



**Otuto v Sammy Traders Limited & 2 others (Civil Appeal  
E098 of 2022) [2024] KEHC 3401 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E098 OF 2022**

**RE ABURILI, J  
APRIL 3, 2024**

**BETWEEN**

**WINNIE ACHIENG OTUTO ..... APPELLANT**

**AND**

**SAMMY TRADERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ALFRED KAIYA ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL TRANSPORT & SAFETY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal arising out of the Judgement of the Honourable W.K.  
Onkunya in the Chief Magistrates Court at Kisumu delivered  
on the 10th February 2021 in Kisumu CMCC No. 487 of 2018)*

**JUDGMENT**

**Introduction**

1. The appellant herein Winnie Achieng Otuto sued the respondents seeking orders to cause the 1<sup>st</sup> and 3<sup>rd</sup> respondents to release motor vehicle registration No KCE 128G to her and transferred to her, a permanent injunction against the 1<sup>st</sup> respondent restraining it from impounding or in any other way interfering with her operation of the aid motor vehicle as well as general damages for loss of user.
2. It was the appellant's case before the trial court that she bought the suit motor vehicle from the 1<sup>st</sup> respondent through an employee of the 1<sup>st</sup> respondent one Alex Rading and that she had subsequently made payments for the purchase price after the initial buyer, one Daisy, had defaulted on the same.
3. The trial magistrate in his judgement found that the appellant had failed to prove her case as she had not produced any document to show the existence of an agreement between herself and the 1<sup>st</sup> respondent over the purchase of the suit motor vehicle and as such she was not a bonafides purchaser for value and



further that she failed to strictly prove her claim for loss of user. The trial court dismissed the appellant's suit with costs to the respondents.

4. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 21<sup>st</sup> October 2022 raising the following grounds of appeal:
  1. That the learned trial magistrate erred in law and fact in failing to appreciate and consider the pleadings and evidence adduced in support thereof.
  2. That the learned trial magistrate erred in law and fact in admitting the evidence of DW1, DW2 and DW3 which was not supported by any factual basis.
  3. That the learned trial magistrate erred in law and fact in failing to attach due weight to appellant's evidence, submissions and authorities attached to.
  4. The learned trial magistrate failed to apply judicially and adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
5. The parties filed submissions to canvass the appeal.

### **The Appellant's Submissions**

6. The appellant submitted that the circumstances under which the 1st respondent was raising fraud were in house issues that the respondent could not be aware of thus it was unjust and inequitable to dispossess an innocent proprietor of her property based on allegations of fraud which could not be substantiated as was held in the case of *Florence Wangu Mwangi & another v British American Insurance Company Limited & another* [2010] eKLR.
7. It was submitted that the 1st respondent failed to tender any evidence demonstrating that the acts of the appellant constituted an illegality in the acquisition of the suit motor vehicle and thus the appellant was a bonafide purchaser of the suit motor vehicle as was stated in the case of *Lawrence Mukiri v Attorney General & 4 other* [2013] eKLR.
8. The appellant submitted that no evidence was tendered to prove fraud on her part whereas it was trite that fraud must be specifically pleaded and proved to a standard below beyond reasonable doubt but above the usual standard in civil matters as was held in the case of *Koinange & 13 others v Koinange* [1968] KLR 23.
9. It was submitted that the appellant should not be punished for having bought the suit vehicle which she paid for in totality as this was the exception to the nemo dat principle. Reliance was placed on the case of *Haul Mart Kenya Limited v Tata Africa Holdings Kenya Limited* [2017] eKLR.
10. The appellant submitted that it was evident by the documents filed and produced during trial that she had made all the payments as agreed between the parties and that she was issued with logbook as proof of the same and actually took possession of the suit vehicle.

### **The Respondent's Submissions**

11. It was submitted that documents that the appellant intended to rely on were never produced and thus there was no evidence that there existed a valid agreement between the appellant and the 1st respondent. Reliance was placed on the case of *Billiah Matiangi v Kisi Bottlers Limited & another* [2021] eKLR where it was held inter alia that if a document is marked for identification and not part of the evidence then it is not properly before the court.



12. It was submitted that the appellant was well aware that the suit vehicle had a caveat and was under investigation but proceeded to purchase it and that she failed to produce any documents to show that she had signed the transfer forms.

### **Analysis and Determination**

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. This is the principle espoused in section 78 of the *Civil Procedure Act*. The Court must, however, bear in 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 *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. In addition, this court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

15. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, the main issue for determination is to whether the appellant proved her case against the 1<sup>st</sup> respondent on a balance of probabilities.
16. At the heart of this matter is the relationship between the appellant and the 1<sup>st</sup> respondent if at all there was any. From the evidence adduced before the trial court, the appellant alleged to have bought the suit vehicle after taking up payments due from one Daisy Akinyi Odhiambo who had defaulted to pay for the purchase, to the 1<sup>st</sup> respondent, whom she met through one Alex Rading an employee, at the time, of the 1<sup>st</sup> respondent. It was her testimony that she entered into an agreement with Daisy for the said payments and even made the said payments to the 1<sup>st</sup> respondent but in the name of Daisy as was evidenced in the two receipts No 508 and 598.
17. On its part, the 1<sup>st</sup> respondent through their witness who testified as DW1 denied any relationship with the appellant but admitted that indeed it had a sale agreement with Daisy for sale of the suit vehicle which she defaulted on according to their records and that they realised that the vehicle had been transferred to the appellant thus forcing them to go and reverse the same at the NTSA and further place a caveat on the said vehicle’s logbook.
18. The 1<sup>st</sup> respondent admitted that Alex Rading was their former accountant and that he had been charged in a criminal Case No 239 of 2019 over the suit vehicle. The 1<sup>st</sup> respondent produced two forensic reports authored by DW2 and DW3 which showed that the receipts allegedly issued to the appellant were forgeries, which fact was not challenged by the appellant.



19. It is trite that no party could acquire a good title by reason of section 23(1) of the [Sale of Goods Act](#) which embodies the nemo dat quod non habet principle in the following terms:
- 23(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
20. Transfer of property is governed by section 19 of the [Sale of Goods Act](#) which provides as follows;
19. Property in specific or ascertained goods passes when intended to pass
- (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
21. It is evident from the evidence adduced before the trial court that the suit vehicle had not passed to Daisy from the 1<sup>st</sup> respondent seller and that the said daisy had no authority to sell the said motor vehicle while she was still repaying for the same to the 1<sup>st</sup> respondent.
22. What that means is that her purported sale and or transfer of the said motor vehicle to the appellant was illegal ab initio and therefore the reversal by NTSA of the transfer in favour of the appellant, as the transfer was not regular, considering the evidence of DW1 and DW2 which was uncontroverted that the 1<sup>st</sup> respondent's employee, committed a forgery as per the criminal case proceedings produced as exhibits, was in order. From the sale agreement produced as PEX1 between the 1<sup>st</sup> respondent and Daisy, it was evident that title in the suit vehicle would only pass to Daisy upon payment in full of the purchase price hence Daisy had no good title to pass to any other person including the appellant herein.
23. It is worth noting that contrary to allegations by the appellant, she failed to produce any document to show that there was an agreement between herself and the 1st respondent. All the documents that the appellant sought to rely on were only marked for identification and never produced as exhibits.
24. It is trite as submitted by th 1<sup>st</sup> respondent and as was held in Billiah Matiangi supra that if a document is marked for identification and is not part of the evidence then it is not properly before the court.
25. In essence, what is evident is that the appellant failed to prove her case against the 1st respondent before the trial court on a balance of probability. I would go further to state that the appellant's case for compensation did not lie against the 1<sup>st</sup> respondent but against Daisy and Alex Rading.
26. The appellant's claim for loss of user amounting to Kshs 1,620,000 were similarly not supported by any documents and as such being a special damage which must be specifically pleaded and proven, this claim fails.
27. In the circumstances, as she was, in the first place, not a legal or even an equitable owner of the suit motor vehicle for her to qualify to use and or loose the use of the suit motor vehicle, she cannot claim damages for loss of user thereof.
28. In the circumstances, I uphold the trial court's judgement dismissing the appellant's case and proceed to dismiss the instant appeal with costs.
29. I so order.



**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF APRIL, 2024.**

**R.E. ABURILI**

**JUDGE**

