



**Mukundi v Mugambi & 2 others (Civil Appeal E068 of 2023)
[2025] KEHC 3043 (KLR) (Civ) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E068 OF 2023

AM MUTETI, J

MARCH 3, 2025

BETWEEN

JOSEPH NG'ANG'A MUKUNDI APPELLANT

AND

MARTIN ANDREW MUGAMBI 1ST RESPONDENT

PRESTIGE SAFE MOTORS LIMITED 2ND RESPONDENT

JOHN M MBIJIWE T/A BEALINE KENYA AUCTIONEERS . 3RD RESPONDENT

(Being an Appeal from the judgment of Hon. H.M. Nyaberi, Chief Magistrate, delivered on 2nd February 2023 in delivered virtually from Garissa in Civil suit No. 2185 of 2020)

JUDGMENT

Introduction

1. The appellant in this matter filed the instant appeal to challenge the decision of the lower court rendered on 2nd February 2023 in which the learned honorable magistrate restrained the appellant, the 2nd and 3rd respondents from altering, offering for sale, selling, disposing off, transferring and or interfering in any way with Motor Vehicle Registration Number KCU 770M Toyota Prado.
2. The learned honorable court also issued a mandatory injunction compelling the appellant, 2nd and 3rd respondents to release the subject motor vehicle to the 1st respondent's possession and ownership.
3. The court in the alternative issued an order directed to the 2nd respondent requiring him to refund the 1st respondent the full purchase price of the Motor Vehicle KCU 770M with interest from the 6th December 2019.



4. Further the lower court ordered that in the alternative the appellant be compelled to release the Original Logbook for Motor Vehicle KCU 770M Toyota Prado to the 1st respondent and execute all necessary transfer documents to ensure transfer of the Motor vehicle to the 1st respondent.
5. The costs of the suit were also awarded to the 1st respondent.
6. It is against the above orders that the appellant moved this court seeking to set aside the judgment of the lower court on the following grounds which were filed through an amended memorandum of appeal dated the 3rd may 2023;-
 - i. The Learned Magistrate erred in law and fact in allowing all the five (5) prayers sought by the 1st Respondent in his plaint as the 1st Respondent had in prayer number 3 of his Plaint sought for an alternative order to prayers 1 and 2.
 - ii. The Learned Magistrate erred in law and fact by failing to analyze and consider all the evidence presented by the Appellant.
 - iii. The Learned Magistrate erred in law and fact in Toyota Prado to the 1st Respondent.
 - iv. The Learned Magistrate erred in law and in fact in holding that the finding that the Appellant had authorized the 2nd Respondent to sell the Appellant's Motor Vehicle of Registration Number KCU 770M 1st Respondent had validly purchased Motor vehicle of Registration number KCU 770M Toyota Prado from the 2nd Respondent.
 - v. The Learned Magistrate erred in law and in fact in holding that the 1st Respondent was an innocent purchaser for value without Notice.
 - vi. The Learned Magistrate erred in law and fact by not appreciating that no good title ever passed to the 1st Respondent as the 2nd Respondent did not have express authority to sell Motor vehicle Number KCU 770M Toyota Prado to the 1st Respondent.
 - vii. The Learned Magistrate totally misapprehended the law and the facts of the case leading to an erroneous decision.

Appellant's Case

Brief Background

7. The 1st respondent in his plaint alleged to have bought Motor Vehicle Reg. No. KCU770M Toyota Prado from the 2nd respondent who held the said motor vehicle under authority of the appellant dated 6th December 2019 for the sum of KSh. 4.5Million.
8. According to the 1st respondent the payment was to be done in two modes i.e cash KSh 2.7 million and trade in with Motor Vehicle Registration Number KCK 709Z Honda CR-V valued at 1.8 million.
9. The Appellant is the registered owner of Motor Vehicle registration number KCU 770M.
On 10th October, 2020, the Appellant instructed his driver Samson Muriuki to deliver his motor vehicle registration number KCU 770M to the 2nd Respondent for them to procure a potential buyer on his behalf at the price of Kshs. 4,500,000/- which was negotiable once a potential buyer was identified.
10. The vehicle was placed at the 2nd Respondent's yard but the Appellant kept the logbook and other transfer documents. The 2nd Respondent was obliged to contact the Appellant once they got a



formidable buyer for negotiations on the consideration and execute a sale agreement and subsequently receive payment.

11. The Appellant left Kenya for an official Government assignment in Spain on 24th November, 2019 and stayed there until 15th December, 2019. Prior to his travel abroad, the Appellant contacted a director of the 2nd Respondent who indicated that he was yet to find a potential purchaser. When he came back to the country, he visited the 2nd Respondent's yard and found the yard closed.
12. He tried to reach the director of the 2nd Respondent on phone but he did not answer his calls. The Appellant used the car tracking device and managed to trace the motor vehicle at Karen within Nairobi county and other places where it was being used.
13. Thereafter, the Appellant was contacted by the Director of Criminal Investigations at the headquarters over the suit motor vehicle. When he appeared before the DCI offices, he realized that the 1st Respondent had filed a complaint against 2nd Respondent.
14. The Appellant further learnt that the 2nd Respondent had acted upon an "Authority to Sell/Motor Vehicle Inventory Form" dated 6th December, 2019 purportedly signed by him on the said date. The selling price quoted on the said authority to sell was indicated as Kshs 5,000,000/.
15. The Appellant instructed the 3rd Respondent to repossess the suit motor vehicle. The 3rd Respondent filed Milimani Misc Application No. 339 of 2020 seeking for orders to repossess. The Orders were subsequently granted on 30th April, 2021. The 1st Respondent filed Milimani CMCC No.2185 of 2020 seeking for:-
 - i. An order of permanent injunction restraining the Appellant, 2nd Respondent and 3rd Respondent jointly and or severally from altering, offering for sale, selling, disposing off, transferring and or interfering in any way, with the motor vehicle registration Number KCU770M, Toyota Prado.
 - ii. A mandatory injunction do issue, compelling the Appellant, 2nd Respondent and 3rd Respondent to release the Motor Vehicle Registration No. KCU 770M, Toyota Prado to the 1st Respondent's possession and ownership.
 - iii. In the alternative to prayers land 2, the 2nd Respondent be compelled to refund the 1st Respondent the full purchase price of the Motor Vehicle Registration No. KCU 770M with interest as from 6th December 2019.
 - iv. the Appellant and the 2nd Respondent be compelled to release the original Log book for Motor Vehicle registration number KCU 770M, Toyota Prado to the Plaintiff and execute all necessary transfer documents to ensure transfer of the Motor vehicle Registration Number KCU 770M to the Plaintiff.
 - v. Costs of the suit.
16. The appellant filed a defence and counter claim and prayed for:-
 - i. An order do issue for unconditional release of Motor Vehicle Registration No. KCU 770M, Toyota Prado to the Appellant.
 - ii. A permanent injunction do issue restraining the 1st and the 2nd Respondents together with their agents from interfering in any way with the Appellant's possession and ownership of Motor Vehicle Registration No. KCU 770M, Toyota Prado.
 - iii. Costs of the Suit.



17. On 2nd February, 2023, the trial court rendered its judgment and allowed the 1st Respondent's suit and the dismissed the Appellant's Counter Claim, the subject of this instant appeal.
18. According to the appellant the following issues arise from the appeal;-
 - i. Whether the Learned Magistrate erred in law and fact in allowing all the five (5) prayers sought by the 1st Respondent in his plaint?
 - ii. Whether the Appellant had authorized the 2nd Respondent to sell the Appellant's Motor Vehicle of Registration Number KCU 770M Toyota Prado to the 1st Respondent?
 - iii. Whether the 1st Respondent had validly purchased Motor vehicle of Registration number KCU 770M Toyota Prado from the Appellant?
 - iv. Whether the 1st Respondent was an innocent purchaser for value without notice? Whether the 1st Respondent acquired good title of the subject Motor Vehicle?
19. The appellant argued that this being a first appeal, the principles guiding the duty of this Court as was stated by Sir Clement De Lestang, V.P., in *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 (cited in *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR: "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put they are, that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."
20. The appellant thus analyzed his case as follows;-

Analysis of the Issues

i. Whether the Learned Magistrate erred in law and fact in allowing all the five (5) prayers sought by the 1st Respondent in his plaint?

21. It is a common occurrence that parties usually claim for alternative prayers in case the first prayer is not granted or tenable. It follows that the parties in such cases are interested in the main prayer and the alternative prayer as a fallback position.
22. The Learned Magistrate erred in law and fact in allowing all the five (5) prayers sought by the 1st Respondent in his plaint as the 1st Respondent had in prayer number 3 of his Plaint sought for an alternative order to prayers 1 and 2 against the natural rule of justice.

Whether the Appellant had authorized the 2nd Respondent to sell the Appellant's Motor Vehicle of Registration Number KCU 770M Toyota Prado to the 1st Respondent?

23. The Appellant contends he never authorized the 2nd Respondent to sell and or do a trade- in his Motor Vehicle of Registration Number KCU 770M Toyota Prado. The Appellant verbally agreed with one Mr. Gitonga the director of the 2nd Respondent that the subject motor vehicle would be stationed at their yard purposely to find a buyer. The Appellant travelled abroad and upon his arrival he visited the 2nd Respondent's yard and to his surprise, the said yard had been closed and it seemed that the 2nd Respondent had relocated.



24. The appellant submitted that he tried to contact Mr. Gitonga the director of the 2nd Respondent but he was unreachable. The Appellant had installed a track on the suit motor vehicle and was able to track it in Karen within Nairobi. It is then that he became aware that the suit Motor Vehicle had been sold to the 1st Respondent via sale agreement dated 6th of December 2019.
25. The Appellant contends that he was neither a party to the sale agreement entered between the 1st Respondent and the 2nd Respondent nor was involved in negotiating its terms.
26. The Appellant further contends that he never signed the purported "Authority/Motor Vehicle Inventory Form" dated 6TH of December 2019 acted upon by the 2nd Respondent owing to the fact that he was out of the country on the said date.
27. The said "Authority/Motor Vehicle Inventory Form" was fabricated by the 2nd Respondent so that they use it to sell the Appellant's Motor Vehicle at a price higher than the amount set by the Appellant which Kshs. 4,500,000/=.
28. The 2nd Respondent forged the Appellant's signature as he could have signed the said document while outside the Country. The Appellant reported the forgeries to the police to Kilimani Police Station under OB Number OB 111/10/09/2020.
29. The appellant maintains that the 2nd Respondent never consulted the Appellant to confirm whether he was agreeable to the agreed purchase price, terms of the agreement and or the trade in arrangement.
30. The appellant further submitted that owing to the opaque nature of the "Authority/Motor Vehicle Inventory Form", it was not expected of the 2nd Respondent would proceed with the sale without the involvement of the Appellant.
31. The Appellant contends that the "Authority/Motor Vehicle Inventory Form" shared with him was in a form of an inventory depicting the state of the suit motor vehicle when delivered at the yard.
32. The Appellant maintained that he had instructed the 2nd Respondent's director that in the event he had gotten a buyer, he was to appraise him on the proposed purchase price for his consideration. The 2nd Respondent reneged on this and went ahead and sold the suit motor vehicle without ostensive authority from the Appellant. The 2nd Respondent acted without express authorization to sell from the Appellant.
33. The appellant referred this court to The Concise Dictionary of Law, 2nd Edition, page 17 defines an "agent" as,

"A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."
34. Further, the appellant relied on the case of Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353 where Lord Pearson with the concurrence of the House used the words-

"The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct."



35. The Appellant authorised his driver to deliver the car to the yard and as a proof that the suit Motor Vehicle was actually delivered to the yard, his driver appended his signature on the "Authority/Motor Vehicle Inventory Form" dated 10th October 2019 for purposes of ascertaining the state of the suit Motor Vehicle before leaving it at the yard.
36. It was contended by the appellant that the said driver was never authorised to sign any authority to sell. The appellant argued that on a keen observation of the "Authority/Motor Vehicle Inventory Form", it's clear that the same only depicts the status of the motor vehicle and not terms for sale.
37. The 2nd Respondent never entered appearance to inform this or the trial Court on the nature and extent of the authority to sell he had with the Appellant and hence the scope of the "Authority/Motor Vehicle Inventory Form" can only be that defined by the Appellant.
38. The appellant admits the delivery of the subject motor vehicle to the 2nd Respondent's yard, and that One Mr Gitonga, a Director, acting on behalf of the 2nd Respondent received the subject motor vehicle.
39. The appellant maintains that the said Gitonga never sought further instructions to sell the motor vehicle and or notify the Appellant that the 1st Respondent had showed interest to purchase it. The appellant submitted that the last conversation he had with a Mr Gitonga, the Director of the 2nd Respondent, was an indication that the 2nd Respondent had not found a suitable buyer hence it was incumbent upon him to inform the Appellant of the new development.
40. The Appellant submits that he instructed the 2nd Respondent to find a buyer who could purchase the subject motor vehicle at approximate consideration Kshs.4,500,000/=. The marked price was subject to negotiation with the potential purchaser hence the subject motor vehicle had to be stationed at the 2nd Respondent's yard for purpose of attracting a buyer.
41. According to the appellant if he had issued any authority to the 2nd respondent and or its agents allowing the later to sell the motor vehicle, he would have surrendered the original log book together with other transfer documents for ease and to further expedite the transaction since he was keen on disposing the suit motor vehicle.
42. The 2nd Respondent despite being dully served with summons to enter appearance by the 1st Respondent failed to enter appearance and hence the Appellant averments against the 2nd Respondent were never controverted.
43. The Appellant submits that the "Authority Sale/Motor Vehicle Inventory Forms" produced as Exhibits for the 1st Respondent were incapable of establishing a Principal/Agent relationship for the purpose of selling the suit motor vehicle as held by the trial court.
44. According to the appellant, the Learned Magistrate erred in law and fact in finding that the Appellant had authorized the 2nd Respondent to sell the Appellant's Motor Vehicle of Registration Number KCU 770M Toyota Prado to the 1st Respondent by didn't of an authority emanating from a forged Authority Sale/Motor Vehicle Inventory Forms not signed by the Appellant.

Whether the 1st Respondent had validly purchased Motor vehicle of Registration number KCU 770m Toyota Prado from the Appellant?

45. The appellant maintains that the sale agreement entered herein was done without the authority, knowledge and or consent of the registered owner the Appellant herein. He was neither a party to the agreement nor aware of its contents and never executed it. Both the 1st and the 2nd Respondent never informed the Appellant of the intended sale. The Appellant only met the 1st Respondent after



tracking the subject motor vehicle to his residence in Karen. 44. As aforementioned, the Appellant was keen on disposing the suit motor vehicle at Kshs.4,500,000/=. The purported agreement indicates that parties entered into a trade in agreement terms which were set by the 1st and the 2nd respondent without the involvement of the Appellant.

46. The doctrine of Privity of Contract provides that only the parties that actually negotiated a contract (who are privity to it) are entitled to enforce its terms. Basically, it advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. The Appellant was never a party to the agreement dated 6/12/2019 or aware of its terms hence the said agreement cannot be enforced against him.
47. In the case of Migori civil Appeal No.111 of 2017 Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others, the Court of Appeal deliberated on the doctrine of privity of contract at length and in Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another (2015) the Court rendered itself that: "In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.
48. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus: "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.

The appellant contends that he was not bound by the agreement for sale entered into between the 1st and 2nd respondents The Learned Magistrate erred in law and in fact in holding that the 1st Respondent had validly purchased Motor vehicle of Registration number KCU 770M Toyota Prado from the Appellant owing to the fact that the Appellant was a stranger to the agreement dated 6th of December 2019 hence he cannot be bound by its terms.

Whether the 1st Respondent was an innocent purchaser for value without Notice?

49. A bona fide Purchaser can be defined as one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.
50. Section 8 of the *Traffic Act* provides that a person who is registered shall be deemed to be the owner of the motor-vehicle unless the contrary is proved. The 1st Respondent was well aware that the suit motor vehicle was registered to a third party but failed to demand for copies of transfer documents for his inspection prior to executing the sale agreement. 31. The Court of Appeal in Weston Gitonga & 10 others vs Peter Rugu Gikanga & Another adopted the definition "bona fide purchaser" as given by the Black's law Dictionary 8th Edition as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

51. The challenges experienced by the 1st Respondent after executing the sale agreement were purely out of his neglect to conduct due diligence before entering into the purported sale agreement and established the ownership and the whereabouts of the log book.



52. It was incumbent upon the 1st Respondent to ensure that the subject motor vehicle had no encumbrances, confirm particulars of the motor vehicle before negotiating on the purchase price.
53. The Learned Magistrate erred in law and in fact in holding that the 1st Respondent was an innocent purchaser for value without Notice and disregarding the fact that the 1st Respondent failed to do his due diligence before purchasing the Subject Motor Vehicle.

Whether the 1st Respondent acquired good title of the subject Motor Vehicle.

54. The appellant submitted that guided by the principle of *nemo dat quod non habet*, and the case of *Katana Kalume & another vs Municipal Council of Mombasa & Another* where the court cited with approval the holding in *Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd* where it was held as follows:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

55. Further, in *Kericho ELC Case No.38/2018 Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina* the Honourable Court pronounced itself 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*.”

56. The Appellant submits that that the 2nd respondent did not have a good title capable of passing it to the 1st respondent. The 2nd Respondent had only been issued with instructions limited to finding a potential buyer and no instructions to sell the suit motor vehicle. Whatever loss the 1st Respondent has suffered can be well compensated by pursuing the 2nd Respondent who illegally sold the suit motor vehicle to him.
57. The Appellant submits that the learned Magistrate totally misapprehended the law and facts of the case leading to an erroneous decision by holding the 2nd Respondent had the authority to sell the suit Motor Vehicle a purported authority that emanated from a forged document.
58. The appellant concluded by urging the court to allow the appeal with costs.



1st Respondent's Case

59. The 1st Respondent was the buyer and Beneficial Owner of Motor Vehicle registration number KCU 770M, Toyota Prado, TX, having bought the same from the 2nd Respondent vide a Sale Agreement dated 6th December 2019.
60. The Appellant (hereinafter "the registered owner") is the registered owner of Motor Vehicle registration number KCU 770M, Toyota Prado, TX, the subject of this suit despite the same having been sold to the 1st Respondent.
61. The 2nd Respondent (hereinafter "the dealer/agent") is a duly registered Motor Vehicle dealer, specializing in the business of buying and selling Motor Vehicles and who was, through an Authority to Sell dated 10th October 2019, authorized by the Appellant, the registered owner, to sell his Motor Vehicle registration number KCU 770M, Toyota Prado, TX.
62. The 3rd Respondent (hereinafter "the Auctioneer") is an auctioneering agent working on the instructions of the registered owner of the Motor Vehicle registration number KCU 770M, Toyota Prado, TX.
63. According to the 1st respondent On 6th December 2019, the 1st Respondent entered into a Motor Vehicle Sale Agreement with the 2nd Respondent, who was the dealer/agent, duly authorized by the registered owner of the Motor Vehicle registration number KCU 770M, Toyota Prado, TX vide an authority to sell dated 10th October 2019 to sell the same. The Motor Vehicle was valued at Kshs. 4,500,000/=.
64. The sale agreement provided that the 1st Respondent trades in his Motor vehicle registration number KCK 709Z, Honda CRV, valued at Kshs. 1,800,000/= and pays the balance of Kshs. 2,700,000/= by cash payment.
65. On 6th December 2019, the 1st Respondent, in line with the sale agreement between him and the dealer/agent, surrendered his Motor Vehicle registration KCK 7092, Honda CRV and cleared the balance of the purchase price of Kshs. 2,700,000/= vide 3 Bankers cheques of Kshs. 900,000/= each.
66. The 1st Respondent was then granted possession, ownership, care and control of the purchased Motor Vehicle registration number KCU 770M, Toyota Prado, TX but upon several requests, the dealer/agent would not release the original logbook to the 1 Respondent, to facilitate its transfer to himself, in contravention and wanton breach of the terms of the sale agreement between him and the dealer/agent.
67. The 1st Respondent reported the refusal and frustration by the dealer/agent to the Director of Criminal Investigations (DCI) on 28th January 2020, who undertook to investigate and guide on the matter.
68. The 1st Respondent then enjoyed quiet and peaceful possession of the Motor Vehicle until the 3rd June 2020, when he was irregularly dispossessed of the same by the 3rd Respondent, acting on express instructions of the Appellant.
69. The 1st Respondent thereafter on 4th June 2022, filed the instant suit, seeking restitution of the Motor Vehicle and a ruling on the Application was delivered on 28th August 2020, before Hon. G.A MMasi, (Mrs) Senior Principal Magistrate, who ordered the release of the Motor Vehicle to the 1st respondent.
70. The Appellant, aggrieved with the Honorable Magistrate's decision, filed an appeal against the ruling and subsequent order issued thereto at the High Court being Milimani High Court Civil Appeal No.



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71. The appeal was heard and judgment delivered on 19th March 2021, before Hon. Justice K. Serгон, who set aside Hon. G.A. MMasi's ruling and the subsequent order issued thereto and substituted the same with inter alia, an order that the Motor Vehicle be kept in a reputable Motor Vehicle yard pending hearing and determination of this suit, with the storage charges thereto being met equally by the 1st Respondent and the Appellant.
72. Pursuant to the said orders, the Motor Vehicle is to date, stored at Car Soko Limited, where it awaits this Honorable Court's verdict.
73. The Appellant is the registered owner of the suit Motor Vehicle and has admitted under oath that he willingly released the same to the 2nd Respondent, its authorized dealer/agent to sell the subject Motor Vehicle. The Appellant through a duly recognized and enforceable Authority to Sell, duly authorized the dealer/agent to sell the subject motor vehicle. This was confirmed by the executed Authority to sell dated on 10th October, 2019 and issued them with a copy of the logbook thereof.
74. In *Industrial & Commercial Development Corporation (ICDC) vs Patheon Limited* Civil Appeal No. 74 of 2011, an agent was defined by the Court of Appeal as follows:

“The Concise Dictionary of Law, 2nd Edition, page 17 defines as "agent" as, "a person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party.”
75. The authority to sell created a principal-agent relationship as was observed in the matter of *Cecilia Nyambura Murunga v John Ndung'u Maina* [2018] eKLR where M.C. OUNDO Judge relied on established definition of existence of such relationship from *Bowstead and Reynolds on Agency* Seventeen Edition, Sweets Maxwell Page 1-001, Principal- Agency relationship is defined as:-

“... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”
76. According to 1st respondent there was express authority to sell the Motor vehicle by virtue of a signed Authority to sell alongside implied authority/consent by conduct on the part of both the Owner and the Dealer/Agent, when they agreed that:
 - (i) the car would be delivered to the dealer/agent;
 - (ii) the owner visited the agent's premises severally to confirm if the subject motor vehicle had indeed been sold; and
 - (iii) the purchase price would be received by the dealer/agent.
77. The Existence of a consent was considered in the case of *Branwhite versus Worcester Works Finance Ltd.* [1969] 1 A.C. 552 at 587 where Lord Wilberforce posited thus; -

“While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.”



78. The 1st respondent maintains that there was authority from the Appellant to the 2nd Respondent to Sell, and in support of that submission cited the decision in *Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967)* 2 All E.R. 353 where Lord Pearson with the concurrence of the House used the words: -

“The relationship of the Principal - Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct”

79. According to the 1st respondent the learned trial magistrate arrived at the correct decision in delivering his judgment in favor of the 1st respondent. The defense of the appellant could not stand in the face of the full facts of the matter.

80. The consent and authority from the Appellant is embodied in the Authority to sell dated 10th October 2019 and that the appellant having surrendered the motor vehicle to the 2nd respondent for purposes of sale he cannot walk away from the sale between the 1st respondent and 2nd respondent.

81. The 1st respondent was categorical that the Motor Vehicle Sale Agreement between the 2nd Respondent and the 1st Respondent was very clear that upon the 1st Respondent trading in his motor vehicle registration number KCK 709Z and settling the balance of the purchase price, the property in the subject motor vehicle passed from the Appellant to the 1st Respondent.

82. The 1st respondent has invited the Honorable court to find that the agent/dealer was duly authorized to sell the motor vehicle and having successfully sold the same, the 1st Respondent obtained a good title to the property and therefore the owner was not entitled to repossess it from a successful bona fide purchaser for value.

83. If indeed the owner had any recourse touching on the sale proceeds of the Motor Vehicle, the claim should have exclusively been against the dealer/agent by the owner as an unpaid seller. This issue was canvassed at length in the case of *Haul Mart Kenya Limited versus Tata Africa Holdings (Kenya) Limited (2017) eKLR*, whereby it was held that:

“I therefore find and hold that Caneland is liable to pay Tata Africa the purchase price for the Units. Since property had passed Tata Africa could not repossess the Units from Haulmart as it had threatened to do. It could only look to Caneland for the price, I now turn to the relationship between Caneland and Haulmart.”

84. The 1st respondent therefore urged the court to uphold the decision of the lower court and dismiss the appeal with costs since he acquired good title over the motor vehicle. The authority to sell the motor vehicle was properly issued to the 2nd respondent a fact that the appellant does not deny.

85. Further, the 1st Respondent, pursuant to the owner's authority to sell, entered into a sale agreement with the dealer/agent for the purchase of the Motor Vehicle. This sale agreement then became binding between the 1st Respondent and the 2nd Respondent.

86. The learned trial magistrate in her findings stated that indeed by signing of the authority to sell by the Appellant's driver, this was express authority to sell the motor vehicle given to by the appellant as the motor vehicle had been delivered to the yard for sale.



87. The 1st respondent invoked the provision contained under clause 8 of the Sale Agreement, which expressly stated that:

“.....the seller fully and irrevocably indemnifies the purchaser for any and all disputes that may arise between the seller and the true lawful owner of the vehicle in their agency agreement and/or arising from this vehicle sale transaction....”

88. The 1st Respondent therefore maintained that he has a right under contract law to enforce the above provision of the contract as against the 2nd Respondent if at all the appellant is aggrieved he could seek to be indemnified by the 2nd respondent. As to the enforceability of the contract of sale that was purely a matter for the 1st and 2nd respondents. This was confirmed in the case of Stephen Gachungu Kimani versus G.I. Kariuki -Direct O-Services & Another (2018) eKLR, where it was held that:

“Under the doctrine of privity of contract, it is only the parties to an agreement who can challenge its validity and enforceability.”

89. The 1st Respondent argued that he is a bona fide purchaser for value without notice who rightfully bought the subject Motor vehicle, entered into a sale agreement and in line with its terms paid the purchase price in full, facts that the Owner has not disputed.

90. Black's law Dictionary 8th Edition defines "bona fide purchaser" as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

91. The recipe for one to qualify as a bona fide purchaser for value was highlighted in the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR where the Judge quoted the case of Katende v. Haridar & Company Limited [2008] 2 E.A.173 it was held:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

92. In this case the 1st Respondent has clearly satisfied the above qualifications and is a bona fide purchaser who ought to be protected by this Honorable court from the Appellant's ill motives as it is the duty of this court to protect the rights of a bona fide purchaser more reason why the appeal should be dismissed with costs to the 1st Respondent.



93. The 1st Respondent was not privy or party to any agreement, if any between the Owner and the Dealer/ Agent. As a matter of fact, the sale agreement entered into between the 1st Respondent and the dealer/ agent expressly indemnified him from any dispute that would arise between the dealer/agent and the owner of the suit motor vehicle touching on the sale transaction thereof, as submitted above.
94. The 1st respondent maintains that any dispute existing between the owner and the dealer/agent, pertaining the sale of the Motor Vehicle and specifically the sale proceeds, would exclusively and squarely have been resolved as between the two, to the exclusion of the purchaser and therefore the actions of the Owner repossessing the vehicle from an innocent purchaser would be violating his rights and occasioning him an injustice., therefore the appeal being allowed would be detrimental to the 1st Respondent.
95. The agreement between the 1st Respondent and the 2nd Respondent was a contract for sale of goods governed by the *Sale of Goods Act*. According to, the 1st respondent property in the unit had passed to him.
96. Under section 14 of the Act, which provides as follows:
14. In a contract of sale unless the circumstances of the contract are such as to show a different intention, there is-
- (a) An implied condition on the part of the seller that in the case of a sale he has right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.
 - (b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.
 - (c) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time when the contract is made.
97. Further, the 1st respondent relying on the above provision of law, submitted that it is quite clear and it remains uncontested that:
- a) The 2nd Respondent had a right to sell the subject motor vehicle by virtue of the Authority to Sell.
 - b) The 1st Respondent enjoyed quiet possession of the motor vehicle for over 6 months.
 - c) The Contract between the 1st Respondent and the 2nd Respondent did indeed confirm that the motor vehicle is being sold free from any charge or encumbrance in favor of any third party including the Appellant.
98. Sections 26(1) and (2) of the *Sale of Goods Act* are exceptions to the nemo dat rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell or confer a better title than he has.
99. These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd vs. Transport Brakes Ltd (1949)* 1 KB 322, at pp. 336-337 when he stated.

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for



value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

100. The 1st respondent argued that the Appellant therefore cannot repossess the Motor Vehicle from the innocent purchaser by itself or the 3rd Respondent which is well out of its limits of the contract. The Appellant's appeal should be dismissed to allow the 1st Respondent, a bona fide purchaser for value to enjoy the fruits of his purchase and Judgment.
101. The respondent contends that the Appellant's appeal lacks merit in the sense that there was a clear principal/agent relationship between the Appellant and the 2nd Respondent, whereby the Appellant out rightly gave express authority by signing the sale agreement dated 6th December, 2019 to the 2nd Respondent to sell the subject of the suit to a bona fide purchaser, the 1st Respondent, if at all there was any disagreement between the principal and the agent the two should exclude the 1st Respondent to whom title over the motor vehicle was lawfully passed.
102. The 1st respondent concluded by arguing that the Appellant acted to defraud the 1st Respondent through a well-orchestrated scheme in which the Owner granted the Dealer/Agent an authority to sell the suit Motor Vehicle, the Dealer/Agent using the authority to sell swayed the 1st Respondent into buying the same. The 1st Respondent fell into their trickery and relinquished possession of his Motor Vehicle through trade-in and topped up the balance of the purchase price in cash as an innocent purchaser for value.
103. The Owner and the Dealer/Agent thereafter conspired and refused to release the Original Logbook to the 1st Respondent to facilitate its transfer into his name and eventually the Owner repossessed and intends on selling it to the detriment of the bona fide purchaser.
104. Further, the first respondent argued that the Appellant's actions depict a never -ending vicious cycle by filing this Appeal aimed at defrauding the 1st Respondent, denying the 1st Respondent his fruits of Judgment.

Analysis and Determination

105. The appeal by the appellant will turn on basically two things;-
 - a) whether the 2nd Respondent had the authority from the appellant to sell the subject motor vehicle,
 - b) whether the 2nd respondent acted as a mercantile agent for the appellant thus he was capable of passing good title to the 1st respondent.
106. The appellant does not deny handing over his motor vehicle to the 2nd respondent for sale.
107. The main argument by the appellant is that at the time the 2nd respondent sold the motor vehicle to the 1st respondent he did not revert to him to tell him that he had found a buyer for the motor vehicle.
108. It is clear from the position that the handover of the motor vehicle was for purposes of sale. The question as to how the 2nd respondent went about the sale is not a matter for the 1st respondent.
109. The understanding between the appellant and the 2nd respondent was strictly a matter for the two to the exclusion of the 1st respondent who was an innocent purchaser for value without notice.
110. The essential function of a sales agent is to represent the owner of a property and negotiate with potential customers on his behalf. The agreement between the property owner and the sales agent will



outline the limits of the agent's authority to negotiate and enter into contracts. It therefore follows that the owner of the property before handing over possession of the property or title to the property to the sales agent, has a duty to ensure that the agreement between him and the agent is clear and that his interests are protected. It cannot be the business of any intending buyer to go into frenzy of interrogatories as to how the vehicle came into the hands of the seller more so where the seller is selling the property in the ordinary course of business.

111. It is not the duty of the court to rewrite the contracts between parties but to interpret and give effect to the agreement between parties. The appellant intended from his own submission and evidence that the 2nd respondent finds a buyer for his vehicle which he did. The fact of the Motor Vehicle having been sold to the 1st respondent by the 2nd respondent was not disputed.
112. The evidence of payment and the modes used to pay for the motor vehicle were similarly not disputed.
113. The issue that arises is whether the 2nd respondent could pass good title to the 1st respondent. It is the view of this court that taking into account the evidence tendered by both parties, there is no doubt that the appellant offered his motor vehicle for sale through the 2nd respondent willingly and the offer was accepted by the 1st respondent who went ahead to give adequate consideration for the Motor vehicle thus concluding a binding sale agreement between him and the 2nd respondent who had lawful authority of the registered owner of the Motor Vehicle.
114. The Sales Agency Agreement is a legally binding document that sets out the terms and conditions of the relationship between the principal and the sales agent. It is important to draft this agreement carefully to ensure that all parties understand their rights and obligations under the agreement. This agreement will include terms such as the appointment of the agent, the scope of their authority, payment terms, and termination clauses. The principal in this case the appellant cannot purport to seek to deprive a bona fide purchaser for value the ownership of the property simply because he continues to hold on to the log book yet he voluntarily put up the vehicle for sale and that the 1st respondent purchased it from his lawfully appointed agent.
115. if the appellant has an issue as to the amount of money that was paid to the 2nd respondent, that is a matter that is purely between them. A Sales Agency Agreement is a legal contract that allows a person or company to appoint an agent to act on his or its behalf, negotiate and enter into contracts, for sale of its product. The agreement for a mercantile agent is designed to protect both the principal and the agent's interests. The appellant in this appeal cannot therefore seek to disposes the 1st respondent the motor vehicle on the basis of a lapse in the agreement between him and his agent.
116. The terms of the agency agreement should be clear to both parties. In *Fakes v. King* (1923) 1 K.B. 282 , a significant British legal decision, the court established that an agent who exceeds their authority when entering into a contract on behalf of their principal, without the principal's knowledge or consent, cannot bind the principal to that contract, even if the third party acted in good faith, believing the agent had the necessary authority. The burden of proving that the agent exceeded his authority lies squarely upon the principal if he seeks to avoid liability on account of the fact that the agent exceeded his authority.
117. Section 107 of the *Evidence Act* expressly place the burden on the shoulders of the party who seeks to have the court give judgment as to any legal right or liability dependent on the existence of facts which he asserts to prove those facts.
118. The appellant did not deny the fact of appointing the 2nd respondent as his agent. He too did not deny that the purpose of handing over Motor Vehicle KCU 770 M Toyota Prado was for sale. The fact that the same was sold to the 1st respondent by the 2nd respondent is not denied. The appellant was not able



to show what portion of the document of authority to sell granted to the 2nd respondent was breached. In the circumstances his argument that the 2nd respondent sold the motor vehicle irregularly cannot stand in the face of the evidence tendered by the 1st respondent.

119. The fact that the 2nd respondent chose not to defend the suit cannot be ignored. It would have assisted this court to determine whether indeed there was a special condition given to him by the appellant regarding the sale which he violated. In the absence of any evidence to contradict the evidence of the 1st respondent, this court is minded to agree with the decision reached by the magistrate that the 1st respondents claim had merit and indeed the motor vehicle that was taken away from him on instructions of the appellant was illegally repossessed for he had bought the same from the duly authorized agent of the appellant.
120. The 2nd respondent being a motor vehicle dealer had apparent authority of the appellant to sell the motor vehicle in the ordinary course of business which he did. Any reasonable man presented with the opportunity to buy the motor vehicle would have bought it on the strength of the authority given by the appellant and signed by the driver who delivered the motor vehicle. The appellant admitted to having send his driver to deliver the vehicle to the 2nd respondent.

In the case; *Lowther v. Harris*, (1927) 2 KB 393: (1926) All ER Rep 352, the plaintiff engaged Prior, a shopkeeper, to act for him in the disposal of some tapestry. Prior obtained possession of the goods by fraud and sold them to a bona fide purchaser. Prior, misappropriated the sale proceeds. Then, the plaintiff sued the purchaser. It was held that the purchaser acquired a good title. Wright J., observed as-

“The first question is whether Prior was mercantile agent....., that is, an agent doing a business in buying and selling, or both having in the customary course of his business as such authority to sell goods. I hold that he was.....it was contended that Prior was a mere servant or a shopman and had no independent status such as was essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman. I think this is still law under the present Act. In my opinion, B. Prior, who had his own shops and who gave receipts and took cheques in his own registered business name and earned commissions was not a mere servant, but an agent.....It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and the Factor Act acquires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in; *Hayman v. Flewker*, (1863) 32 LJCP 132, and I think the same is the law under the present Act.”

121. The fact of the 2nd respondent being a motor vehicle dealer was not disputed thus his sale of the vehicle to the 1st respondent was in the course of duty the very reason why the appellant had appointed him. In the case; *Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd.*, (1934) 2 KB 305: (1934) All ER Rep 322, it was held that the mercantile agent should be in possession of the goods and if goods are entrusted to him in any other capacity, he cannot convey a good title. The 2nd respondent had the suit motor vehicle thus he had capacity to dispose the same as an agent.
122. The law is that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title of the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell. See *Folkes v. King*, (1923) 1 KB 292 CA



The 1st respondent in buying the motor vehicle acted in good faith and cannot therefore be faulted. By agreeing to trade in his own motor vehicle, he acted above board and that any issue arising from the sale can only remain a matter between the appellant and the 2nd respondent.

123. In the circumstances this court finds that the appeal has no merit, the same is dismissed and the motor vehicle held at the appointed yard shall be released forthwith to the 1st respondent.
124. The appellant has a recourse against the 2nd respondent if he believes that he violated their understanding which this court has not been able to determine on the basis of the evidence presented.
125. The 1st respondent shall have the costs of the appeal.
126. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 3RD DAY OF MARCH 2025.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Chumba for the Applicant

Raingo for 1st Respondent

