



**Ngao Credit Limited v Mwangi & another (Civil Appeal 74 of 2019)  
[2024] KEHC 16069 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 74 OF 2019  
PN GICHOHI, J  
DECEMBER 17, 2024**

**BETWEEN**

**NGAO CREDIT LIMITED ..... APPELLANT**

**AND**

**STEPHEN MURUNGA MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**RONALD NAMISI KARANI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the whole Judgement and Decree of Hon. J.B Kalo (CM)  
delivered on 26th March, 2019 and further reviewed on 17th September, 2019)*

**JUDGMENT**

1. The background of this matter is that by an Amended claim dated 30<sup>th</sup> July, 2018, the 1<sup>st</sup> Respondent (Plaintiff), instituted the suit against the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant), the Appellant (2<sup>nd</sup> Defendant) and Kiriya Merchants Auctioneers (3<sup>rd</sup> Defendant), seeking for the following Orders: -
  - a. A declaration that the plaintiff is the lawful and beneficial owner of motor vehicle registration number KBK 596T.
  - b. A declaration that the transfer of the subject matter herein in favor of the 1<sup>st</sup> & 2<sup>nd</sup> defendants as being illegal and unlawful ab initio.
  - c. An order for nullification and cancellation of the log book currently in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - d. An order for mandatory injunction compelling the National transport and safety authority to register the subject motor vehicle in the names of the plaintiff upon payment of the requisite charges.



- e. An order for mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to release the subject motor vehicle to the Plaintiff forthwith.
  - f. A declaration that the attachment of the subject matter by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant has been unlawful.
  - g. Orders for certiorari quashing the advertisement for sale by public auction of the subject matter in the Star newspaper the 23<sup>rd</sup> January, 2018 edition.
  - h. An order of permanent injunction restraining the defendants from selling and transferring the subject matter to third parties.
  - i. General damages.
  - j. Special damages amounting to Kshs 585,000.
  - k. Loss of user from 30<sup>th</sup> July, 2018 to when the motor vehicle will be returned at Kshs.3000 per day.
  - l. Interest on (i), (j) &(k) above at court rates.
  - m. Costs of the suit and interest at court rates.
  - n. Any other relief that this Honourable Court may deem just and fit to grant.
2. In summary, the case was that the 1<sup>st</sup> Respondent herein bought motor vehicle registration number KBK 596T, belonging to Jefferson Nguru Kariuki, from Sakinya Motors on 28<sup>th</sup> December, 2015 for consideration of Kshs. 460,000 and took immediate possession of the said vehicle. He enjoyed quiet possession of the said car until 10<sup>th</sup> January, 2018, when the 2<sup>nd</sup> Respondent borrowed the car but failed to return the same.
  3. The 1<sup>st</sup> Respondent followed up with the 2<sup>nd</sup> Respondent and on 25<sup>th</sup> January, 2018, he learnt that the Appellant herein together with the 2<sup>nd</sup> Respondent had registered the vehicle in their joint names. Further, that it came to his knowledge that the 2<sup>nd</sup> Respondent had misrepresented himself as the owner of the said vehicle having allegedly bought it from Jefferson Nguru Kariuki, and used the said car as collateral to obtain a loan of Kshs 100,000 from the Appellant herein.
  4. The 2<sup>nd</sup> Respondent defaulted in the payment of the said loan and therefore the subject vehicle was auctioned by Kiriuyu Merchants Auctioneers, to recover the loan advanced to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent reported the said issue to the police and criminal charges were preferred against the 2<sup>nd</sup> Respondent, which proceedings are still ongoing.
  5. On 13<sup>th</sup> August, 2018, the Appellant herein (2<sup>nd</sup> Defendant in the suit) entered appearance and filed an amended defence to amended Plaint denying the claim and particulars of fraud raised against it.
  6. The Appellant stated that the 2<sup>nd</sup> Respondent herein approached them for a loan facility of Kshs 110,091/= and offered the subject motor vehicle as collateral saying that he had bought it from Jefferson Nguru Kariuki. The 2<sup>nd</sup> Respondent produced a sale agreement in support of that fact.
  7. That upon undertaking due diligence, the Appellant confirmed that the vehicle was registered in the name of the said Jefferson Nguru. On that basis and in order to secure their interest, the vehicle was registered in the joint names of the Appellant the financier and the 2<sup>nd</sup> Respondent as the borrower. The offer letter was thus issued to the 2<sup>nd</sup> Respondent on 21/08/2017.



8. The Appellant stated that the 2<sup>nd</sup> Respondent executed a loan agreement on even date. The said agreement provided for terms of the loan that the 2<sup>nd</sup> Respondent was to pay a monthly instalment of Kshs. 26,770/= for a period of 6 months. However, the 2<sup>nd</sup> Respondent paid the 1<sup>st</sup> and 2<sup>nd</sup> Instalment and then defaulted, causing the Appellant to instruct Kiriiyu Merchants Auctioneers to recover the said loan. It is on that basis, that the subject motor vehicle was placed on auction.
9. The Appellant maintained that they followed due procedure in securing the collateral for the loan granted. They further maintained that they were not privy to any transaction between the respondents herein.
10. After hearing the parties, the trial court on 26<sup>th</sup> March 2019 entered judgment in favour of the Plaintiff (1<sup>st</sup> Respondent) against the Defendants jointly and severally as follows: -
  - i. A declaration that the plaintiff is the lawful and beneficial owner of motor vehicle registration number KBK 596T (The motor vehicle).
  - ii. A declaration that the transfer of the subject matter herein in favour of the 1<sup>st</sup> & 2<sup>nd</sup> defendants as being illegal and unlawful ab initio.
  - iii. An order for nullification and cancellation of the log book currently in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - iv. An order for mandatory injunction compelling the National Transport and Safety authority to register the subject motor vehicle in the names of the plaintiff upon payment of the requisite charges.
  - v. An order for mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to release the subject motor vehicle to the plaintiff forthwith.
  - vi. A declaration that the attachment of the subject matter by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant has been unlawful.
  - vii. An Order of permanent injunction restraining the defendants from selling and transferring the motor vehicle to third parties.
  - viii. General damages.
  - ix. Special damages amounting to Kshs. 585,000/=.
  - x. Kshs. 540,000/= for loss of use.
  - xi. Costs of the suit.
  - xii. Interest on ix from the date of filing the suit until payment in full and interest on x and xi from the date of hereof until payment in full.
11. Aggrieved by the said judgment, the Appellant filed this Appeal by an Amended Memorandum of Claim dated 18<sup>th</sup> September, 2019, raising the following grounds: -
  1. That the Learned Magistrate erred in law in failing to find that the Plaintiff had failed to discharge the burden of proof and had not proved his case on a balance of probability or at all as against the 2<sup>nd</sup> Defendant.
  2. That the Learned Magistrate erred in law and contrary to the doctrine of stare decisis and precedent in failing to abide by and/or in disregarding the binding decisions of the High Court



in the cases of Bruce Joseph Bockle v Coquero Limited [2014] eKLR and Cyprian Masafu Wanyonyi Wekesa v Jaswinder Singh Enterprises Ltd [2006] eKLR.

3. That the Learned Magistrate erred in law by importing the burden of proof upon the 2<sup>nd</sup> Defendant contrary to the rules of evidence and further that the 2<sup>nd</sup> Defendant was expected to prove its case on a balance of probability without the Plaintiff first discharging the required burden of proof.
4. That the Learned Magistrate erred in law and fact by failing to consider the 2<sup>nd</sup> Defendant's pleadings, written submissions, and all the evidence tendered by the 2<sup>nd</sup> Defendant in arriving at his judgment.
5. That the Learned Magistrate erred in law by finding that fraud was inferred rather than the same was proved by the Plaintiff as required by the rule of evidence and the law and further and according to the doctrine of stare decisis and judicial precedent as the Plaintiff failed to establish any fraud on the part of the 2<sup>nd</sup> Defendant.
6. That the Learned Magistrate erred in law by finding that the Plaintiff was the beneficial owner of Motor Vehicle Registration Number KBT 596T (“the suit motor vehicle”) even though the Plaintiff was never registered as an owner of the suit motor vehicle while the 2<sup>nd</sup> Defendant's registration as a co-owner of the suit motor vehicle was never proved to be a forgery.
7. That the Learned Magistrate erred in law by awarding special damages under the header of loss of user while the prayer was speculative in nature and unascertainable and could not be calculated to the last cent contrary to the binding decisions of the High Court in the case of African Line Transport Company & another v Sylvester Keitany [2017] eKLR.
8. That the Learned Magistrate erred in law and misdirected himself by awarding special damages for the prayed sum by the Plaintiff under the header even though the same was neither strictly proved as prescribed by the rules of evidence and the law.
9. That the Learned Magistrate erred in law by entering judgment jointly and severally in favor of the Plaintiff as against both Defendants even though the Plaintiff failed to prove his case as against the 2<sup>nd</sup> Defendant.
10. That the Learned Magistrate erred in fact by granting permanent and mandatory injunctive orders touching on the suit motor vehicle upon the conclusion of the main suit as against the Defendants even though the Honorable Magistrate was well aware that he dismissed the Plaintiff's Application dated 28<sup>th</sup> January, 2018 which application sought temporary injunctive orders which orders he declined to issue therefore the 2<sup>nd</sup> Defendant was at liberty to dispose of and/or transfer the suit vehicle to third parties.
11. That the Learned Magistrate erred in fact and law by granting permanent and mandatory injunctive orders touching on the suit motor vehicle creating a state of affairs that would result to the Honourable Magistrate issuing orders in vain which would be nearly impossible to full execute without involving a third party.
12. That the Learned Magistrate erred in law and fact and contrary to the principle of the doctrine of stare decisis and judicial precedent as rightly held in the case of Dharamshi Vs. Karsan 1974 EA 41, by awarding general damages in addition to quantifiable special damages that had not been prayed for by the plaintiff therefore leading to a duplication of award in that the plaintiff had already calculated the loss he had suffered in specific terms.



13. That the Learned Magistrate erred in law and fact by failing to appreciate that while the chattel mortgage was defective the same did not release the 1<sup>st</sup> Defendant from his loan obligation to the 2<sup>nd</sup> Defendant and therefore the loan agreement was contractual and binding between the parties to it.
12. The Appellant prays that this Court make the following Orders: -
  - a. That the Appeal filed herein be allowed in its entirety.
  - b. That the judgment of Hon. Chief Magistrate J. B Kalo made and/or delivered on 26<sup>th</sup> March 2019, and further reviewed on 17<sup>th</sup> September 2019 and the decree passed therefrom in favour of the Plaintiff as against the 2<sup>nd</sup> Defendant be set aside.
  - c. That the Plaintiff's suit against the 2<sup>nd</sup> Defendant in the Lower court be dismissed with costs and interest at court rates until payment in full.
  - d. That this Court be at liberty to make such further or alternative orders as it deems proper in the circumstances.
  - e. That the Costs of the Appeal together with interest at court rates until payment in full be borne by the Respondents jointly and severally.

### **Appellant's Submissions**

13. The Appellant condensed the grounds of Appeal into three issues being: - ownership of the motor vehicle; whether fraud was proved on the Appellant's part and whether the court should have granted the prayers in the amended plaint.
14. On ownership, it was submitted that the Appellant herein never interacted with the 1<sup>st</sup> Respondent in any way throughout the transaction and was not aware of any dealing between the Respondents' herein. Further, Appellant submitted that as per the documentation brought to their offices, the 2<sup>nd</sup> Respondent indicated, and indeed it was verified, that the subject motor vehicle was registered in the name of a third party.
15. The Appellant therefore submitted that it cannot be faulted for believing that the information provided by NTSA was correct and factual and besides, Section 8 of the [Traffic Act](#) provides that; -

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
16. Appellant therefore urged that the trial court's decision be set aside and substituted with a finding in favour of the Respondents and with costs.
17. In support of this, the Appellant cited the case of Superfoam Ltd & Another v Gladys Nchororo Mbero [2014] eKLR, where the Court expounded on the import of Section 8 of the [Traffic Act](#) and stated as follows: -

“This to my understanding means a logbook or certificate of search is not conclusive proof of ownership though such document may purport to show the registered owner but may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out or provides that the contrary can be proved. This is a clear recognition of a fact that often times, vehicles change hands but records are not adjusted to reflect the actual position.”



18. Similarly, that in this case, the Appellant at material time did not have notice of defect of the logbook. Therefore, that record held at the NTSA should be deemed as conclusive proof as to the ownership.
19. The Appellant also relied on the case of Cyprian Masafu Wanyonyi Wekesa v Jaswinder Singh Enterprises Ltd [2006] eKLR, where the court held as follows: -

“In my considered view, the 2<sup>nd</sup> objector appears to have a legitimate point. I say so because by virtue of the provisions of Section 9 (4) of the Traffic Act, the registration of a new owner becomes effective upon the surrender of the log book to, and reissuance of the same by, the Registrar. Therefore, unless the entry in any of the logbooks is shown to be a forgery, it would, by virtue of Section 6 (5) of the Traffic Act, be deemed to be proof of registration of the vehicle.”

20. Consequently, it was submitted that there was no evidence presented by the 1<sup>st</sup> Respondent to show that the registration of the third party’s name on the logbook was a forgery. Moreover, that the 1<sup>st</sup> Respondent alleged to have bought the said vehicle from Sakinya motors, when they were not the registered owners. Further it was submitted that no evidence was produced in support of the purported authority granted to Sakinya Motors to sell the vehicle on behalf of the Jefferson Ngutu.
21. From the foregoing, the Appellant submitted that the 1<sup>st</sup> Respondent failed to prove that the registration of the Appellant as the joint owner of the suit motor vehicle was a forgery or that they colluded with NTSA in effecting the registration. Therefore, the trial court erred in finding that the consent of the third party was not acquired when the vehicle was registered in the joint names of the Appellant and the 2<sup>nd</sup> Respondent. Moreover, registration could not have been done without the consent of the said Jefferson.
22. The Appellant argued that the issue of ownership could have been easily settled if NTSA were joined to the suit, but the 1<sup>st</sup> Respondent failed to do that.
23. On whether fraud was proved, the Appellant’s submitted that no fraud was proved on their part. It was argued that no cogent evidence was tendered beyond the mere allegation that the Appellant herein was part of the fraud. Moreover, since the Appellant herein is juristic person, the 1<sup>st</sup> Respondent ought to have laid the fraud on at least one known officer from the Appellant’s company.
24. In support those arguments, the Appellant relied on the case of Demutilla Nanyama Pururmu Vs Salim Mohamed Salim [ 2021] eKLR where in stating standard of proof in fraud cases, the Court of Appeal referred its own decision the case of Kinyanjui Kamau vs George Kamau [2015] eKLR that court expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

25. Accordingly, that the onus of proving the alleged fraud was on the 1<sup>st</sup> Respondent, which standard is beyond balance of probabilities.



26. The Appellant also submitted that even though the court found the chattel mortgage to be defective, the same should not be used to absolve the 2<sup>nd</sup> Respondent from paying the monies loaned to him. On the contrary, that the court ought to have upheld the sanctity of the loan agreement between the Appellant and the 2<sup>nd</sup> Respondent.

### 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

27. The 1<sup>st</sup> Respondent equally summarised the issues for determination to three, that is; whether the 1<sup>st</sup> Respondent discharged his burden of proof; whether this Court ought to disturb the reliefs granted or awards made by the trial court and who should bear costs of this Appeal.
28. On burden of proof and in regard to ownership of the subject motor vehicle, it was submitted that he demonstrated before the trial court that he is the owner of the vehicle by producing a motor vehicle sale agreement from between him and Sakinya Motors Ltd, together with the RTGS transfer slip both of 28<sup>th</sup> December, 2015 and vehicle delivery note, then took immediate possession of the car until 10<sup>th</sup> January, 2018.
29. It was submitted that the sale transaction was corroborated by Sakinya's manager who testified and confirmed the said facts. The Respondent submitted that he even took out third party insurance policy and produced in evidence the insurance sticker in his name and insurance renewal endorsement of the subject vehicle.
30. From the foregoing, the Respondent submitted that it demonstrated that he was the legal owner of the said vehicle. To support his arguments, he relied on the case of Nancy Ayiamba Ngaira Vs Abdi Ali C.A No. 107/ 2008 [2010] eKLR where High Court 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 fully 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 has 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; possessory ownership.”

31. As regards proof of fraud, it was submitted that the 2<sup>nd</sup> Respondent herein took possession of the subject motor vehicle on the guise that he was using it to run some errands only for said vehicle to be used as collateral in obtaining loan from the Appellant. The Respondent argued that these events were not controverted by the Appellants and the 2<sup>nd</sup> Respondent and therefore, fraud was committed and the Appellant herein was the beneficiary of the said fraud.
32. On how the Appellant perpetuated fraud, it was submitted that the Appellant transacted with the 2<sup>nd</sup> Respondent in full knowledge that he had no legal interest in the subject motor vehicle.
33. It was submitted that Faith Owino who testified as the Legal Officer of the Appellant herein produced all documents in the list of documents except the sale agreement of the subject motor vehicle. Further, it was the Respondent's argument that the Appellant did not have or see any transfer documents from the 2<sup>nd</sup> Respondent of the subject motor vehicle.
34. The Respondent contended that the chronology of the events do not add up for reasons that the tracker was fitted on 20<sup>th</sup> July, 2017 while the loan agreement was entered into on 21<sup>st</sup> August, 2017,



which raise questions as to why a tracker was fitted in the car before a loan agreement that was entered into. Further, he contended that the vehicle was insured in the name of the 1<sup>st</sup> Respondent, a fact that was admitted by the Appellant, but the Appellant ignored to find out the true owner of the vehicle because it was working in cahoots with the 2<sup>nd</sup> Respondent.

35. The Respondent submitted that it was not sufficient for the Appellant to show that the Appellant and the 2<sup>nd</sup> Respondent were the registered owners. That it was incumbent upon them to demonstrate and trace the root under which they obtained the said registration of logbook. In support of this argument, reliance was placed in the case of *Munyu Maina Vs Hiram Gathiha Maina* [2013] eKLR where the Court held that: -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

36. In the circumstances, the Respondent submitted that the Appellant’s failure to lead evidence in support of how the said vehicle was registered in its joint name with the 2<sup>nd</sup> Respondent without producing any transfer documents and or obtaining consent of the said Mr. Jefferson, lead to an inevitable inference that the Appellant deliberately withheld the said information and evidence.

37. In support, Respondent he relied on the case of *Stanley Mombo Amuti Vs Kenya Anti-corruption Commission* [2019] eKLR where the Court of Appeal had this to say: -

We note that the failure to call a particular witness or voluntarily to produce documents or objects in one’s possession is conduct evidence. (See J. Wigmore, *Evidence* § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent’s evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.

38. It was submitted that the entire procedure of fixing tracker and transferring the vehicle to their joint names reeks of fraud and conspiracy especially considering that the Appellant bypassed most of its procedure and practice. On that note, it was submitted that particulars of fraud were particularized and proved and such the trial court was right in finding in his favour.

39. Regarding the award granted by the trial court, the 1<sup>st</sup> Respondent submitted that all the prayers awarded are justified in the circumstances and urged this court not to interfere with any of the awards.

40. On the release of the vehicle, the 1<sup>st</sup> Respondent submitted that no evidence was tendered by the Appellant to support the allegations that the said vehicle was sold to third parties. He however submitted that in the event the Court is persuaded otherwise, then the 1<sup>st</sup> Respondent herein be awarded Kshs. 460,000 /= being the value of the subject motor vehicle.

41. With regard to costs, the 1<sup>st</sup> Respondent submitted that section 27 of the *Civil Procedure Act*, provide that costs follow event. Accordingly, that he should be awarded costs of this Appeal when the Appeal is dismissed.



## Analysis And Determination

42. As the first appellate court, this court should evaluate the evidence on the record and make its own determination except having in mind that it did not have the advantage of hearing witnesses. See: *Selle & Another vs. Associated Motor Board Company Ltd* [1968] EA 123.
43. Further 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.”
44. After considering the grounds of appeal, the evidence adduced before the trial court and the submissions herein, the issues for determination in the appeal are: -
1. Whether the trial court erred in holding that the vehicle belonged to the 1<sup>st</sup> Respondent.
  2. Whether the trial court erred in finding the Appellant committed fraud.
  3. Whether the trial court erred in granting mandatory orders for the release of the subject vehicle, which has allegedly been sold to third parties.
  4. Whether the trial court erred in awarding special damages, loss of user and general damages.
45. With regard to ownership of the subject motor vehicle, it is trite law that he who alleges must prove, this is anchored in Sections 107 and 108 of *Evidence Act*. It is also trite that the burden of proof in civil cases is on a balance of probability.
46. The issues raised in this case have root on the ownership of the subject motor vehicle registration number KBK 596T. Each of the Respondents herein claimed ownership. In support of the said ownership, the 1<sup>st</sup> Respondent produced the Motor vehicle sale agreement, the RTGS slip confirming payment of the said vehicle, Delivery note from Sakinya Motors Ltd, a Certificate of insurance issued by Monarch Insurance, endorsement form for two years from the 28<sup>th</sup> December, 2015 to 27<sup>th</sup> December, 2016 and one from 28<sup>th</sup> December, 2016 to 28<sup>th</sup> December, 2017 and copy of the logbook showing that he took the original on 29<sup>th</sup> December, 2015.
47. The 2<sup>nd</sup> Respondent did not participate in these proceedings. The Appellant on the other hand maintained that it knows the 2<sup>nd</sup> Respondent as borrower and them a financier and produced documentation to show that the 2<sup>nd</sup> Respondent was a beneficiary of a loan and the subject vehicle was merely used as a collateral.
48. He admitted however, that when the 2<sup>nd</sup> Respondent approached it for the loan, it was in possession of a sale agreement executed by Jefferson Nguru Kariuki, but the said agreement was not produced in evidence. Therefore, the only documents, the 2<sup>nd</sup> Respondent was in possession of is the log book of the said car in the previous owner's name.
49. From these facts, it is clear that as at the time the Appellant approved the loan in favour of the 2<sup>nd</sup> Respondent, the logbook was still in the original owner's names and never at one point was it in the name of the 2<sup>nd</sup> Respondent until the time they registered ownership in their joint names as financier and borrower in September, 2017. That means that both Respondent were not registered owners of



the said vehicle and therefore that there was need to demonstrate how the said vehicle moved from the original owner to either of the Respondent.

50. Section 8 of the Traffic Act provides that the person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle. On that issue, Okwengu J (as he then was) had this to say in the case of Samwel Mukunya Kamunge v John Mwangi Kamuru Civil Application No.34 of 2002: -

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicles change hands but the records are not amended.”

51. Similarly, having a dispute as to who was the owner of the subject vehicle or put it different who was the legal purchaser for value of the subject motor vehicle in this case, the 1<sup>st</sup> Respondent tendered evidence of sale agreement between him and Sakinya Motors as the agents of the Jefferson Nguru Kariuki where the said vehicle had been displayed. He paid the consideration of Kshs 460,000 and took immediate possession of the said vehicle for his use.
52. Evidence was tendered to show that he even took out insurance for the said car from the years 2015 to December, 2017, which was a further confirmation that he was the beneficial owner and purchaser of the said vehicle. Although the 2<sup>nd</sup> Respondent claimed ownership of the subject vehicle, he did not tender evidence to support his claim. On that basis, the trial court did not err in its finding that the 1<sup>st</sup> Respondent was the lawful and beneficial owner of motor vehicle registration No. KBK 596T.
53. On whether the Appellant and the 2<sup>nd</sup> Respondent worked in cahoots to defraud the 1<sup>st</sup> Respondent of the said vehicle, it was incumbent upon the Appellant to specifically plead and prove the fraud to a standard above a balance of probabilities but not beyond reasonable doubt as was held by the Court of Appeal in Gladys Wanjiru Ngacha Vs Theresa Chepsaat & 4 Others [2013] e KLR.
54. The 1<sup>st</sup> Respondent stated that while using the subject vehicle, the 2<sup>nd</sup> Respondent borrowed it to run some errands and eventually failed to return the said car and on following up, he became adamant until the issue was reported to the police and the 2<sup>nd</sup> Respondent arrested.
55. The Police Officer Lydia Murage (PW3) testified that the 2<sup>nd</sup> Respondent admitted to taking the said vehicle from the 1<sup>st</sup> Respondent and informed her that the vehicle had broken down in Bungoma.
56. It is noted that the 2<sup>nd</sup> Respondent did not claim any ownership of the said vehicle. It is stated that when he borrowed the said car, he used the same to secure a loan with the Appellant herein, but failed to repay, leading to the auction of the subject vehicle.
57. In the Amended Complaint, the particulars of fraud were pleaded as follows: -
- a. Conspiring to take away the subject motor vehicle without the plaintiff’s Authority.
  - b. Conspiring to transfer the subject vehicle without the plaintiff’s authority.
  - c. Fraudulently obtaining documents necessary to facilitate registration of the subject motor vehicle in the defendant’s names.
  - d. Illegally and unlawfully colluding with the registration authorities to transfer the subject motor vehicle to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants names.



58. It is evident from the 1<sup>st</sup> Respondent's testimony that the 2<sup>nd</sup> Respondent borrowed the subject vehicle on the guise that he would return it after an hour, only to disappear with the vehicle and use it to secure a loan from the Appellant after dubiously obtaining registration documents.
59. In its defence, the Appellant herein submitted that they only registered their names in the said logbook as financiers of the 2<sup>nd</sup> Respondent who had taken a loan from them and given the subject vehicle as collateral. They stated that in facilitating the registration of the said vehicle to its name, they received a sale agreement from the 2<sup>nd</sup> Respondent and the Mr. Jefferson and an original log book.
60. It is the Appellant's defence that they conducted a search that showed that the subject vehicle was registered in the name of Mr. Jefferson and therefore they believed the search issued by NTSA and proceeded to register the vehicle in their name to only secure their interest as financier.
61. The Appellant maintained that it had no knowledge of the ownership issue between the Respondents herein and thus if any fraud was perpetuated, it is the 2<sup>nd</sup> Respondent that should take the entire blame.
62. From the analysis of evidence on record, there is no doubt that the 2<sup>nd</sup> Respondent fraudulently obtained the said vehicle from the 1<sup>st</sup> Respondent to secure a loan with the Appellant herein. It is not in doubt that the allegation of fraud had been communicated to the Appellant when the suit was initially filed but the Appellant proceeded with the sale by Auction.
63. However, from the material on record, the Appellant's actions in this matter reveals outright lack of due diligence in such a commercial transaction rather fraudulent action on his part. However, it is his actions that made easy for the 2<sup>nd</sup> Respondent to execute his fraudulent intentions thus occasioning loss to the 1<sup>st</sup> Respondent. For those reasons, the Appellant cannot escape liability for the loss suffered by the 1<sup>st</sup> Respondent. Both are liable jointly and severally.
64. Having found the 2<sup>nd</sup> Respondent guilty of fraud, the logbook registration between him and the Appellant herein was illegal and therefore, no good title could pass either to the Appellant as the financiers or any subsequent third parties.
65. In such a scenario case, the Court of Appeal in the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment) held: - -
- “ All transactions stemming from the fraudulent proceedings were all rooted on a fraudulent and illegal decree and could not in law be sanctioned by a court of law as they were null and void ab initio and could not therefore bestow any rights to any party either directly or indirectly affected by those proceedings.”
66. Since the original logbook held by the 2<sup>nd</sup> Respondent was marred with illegalities, then the 2<sup>nd</sup> Respondent could not have given any better title to the Appellant herein, as the financier and subsequently, the title given to third parties in the public Auction could not be any better. However, that did not release the 1<sup>st</sup> Defendant from his loan obligation to the 2<sup>nd</sup> Defendant.
67. Consequently, the trial court was justified in finding the transfer of the subject matter herein in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the suit as illegal and unlawful ab initio.
68. However, it is evident that the vehicle has since been sold after the trial court failed to grant stay orders sought and therefore, an order compelling release of the vehicle to the Plaintiff (1<sup>st</sup> Respondent) was not tenable. Also untenable was the order for mandatory injunction compelling the National Transport and Safety Authority to register the subject motor vehicle in the names of the plaintiff. Those orders



are not enforceable in the circumstances herein as the vehicle has already passed to third parties who are not parties to the suit. And therefore, the trial court fell in err when it issued them.

69. As regards the claim for special damages, it is settled that special damages must be specifically pleaded and proved. The 1<sup>st</sup> Respondent tendered receipts in support of hiring a vehicle every day from Crown Commercial Agencies, all amounting to Kshs 585,550/=. That award is upheld.

70. On the claim for loss of user, the Court of Appeal in the case of *Kiai t/a High Flyer Services and Publishers & another v Gichuki t/a High Flyer Publishers & another* (Civil Appeal E003 of 2021) [2024] KECA 842 (KLR) reiterated its earlier decision in *David Bagine vs. Martin Bundi* [1997] eKLR where it stated: -

“The learned judge proceeded to assess “loss of user” damages as general damages although the same were claimed as special damages “to be proved at the hearing of the suit”. In doing so the learned judge erred. We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.”

71. In this case, the 1<sup>st</sup> Respondent submitted that due to loss of the subject vehicle, he has been expending Kshs 3,000 per day from the 30<sup>th</sup> July, 2018 when he stopped using the hired vehicle till when the said vehicle is returned to him. The trial Court awarded Kshs. 540,000/= under this head, awarding loss of user for 6 months.

72. Accordingly, this too being special damages claim, the 1<sup>st</sup> Respondent ought to have proved it to the required standard. All that the 1<sup>st</sup> Respondent stated was that he was losing Kshs. 3,000/= per day from the 30<sup>th</sup> July, 2018 when he stopped using the hired vehicle till when the said vehicle is returned to him but there was no proof. There was no basis for awarding the same. That award is therefore set aside.

73. Regarding general damages, it is noted that the 1<sup>st</sup> Respondent pleaded in his Amended Plea that due to Defendant’s actions, he and his family had suffered emotional, physical, psychological trauma and distress to the extent of interfering with the normal functioning of their lives at work and at home and as such, he claimed for compensation in general damages.

74. Having so pleaded, it would not have amounted to double compensation if the court went ahead to assess the same in its judgment. The concern is that the trial court went ahead to review its Judgment when it was prompted to do so on account that it was an error apparent on record.

75. Order 45 of the Civil Procedure Rules provides: -

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
76. In this case, by awarding general damages but not quantifying the sum awardable, the omission was an error and the judgment would not be enforceable without a figure attached to it.
77. However, this is not an error that can be cured by Slip Rule or through Order 45 of the Civil Procedure Rules reason being that it is not shown how he arrived at the sum of Kshs. 50,000/=. He was functus officio and in the circumstances, he erred in reviewing the same. The ward of Kshs. 50,000/= made on 17<sup>th</sup> September, 2019 is hereby set aside.
78. As earlier stated, the 1<sup>st</sup> Respondent proved that he was the owner of the subject motor vehicle and that he bought it at Kshs. 460,000/-. Since the vehicle was sold, this court is satisfied that under “any other relief the court may deem fit to grant” as prayed in the plaint, this Court finds it fair and it award him the said sum in leu of an order for release of the vehicle to him which order has been found untenable.
79. Having awarded the 1<sup>st</sup> Respondent the said sum, then his interest on further transactions in regard to the said vehicle cease from the date of this judgment.
80. In those circumstances, this Court disposes off the Appeal by making the following Orders: -
1. A declaration that the attachment of the subject matter by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant was unlawful.
  2. An order for nullification and cancellation of the log book in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  3. Award of Kshs 585, 000 /= as special damages is upheld.
  4. Plaintiff is awarded Kshs. 460,000/= being the purchase price of the subject motor vehicle.
  5. The award of general damages of Kshs. 50,000/= is hereby set aside.
  6. Award of Kshs. 540,000/= for loss of user is set aside.
  7. Interest in (4) and (5) above at court rates from the date of filling the suit.
  8. Each party to bear its own costs of this Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

Ms Terer for Mr. Onyancha for Appellant

Ms Gatonye for 1<sup>st</sup> Respondent

Ruto, Court Assistant

