



**Diamond Trust Bank Kenya Ltd v Warukira (Civil Appeal
1 of 2022) [2025] KEHC 3356 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 1 OF 2022
BK NJOROGE, J
MARCH 18, 2025**

BETWEEN

DIAMOND TRUST BANK KENYA LTD APPELLANT

AND

GEORGE MWIHIA WARUKIRA RESPONDENT

JUDGMENT

1. This is a judgement arising out of the decision of Hon. R.A. Ogango (CM) delivered on 27/4/2016 in Kiambu CMCC No. 209 of 2016.
2. The issues in the Appeal bring into the fore challenges that a buyer of a second-hand motor vehicle may encounter in relation to the previous legal ownership of the motor vehicle. This is more so considering cases of fraud and multiple claims of ownership of such a motor vehicle.
3. One party will be claiming to be the legal owner, where title cannot be extinguished by fraud. On the other hand, the other party will be claiming to be an innocent purchaser for value for a valuable consideration, without any notice to any defects to the title passed. It then falls upon the Courts to make sense of such rival claims.
4. The Trial Court passed judgment in favour of the Respondent as against the Appellant. The resultant decree states as follows;
 - a. That a mandatory injunction be and is hereby issued compelling the Defendant to deliver possession of motor vehicle registration number KAV 953J to the Plaintiff already issued from Court on 23rd August, 2011 to remain in force.
 - b. That the Plaintiff be and is hereby awarded special damages for inconveniences caused of Ksh.1,449,000 arrived at by multiplying the number of days of inconvenience at 483 days with the daily rate of hiring the motor vehicle daily at Ksh.3,000.



- c. That the Defendant refund of costs of repairs assessed at Ksh.158,050/=.
- d. That a declaration be and is hereby made that the Plaintiff is the bonafide owner of motor vehicle registration number KAV 953J in terms of Section 8 of the Traffic Act, Cap 403, Laws of Kenya.
- e. That costs of the suit be and are hereby awarded to the Plaintiff.
- f. That interest on cost.
- g. That interest to accrue on all the sums awarded at Court rates, under (1) and (3) beginning from the date of judgment till payment in full and on (5) from the date of filing suit until payment in full.

Background Facts

5. The Appellant was the original Defendant while the Respondent was the original Plaintiff before the Trial Court.
6. The Respondent purchased a motor vehicle from one Peninah Wambui Mbugua and Jamnadass Hire Purchase Limited. He took possession and had the motor vehicle registered in his name. A log book was issued to him.
7. Regarding the very same motor vehicle, it had been pledged to the bank by one Stephen Migwi Magu. He had pledged it in respect of a loan issued to Prostem Limited. Mr. Stephen Migwi Magu was a Director of the Prostem Limited.
8. It transpired that Stephen Migwi Magu had sold the motor vehicle to Peninah Wambui Mbugua, yet thereafter he had used the motor vehicle as a pledge for a loan granted by the Appellant herein. A chattels mortgage had been registered for the motor vehicle.
9. When Prostem Limited defaulted in paying the loan, the Appellant gave instructions for the repossession of the securities given. This included the subject motor vehicle.
10. The motor vehicle was repossessed while in the hands of the Respondent. He complained that he was registered as the owner of the motor vehicle. That he had acquired it lawfully. The Appellant held on to the fact that the vehicle was pledged as security. That there was an outstanding debt. That it was entitled to repossess the motor vehicle.
11. The Respondent aggrieved by this action filed suit against the Appellant.
12. He sought for the release of the motor vehicle. He also sought special damages arising out of the period when the motor vehicle was repossessed and held by an auctioneer. He also sought aggravated damages as well as the costs of the suit.
13. In the interim period after the suit was filed, the motor vehicle was released to the Respondent through an order of the Trial Court.
14. It is the final decision in favour of the Respondent against the Appellant that has triggered this appeal.

The Appellant's Case

15. The Appellant has filed written submissions dated 8th May 2024 as well as a list of authorities of even date. The Court has read and appreciated the submissions.



16. The Appellant maintains that the Respondent could not have acquired a good title to the motor vehicle. This is because the motor vehicle was already pledged to the Appellant. A Chattels Transfer Agreement had been signed dated 25th September, 2007. It was further registered on 28th September, 2007. This served as a notice to the whole world as to the Appellant's interest in the motor vehicle. The Appellant relied upon Daniel Kirugut Maiywa -vs- Rebecca Chepkurgat Maina [2019] eKLR on the application of the principle of nemo dat quod non habet. That one cannot give that which he does not have or own.
17. It is also submitted that the Respondent was not an innocent Purchaser for value without notice. That no proof was presented to show he actually purchased this motor vehicle from Peninah Wambui Mbugua. That there was no proof that Peninah Wambui Mbugua held a valid title capable of passing to the Respondent. That there was no proof that any valuable consideration passed. The Court was referred to Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -vs- Attorney General & 4 others [2017] eKLR. That the Respondent did not meet the criteria for an innocent purchaser set out by that decision.
18. It was strongly submitted that special damages were not strictly proved. There are the special damages relating to car hire charges. That other than making reference to the agreement to hire a vehicle, no proof of payments by way of receipts was presented. The Court was referred to the case of Zacharia Waweru Thumbi -vs- Samuel Njoroge Thuku [2006] eKLR.
19. On refund of car repairs of Ksh.158,050.00, it was pleaded that the same were neither pleaded nor proved. The Court was referred to Daniel Kariuki Francis -vs- John Gichovi Njiru [2008] eKLR.
20. The Court was urged to allow the appeal with costs.

The Respondent's Case

21. The Respondent filed written submissions dated 20/5/2024 and list of authorities dated the same date. The copies of the authorities are also attached. The Court has perused the same.
22. The Respondent maintains that it was a bonafide purchaser of the motor vehicle for valuable consideration without notice of any defects. For this proposition it cites the case of Mohamed -vs- Duba & another (Civil Appeal No, 83 of 2019) [2022] KECA 442 (KLR), and Katende -vs- Haridar & Company Limited [2008] 2 E.A 173. It submitted that it purchased the motor vehicle from Peninnah Wambui Mbugua and Jamnadass Limited through a private treaty. That they held documents for ownership. That he did not deal with Stephen Migwi Magu at any time. Stephen Migwi Magu had earlier sold and transferred the motor vehicle to Peninnah Wambui Mbugua. She had acquired the motor vehicle through finance from Jamnadass Limited. Their joint ownership of the motor vehicle was noted in the logbook. When Peninah Wambui defaulted in the payment, she sought authority of Jamnadass Limited, so that they could jointly sell the motor vehicle to the Respondent. Thus, the sale and transfer of the motor vehicle to the Respondent was lawfully done.
23. The Respondent relies on the provisions of Section 8 of the *Traffic Act*. The name of the person appearing as a registered owner is deemed to be the owner of the vehicle. He referred the Court to Weston Gitonga & 10 others -vs- Peter Rugu Gikanga & Another [2017] eKLR, on the issue of who a bonafide purchaser is.
24. The Respondent submitted that it acquired the motor vehicle for valuable consideration. It referred the Court to Chappel & Company Ltd -vs- Nestle Company (1960) A.C 87 and Superfoam Ltd & Another -vs- Gladys Nchororo Mbero [2014] eKLR. That consideration must be sufficient but need not be adequate. Further that Courts will not interfere with the freedom of parties to contract.



25. The Respondent went on to submit that he had proved that he acquired a good title. That as at time the Appellant Bank was creating a security over the motor vehicle, the same Stephen Migwi Magu had by prior arrangements sold the same motor vehicle to Peninnah Wambui Mbugua.
26. He maintained that Peninnah Wambui Mbugua was innocent and unaware the motor vehicle was being used as security. That the appellant was reckless in allowing Stephen Migwi Mbugua to still retain the original logbook. That this logbook was used to facilitate the sale to Peninnah Wambui Mbugua, cannot be blamed on the Respondent. It is for the Appellant to own up to this blame. That the transaction between Stephen Migwi Magu and Peninnah Wambui Mbugua was voidable at the option of the Appellant who held a Chattels Transfer Agreement. The Applicant did not take any steps to void this transaction despite the written admission made by Stephen Migwi Magu. This is to the effect that he had sold the motor vehicle. Once the sale took place to the Respondent, this sale was no longer voidable. The Court was referred to Rift Valley Products Limited -vs- Plexus Cotton Limited [2020] eKLR. That a contract is only voidable as between the parties to it.
27. As to the special damages, the Respondent maintained that it hired a motor vehicle from 27th April, 2010 until 18th September, 2011 at the rate of Ksh.3,000/= per day. The hirer was the Respondent's brother. That he had the rental agreement dated 1st May, 2010 which was produced in Court. That he paid cash but had no receipts. This is because Joseph Kamau Warukira the hirer, was not in the business of hiring motor vehicles. Hence, he could not issue receipts.
28. He also submitted that he spent Ksh.158,050 to repair the motor vehicle. This was on account of damages it sustained while it was held by the auctioneers. He conceded that this amount was not included or pleaded in the Amended Plaint dated 14th February, 2011. This is because the damages became apparent on 1st September, 2011 when the motor vehicle was released to him. He urged the Court to award the special damages.
29. The Court was urged to dismiss the appeal with costs.

Issues for Determination

30. The Court has seen the Memorandum of Appeal filed. It raises Thirteen (13) Grounds of Appeal.
31. The Court frames two (2) issues for determination;
 - a. Whether the appeal is meritorious
 - b. What reliefs lie from this appeal?

Analysis

32. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial Court afresh. Then this Court has to reach its own independent conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
33. When it comes to interfering with the exercise of judicial discretion, the Court turns to the case of *Mbogo & another Vs. Shah* [1960] E.A. 93.
34. The Court proceeds to analyse the two (2) issues framed as follows;



Whether the appeal is merited

35. In answering this issue, the Court notes that the Appellant as the original Defendant did take out 3rd Party proceedings against Stephen Migwi Magu and Prostem Limited. Those two 3rd Parties failed to respond to the suit. The Appellant has an interlocutory Judgement against them in default of Appearance.
36. The Court takes note that the originator of the mischief herein is Stephen Migwi Magu. At the first instance he sold the motor vehicle to one Peninah Wambui Mbugua. She in turn sought finance from Jamnadass Limited.
37. The Court has looked at the seller's statement and description of vehicle which is undated. It has also looked at the letter dated 24th September, 2007 comprising the Hire Purchase Agreement. It states as follows;

“Mr. Stephen Migwi Magu

O Box 4530-00200

Nairobi

RE: HIRE PURCHASE AGREEMENT 7475/M VEHICLE NO KAV 953J NISSAN SALOON FB 14,1998

We have today completed a hire purchase agreement for Peninah Wambui Mbuguah of P O. Box 1595-Nairobi, on the above vehicle which is being sold to you for Ksh.580,000. We understand that you have already collected the initial deposit of Ksh.260,000. Please release the vehicle to our hirer and we undertake to pay you 75% of the balance due to you in 14 days from today's date on the condition we have the following;

1. The transfer receipt in joint names.
2. Your invoice/private dealer form
3. Anti-theft device duly filed in the vehicle and the certificate.

The balance of 25% will be paid upon receipt of the registration book from the registration of motor vehicle.

Yours faithfully,

Signed

Jamnadass Hire Purchase Limited

Director”

38. On the other hand, she Court notes that the very same Stephen Migwi Magu executed a Chattels Transfer Instrument in favour of the Appellant in respect of the very same motor vehicle. It is dated 25th September, 2007. A day after the sale to Peninnah Wambui Mbugua.
39. It is not clear how the original logbook was retained by Stephen Migwi Magu. The Appellant's witness during cross examination owned up that the lapse was on the Appellant's side.
40. The Court notes that Peninnah Wambui Mbugua and Jamnadass Hire Purchase Limited were registered as joint owners of this motor vehicle. A copy of a logbook dated 12/10/2007 was produced as evidence.



41. It follows that when Peninnah and Jamnadass Hire Purchase Limited entered into a sale with the Respondent, they both had a valid title and possession of the motor vehicle. They passed the possession and title to the Respondent. A logbook was issued dated 28th March, 2009.
42. No evidence has been produced to show that the Respondent was aware of the Chattel Transfer Agreement with the appellant.
43. Even the Registrar of Motor Vehicles was unaware of this arrangement, otherwise he/she would not have sanitized the transfer to the Respondent.
44. The Appellant knew that Stephen Migwi Magu had sold this motor vehicle to a 3rd party. A letter was produced as the Defendant's exhibit before the Trial Court. It was written by Stephen Migwi Magu to the bank. It was received on 8th May, 2010, yet the Appellant took no steps to remedy the situation. In any event, the Respondent already had a logbook in his name by this time.
45. The Court agrees with the submissions by the Respondent, that the sale was voidable as between Stephen Migwi and Peninnah Wambui Mbugua and Jamnadass Hire Purchase Ltd. The appellant could have moved to void this transaction. However, the situation changed once the motor vehicle was transferred to a second party who was not aware of the defects to the title. See *Kiptorus & another v Shajanand Holdings Ltd (Civil Appeal 275 of 2019) [2025] KECA 467 (KLR) (7 March 2025) (Judgment)*.

“There was no evidence connecting the respondent to any illegal actions in acquiring the title to the suit property. The respondent was therefore an innocent purchaser for value and without notice. The concept of an innocent purchaser for value was emphasized by the Supreme Court in the case of *Law Society of Kenya vs. Commissioner of Lands & Others [2001] eKLR* where the court stated:

“A bona fide purchaser for value without notice of any fraud or irregularity is protected by law. Such a purchaser acquires a good title to the property, even if the vendor's title was defective, provided that the purchaser acted in good faith and without knowledge of the defect.”

37. Indeed, there was no fraud proved at all on the part of the respondent and we agree with the trial court that in the absence of evidence of fraud, and considering that the vendor had a valid title, there was no basis to cancel the respondent's title to the suit property. The respondent established its right to the property, and allegations of fraud by the 2nd appellant were not proved.”
46. When the Appellant gave instructions to repossess the motor vehicle, it was aware that it was aware that it was affecting the rights of a 3rd party. There is no evidence it ever took any action against Stephen Migwi Magu by reporting these deceitful actions to the police.
47. The upshot is that the Appellant mishandled the entire issue. It moved with force to collect its debt without due regard to the effects on a third party. It now turns out the Respondent was affected by this action. This was a situation that the Appellant would have foreseen and avoided. It was exercise of brute force when things have gone wrong.
48. The Appellant had no Counter-claim for the title for the subject motor vehicle.



49. Though for different reasons, the Court reaches the same conclusion as the Trial Court. This being that the Respondent held a valid title as an innocent purchaser and the repossession of his motor vehicle was wrong.

On Special Damages

50. The Court is not convinced that the car hire charges were sufficiently proved. Special damages must be specifically pleaded and proved.
51. It is not enough to draw a car hire agreement. Without proof of payment for the car hire charges, the claim for car hire charges as special damages fails. The Respondent submits that the Respondent's brother was not in the business of issuing car hire receipts. That is a concession that no car hire receipts were either issued or produced. Without receipts to explain the expenses how does the Court award the special damages? The Court refers to the case of Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR).

“We turn next to the issue of special damages, and whether the learned judge was right to award special damages on the basis of the proforma invoices produced before the trial Court. This Court has consistently held that it is trite law that special damages must be specifically pleaded and proved. In the case of Hahn vs Singh 1985 Kenya Law Reports 716, this Court stated thus: -

“...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves”.

The appellant's contention is that the respondent produced proforma invoices from various suppliers specifying the equipment in question, together with their values, yet, with reference to the proforma invoices, the learned judge stated thus: -

“...PW.1 in his evidence identified proforma invoices. These were proforma invoices in respect of wheel balance valued at Kshs. 468,460/-. The invoice was dated 22nd December 1993, invoices for automatic Tyre changer which showed an amount of Kshs 225,000/-. It was also dated the same date 22nd December 1993. Invoice for Ksh. 175,000/- in respect of the value of trolley jack and Invoice for wheel aligner valued at Kshs 75,000/- The last two invoices were both dated 22nd December 1993 also. These four equipment were the ones in respect of which the Plaintiff made some effort to prove their values. But even the same proof was only in respect of new ones as on 22nd December 1993, and thus did not reflect their true values as on the date the Plaintiff was evicted from the service station...”

The learned judge concluded: -

“...With all this in mind and doing the best I can, I will reduce the values given in the invoices i.e. in Exh 12, 13, 14, and 15 by 255 in an attempt to arrive at a value which would reflect all of the above. Thus, I do allow an amount of KSh.351,345/- for Wheel Balance, I allow KSh. 168,750/- as the value of the tyre changer. For Trolley jack, I accept the amount of KSh. 131,250/-, and finally on that I do KSh. 56,250/-for wheel aligner. These were the only equipment whose values were to an extent availed in accordance with the legal requirements...”

In the case of Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority (2009) eKLR 720, on the production of proforma invoices, this Court stated thus’



“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word” paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”

From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”

52. To this Court, it is therefore not enough to state that expenses were incurred by way of car hire charges without any proof of such payments. The Agreement cannot substitute the requirement for such receipts to support the expenses.
53. On vehicle repairs of Ksh.158,050, the Court noted that they were not pleaded. The Court cannot award special damages that were not pleaded. Simply put if you do not plead the special damage the Court will not award it. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR)

“The Kshs.296, 019,767.80 forming the appellants claim in HCCC no.518 of 1996 fell into the category of claims known to law as special damages. It is now trite that these must be specifically pleaded and strictly proved. See the case of *Hann versus Singh* (1985) KLR 716 wherein the Court of appeal held inter alia that: -

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof depend on the circumstances and the nature of the acts themselves”

54. It follows therefore that the awards of special damages by the Trial Court were in error and the same are set aside and instead the Court proceeds to dismiss the claims for Special Damages as unproven.

What Reliefs lie from this Appeal

55. The Court notes that the Appeal succeeds in part in that the award of special damages by the Trial Court is dismissed. The award for aggravated general damages stood already dismissed by the Trial Court. There was no Cross-appeal by the Respondent on that issue.
56. On the issue of costs, the Court will not disturb the order of costs issued by the Trial Court. The Respondent was entitled to approach the Court to vindicate his ownership of the motor vehicle.
57. In this Appeal, considering all the circumstances of the case, the fair order is that let each party bear its or his own costs of the Appeal.



Determination

- 58. The Appeal partially succeeds. The judgment and decree of the Honourable Magistrate delivered on the 27th April, 2016 in Kiambu CMCC No 209 of 2010 is set aside and substituted with a judgment and decree as follows;
 - a. That a mandatory injunction be and is hereby issued compelling the Defendant to deliver possession of motor vehicle registration number KAV 953J to the Plaintiff already issued from Court on 23rd August, 2011 to remain in force.
 - b. That the Plaintiff's claim for special damages for car hire charges is hereby.
 - c. That a declaration be and is hereby made that the Plaintiff is the bonafide owner of motor vehicle registration number KAV 953J in terms of Section 8 of the Traffic Act, Cap 403, Laws of Kenya.
 - d. The Claim for aggravated damages is dismissed.
 - e. That costs of the suit be and are hereby awarded to the Plaintiff.
- 59. Each party to bear its/his own costs of this appeal.
- 60. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 18TH DAY OF MARCH 2025

NJOROGE BENJAMIN

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent

Mr. Luyai- Court Assistant

