



Tiny Bees Credit (K) Limited v Gachigua & another; Amisi (Interested Party) (Criminal Appeal E48 of 2022) [2023] KEHC 2138 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E48 OF 2022
JM CHIGITI, J
MARCH 14, 2023**

BETWEEN

TINY BEES CREDIT (K) LIMITED APPELLANT

AND

MARGARET WANJIKU GACHIGUA 1ST RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATIONS RUIRU POLICE 2ND
RESPONDENT**

AND

ROGERS OKEYO AMISI INTERESTED PARTY

*(Being an appeal against the ruling and orders delivered by the
Honorable J. A. Agonda (Principal Magistrate) in Ruiru Miscellaneous
Criminal Application No. E070 of 2022 on 31st August, 2022))*

JUDGMENT

Brief Background:

1. In its application dated 14/4/22 the Appellant sought for the following orders:
 - a. That this Honourable Court be pleased to compel the 2nd Respondent to release Motor vehicle registration No. KCY xxxJ Toyota Pardo unconditionally to the Interested party herein.
 - b. Costs of the Application be provided for.
2. The trial court in Misc. Criminal Application No. E070/2022 at Ruiru Law Court on 31st August 2022 dismissed the Application with a finding that the 2nd Respondent had lawfully detained the said



motor vehicle. The Court further proceeded to order the 2nd Respondent to fast track the matter and charge the culprits in the matter.

3. Being dissatisfied with the trial Court's Ruling and orders the Appellant filed a petition of appeal on 16/9/22 setting out the following grounds:

- a. That the Learned magistrate erred both in law and fact by failing to consider the Appellant's evidence on record which failure occasioned a miscarriage of justice.
- b. That the Learned magistrate erred in law and fact failing to appreciate the fact that the Appellant conducted due diligence and followed due procedures prior to advancing the loan to the borrower despite the Appellant herein attaching a search from NTSA and other documentation.
- c. That the Learned Magistrate erred in both law and fact by asserting that the Appellant did not produce the original Logbook and Loan Agreement yet the Appellant herein had annexed to its Application dated 14th April, 2022 a certified copy of the Logbook, a duly filed and signed Letter of Offer and the Security Agreement.
- d. That the Learned Magistrate erred both in law and fact by failing to appreciate the evidence on record in regard to ownership of the subject Motor vehicle such as copies of the Registration Certificate and a search from the National Transport and Safety Authority (NTSA) confirming that the Appellant herein is a joint owner of the subject Motor Vehicle.
- e. That the Learned Magistrate erred both in law and fact by failing to appreciate the fact that the subject Motor Vehicle is a security for a loan advanced to Ellison (the "borrower") and that upon default in repaying the Loan, the Appellant was entitled under law to exercise its right to repossession and sale.
- f. That the Learned Magistrate erred both in law and fact by failing to appreciate the legal concept that parties are bound by the terms of their contract by finding that the Appellant herein should have served requisite notices upon the borrower yet the Agreement entered into between the Appellant herein and the borrower did not contain such provisions.
- g. That the learned Magistrate misdirected herself by finding that requisite notices such as the 90 days' notice and the 45 redemption days' notice should have been served upon the borrower yet the aforesaid notices are applicable to immovable properties such as land and not movable properties such as a motor vehicle which is the subject matter herein.
- h. That the learned Magistrate erred in law and fact by failing to appreciate the concept that parties are bound by their pleadings by finding that the subject motor vehicle belongs to the 1st Respondent yet the 1st Respondent had not sought for such prayers.
- i. That there is an ongoing civil suit before the Senior Principal Magistrates Court at Ruiru [Hon. C.K. Kisiangani involving the same subject matter and arising from the same cause of action in which the dispute at hand is in regards to ownership of the subject motor vehicle.



- j. That the Senior Principal Magistrates Court at Ruiru [Hon. C.K. Kisiangani on 8th September, 2022 delivered a ruling on the 1st Respondents Application dated 20th April, 2022 wherein it ordered that the subject Motor Vehicle remains at Ruiru Police Station pending hearing and determination of the Civil Suit which has a mention date for pre-trial on 3rd October, 2022.
 - k. That in view of the foregoing, this Honourable Court should set aside the Ruling and Order issued by Honourable J.A. Agonda on 31st August, 2022 to avert a situation where there are conflicting judgments in regards to ownership of the subject motor vehicle thus creating confusion.
 - l. That it is our humble submission that this Honourable Court should set aside the Ruling and Order issued by Honourable J.A. Agonda to allow the Senior Principal Magistrates Court at Ruiru [Hon. C.K. Kisiangani] to hear and determine the Civil Suit to finality upon considering the evidence on record.
4. The parties agreed to dispense off the appeal by way of written submissions.

Analysis & Determination

5. It is trite that this being a first appellate court it is expected, that it will analyze and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In *Okeno v Republic* [1972] EA 32 the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.”

6. Similarly, in *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

- “1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
- 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

7. According to the Appellant, the issues for determination are as set out in its submissions being;



- a. Whether the Appellant exercised due diligence during the loan approval.
 - b. Whether the Appellant is a registered and bona fide owner of the subject motor vehicle.
 - c. Whether the Appellant should have issued requisite notices when exercising its right of repossession of the subject motor vehicle.
 - d. Whether the subject motor vehicle should be released to the Appellant.
8. In order for me to review, reassess and re-evaluate the evidence I have to crystallize the issues for determination.
 9. The Appellant in the application 14/4/22 is asking the court to compel the respondent to release motor vehicle Registration No KCY xxxJ Toyota Prado unconditionally to Rogers Okeyo Amisi.
 10. The Notice of Motion was brought under Order 40 Rules 1,2,3 and 4 and order 51 rule 1 of the Civil Procedure Rules 2010 and under sections 1A 1B 3,3A and 63 (e) of the Procedure Act and Article 159 (2) (d) of the Constitution.
 11. The subject of dispute is motor vehicle registration No. KCY xxxJ wherein the issue of ownership and detention of the motor vehicle that pits the parties to the application against one another.
 12. There is a question touching on one Ellison Mutungati Sheikh Chandi as borrower from the Appellant who is said to have purchased the vehicle from the 1st Respondent.
 13. A loan was secured by Ellison Mutungati through the motor vehicle registration No. KCY xxx J. The said Ellison who is not a party to the suit handed over the log book of the vehicle to the Appellant.
 14. The 1st respondent transferred the vehicle to the said Ellison and the Appellant jointly under a condition that in the event Ellison defaults in the loan repayment, then the Appellant would exercise the right to release the security to recover what would be outstanding.
 15. The said Ellison defaulted as a result of which the Appellant sought to sell the vehicle by engaging the services of Laar auctioneers who repossessed the vehicle and kept it at its yard along Kiambu road.
 16. On 21/12/21, the 2nd respondent seized the motor vehicle. The auctioneers proceeded to sell the motor vehicle to the 2nd interested party notwithstanding the seizure.
 17. The Appellant moved the court seeking orders to enable the vehicle to be released to the 2nd interested party.
 18. Parties filed affidavits to support their rival positions. I have looked at the Affidavits and the submissions and the proceedings. I have noted that there was a Civil Case No. E 261/22 pending.
 19. From the affidavit and the submissions, the Appellant is unhappy that the trial court failed to appreciate the fact that he conducted due diligence and followed the appropriate procedure in securing the loan.
 20. He avers that the logbook had been released and a Tims transfer effected in favor of the appellant and Ellison. The Appellant believes it is the bona fide owner of the vehicle as set out in the loan Application, letter of offer, Security agreement, and loan statement being annexures 1, 3, 4, and 7.
 21. The Appellant relies on the fact that the 1st Respondent had effected a transfer of the motor vehicle through the Tims platform to the Appellant and Ellison Mutungati and that a new log book exists as annexure CO5.



22. The Appellant argues that they are the owners in line with Section 8 of the Traffic Act.
23. On its part, the Respondent filed submissions where they argue that the Office of The Director of Public Prosecution ODPP has powers to require the police to carry out investigations and to submit the results to the ODPP under Section 49 of the National Police Service Act.

Disposition:

24. Article 157(4) of the *Constitution* provides that :-

“(4) The Director of Public Prosecutions shall have the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct, and the Inspector-General shall comply with any such direction.”

25. The Appellant in its application seeks an order that motor vehicle registration No. KCY xxxJ Toyota Prado be released to them. The investigating officer had lawful authority to detain the vehicle at Ruiru Police Station and the magistrate was within the law in so ordering.
26. However, I have issues with the further directions where the trial magistrate proceeded to order that the investigating officer do fast track the matter and charge the culprits.
27. To this extent, she overstretched her mandate and walked into the arena of the office of the Director of Public prosecution who has the mandate to investigate under Article 157 of the Constitution. In any event the Appellant had not sought for such orders. Order 2 is not enforceable.

Order:

- 28 The appeal lacks merit and the same is hereby dismissed.

DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF MARCH, 2023.

J. CHIGITI (SC)

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

