Jairus Wamukoya t/a Yamuko Auctioneers v Samba & 2 others (Civil Appeal E097 of 2023) [2025] KEHC 3341 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3341 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E097 OF 2023

DKN MAGARE, J

MARCH 7, 2025

BETWEEN

JAIRUS WAMUKOYA T/A YAMUKO AUCTIONEERS .... APPELLANT

AND

NAFTAL BENSON SAMBA .... 1ST RESPONDENT

COOPERATIVE BANK OF KENYA LTD .... 2ND RESPONDENT

DAVID OMWOYO T/A OMWOYO AUCTIONEERS .... 3RD RESPONDENT

JUDGMENT

1. If Chichén Itzá is recognized as the eighth wonder of the world, then this issue would have a strong case for becoming the ninth. What makes it so astonishing is the sheer audacity of stubbornness and the dangerous mix of ignorance, deception, and a grim sense of dark humor. Were it not so tragic, it would be a catastrophe of epic proportions.
2. The appeal is from the short judgment of the Hon. P.K. Mutai (PM) given on 24.07.2023 in Kisii CMCC No. 56 of 2019. The court delivered its judgment in the following terms:
   a. The Appellant orchestrated the botched process.
   b. The Appellant will compensate the 1st Respondent with a sum of Ksh. 200,000/= paid under the guise of an auction.
   c. Interest at commercial rates from the date of payment until payment in full.
   d. The claim for release is dismissed.
   e. The claim for loss of user is dismissed.
   f. Costs to the plaintiff, and 1st Respondent to be borne by the Appellant.

3. Aggrieved by the decision, the Appellant filed a Memorandum of Appeal and set forth the following grounds of appeal:

   a. The learned trial magistrate erred in law and in fact, in arriving at a finding that the Appellant did not prove his case on a balance of probabilities.

   b. The learned trial magistrate erred in law and in fact, when he failed to make a finding that the 2nd Respondent's actions caused the 1st Respondent to suffer loss and damage.

   c. The learned trial judge erred in law and in fact, in that he failed to analyze the evidence that was before him, in particular, that the 2nd Respondent never issued instructions to the Appellants, yet the evidence on record, particularly by the Appellant and the 1st Respondent, showed that the 2nd Respondent had issued instructions to the Appellant to repossess the suit motor vehicle.

   d. The learned trial magistrate erred in law and in fact, when he failed to analyze in total all the documents presented to him in making his determination.

   e. The learned trial magistrate erred in law and in fact, when he failed to consider and appreciate that in the circumstances of the case, the Appellant had proved his case as against the 2nd Respondent and that his evidence was not rebutted.

   f. The learned trial magistrate totally erred in law and fact in that he failed to consider or sufficiently consider the material placed before him and, as a result, came to wrong conclusions and prejudiced the Appellant.

   g. The trial magistrate erred in law and in fact, when he failed to analyze the role by the 2nd Respondent, which resulted in the issuing of multiple instructions to the Appellant and the 3rd Respondent, which resulted in the 1st Respondent obtaining the suit motor vehicle.

   h. The trial magistrate erred in law and in fact, in failing to find that the 2nd Respondent, if at all, had not received the money from the sale, failed to institute any action or counter-claim against the Appellant.

4. They prayed for the judgment given on 24.7.23 to be set aside and in its place, be made a judgment as prayed in the Appellant's defence dated 17.1.2020.

5. The 1st Respondent filed suit vide an amended plaint dated 11.7.2019. He sought a declaratory order that the seizure of motor vehicle Registration No. KBQ 702L from the plaintiff was unlawful and should be released back to him. He further prayed for a sum of Ksh. 300,000/=, which is the value of the motor vehicle Registration No. KBQ 702L. They also claimed general damages for loss of user at the rate of Kshs.3,500/= per day.

6. The 2nd Respondent had instructed the sale of motor vehicle Registration No. KBQ 702L. The dispute was to whom the instructions were given. The 3rd Respondent was an auctioneer who had hitherto been instructed to sell the subject motor vehicle.

7. The 1st Respondent pleaded that he bought a motor vehicle Registration No. KBQ 702L from the Appellant on 17.2.2018. He paid and was issued a certificate of sale dated 19.2.2018. The vehicle was released to the 1st Respondent. The Appellant repaired the vehicle at the cost of Ksh 100,000/=. He stated that he was using the vehicle as an agency manager.

8. He stated that the vehicle was repossessed by the 2nd Respondent and officers from the directorate of criminal investigations. He stated that he was not indebted to the 2nd Respondent. The 1st Respondent

attached various exhibits to his bundle of documents produced in evidence. Among them is a Daily Nation advert of 1.9.2020, indicating that the subject motor vehicle Registration No. KBQ 702L was held by the 3rd Respondent.

9. The 2nd Respondent filed an amended defence dated 25.7.2019. They denied ever instructing the Appellant and claimed they had instructed the 3rd Respondent to repossess. They argued that the said motor vehicle was collateral for one Elijah Odongo, who was indebted to a sum of Ksh. 300,000/=, which is outstanding to date. They christened the 1st Respondent and the Appellant strangers.

10. The respondent filed a defence dated 5.7.2019. They admitted to repossessing the motor vehicle but denied that it was unlawful.

Evidence

11. After some reed dance for over two years, the matters finally started in 2022. The 1st Respondent testified on 16.2.2022. He reiterated the contents of his statement, which mirrored the amended plaint. On cross-examination, he stated that the suit motor vehicle was bought in an auction but never transferred to him. He stated that he did some repairs, though he did not have receipts.

12. The 3rd Respondent testified on 19.9.2022. He stated that he was an auctioneer. He adopted a statement recorded on 14.5.2019. He stated that the 2nd Respondent instructed him to sell motor vehicle Registration No. KBQ 702L through a public auction. The vehicle is still in the yard and has not been sold. He stated that he repossessed the said motor vehicle Registration No. KBQ 702L from the 1st Respondent. He then learnt that the 1st Respondent bought the vehicle from the Appellant. On cross-examination, he stated he was not a party to the transactions between the Appellant and the 1st Respondent.

13. The 2nd Respondent testified through Dorcas Yegon, the Branch Manager of the said Respondent's Kisii branch. She stated that the 2nd Respondent did not instruct the Appellant to sell motor vehicle Registration No. KBQ 702L. She stated that their client Elijah Odongo owes Ksh 300,000/=, with respect to the fact that they repossessed the vehicle through the 3rd Respondent. She was not aware of the sale by the Appellant.

14. On cross-examination, she stated that she did not know the Appellant and had no file on them. She stated that the debt was still outstanding. She argued that the said vehicle was registered in the names of the bank and their clients jointly. Unfortunately, the naming of exhibits causes duplication.

15. The Appellant testified through James Wamukoya Amarichonei. He produced his documents as exhibits 1-8. He stated that they received instructions on 15.11.2017. They acknowledged the instructions were to repossess the vehicle from Odongo Morris. They gave out notices and advertised in Star Newspaper. The instructions were not in writing. They got a highest bidder, and sold the vehicle for 200,000/=. He wrote a blank cheque to her bank. The bank had not discharged them of work done.

16. On cross-examination, he stated that he was instructed, though he did not have the instructions. He also did not produce the auctioneer's license. Further, he did not have anything to show that he gave money for sale to the bank. He acknowledged that he gave the 1st Respondent receipts for money paid.

17. The parties made detailed submissions. The court gave its judgment, hence this appeal.

Submissions

18. The Appellant submitted that 2nd Respondent issued instructions to the Appellant to repossess motor vehicle Registration No. KBQ702L, and the 1st Respondent was the successful bidder. Therefore, it

was submitted that the 3rd Respondent was not liable for the loss occasioned to the 1st Respondent. Reliance was placed inter alia on Global Babipo Holdings Ltd v Diamond Bank Kenya Limited & Another (2019) eKLR.

19. The 1st Respondent filed submissions on 20.12.2023 by which it was submitted that the 1st Respondent was an innocent purchaser for value in a public auction. He had no notice of any irregularity. Reliance was placed on George Omollo Ogoma v Eagle Millers Ltd & Infrastructure Africa Ltd (2016) eKLR.

20. He also relied on Nationwide Finance Co. Ltd v Merk Industries Ltd (2005) eKLR. Based on this, it was submitted that an innocent purchaser for value without notice of irregularity would have title. It was also submitted that the auctioneer was under duty to investigate who owns the property before attaching it. Reliance was placed inter alia on Atogo v Agricultural Finance Corporation (1991) eKLR.

21. It was also the submission of the 1st Respondent that the lower court erred in not issuing an order for the release of the motor vehicle and granting compensation for award of damages of Ksh. 3,500/= per day. Reliance was placed on David Nguna Ngotho v Family Bank Ltd & Another (2018) eKR.

22. The 2nd Respondent submitted that the alleged sale was a sham. That there was no evidence of instructions to the 3rd Respondent to sell the motor vehicle. Therefore, there was no proof to the required standard, that is, the balance of probabilities. They relied on Sections 107, 108, 109 and 112 of the *Evidence Act*.

23. Reliance was placed on *Stackpartk Industries Ltd v James Mbithi Nairobi Civil Appeal No. 152 of 2003* based on which it was submitted that the 1st Respondent failed in the burden to prove a causal link to negligence. It was also submitted that special damages must be specifically pleaded and strictly proved. They relied on Jackson Mwabili v Peterson Mateli (2020) eKLR.

24. The 3rd Respondent filed submissions dated 11.3.2024. It was submitted that the lower court's decision was proper and that the Appellant did not state how he received his fees. Reliance was placed on Serraco Ltd v Attorney General (2016) eKLR.

25. It was further submitted that no evidence was adduced to demonstrate that the Appellant was in the panel of auctioneers working for the 2nd Respondent. He relied on the matter of the estate of Soti Kigen Kiprotich Kigen v Samson Kigen (2003) eKLR to submit that the court was entitled to draw adverse inference where evidence did not exist.

Analysis

26. 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 at the back of its 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.

27. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

28. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for

themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

29. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

30. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

31. The issue for determination is whether the court erred in allowing the 1st Respondent's suit. This question turns on the interpretation of the *Auctioneers Act* and Rules. Rule 6 of the Auctioneers rules require that the auctioneer keeps a record of letters of instructions and warrants. It states:

> An auctioneer shall keep a register of all warrants and letters of instruction passed to him by a client, and shall record in it:
>
> a. the number of the case under which the warrant was issued and the name of the court that issued it;
>
> b. the name and address of the creditor and the advocate (if any) who issued the letter of instruction;
>
> c. the date he received each warrant or letter of instruction;
>
> d. the amount he is required by the warrant or letter of instruction to recover;
>
> e. the date of return endorsed upon the warrant;
>
> f. an itemised inventory of the property to be sold showing the value to be placed on each lot;
>
> g. the amount realised in respect of each item sold;
>
> h. the date the warrant was returned to the court;
>
> i. the date and amount of the proceeds of any sale forwarded to the court, or to the creditor, or his advocate; and

j. the charges levied by the auctioneer.

32. By admitting that the instructions were oral, then the Appellant was admitting that he had no instructions. An auctiooner cannot act without instructions. In any case, there is no evidence that he ever received instructions. He did not acknowledge instructions or even remit the proceeds of sale.

33. The contents of the letter of instructions are set out in rule 11 as follows:

(b) Movable property

i. the decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;

ii. the person amongst whom the decree is to be executed;

iii. the exact location of goods;

iv. the person to point out the goods;

v. where ascertainable, a list of the goods to be attached or repossessed;

vi. where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices;

34. In this context the action by the Appellant was null and void. Such an action cannot be a basis for anything. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning, delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

35. The purported sale was null and void. It is of no consequence whatsoever. Nevertheless, the court cannot allow the Appellant to unjustly enrich himself. In Amuel Kamau Macharia vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR, R. KULOBA, J as he then was, posited as follows:

> As Lord Goff of Chieveley and Professor Gareth Jones state in their monumental treatise, The Law of Restitution, 5th edn (1998), at pp 11-12:
>
> "Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."
>
> This statement is founded on the observation of Lord Wright in the English case of Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour, Ltd, [1943] AC 32, at p 61 where he said:
>
> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit .... Such remedies ...... are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi - contract or restitution."

36. Unjust enrichment was earlier addressed by the Court of Appeal [Madan, Wambuzi & Law JJ A] in Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR as doth:

In Fibrosa Spolka, Lord Wright ([1943] AC at page 61):

It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

It seems to me that upon a fine analysis the first category, ie the contract of guarantee which I have discussed above, blends into the theory of restitution which gives it the foundation to justify it. Goff and Jones in their treatise, Law of Restitution, state (page 11):

Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.

Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

All the three foregoing conditions are satisfied in this case: the appellants have been enriched by the receipt of benefit at the expense of Laxmanbhai, and, so obviously, it would be unjust to allow the appellants to retain the benefit of it to the full extent of Laxmanbhai's claim

37. The condition for unjust enrichment to work are that:

    a. He has been enriched by the receipt of benefit

    b. The benefit is at the expense of the 1st respondent

    c. So obviously, it would be unjust to allow the appellants to retain the benefit of it to the full extent.

38. To make matters worse, the instructions were already with another auctioneer. It is an offence to alter goods already proclaimed. Rule 14 of the Auctioneers Rules provide as follows:

> A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.

39. An auctioneer cannot attach attached goods or steal instructions from another auctioneer. Further, they must remit proceeds of sale within 15 days. Rule 18(4) of the auctioneers rules provides as doth:

> The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable

property within fifteen days of the sale and in the case of immovable property as provided under Order 22, rule 70 of Civil Procedure Rules.

40. There was thus no sale. The Appellant took the money and unjustly enriched himself with Kshs. 200,000/=. The only auctioneer with instructions then was the 3rd Respondent. It is understood that the principle of nemo dat quod non habet, posits that no one can give what they do not have. The Appellant had nothing to sale, and the 1st Respondent had nothing to receive. In Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR) Onyango J posited as follows:

> “The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited vs Tata Africa Kenya limited (2017) eKLR and Katana Kalume vs Municipal Council of Mombasa (2019) eKLR.”

41. The Appellant had no title to pass. Consequently, the court was correct in holding the Appellant liable.

42. The next question was whether the other Respondents were complicit. There was no evidence, in line with the auctioneer's rules, that the Appellant was instructed to sell the said motor vehicle. If he received instructions, they must have been unlawfully issued. The 2nd and 3rd Respondents were not complicit in the actions of the Appellant. The 1st Respondent did not reach the status of an innocent purchaser without notice. Having bid for 230,000/= and changed the same to Ksh. 200,000/=, he was complicit. Therefore the passing of title at the fall of the hammer cannot by any stretch of imagination apply to him.

43. In Harishchandra Bhovanbhai Jobanputra & another v Paramount Universal Bank Limited & 3 others [2019] eKLR the court of appeal [WAKI, SICHALE & KANTAI, JJ.A. stated that:

> This Court has – post *The Constitution* of Kenya, 2010 – had occasion to pronounce on the said equity of redemption. In the case of Savings and Loan Kenya Limited V Mayfair Holdings Limited [2012] eKLR we found that a chargors right of redemption over a charged property is extinguished when the property is sold by the chargee in exercise of its statutory power of sale. We observed:
>
> “This position is further reflected in common law and the doctrines of equity which are applicable in this case by virtue of section 163 of the RLA. In Mbuthia v Jimba Credit Finance Corporation & Another Civil Appeal No. 111 of 1986 the Court of Appeal held that by virtue of the security being registered under the RLA the equity of redemption was lost at the fall of the hammer at auction sale. This is because at the fall of the hammer the highest bidder is declared the purchaser and a binding contract of sale is concluded.”

44. In this case, there was no hammer. The bid was fraudulent and tainted with illegality. The sale was affected by the Nemo dat rule. There was also no fall of the hammer for 200,000/=. The hammer, albeit illegally was for Ksh. 230,000/=.

45. The upshot of the forging is that the appeal is hopeless and must be saved from its own ignominy. It must give way.

46. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

47. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

48. The costs follow the event. The event in this case is the dismissal of an opposed appeal. The Respondents shall have costs of Ksh. 75,000/= each.

Determination

49. The upshot of the foregoing is that I make the following orders:

a. The appeal is dismissed for lack of merit.

b. Costs of Ksh. 75,000/= to the 2nd Respondent.

c. Costs of Ksh. 75,000/= to the 3rd Respondent.

d. Costs of Ksh. 75,000/= to the 1st Respondent.

e. 30 days stay of execution.

f. 14 days right of appeal.

g. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael