sought in the plaint.

The appellant was aggrieved by the judgment and decree. Hence it preferred this appeal. It faulted the learned magistrates decision on 20 grounds to wit;
"1. The learned magistrate erred in fact and in law in failing to

appreciate that so long as the Appellant is performing the functions stated in Section 5 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya, the proviso in Section 3(2)(a) of the Kenya Revenue Authority Act, makes it mandatory that a Notice of Intention to sue must be issued to the Attorney General before any suit is filed against the Appellant.

2. The learned magistrate erred in fact and in law by awarding damages to the Respondent which were not proved contrary to the settled court practice.

3. The learned magistrate erred in fact and in law by holding that the documents of ownership of the motor vehicle registration number KAG 620Y were not produced by the Appellant.

4. The learned magistrate erred in fact and in law by holding that the vehicle was not taken over by the complainant.
5. The learned magistrate erred in fact and in law by holding that the appellant failed to seize the third vehicle.

6. The learned magistrate erred in fact and in law by holding that the appellant did not dispatch its security officers to check the engine and chassis number of the third vehicle.

7. The learned magistrate erred in fact and in law by holding that the appellant failed to establish which of the three vehicles the genuine one is.

8. The learned magistrate erred in fact and in law by holding that the certificate of search confirms beyond doubt that the respondent is the registered KAG 620Y.

9. The learned magistrate erred in fact and in law by holding that the appellant only produced documents in respect of Stephen Chiluka Ambulwa's vehicle but did not produce those of Daniel Ngugi Mwenje.

10. The learned magistrate erred in fact and in law by holding that the appellant failed to put in a counterclaim to the effect that the respondent is not entitled to the vehicle.
11. The learned magistrate erred in fact and in law by
failing to consider the appellant's evidence that the respondent's vehicle is not the proper one which was initially registered.

12. The learned magistrate erred in fact and in law by failing to consider the appellant's evidence that the respondent's vehicle was initially operating on a fake logbook.

13. The learned magistrate erred in fact and in law by failing to consider the appellant's evidence that the respondent's vehicle had its chassis numbers tampered with.

14. The learned magistrate erred in fact and in law by failing to consider the appellant's evidence that the manner in which the respondent acquired the duplicate logbook was not procedural.

15. The learned magistrate erred in fact and in law by failing to consider the appellant's evidence of the various change of ownership of the vehicle.

16. The learned magistrate erred in fact in law by failing to consider the appellant's evidence that there is a transfer of ownership of the vehicle pending and there is a communication to that effect.

17. The learned magistrate erred in fact and in law by failing to consider that certificate of ownership and possession of the logbook is not conclusive evidence of actual ownership of the vehicle KAG 620Y as section 8 of the Traffic Act provides that the contrary can be proved.

18. The learned magistrate erred in fact and in law by failing to consider that no ownership was passed to the respondent in exchange of motor vehicle KAA 436C to KAG 620Y.

19. The learned magistrate erred in fact and in law by failing to consider the appellant's arguments and supported by an authority that the respondent's action was a nullity ab initio.

20. The learned magistrate erred in fact and in law by relying mainly on the submission of the respondent and not on the entire evidence in the suit."

When the appeal came up for directions **Mr. Twahir**, learned counsel for the appellant and **Mr. Gichana** learned counsel for the respondent agreed to canvass it by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside authorities cited.

It is settled law that as this is a first appeal, this court is under a duty to re-appraise, reconsider and re-evaluate the evidence and record and to draw its own conclusions always bearing in mind however, and giving due allowance for it, that the trial court had the added advantage of seeing and hearing the witnesses testify before it.

The issues for determination before the trial court was fairly simple and straight forward:

- ***Whether in law the respondent was the registered owner and entitled to the possession of the motor vehicle.***
- ***Whether appellant illegally and unlawfully seized and detained the vehicle.***
- ***Whether the respondent was entitled to damages if at all***
- ***Quantum***
- ***Costs***

Before I go in to details with regard to the above issues, I would wish to deal with the issue which has been raised in this appeal for the 1st time. This is the fact that the respondent before he filed this suit did not issue the appellant with the mandatory statutory notice of intention to sue pursuant to the provisions of section 13A(1) of the Government proceedings Act. It is the case of the appellant that its an agent of Government in the collection and receipt of all revenues, Pursuant to section 5(1) of the Kenya Revenue Act. Much as the appellant is a body corporate with perpetual succession capable of suing and being sued, nonetheless there is a provision to this effect ***"……..provided that any legal proceedings against the authority arising from the performance of the functions or exercise of any of the powers of the Authority Under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of Government proceedings Act…."*** It is trite law that no proceedings against the Government can lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings (see section 13A(1) of Government

proceedings Act). It is the appellant's contention that no such notice was issued and therefore the suit was incompetent and fatally defective.

My take on this submission is that the appellant never made it an issue during the trial. It never raised it in its defence nor in its evidence. The issue was however obliquely raised in cross-examination of the respondent. His response was that such Notice was issued and served by his lawyers. Indeed the record shows that a statutory Notice dated 19th June, 2007 was issued. Accordingly nothing much turns on this submission. Even if it had not, I would still have rejected that submission on the ground that a party to an appeal is not allowed to raise fresh issues or grounds which were not canvassed during the trial in the subordinate court.

Next, the learned magistrate in finding for the respondent held thus ***"……..For the foregoing observations I come to the finding that the plaintiff has established his case on balance of probabilities. The defendant has not shaken his evidence. Consequently I grant the prayers sought in the plaint dated 25.7.2007…."*** The respondent had in his plaint sought several prayers that I have set out at the beginning of this judgment. Of particular interest however are the prayers for the release of the motor vehicle as well as permanent injuction against the defendant. The appellant was performing its function under section 5 of the Kenya Revenue Authority Act when it seized the motor. It was sued as a result of the said act. Accordingly those proceedings are a kin to legal proceedings against the Government. If that is the case can an injunction whether permanent or mandatory issue against the appellant as sought in the plaint. I do not have a ready answer but I think the issue is still debatable and far from settled. However, I know as a fact that an injunction of whatever description can never issue against the Government.

The respondent too had asked for general damages. Now if learned trial magistrate issues a blanket order that he had granted the prayers as sought in the plaint, how is the respondent to know what damages were awarded to him. The respondent thus has a decree that awarded him damages, which damages were never assessed. How then is he expected to execute such a decree. How is the appellant to know the damages awarded against it. In any event I do not think that there was credible evidence that would have assisted the court in arriving at the appropriate quantum of damages. For instance, the respondent did not say to what use he had intended to put the vehicle to. All that the respondent said in this regard was that he had suffered great loss. He never went into the details of such loss and damage. That being the case, the trial court had no basis upon which it would have awarded general damages. I am not surprised therefore that the court resorted to an ambiguous order aforesaid on this aspect of the matter.

Was the respondent the registered proprietor of the vehicle? On the face of it, the answer should be obvious – Yes. He produced during the trial a duplicate log book and a copy of official search issued to him by the appellant. On the other hand, the appellant was of the view that those documents were not procedurally acquired. As far as they were concerned those documents were fake. Infact according to the evidence of DW2, the respondent's vehicle engine and chassis numbers had been interfered with. The two vehicles were inspected by scenes of crime personnel both physically and chemically. The outcome of the examination was that the other motor vehicle was genuine and not the respondent's. The manner by which the respondent came by the said motor vehicle is suspicious also. According to his evidence he had initially intended to buy from **Samson Kariu Waweru**, motor vehicle registration number KAA 436C, Toyota pick up. Apparently Mr. **Waweru's** wife objected to the transaction forcing him to source from elsewhere the instant vehicle. The respondent felt that the amount he had paid for the previous motor vehicle was more and sought a refund of the difference. As **Mr. Waweru** could not readily pay the difference, they agreed to have the vehicle kept at the police station. However, **Mr. Waweru** was never to be seen again. Now if indeed the respondent bought the vehicle in the circumstances outlined above, where is the sale agreement. Further, if the amount he had paid for the previous motor vehicle was more than the vehicle he was now being offered, how came he never got the logbook for this vehicle upfront. After all, he had already paid **Waweru**, the amount in excess of the purchase price and all he was looking forward to was a refund. After **Mr. Waweru** disappeared there is no evidence that the respondent ever complained to the police so that the police could invoke our criminal justice system to come to his aid. It would appear again that the respondent later obtained a duplicate logbook for the motor vehicle through falsehood and misrepresentation. In his application before the resident magistrate's court at

Rongo in Misc. Civil Application number 15 of 2006, the respondent sought for the release of the motor vehicle as it was being vandalized. The application was served one one, **Samson Karingi Waweru** and **Eucabeth Kemunto Meroka,** perhaps his wife. If the respondent traced and served the two going by the affidavit of service on record, how come he never insisted on being given the original logbook by the same. The respondent then mischievously asked the court to order the vehicle released to him together with the logbook yet he knew that there was no such logbook. Using the said order he proceeded to the appellant's offices and managed to obtain a duplicate logbook on the basis of the same court order as well as on the allegation that original logbook got lost. He knew that all these allegations were false. The learned magistrates rested his decision on the fact that the respondent had been issued with a log book which had been confirmed to be genuine. However the certificate of ownership and possession of the logbook is not conclusive evidence in law of actual ownership of a motor vehicle. After all section 8 of the Traffic Act specifically 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".***

As correctly submitted by **Mr. Twahir**, though it was confirmed that the respondent appears as the registered owner, it was proved otherwise that the vehicle he owns was not the one which was initially registered. The proper vehicle initially registered is the one now currently being owned by PW6. The evidence shows that infact there are three vehicles with similar registration numbers. On his own, the magistrate was not in position to state categorically who genuinely owned the vehicle. He thus had no choice in the matter but to rely on the evidence of the appellant and his witnesses. These witnesses had nothing to gain by giving any evidence against the respondent. The net effect of the learned magistrate judgment is to have on our roads three vehicles with similar registration numbers. I do not think that it would be in the interest of the public to have on our roads more than one vehicle with the same registration number. For all the foregoing reasons I find that the respondent was not legally and in law the registered owner and entitled to the possession of the motor vehicle. The respondent acquired the registration through falsehood and misrepresentation and therefore was not a genuine owner of the motor vehicle. The evidence of DW5 was to the effect that the right procedure was not followed in obtaining the duplicate logbook for the motor vehicle. That evidence was hardly challenged. In my view therefore the trial magistrate erred in holding that the respondent was the owner of the vehicle on the basis of the duplicate logbook.

Did the appellant illegally and unlawfully seize and detain the motor vehicle? I do not think so. DW1 testified that from his records he detected the following anomalies with regard to the motor vehicle; the serial number of the logbook presented by the respondent differed with serial number in their records with regard to the motor vehicle, the stamps appearing in the logbook are not the ones used by the appellant, the quality of the paper was substandard and signatures of the certifying officers were not proper. It was on the foregoing basis that DW2 came in the picture and caused the vehicle to be impounded. Upto this stage the appellant was justified in impounding the vehicle for want of proper documentation. This position was not discounted by the respondent. Under section 210 and 213(1) of the East African community customs management Act the appellant is empowered to seize any goods which it believes that duty on the same has not been paid. According to the appellant if the vehicle is found not to have proper documents, doubts as to whether duty was paid for and was properly registered arise. When the vehicle was impounded and subjected to physical and chemical analysis, the scene of crime report indicates that the two vehicle allegedly belonging to the respondent and one, **Chiluka**, had similar chassis and engine numbers! However, the report for the respondent's vehicle went further and indicated that its chassis number had been tampered with. In the premises, I am satisfied unlike the learned magistrate that the appellant was justified in law in impounding and detaining the motor vehicle.

Was the respondent entitled to damages? I do not think so. To have granted the respondent damages as prayed in the plaint, the learned magistrate gravely erred. He allowed the respondent to benefit from his own mischief and illegality. It is not the function of the court to sunction illegalities. After his vehicle was impounded, the respondent applied for the duplicate logbook. He sought the logbook aforesaid on the basis that the original logbook had been lost knowing that, that was a lie. Thus he did not come clean on the issue. Further, the respondent in his application used an order of the court. The order compelled the OCS Rongo Police Station to ensure that the vehicle was released to the respondent. In his application for a duplicate logbook, the respondent indicated ***"…….As per the attached court order ……".*** That court

order was not meant for the appellant to issue the respondent with a duplicate logbook and he knew it. As I have already stated elsewhere in this judgment, even if the respondent had proved that he was genuinely entitled to damages, he led no evidence in support of that prayer. That being my view of the matter, the issue of quantum of damages does not therefore arise.

The respondent has of course raised the issue of fraud, he did not specifically plead nor prove it. It is settled law that allegations of fraud must be specifically pleaded and strictly proved. See for instance ***Virani t/a Kisumu Beach Resort V hoenix of East Africa (2004) KLR 269. Assurance Co Ltd, Koinange & 13 others V Koinange (1986) KLR 23***. The respondent also took the view that neither the appellant or any other party filed a counterclaim claiming ownership of the vehicle. Hence the court would not have bestowed ownership of a party who had not sought it. This is all fine. However in paragraph 4 of the Defence, the appellant had categorically pleaded fraud and gone further to give the particulars thereof. The appellant, did in my view prove the alleged fraudulent acts on the part of the respondent. How about a counterclaim. There was no need for such. Afterall the appellant was not claiming ownership of the same. The appellant's role was limited to establishing the genuiness of the motor vehicle. Once it established that the presence of the other two vehicles bearing similar registration numbers and having investigated and found that the respondent's vehicle was not genuine, it was bound to impound it, end of story.

In the upshot, I allow the appeal, and set aside the judgment and decree of the subordinate court and substitute therefor an order dismissing the suit with costs. The appellant shall have the costs of this appeal too.

Judgment Dated, Signed and **Delivered** at Kisii this 31st day of May, 2010.

ASIKE-MAKHANDIA

JUDGE