



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Oira v Nyamongo & 3 others (Civil Appeal E007 of 2022)  
[2023] KEHC 20412 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20412 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E007 OF 2022**

**WA OKWANY, J  
JUNE 22, 2023**

**BETWEEN**

**JOASH MOGARE OIRA ..... APPELLANT**

**AND**

**EVANS NYAMWARO NYAMONGO ..... 1<sup>ST</sup> RESPONDENT**

**THE OCS NYAMIRA POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**WILFRED MOCHAMA MABEYA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and decision of Hon. W. C. Waswa,  
Resident Magistrate dated & delivered on the 20th day of December  
2021 in the original Nyamira CMCC Civil Case No. E13 of 2020)*

**JUDGMENT**

1. The Appellant herein was the Plaintiff before the trial court in Nyamira CMCC No E13 of 2020 where he filed the plaint dated October 7, 2020 and amended on February 10, 2021 against the 1<sup>st</sup> and 4<sup>th</sup> Respondents for conspiring to defraud him motor vehicle Registration KBY 991D Toyota Hiace, (hereinafter “the Suit Motor Vehicle”). The Appellant also sought orders as follows: -
  - a. An order directing the Respondents, jointly and severally, to release the suit motor vehicle into his custody in good condition,
  - b. An Order for payment of a sum of Kshs 5,000/= daily from July 28, 2020 until the said motor vehicle released into his custody,
  - c. An Order of payment of general damages for trespass of goods; costs of the suit and interests at court rates.



2. A summary of the Appellant's case was that he purchased the suit motor vehicle in the name of the 4<sup>th</sup> Respondent, Wilfred Mochama Mabeya, through a loan facility from Family Bank. The Appellant stated that he repaid the loan in full and that he used the suit vehicle for transport business between Migori and Nakuru.
3. The Appellant averred that on the night of July 27, 2020 police officers seized the suit motor vehicle and took it to Nyamira Police station where it remained until October 1, 2020 when the police release it to the 1<sup>st</sup> Respondent without his authority thereby precipitating the filing of the suit before the trial court.
4. In a judgment rendered on December 20, 2021, the trial court found that the Appellant had not proved ownership of the said motor vehicle and dismissed the suit.
5. Aggrieved by the said judgment of the trial court, the Appellant brought the present appeal and listed the following grounds of Appeal in the Memorandum of Appeal: -
  1. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's evidence.
  2. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's submission and failing to properly analyse and consider the evidence before him thus arriving at an erroneous decision.
  3. That the learned trial Magistrate erred in law and fact in failing to find that the evidence and the documents before him demonstrated beyond any reasonable doubt that the Appellant was the owner of the motor vehicle registration No KBY 991D Toyota Hiace despite the motor vehicle's registration being in the 4<sup>th</sup> Respondent's name.
  4. That the learned trial Magistrate erred in law and fact in failing to find that the Appellant took a loan using the 4<sup>th</sup> Respondent's family bank account for the purchase of the motor vehicle registration No KBY 991D Toyota Hiace.
  5. That the learned trial Magistrate erred in law and fact to appreciate that the Appellant entirely paid off the loan at Family Bank which he had taken using the 4<sup>th</sup> Respondent's bank account.
  6. That the learned trial Magistrate erred in law and fact in failing to hold that the Appellant was the owner of the motor vehicle registration No KBY 991D Toyota Hiace.
  7. That the learned trial Magistrate erred in law and fact in failing to appreciate that the motor vehicle was in possession and control of the Appellant until its seizure sometime in the year 2020.
  8. That the learned trial Magistrate erred in law and fact in making a finding that the motor vehicle registration KBY 991D Toyota Hiace belonged to the 4<sup>th</sup> Respondent.
  9. That the learned trial Magistrate erred in law and fact in finding that ownership of a motor vehicle is solely proven through Registration.
  10. That the learned trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.
6. The orders sought in the Appeal are that the judgment and order of the learned trial Magistrate dated December 20, 2021 be quashed and the same be substituted with an Order upholding the prayers sought in the Plaintiff's suit.



### **The Appellant's Case**

7. The Appellant (PW1) testified that he owned the suit motor vehicle and that he used it for transport business in which he would make a gross income of Kshs 7,000/= and net of Kshs 5,000/= per month. He denied the claim that he was the 4<sup>th</sup> Respondent's employee.
8. He testified that the vehicle was illegally impounded and held at Nyamira Police Station, over a debt he owed to the 1<sup>st</sup> Respondent. He stated that the 4<sup>th</sup> Respondent did not claim the vehicle from the police station and that he repaid the Family Bank loan in full and would at times send the 1<sup>st</sup> Respondent to make the loan repayments on his behalf. He produced receipts in this respect as (P.Exh 1-2).
9. PW2 was Inspector Collins Omondi, the Deputy OCS Nyamira Police Station who testified that the original Occurrence Book number 46/28/7/2020 indicated that the suit vehicle was escorted and booked at his station but was later released to the 1<sup>st</sup> Respondent and an auctioneer on the instructions of one Sarah Nyamweya vide OB No 42/1/10/2020 (P.Exh 14).

### **The Respondents' Case**

10. The 1<sup>st</sup> and 4<sup>th</sup> Respondents testified as DW1 and DW2 respectively. DW1 testified that he knew the Appellant as a person from his home and that the 4<sup>th</sup> Respondent was his good friend. He stated that he did not know the owner of the suit motor vehicle but heard that it belonged to the 4<sup>th</sup> Respondent. He further stated that he did not take the vehicle from the Police Station as alleged but only went to assist one Sarah Nyamweya, the 4<sup>th</sup> Respondent's wife, to collect the vehicle from the police station.
11. On cross-examination, DW1 stated that he did not know why he was listed as a complainant in the OB entry in respect to the impounding of the suit motor vehicle and stated that he did not seize the vehicle because of the debt owed to him by the Appellant.
12. DW2, the 4<sup>th</sup> Respondent herein, testified that he bought the suit vehicle through a loan facility in the sum of Kshs 2,000,000 from Family Bank and was using it in transport business with the Appellant as his business manager. He testified that he cleared the loan in August 2017 after which the Bank released the logbook to him in his name.
13. On cross-examination, he stated that he neither had his identification and loan documents nor any employment documents to prove that the Appellant was his business manager. He also the claim that he reported the Appellant to the police but confirmed that he had since transferred the suit motor vehicle to his wife who had used it as a collateral to obtain a loan from Platinum Credit Limited.
14. The Appeal was canvassed by way of written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents neither participated in the trial proceedings nor in this Appeal.

### **Appellant's Submissions**

15. Regarding ownership of the suit motor vehicle, the Appellant submitted that Section 8 of the [Traffic Act](#) provides that even though registration of a person as an owner is prima facie proof of ownership, the same is not conclusive evidence of ownership as there could be other forms of ownership such as actual ownership, beneficial ownership and possessory ownership. It was submitted that where it is proved, by other material evidence, that the person registered was not the owner, that other person will be deemed to be the owner. Reference was made to the case of Charles Nyambuto Mageto & Another vs. Peter Njuguna Njathi (2013) eKLR where the court recognized that there were other forms of ownership such as actual, possessory and beneficial ownership.



16. The Appellant contended that Section 8 of the *Traffic Act* recognizes that there are instances when motor vehicle ownership would change hands even though the records have not been amended to reflect that change. The Appellant maintained that in the instant case, he used the 4<sup>th</sup> Defendant's name and account to obtain a loan from Family Bank and thereafter made payments through the 4<sup>th</sup> Respondent's name but had taken possession and control of the motor vehicle from 2014 until July 27, 2020 when the said vehicle was impounded by the police. He cited the case of *Samuel Mukunya Kamunge vs. John Mwangi Kamuru*, Nyeri HCCA No 34 of 2002 (2005) eKLR where Okwengu J. (as she then was) held that a certificate of official search was not conclusive proof of actual ownership of the motor vehicle. Reference was also made to the case of *Securicor Kenya Limited vs. Kyumba Holdings Limited* (2005) 1 KLR 748 where the Court of Appeal held that even though the Appellant was the registered owner of the motor vehicle its actual possession had passed to a third party.
17. The Appellant further submitted that the 4<sup>th</sup> Respondent held the suit motor vehicle in trust for him. He cited the Court of Appeal case of *Peter Ndung'u Njenga vs. Sophia Watiri Ndung'u* (2000) eKLR where it was held that the Court will imply a trust based on the intentions of the parties. The Appellant argued that he entered into an agreement with the 4<sup>th</sup> Respondent over the purchase of the suit vehicle through a bank loan even though the said agreement was not reduced into writing. He added that there was cogent evidence to show that he solely paid the loan facility taken by the 4<sup>th</sup> Respondent for the purchase of the suit vehicle. For the argument on the existence of a constructive trust between him and the 4<sup>th</sup> Respondent, the Appellant cited the case of *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al Heidy* (2015) eKLR where it was held that a constructive trust will arise where a person who is already a trustee takes advantage of his position for his own benefits.
18. The Appellant submitted that it was inconceivable that he could have deposited money in the 4<sup>th</sup> Respondent's account without his knowledge and that the only reason this happened was to repay the loan that the 4<sup>th</sup> Respondent had taken on his behalf, making him a trustee over the suit vehicle. Reliance was placed on the case of *Abubakar Salim Machiri vs. Machiri Y.S.M. Mohamed* (2021) eKLR, pages 12 at paragraph 1 where the court held that a court of equity cannot allow a defendant to unjustly enrich himself to the detriment of the plaintiff.

### **The 1st and 4th Respondent's Written Submissions**

19. The 1<sup>st</sup> and 4<sup>th</sup> submitted that the Appellant did not prove that he owned the suit motor vehicle and that the ownership documents showed that the vehicle was registered in the 4<sup>th</sup> Respondent's name. It was submitted that the loan payment receipts presented in evidence before the trial court were immaterial in proving who repaid the loan because anyone could have been requested by the 4<sup>th</sup> Respondent to deposit money to the bank on his behalf.
20. The Respondents noted that the Appellant did not call any material witnesses to rebut the prima facie evidence of ownership, particularly one Bernard Nyatebe Makori who recorded a statement in his favour. The Respondents argued that the Police officer who testified as the Appellant's witness did not corroborate his evidence. It was further submitted that possession was not proof of ownership and that the trial court rightfully found that the ownership of a motor vehicle was proved because the logbook was prima facie evidence of ownership and that there was no contract between the Appellant and 4<sup>th</sup> Respondent confirming the supposed arrangement.
21. It is trite that the duty of a first appellate court is to re-evaluate and re-analyse the evidence before a trial court and arrive at its own independent findings. This principle was aptly espoused by the Court of



Appeal in the case of *Abok James Odera t/a. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, 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 reanalyse 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.”

### **Analysis and Determination**

22. I have carefully considered the Record of Appeal and the parties’ rival submissions. The following issues arise for my determination: -

- i. Whether the Appeal is properly before this Court.
- ii. Whether the Appellant was the legitimate and beneficial owner of the suit vehicle.
- iii. Whether the Appellant was entitled to the prayers sought in the Plea.
  - i. Whether the Appeal was properly before the Court.

23. The Respondents submitted that the Appeal was lodged after 47 days without leave of the Court and was therefore not properly before the Court in line with the provisions of Section 79G of *Civil Procedure Act*. Reference was made to the case of *Andrew Ng’ang’a Ndung’u vs. Geoffrey Karuri & Another*, High Court of Nakuru Civil Appeal No 198 of 2005, where the court struck out an appeal that was filed outside the 30 days period.

24. Section 79G of the *Civil Procedure Act* provides thus: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of decree or Order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time.

25. I have perused the Record and noted that judgment in the trial court was delivered on December 20, 2021 and the Memorandum of Appeal filed 47 days later on February 9, 2022. The question which arises is whether the appeal was filed outside the stipulated period.

26. My finding is that Order 50 Rule 4 of the *Civil Procedure Rules* provides for the exclusion of the period between 21st December and 13th January in the next year in computing time applies to the filing of appeals from the subordinate to the High Court. The said Order 50 Rule 4 of the *Civil Procedure Rules* provides as follows:-

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”



27. Section 57(b) of the *Interpretation and General Provisions Act* which provides that:-

“In computing time for the purposes of a written law, unless the contrary intention appears-

- b. If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day”

28. Regarding the vacations to be observed by the Courts and the offices of the High Court, Rule 2(2)(b) of the *High Court Practice and Procedure Rules*, made pursuant to Section 10 of the *Judicature Act*, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January.

29. Applying the above provisions to the instant matter, I find that the instant appeal was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents. (See *Keziah Stella Pyman & 2 Others vs Paul Mwololo Mutevu & 8 others* [2016] eKLR).

## ii. Ownership of the Suit Motor Vehicle.

30. It was the Appellant’s case that the trial magistrate erred in finding that the suit vehicle belonged to the 4<sup>th</sup> Respondent and that he was not the beneficial owner of the vehicle because of lack of a sale agreement. The Appellant argued that there was a rebuttable presumption of ownership where a person was registered as the owner of a motor vehicle.

31. The Appellant was required to prove ownership of the vehicle on a balance of probabilities in accordance with Sections 107-109 of the *Evidence Act*. This standard of proof was explained by the Court of Appeal in the case of *Ignatius Makau Mutisya vs. Reuben Musyoki Muli* (2015) eKLR citing the case of *Miller vs Minister of Pensions* (1947) 2All ER 372 wherein it was held thus: -

“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.’ 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 unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

32. Section 8 of the *Traffic Act* provides for ownership of motor vehicles as follows: -

“The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle.”

33. The above provision connotes that proof of ownership of a motor vehicle through a logbook is considered only as prima facie evidence of proof which may be rebutted by other evidence. This is the position that was taken by the Court of Appeal of Uganda in *Osapil vs. Kaddy* (2000) 1 EALA, 187 wherein it was held that: -

“Registration card or logbook was only prima facie evidence of title to a motor vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.”



34. Similarly, in *Benard Muia Kilovoo vs. Kenya Fresh Produce Exporters* (2020) eKLR the principle was summarised as follows:-

“ 41. The Court of Appeal in these binding decisions is clearly stating:-

- 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 prove 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.”

35. In the present case, the 4<sup>th</sup> Respondent produced a copy of the logbook D.EX2 which indicated that he was, at the material time, the sole registered owner of the motor vehicle. The Appellant on the other hand produced copies of the original logbook in the name of the seller Toyopet Automobile (K) Limited. I have further perused the trial Record and noted there is copy of the logbook, in the name of Family Bank and the 4<sup>th</sup> Respondent and a certificate of official search indicating Platinum Credit Limited and Sarah Nyamweya Kamemba as the current registered owners as of October 29, 2020. It is clear therefore that the suit motor vehicle has since changed hands and that the current the registered owners are Sarah Nyamweya and Platinum Credit.

36. The Appellant’s case was that the 4<sup>th</sup> Respondent was only registered as an owner because the loan from Family Bank that was taken in his name and that there was constructive trust between them over the suit vehicle. The Appellant averred that he had receipts showing that he made regular loan repayments to the bank.

37. On his part, the 4<sup>th</sup> Respondent submitted that the Appellant made the loan repayments in his capacity as the 4<sup>th</sup> Respondent’s agent and that the logbook and bank documents were conclusive proof of ownership.

38. I have perused the bundle of receipts (P.Exh1-2) and noted that they show the several deposits made to Family Bank by Appellant and the 1<sup>st</sup> Respondent to the account of the 4<sup>th</sup> Respondent in repayment of the loan. I note that it was not in dispute that the suit motor vehicle was at all material times in the Appellant’s possession until it was impounded by the police officers. It is noteworthy that it is the Appellant who took active steps to pursue the release of the suit motor vehicle from police custody, albeit in vain as it was eventually released to the 1<sup>st</sup> Respondent who later handed it over to the 4<sup>th</sup> Respondent. I note that at no time did the 4<sup>th</sup> Respondent appear before the police to secure the release of the suit vehicle even though he claimed that he was its sole legal owner.

39. I further noted that the Appellant produced documentary evidence in the form of delivery notes from the Matatu Sacco (P.Exh4) and Sacco Receipts in respect to his contribution to the Matatu Sacco in support of his claim that he was in possession of the suit vehicle as its owner and that he used it in matatu transport business. The receipts also indicate that the Appellant earned a daily income of Kshs 7,000/= from the said business.

40. A close analysis of the evidence presented by the parties lead me to the conclusion that the Appellant established, on a balance of probabilities, that he was the actual owner of the suit vehicle despite the fact that the same was registered in the 4<sup>th</sup> Respondent’s name. I am satisfied that the Appellant was able to prove that he had, what can be termed as a friendly/gentleman’s agreement with both the 1<sup>st</sup>



and 4<sup>th</sup> Respondent to assist him secure a loan to purchase the said vehicle only for the said friends to turn around and take over the vehicle with the assistance of the police.

41. I find that the Appellant was able to prove that he was both the beneficial and possessory owner of the suit vehicle. I am persuaded by the decision of J.B. Ojwang J. (as he then was) in the case of *Nancy Ayemba Ngana vs. Abdi Ali* (2010) eKLR when he held that:-

“There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.

And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.....” (Emphasis mine).

42. Regarding the 4<sup>th</sup> Respondent’s claim that the Appellant was his employee, managing his transport business, I find that there was no evidence on Record proving this claim. I have also not found any evidence to show that of the Appellant remitted the proceeds of the suit vehicle to him as the beneficial owner, save for evidence that money was remitted to his account for loan repayment which he never controverted.
43. Furthermore, there was no evidence on Record to show that the 4<sup>th</sup> Respondent personally made any deposits in repayment of the loan. The entire evidence on record shows that it was the Appellant and the 1<sup>st</sup> Respondent who deposited money for the repayment of the loan. It is apparent, from the totality of the evidence on record, that the 4<sup>th</sup> Respondent was merely the account holder from which the loan was advanced and repaid as demonstrated by the Bank Clearance Letter dated 3<sup>rd</sup> November 2020 (D.Exh1). The 4<sup>th</sup> Respondent did not tender any evidence to support his assertion that he was the one who repaid the loan. This lends credence to the Appellant’s claim that the 4<sup>th</sup> Respondent was merely a conduit for him to obtain the loan to purchase the vehicle and not the actual owner of the suit vehicle nor the person who repaid the loan. In essence, the 4<sup>th</sup> Respondent acted in trust for the Appellant.
44. The doctrine of a constructive trust was aptly explained by the Court of Appeal in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR as follows: -

“According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as:

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely



interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ..." (Emphasis mine).

45. From the facts of this case and the parties' rival arguments, it is clear that while the Appellant stated that he bought the suit vehicle, through financing, in the name of the 4<sup>th</sup> Respondent he did not produce any agreement to this effect. The 4<sup>th</sup> Respondent, on the other hand, claimed that he bought the said vehicle on his own through financing but also did not tender any documents in this regard such as a sale agreement and loan documents. This court is therefore called upon to discern the true intention of the parties and determine whether the evidence on Record and the circumstances of this case imply that the 4<sup>th</sup> Respondent ought to be treated as a trustee.
46. The Record contained agreement dated April 21, 2016 (P.Exh7) between the Appellant and the 1<sup>st</sup> Respondent where the Appellant borrowed Kshs 805,000/= from the 1<sup>st</sup> Respondent for the purchase of the suit vehicle. The said agreement was witnessed by the 4<sup>th</sup> Respondent and one Beatrice Nyabwana. It was the Appellant's case that he borrowed the said amount from the 1<sup>st</sup> Respondent because it was part of the payment for the suit vehicle. He also contended that the vehicle could not be transferred to him after he had finished repaying the loan from Family Bank because he was yet to pay the 1<sup>st</sup> Respondent's debt. According to the Appellant, this was the reason why the suit vehicle remained in the sole name of the 4<sup>th</sup> Respondent.
47. The evidence on how the motor vehicle was purchased was not controverted by the Respondents and I find that the Appellant's explanation is plausible. The 1<sup>st</sup> and 4<sup>th</sup> Respondent confirmed, in their evidence, that the Appellant borrowed money from the 1<sup>st</sup> Respondent to purchase the suit motor vehicle which loan he was yet to repay it.
48. I am satisfied that the Appellant proved, on a balance of probabilities, that he entered into the said arrangement with the Respondents in good faith and was not aware that he would eventually be boxed out of the transaction or short-changed simply because he did not take the measures to legally cushion himself. As a court of equity, I find guidance in the maxim 'Equity will not suffer a wrong to be without a remedy'. This means that this Court cannot turn a blind eye to the evident injustice to the Appellant that is apparent from the facts of this case.
49. Needless to say, it is disingenuous that the 4<sup>th</sup> Respondent to claim that he bought the vehicle on his own and solely repaid the bank loan yet he was a witness to the loan agreement between the Appellant and the 1<sup>st</sup> Respondent, for the purchase of the same motor vehicle. It is my finding that the 4<sup>th</sup> Respondent was aware that the Appellant was the purchaser of the suit vehicle and the steps that the Appellant took in consolidating funds for the said purchase. The 4<sup>th</sup> Respondent cannot therefore not renege on their arrangement and turn around to claim sole ownership of the vehicle.
50. It is my finding that the Appellant's claim that he bought the motor vehicle through financing from Family Bank in the name of the 4<sup>th</sup> Respondent is more plausible than the 4<sup>th</sup> Respondent's claim that he was the one who bought the vehicle. I find no reason to doubt the Appellant's account of the matter.



51. It is therefore my finding that, a constructive trust existed between the Appellant and the 4<sup>th</sup> Respondent, where the 4<sup>th</sup> Respondent was to obtain financing from Family Bank to assist the Appellant to purchase the suit vehicle and the Appellant in turn repays the loan. It is my further finding that the suit vehicle belonged to the Appellant and was only registered and held in trust by the 4<sup>th</sup> Respondent until all outstanding liabilities were settled in full.
52. My finding that the 4<sup>th</sup> Respondent was a trustee of the suit vehicle in favour of the Appellant notwithstanding, this Court cannot overlook the fact that the vehicle ownership has since changed hands. The question which therefore arises is whether the subsequent transfer was proper and legal. In addressing this issue, I find guidance from the Court of Appeal in *Stephens & 6 others vs. Stephens & another* [1987] eKLR, per Apaloo J.A. wherein it was held: -
- “That being so, it is plain to me that the 1<sup>st</sup> respondent in converting the trust property into his own and that of the 2<sup>nd</sup> respondent, he was guilty of a breach of trust. That equitable “wrong” is a mixed bag of many deviations from the duty of fair, efficient and honest dealing by a fiduciary and which consists of both commissions and omissions. At page 662 of Nathan & Marshall Cases and Commentary on the Law of Trusts, it is said:-
- “A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires or if he does what as trustee he is not entitled to do.”
53. Flowing from the above cited case, I find that the 4<sup>th</sup> Respondent as a trustee, lacked the legal capacity to transfer the suit vehicle to a third party or his wife for that matter. The said transfer amounted to a breach of trust between him and the Appellant. It is clear to me that the 4<sup>th</sup> Respondent took advantage of the Appellant’s legal vulnerability and the fact that he was registered as the sole owner of the suit vehicle to transfer the suit vehicle to his wife who in turn charged it to a financier in an obvious attempt to keep the said vehicle from the Appellant’s reach.
54. It follows that the 4<sup>th</sup> Respondent’s wife’s ownership of the suit vehicle is tainted with illegality as the same was transferred in breach of trust. It apparent that the 4<sup>th</sup> Respondent conspired with the 1<sup>st</sup> Respondent to dispossess the Appellant of the suit vehicle without basis by involving the 2<sup>nd</sup> Respondent and his officers.

### **iii. The Prayers Sought in the Pleint.**

55. Having found that the Appellant was the rightful owner of the suit vehicle, I find that the Appellant proved his case against the Respondents on a balance of probabilities.
56. On the prayer for the return of the suit motor vehicle to the Appellant, I find that the same cannot be granted in the circumstances of this case in view of the fact that the said vehicle is currently in the name of a third party who was not enjoined as a party to this case.
57. I have also considered the financial loss suffered by the Appellant following the impounding of the suit vehicle and the subsequent transfer to a third party. The evidence presented in the form of the delivery notes (P.Exh4) proved that the Appellant earned an income of about Kshs 6000/= to 7,500/= daily from the suit vehicle. He testified that his driver would remit a minimum net of Kshs 5,000/= daily. This Court takes cognizance of the volatility of the transport business in Kenya and considers the fact that there may be days when the income from the suit vehicle may have been lower than expected. I am not persuaded that a sum of Kshs 5,000/= would always be the daily income. Adopting a daily income of Kshs 5,000 would translate to a monthly earning of Kshs 150,000 and a yearly income of



Kshs 1,800,000. In this regard, I consider a global sum of Kshs 3,000,000/= as adequate compensation for loss of income.

58. In terms of the prayer for damages, I award the Appellant Kshs 500,000/= as general damages.

59. As costs follow the event, this Court also awards the Appellant the costs of the Appeal.

60. In the end, I find this Appeal is merited I therefore allow it. I set aside the judgment of the trial court and enter judgment for the Appellant as follows: -

a. Payment for Loss of Income – Kshs 3,000,000/=

b. General Damages – Kshs 500,000/=

c. Costs of this Appeal

d. Interests on (a) – (d) at court rates from the date of filing this suit before the trial court.

61. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 22ND DAY OF JUNE 2023.**

**W. A. OKWANY**

**JUDGE**

