



**Kariuki v Green Valley Business Park Limited t/a Green Valley Motors & 3 others
(Civil Appeal 97 of 2021) [2023] KEHC 19128 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 97 OF 2021
HM NYAGA, J
JUNE 21, 2023**

BETWEEN

NAOMI WARUGURU KARIUKI APPELLANT

AND

**GREEN VALLEY BUSINESS PARK LIMITED T/A GREEN VALLEY
MOTORS 1ST RESPONDENT
SALOME WANJIKU KAGO 2ND RESPONDENT
KIPROTICH SOI 3RD RESPONDENT
PLANTINUM CREDIT LTD 4TH RESPONDENT**

(Being an appeal from the judgment and decree (Hon, Ombata Senior Resident Magistrate) delivered on 31st August, 2021 in CMCC No. 23 of 2017)

JUDGMENT

1. The Appellant vide a plaint dated 19th January, 2017 instituted a case against the Respondents seeking the following orders;
 - i. A declaration that the Plaintiff is the Lawful owner of Motor Vehicle Registration No. xxx X Toyota Fielder and the transfer of the vehicle in favour of the 3rd and 4th Defendants is unlawful and the same is reversed and the vehicle be registered in the name of the Plaintiff herein.
 - ii. A permanent injunction be issued against the defendants restraining them by themselves, their agent and or servants from attaching, repossessing and or interfering with the plaintiff's possession of Motor Vehicle Registration Number xx X Toyota Fielder.
 - iii. Costs of the suit.



2. The suit proceeded to full hearing and at the conclusion of the trial the learned trial magistrate dismissed the Appellant's case on grounds that she had failed to prove her case on a balance of probability.
3. The appellant, being aggrieved by the decision of the trial court aforementioned, lodged this appeal vide a memorandum of appeal dated 9th September, 2021. The appeal is premised on grounds that;
 1. The learned trial magistrate erred in law and fact in holding that the Appellant did not prove her case on a balance of probabilities.
 2. The learned trial magistrate erred in law and fact in failing to appreciate the evidence tendered before her by the Appellant.
 3. That the finding and the judgement of the court is not in line with the evidence presented before the trial court.
 4. That the learned magistrate did not consider the Appellant's evidence and submissions presented before her.
 5. That the learned trial magistrate erred in law and fact in concluding that the Appellant was conned without considering the period that the Appellant got possession and control of the subject motor vehicle.
 6. That the learned trial magistrate erred in law and fact in failing to appreciate the applicable provisions of Chattels Transfer Act Chapter 28 of the Laws of Kenya which were applicable to the dispute before her.
 7. That the learned trial magistrate erred in law and fact when she failed to appreciate that the respondent was negligent in the manner that it approved a loan to the 3rd defendant who did not comply with the terms set by the Respondent in the loan application form.
 8. That the entire analysis of the fact and the law in the judgement of the trial court cannot stand and the same ought to be set aside by the Appellate court.
4. The Appellant thus prayed for the judgement of the trial court to be set aside and judgement be entered in her favour as prayed in the Plaint. She also prayed that she be awarded the costs of this Appeal.

Pleadings

5. In her pleadings in the lower court, the Appellant averred that she was the lawful and rightful owner of Motor Vehicle Registration Number KCF 455 X Toyota Fielder Station Wagon having purchased the same from the 1st Respondent at an agreed sum of Ksh. 1,250,000/=. It was her case that she paid the entire purchase price and the 1st Respondent acknowledged receipt of the same and issued her with a receipt and thereafter she took possession of the said Motor Vehicle.
6. She pleaded that upon purchase of the aforesaid Motor Vehicle, the 1st respondent provided her with photocopies of log book, I.D Card, P.I.N certificate all registered in the name of the 2nd defendant and a copy of transfer form duly signed by the 2nd Defendant to enable her register the vehicle in her name.
7. It was her averment that the 2nd respondent was the principal of the 1st Respondent and that the 1st respondent assured her that they would provide her with the original documents in due course. However, despite her several demands for the log book from the 1st Respondent, it declined to issue her with the same and on or about 16th September, 2016, the 1st respondent sent an agent to her who



requested to be allowed to take the suit motor vehicle to KRA offices at Nakuru to sort out undisclosed issues relating to the vehicle, a request which she granted but the Motor Vehicle was returned to her the following day.

8. She averred that she learned that the 1st and 2nd Respondents unlawfully and without her consent caused the subject Motor Vehicle to be transferred to the 3rd and 4th Respondents and thereafter, the 1st, 2nd and 3rd respondents fraudulently provided the Suit Motor Vehicle as a security for a loan facility from the 4th respondent with full knowledge that the Motor Vehicle belonged to her. She enumerated 5 particulars of purported fraud in paragraph 15 of the plaint.
9. The 4th Respondent denied the Appellant's case vide its statement of defence dated 20th March, 2017. It denied knowledge of existence of any agreement between the Appellant and the 1st and 2nd respondent.
10. It admitted that the subject Motor Vehicle is registered in its name and the 3rd respondent.
11. The 4th Respondent averred that the third respondent approached it for a loan facility to purchase the subject Motor Vehicle and the said loan was advanced on the understanding that the facility would be governed by the terms and conditions that the Motor Vehicle to be purchased would be registered in its name and the third respondent as a security for the facility in the event of default by the borrower.
12. The 4th Respondent pleaded that the 3rd respondent at some point defaulted and failed to remedy the situation and it took action to realize the security but was stopped by the orders of the court.
13. It averred that it is only the financier and that the 3rd respondent offered the Motor Vehicle as security and that its only interest is to secure the repayment of the loan arrears owed to it and prayed for the dismissal of the Appellant's case with costs.
14. The 1st, 2nd and 3rd Respondents did not enter appearance or file any defences
15. The appeal was canvassed through written submissions. The Appellant filed her submissions on 3rd April, 2023 while the Respondent's submissions were filed on 2nd May, 2023.

Appellant's submissions

16. The Appellant submitted that the 1st, 2nd and 3rd Respondents did not deny fraud claim against them.
17. The Appellant cited the provisions of Section 8 of the *Traffic Act* and relied on the case of Benard Muia Kilovoo v Kenya Fresh Produce Exporters [2020] eKLR which the court held inter alia that registration of the Motor Vehicle is not a conclusive proof of ownership and that there must be evidence in support of the alleged registration.
18. She thus submitted that the subject Motor Vehicle was registered as at 13th September, 2016 in the name of Salome Wanjiku Kago who is the 2nd Respondent and that she testified that she purchased the said Motor Vehicle from the 1st Respondent who was an agent of the 2nd respondent at an agreed sum of Ksh.1, 250,000/- and thereafter took possession of the said Motor Vehicle, insured it and retained its possession.
19. The appellant also referred the court to the case of Stephen Kilonzo Nyondo v Samuel Wahome Kibuthu [2015] eKLR. This case is distinguishable from the facts of this case. In this case the court was determining the sale agreement of a motor cycle in which the respondent had paid full purchase price but its registration number belonged to the Motor Vehicle. The Court inter alia held that It would be unreasonable to expect the buyer to have continued keeping the motor cycle under such circumstances and that there would be no difficulty in concluding that the intention of the parties was that the buyer would have a good title.



20. The Appellant submitted that the 2nd and 3rd Respondents who claimed ownership of the said Motor Vehicle did not come to defend the suit and it follows therefore that there existed overwhelming evidence to the effect that the subject motor vehicle belonged her notwithstanding that as at 13th September, 2016, it was registered in the 2nd respondent's name. She contended that the 1st and 3rd Respondents fraudulently secured money from the 4th Respondent who was not diligent leading to loss of Money on its part. The Appellant cited the case of Vitalis K Kaitany vs Joseph C Chepkwony & another [2014] eKLR where the court upheld the trial court's orders that revoked the registration book issued to the Appellant and cancelled his registration as the owner of the vehicle on grounds that the circumstances under which the Appellant was registered as the owner of the Motor Vehicle were fraudulent.
21. The appellant thus faulted the trial magistrate in concluding that the she did not prove her case on a balance of probabilities.
22. The Appellant submitted that the 3rd and 4th respondents did not acquire good title over the subject motor vehicle and that there was no evidence before the court to show how the 3rd respondent acquired the subject motor vehicle.
23. She argued that the 4th respondent was required to conduct due diligence before advancing credit to the 3rd Respondent in compliance with the conditions set out in the log book Financing Appraisal form and that it can only blame itself for failure to do so.
24. She submitted that the Loan Application form dated 13th September, 2016 that was produced by the 4th Respondent's witness one Richard Simpala, showed that the Motor Vehicle was registered in the name of the 2nd respondent as at the said date.
25. The Appellant argued that no sale agreement was produced between the 3rd respondent and the 2nd Respondent and that there was no evidence that such agreement was given to the 4th Respondent, and neither was the subject motor vehicle insured by either the 2nd or 3rd Respondents.
26. The appellant argued that paragraph 10 of the Loan Application shows that the purpose of the loan was for business and not for purchase of a motor vehicle and as such DW1's evidence that the short term loan was for purchase of the Motor Vehicle contradicted the aforesaid paragraph.
27. The Appellant also submitted that the terms and conditions of the loan agreement were governed by the provisions of Chattels Transfer Act Cap 28 of the Laws of Kenya and referred this court to the provisions of Section 4 of the Chattels Transfer Act and submitted that there is no evidence before court that any instrument was registered in respect of the Motor Vehicle as required by the Law. To support this position reliance was placed on the case of George Ndege Okello vs K-Rep Bank Limited & Another [2012] eKLR where the court held that disregarding the provisions of Section 6 and 13 of Cap 28 is not a mere triviality but it went to the root of the defence case.
28. The Appellant submitted that he is a bona fide purchaser of the Subject Motor Vehicle having paid full purchase price to the 1st respondent on behalf of the 2nd respondent herein and was given possession and control of the suit motor vehicle.
29. The Appellant faulted the trial magistrate for only examining the record of registration of the Motor Vehicle without considering that the registration was under challenge in the suit. She contended that had the trial magistrate properly directed her mind she would have arrived at a different conclusion in the matter. She urged the court to allow the Appeal.



4th Respondent's Submissions

30. The 4th Respondent framed the following issues for determination:-
1. Whether the 4th Respondent proved its case on a balance of probabilities
 2. Whether the learned magistrate was correct in finding that the Appellant failed to prove her claim.
31. On the first issue, the 4th respondent cited the provisions of section 8 of the *Traffic Act* and submitted that on its part it was able prove that it held a valid certificate of title(Log Book) over the subject motor vehicle and that it had lawful interest to the subject motor vehicle.
32. It submitted that in support of its defence, it produced a logbook together with a copy of motor vehicle search which confirmed the 3rd and 4th respondents were indeed the owner of the said motor vehicle.
33. The 4th Respondent referred this court to the decision of Justice Ndungu in *Billiah Matiangi vs Kisii Bottlers Limited & another* [2021] eKLR which quoted the Court of Appeal in the case of *Joel Muga Opinja vs East African Sea food limited* (2013) eKLR. The court cited with approval the decision in *Ignatius Makau Mutisya vs Reuben Musyoki Muli* where the court found that:-
- “ the best way to proof ownership would be to produce to the court a document from the Registrar of Motor vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied.”
34. It thus submitted that the Appellant never challenged the evidence adduced in the log book but only challenged the acquisition process without any tangible back up.
35. The 4th Respondent further submitted that the Court of Appeal in the case of *Ignatius Makau Mutisya vs Reuben Musyoki Muli* (supra) stated that section 8 of the *Traffic Act* has been interpreted to mean the registration of the Motor Vehicle is not conclusive proof of ownership.
36. The respondent also cited the case of *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.
37. It was argued that the same Court of Appeal adopted the above interpretation in *Securicor Kenya Ltd vs Kyumba Holdings Ltd* Civil Appeal No. 73 Of 2002 [2005] eKLR
38. The 4th Respondent also submitted that the Court of Appeal in these binding decision clearly stated :-
- I. That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable
 - II. Where there exists other compelling evidence to proof otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
 - III. Each case must however be considered in its own peculiar facts.
39. It was further submitted that the appellant never adduced any satisfactory evidence to deny the 4th Respondent the legal right of ownership or made any claim on bad title thereto nor did she provide a



search from the Registrar of Motor Vehicles as proof of ownership and as such she failed to provide evidence as to payment between herself and the 2nd respondent.

40. The 4th Respondent also contended that the payment slips provided as evidence by the appellant indicated that the money was paid to the 1st respondent yet the copy of logbook which the appellant relied on at the time of the alleged sale indicates the owner of the subject motor vehicle was the 2nd respondent.
41. It was argued that the appellant acknowledged in paragraph 24 of her submissions that she purchased the said subject motor vehicle from the 1st respondent whom she claimed was an agent of the 2nd respondent without adducing tangible evidence in support of the same and to also prove that the 1st Respondent had good or valid title at the time of purchase.
42. The 4th Respondent argued that the contention that it failed to prove validity of the loan was not an issue of determination before the trial court.
43. Regarding the second issue, the respondent submitted that the plaintiff failed to prove allegation raised in the plaint in accordance with section 107 of the *Evidence Act*. It contended that it adduced sufficient evidence as to the transfer of the logbook from the 2nd respondent to the 3rd and 4th respondent and that further its witness testified as to how the log book got to be registered jointly in the name of the 3rd and 4th respondent.
44. The 4th Respondent further submitted that it carried out its due diligence including carrying out a search on the NTSA website, which revealed that the 2nd respondent was the registered owner of the subject motor vehicle at the time and not the appellant and that there were no restrictions at the time of the registration.
45. From the foregoing, the 4th Respondent argued that the appellant was therefore obligated to provide evidence that would have led the trial court to consider that indeed she held good title over the Motor Vehicle.

Analysis & Determination

46. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In the case of *Selle vs Associated Motor Boat Co. & others* [1968] E.A. 123 where it was stated as follows: -

“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 an 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed sholan* (1955), 22 E.A.C.A. 270)”

47. In *Kiruga vs Kiruga & Another* (1988) KLR 348 the Court of Appeal held that: -

“an appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine



whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

48. Having considered the grounds of appeal, the submissions of counsel, and the entire record plus the cited cases and the law applicable, it is my considered view that the following issues arise for determination: -
1. Whether the appellant had established legal interest in subject motor vehicle.
 2. If answer to the above is in the affirmative, whether the Appellant should be granted the orders sought in the plaint
 3. Who should pay the costs of this Appeal?

Whether the appellant had established legal interest in subject motor vehicle

49. It is trite law that he who alleges must prove. Sections 107 and 108 of *Evidence Act* (Cap 80 Laws of Kenya) assign burden of proof in a case. These sections provide as follows:-

“ 107.

- (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

50. It is also trite that the burden of proof in civil cases is on a balance of probability. Denning J. in *Miller vs Minister Of Pensions* [1947]2 All ER 372. discussing the burden of proof said that;

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

51. In *James Muniu Mucheru vs National Bank Of Kenya Ltd C.A Civil Appeal No. 365 Of 2017* [2019] eKLR, the Court stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party’s version of the story is more believable.”

52. The burden of proof in civil cases on the balance of probability was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it



can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

53. In case of *Kirugi & Anor. vs Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.
54. The Appellant testified along the same lines as pleaded in the plaint. Suffice to add, she produced the following documents in support of her case: -2nd Respondent's Identification card, 2nd Respondent's KRA PIN, Duly signed transfer forms, Sale Agreement, Receipt of payment, Delivery Note, Insurance certificate registered in the Appellant's name, A letter to the 1st Respondent requesting for a log book, Demand letter dated 20th September, 2016, Platinum Credit Ltd Letters dated 6th December, 2016, DCF letter dated 23rd December, 2016.
55. She also stated that there is no evidence that the Motor Vehicle was sold to the 3rd Respondent and that in the year 2016 and 2017 the subject Motor Vehicle was insured in her name.
56. In cross examination, she said the subject Motor Vehicle was in her possession and confirmed that among the Respondents, she had only met the 1st Respondent. It was her testimony that though she paid the 1st Respondent, the log book was in the name of the 2nd Respondent. She said transfer was still pending and that she paid the money for transfer of the log book, though she did not have a receipt for it. She further stated that she bought the Motor Vehicle on 18th April 2016 and that the 4th Respondent advanced the loan to the 3rd Respondent on 20th March 2017. She said when the auctioneers proclaimed the subject Motor Vehicle she was appraised that the same had loan arrears. She averred that she never took a loan and upon enquiries, she learnt that the subject vehicle was registered in the name of the 3rd and 4th Respondents.
57. In re-examination, she testified that the original log book was in possession of the seller and was yet to transfer it to her. She added that she had never met the 3rd Respondent and did not know how the suit Motor vehicle was registered in his name. She asserted that she never gave authority for the subject Motor Vehicle to be used as security.
58. Rishal Simbala Wonancy, a legal officer of the 4th Respondent testified on behalf of the 4th Respondent. His testimony was that the 3rd respondent offered the subject Motor Vehicle as security for a loan of Kshs. 505,000/= given by the 4th Respondent. He further averred that the 4th Respondent was unaware the Plaintiff was the owner of the suit Vehicle. He stated that the log book was registered in the name of the 2nd Respondent and later transferred to the 3rd Respondent. He said a search was conducted at NTSA and a valuation done and that there were no restrictions at the time of registration. He claimed the Appellant did not have a proper title and prayed that the court finds that the subject Motor Vehicle was lawfully transferred to the 4th Respondent and the 3rd respondent.
59. He produced a copy of the Loan Application dated 13th September, 2016 and Copy of Records as exhibits before court.
60. In cross examination, he confirmed that the 3rd Respondent applied for a loan on 13th September, 2016 and at that time the registered owner of the Subject Motor was the 2nd Respondent. He did not have a sale agreement of the subject Motor Vehicle between the 3rd and 4th Respondents. He confirmed that at the said time Gateway Insurance was the insurer of the subject Motor Vehicle and the Policy Holder was the Appellant herein.
61. The Appellant exhibited a sale agreement between herself and the 1st Respondent for the purchase of the subject Motor Vehicle. She also produced a receipt evidencing payment of Ksh. 1,250,000/=



- being the purchase price of the suit Motor Vehicle. It was her averment that upon purchase of the subject motor vehicle she took possession of the same and insured it for 1 year. She was issued, by the 1st Respondent, with photocopies of logbook for the subject Motor Vehicle, I.D Card, P.I.N Certificate all registered in the name of the 2nd Respondent and a transfer form duly signed by the 2nd Respondent.
62. The Appellant did not adduce evidence to show that the 1st Respondent was an agent of the 2nd Respondent at the time she purchased the subject Motor Vehicle, even though she took possession of the same.
63. There is no dispute that at the time the vehicle was used as a collateral for the loan, the subject motor vehicle was in the name of the 2nd defendant and was transferred to the 3rd defendant. After that the vehicle was registered jointly in the names of the 3rd and 4th Respondents.
64. Section 8 of the *Traffic Act* provides as follows:
- ‘The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle’.
65. The Court of Appeal in *Securicor Kenya Ltd V Kyumba Holdings Ltd.*, (2005) eKLR while interpreting the provisions of Section 8 above held as follows: -
- “...it was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under Section 8 of the *Traffic Act* when he states that the true owner of the motor vehicle is the appellant. That Section reads as:
- “The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
- We think that the appellant had, by evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time of the accident occurred since it had sold it. Our holding finds support in the decision in *OSABPIL V 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 names the vehicle was registered was presumed to be the owner thereof unless proved otherwise....”.
66. There is no evidence to show that at the time of the Registration of the subject Motor Vehicle in the names of the 3rd and 4th Respondents, there were any restrictions at the NTSA. Therefore, the transfer of the subject Motor Vehicle to the 3rd and 4th Respondent was lawful. The 4th respondent could not have been expected to be aware of the appellant’s claim to ownership of the vehicle. It conducted due diligence before it proceeded to advance the loan to the 3rd respondent.
67. The appellant did not explain why despite having paid the full purchase price and the transfer fee, she did not follow up to ensure the transfer was effected. If there was a delay she could have secured her interest by placing a caveat at the NTSA. If there is anyone to blame for the aftermath, she has to be one of them.
68. I therefore find no fault with the judgment of the Honourable magistrate that the appellant did not prove her case on a balance of probability. The trial Magistrate rightly observed that the appellant’s recourse lies in a claim against the 1st defendant/respondent for damages and/or refund of the purchase price which had been paid for the Motor Vehicle.



Whether the Appellant should be granted the orders sought in the plaint

69. Flowing directly from the consideration on the 1st issue, I am satisfied that the Appellant is not entitled to the orders sought in the plaint.
70. Before I move to the last issue, I need to point out one more issue that arises from the trial in the lower court. It is noted that the appellant had sued four (4) parties. While dismissing the suit against the 4th defendant/respondent the court made no mention of the fate of the claim against the other defendants. The plaintiff's prayers were as stated hereinabove. There was no separate claim against the 1st, 2nd and 3rd respondents. In finding in favour of the 4th Respondents, the court ought to have dealt with the case against the other defendants as well. Be it as it may, in arriving at its decision, the trial court basically dealt with the other defendants, but without saying so.
71. Having found that the plaintiff had not established ownership, it could not grant the orders against the other defendants. As such no prejudice was caused to the appellant. It is further noted that she had filed a separate suit against the 1st defendant in CMCC No. 1315 of 2016. I believe that the court seized of the matter will determine among other issues, liability to the appellant between the 1st and 2nd respondents herein.

Who should pay the costs of this Appeal?

72. Section 27 of the *Civil Procedure Act* provides: -

“(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.”

73. By virtue of aforementioned, it is trite law that the issue of costs is a discretionary award that is awarded to a successful party.

74. In the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227 that it stated:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.... In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

75. In *Republic vs Rosemary Wairimu Munene (Ex parte Applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J* held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in



prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR.

76. It may be argued that the 4th respondent has been successful in this Appeal and it should be awarded costs.
77. However, this is a case where the appellant showed that she had actually paid for the vehicle in full, albeit to a person who was not the registered owner. She is already staring at a great loss, if she cannot recover the purchase price from the 1st respondent herein. She was entitled to sue, to stake her claim in the vehicle. The whole mess was caused by the 1st respondent, and possibly the 2nd respondent, who failed to have the transfer effected to the appellant. For these reasons, I find that it would be unfair to condemn her to further punishment by way of costs.
78. The 1st respondent did not appear in the trial and in this appeal, yet it received money from the appellant. It has to carry the burden of this appeal, even in its absence.
79. I therefore order that the appellant's and the 4th respondent's costs of this appeal shall be borne by the 1st respondent.
80. The upshot is that the instant Appeal is devoid of merit and the same is hereby dismissed, subject to the orders on costs above.

DATED SIGNED AND DELIVERED THIS 21ST DAY OF JUNE, 2023.

H. M. NYAGA

JUDGE

In the presence of:-

Ms Wangari for the Appellant

Ms Waitiki for the Respondents

