



REPUBLIC OF KENYA



**Sarwar Motor Spares Limited v NIC Bank Limited (Civil Appeal 230 of 2019)
[2025] KEHC 12918 (KLR) (Civ) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12918 (KLR)

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

CIVIL

CIVIL APPEAL 230 OF 2019

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

SARWAR MOTOR SPARES LIMITED APPELLANT

AND

NIC BANK LIMITED RESPONDENT

*(An appeal from the judgment and decree of Hon. E. Wanjala (Ms.)
SRM delivered 28.03.2019 in Milimani CMCC No. 1023 of 2015)*

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. E. Wanjala (Ms.) SRM delivered 28.03.2019 in Milimani CMCC No. 1023 of 2015. The appellant was the plaintiff in the lower court. The suit was dismissed with costs.
2. The Appellant raised the following grounds of appeal in an amended memorandum of appeal dated 10.06.2019:
 - a. That the lower court erred in law and in fact in dismissing the Appellant's suit.
 - b. That the lower court erred in law and in fact in ignoring the Appellant's pleadings and evidence and thus the entire suit (sic).
 - c. That the lower court erred in law and in fact by making a finding that the Plaintiff's suit had no merit altogether without giving reasons therefore (sic).
3. The Appellant filed suit stating that they bought a salvage motor vehicle for Ksh. 800,000/= and sold the same to Anastasia Shiron Nyayieka leaving a balance of Ksh. 800,000/=. The defendant repossessed the said motor vehicle through auctioneers on account of a loan taken by one Frank Nyabwari. On



searching he discovered that the vehicle had been transferred to Frank Nyabwari who secured finance with the Respondent.

4. The new owner got a new log book for a vehicle indicated to be a 2008 model while the original vehicle was a 2004 model. They sought to restrain the sale of the vehicle among other prayers including damages.
5. The Respondent filed defence in April 2025 stating that they advanced a sum of Ksh 3,295,000/= to enable Frank Onchagwa Nyabwari to acquire a vehicle. A chattel mortgage was registered for the vehicle registration number KBK 186R. The borrower was registered as an owner on 15.07.2013.
6. From the evidence, salvage was sold to Nasir Ur Din. There is no nexus shown between the said purchaser and the Appellant. From the pleadings, it appears that someone made a mistake of ginormous proportions. Vehicle chassis numbers are the same.

Evidence

7. The appellant's witness, Guram Mustafa testified and reiterated the contents of the plaint. They stated that they purchased the suit motor vehicle for Ksh.800,000/= and sold the same to Anastacia. She paid Ksh. 1,320,000/=. The balance was Ksh. 80,000/=. When Anastacia came to pay the balance, she saw the file and records were missing. He learnt that the vehicle was registered in the names of Francis Onchagwa Nyabwari. On cross examination he stated that he bought the vehicle on 04.06.2010 and sold it on 19.1.2015. They had a transfer form from Kevin McCourt but it did not have a transferee. He did not have evidence that the vehicle was registered in the name of the Plaintiff. He stated that there was no evidence that the respondent participated in change of the model.
8. DW1 was Hulder Mengele who adopted her witness statement. She stated that she did a search in 2013 which showed that the vehicle was registered in the names of Starget Enterprises Limited manufactured in 2008. The borrower bought the vehicle from the registered owner. They paid Starget Enterprises Limited a sum of Ksh. 3,200,000/=. The borrower defaulted and repossession took place. The arrears had not been paid by the time repossession took place. The vehicle was registered in the name of the bank and Francis Onchagwa Nyabwari. This remains in possession at the time of testimony on 4.12.2018.
9. On reexamination, she stated that they had log books in the names of Francis Onchagwa Nyabwari with the bank and the copy with the original owner, Starget Enterprises Limited.
10. The court found that the case was not proved. Thereafter the court delivered the impugned judgment resulting in the current appeal.

Submissions

11. This appeal was heard by way of submissions. The appellant filed submissions dated 19.11.2024, while the Appellant filed submissions dated 18.03.2025. The appellant filed submissions giving a profound analysis of the registration of Starget Enterprises Limited. This part did not arise from evidence or pleadings. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, where the court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the



law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

12. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

13. The Appellant then gave a synopsis on how the transfer started from Kevin McCourt to Starget Enterprises Limited and finally to the current registered owners and the financier.
14. The appellant stated that the Respondent's acquisition of the vehicle was proper. They stated that transfer of the property under section 3(1) of the Transfer of Property Act 1892 requires the same to be in writing. They forgot to mention that the Act was repealed over 13 years ago by Section 109 of the *Land Registration Act*. They also forgot to mention that the Act does not deal with transfer of chattels. They also deal with aspects of fraud which I do not find useful as they do not arise from pleadings. They also stated that the appellant was a bona fide purchaser for value. The rest of the submissions are not related to the appeal.
15. The respondent filed submissions that the vehicle was registered in the names of Starget Enterprises Limited as at 15.07.2013. The owner invoiced the Respondent for Ksh. 3,295,000/= to be settled on behalf of the borrower. The vehicle was repossessed on 19.01.2015. They stated that submissions in parts (b) and (c) in the submissions were not part of the questions raised in the memorandum of appeal. This was in line with Order 42 Rule 1(2) and 4 of the Civil Procedure Rules. Reliance was placed on the case of Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR, where Mary Kasango J, stated as follows:

Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-

"Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

'.... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

16. On the cardinality of the pleadings and fidelity to them, the respondent placed emphasis on the decision of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR, where the court of appeal [G. B. M. Kariuki, M'Inoti & Mohammed, JJ.A] stated as follows:

In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it



is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

17. Reliance was also placed on some Tanzanian cases, whose citation, the court does not find necessary to regurgitate in view of the supremacy of our indigenous laws.
18. Further submissions were made in respect of proof of ownership. They stated that a copy of certificate of ownership was not produced. The Appellant did not prove ownership of the vehicle. The respondent posited that sections 107-109 of the Evidence Act provides for the burden of proof.
19. Reliance was placed in the case of Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR, where the Court of Appeal [Karanja, Mwera & Azangalala, JJ.A)] posited as follows:

This Court adopted the interpretation above in the case of Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ.A) and held that;

“Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

20. They also relied on the case of Rayan Logistics Limited & another v Aletia & another (Civil Appeal E104 of 2022) [2024] KEHC 10119 (KLR) (13 August 2024) (Judgment), where, G.L. Nzioka J, held as follows:

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No.92 of 1998, “whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.

21. The respondent's case was that the Appellant's evidence was underwhelming at the trial. They sought refuge in the decision of the court of appeal [Makhandia, Ouko & M'Inoti, JJA] in Muhambi Koja v Said Mbwana Abdi [2015] eKLR, where it was held that:

We agree. To begin with, in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. But situations, in the normal course of business and human interactions, may arise where the person named in those records may have passed the property in the vehicle to some other person in whom the ownership presently vests. For instance, Section 9 of the Traffic Act recognizes this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The



registered owner must, within seven days from the date of the transfer inform the Registrar in a prescribed form. (He is also required to furnish) the name and address of the new owner and deliver the original registration book to the new owner.

22. They stated that the Respondent produced the log books and financing. Reliance was placed on the case of *Sagala v Sagala* (Civil Appeal 9 of 2023) [2024] KEHC 5573 (KLR) (9 May 2024) (Judgment), where, AC Mrima, J, posited as follows:

69. Based on the averments made by the Appellant, the Respondent tendered evidence to the effect that cared for him through his parents, that he educated the Appellant and that he gave him land to settle in.

There is also evidence that the Appellant sold off the land allotted to him by the Respondent. Several exhibits were produced by the Respondent.

70. The Respondent, therefore, managed to shift the evidential burden of proof back to the Appellant. It was, hence, upon the Appellant to adduce further evidence countering the Respondent's evidence. That, he did not do. As such, the averments by the Respondent were uncontroverted and can only be found by this Court as truthful.

23. They also submitted on a long line on the question of injunction which I don't find relevant.

Analysis

24. 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. 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 it 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.”

25. The duty of the first appellate court was discussed by the Court of Appeal [Clement De Lestang, VP, Duffus and Law JJA] in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

26. The court is to bear 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.



27. 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...”

28. The appellant allegedly bought the vehicle and sold the same. There was no evidence that the Appellant bought the vehicle at all. Even the documents that were produced are bogus. They relate to a sale to Nasir Ur Din. The vehicle was sold to Anastacia, if we believe the Appellant. The contract was not cancelled. This means that the appellant lost interest in the vehicle. They only had an unpaid seller’s lien pursuant to Section 39 and 40 of the *Sale of Goods Act*. The same provides as follows;

39.

- (1) The seller of goods is deemed to be an unpaid seller within the meaning of this Act-
 - (a) when the whole of the price has not been paid or tendered;
 - (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
- (2) In this Part, “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

29. The rights of an unpaid seller are defined as follows:

40.

- (1) Subject to the provisions of this Act, and of any Act in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them; (c) a right of resale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

30. The most difficult point is that there is no privity between the Appellant and Respondent. The vehicle is registered in the names of the Respondent as the financier and Francis Onchagwa Nyabwari as the owner. The appellant does not purport to be an agent of the said Francis Onchagwa Nyabwari.

31. To be able to impeach the charge, the court must impeach the ownership by Francis Onchagwa Nyabwari. He is not a party to the suit. His ownership has not been challenged. It is a cardinal principle of law that a party cannot be condemned unheard, *audi alteram partem*. In the circumstances, no



orders can be issued against a nonparty. In the case of *Obala v Okello & 2 others* (Civil Appeal E022 of 2022) [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), the court, R.E. Aburili J posited as follows:

35. In this case however, the consent recorded affected or involved a party that was not party to the case between the 1st respondent and the appellant. From the case of *James Muchori Maina supra*, a consent is a form of contract. Accordingly, it cannot bind a party that is not privy to it.
 36. The Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (2015) eKLR rendered itself as follows: “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.
 37. For the above reason, I find that in the instant case, the consent order amending the appellant’s defence to include the third party was void ab initio as the purported third party was not party to that consent.
32. The orders sought relate to the quashing of interests held by Francis Onchagwa Nyabwari. The said person, being a non-party to the suit, cannot have orders issued against him. In the case of *David Njoroge Kinuthia & 653 others v Gnanjivan Screws and Fasteners Limited & 5 others* [2021] eKLR, the court held that a person who is not a party to the proceedings cannot be bound by or subjected to orders arising therefrom. The court stated as follows:

In the case *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR the court stated as follows,

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

It follows that the court cannot issue orders against a person that is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party. The fact that the 2nd and 3rd Respondents purchased the assets of the judgment debtors does not make them shareholders or parties to the suit, neither attract any liability.

33. The net effect is that the Appellant did not establish any right capable of enforcement. The Appeal is not meritorious and is accordingly dismissed.
34. 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.



35. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

36. 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.

37. The appeal is unmeritorious. Costs follow the event. The respondents are entitled to costs. Costs of Ksh. 105,000/= to the Respondent.

Determination

38. In the upshot, I make the following orders:

- a. The appeal is dismissed with costs of Kshs.105,000/= to the Respondent.
- b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

KIZITO MAGARE

JUDGE

Represented by: -

Chaudhri & Associates Advocates for the Appellant

Musyimi & Co. Advocates for the Respondent

Court Assistant – Michael

