



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 281 OF 2009**

**PATRICK KINYUA MUNYITO .....PLAINTIFF**

**-VERSUS-**

**FRANCIS MURIUKI MURAGURI .....1<sup>ST</sup> DEFENDANT**

**BERNARD GATHUNGU .....2<sup>ND</sup> DEFENDANT**

**NIC BANK LTD .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed his original plaint on 28<sup>th</sup> May 2009 and amended the same on 25<sup>th</sup> February 2011 and filed the same on 1<sup>st</sup> March 2011. He avers that on or about 12<sup>th</sup> May 2008 he entered into an agreement with the 1<sup>st</sup> defendant to buy from him his vehicle KAV 428F Mitsubishi Lorry for a sum of Kshs. 4,100,000/-. That it was a term of the agreement that the plaintiff would pay the 1<sup>st</sup> defendant **Kshs. 2,500,000/-** being the net value of the truck and take over the loan facility of **Kshs. 1,600,000/-** with NIC Bank Ltd. The vehicle which was then registered in the names of the 1<sup>st</sup> defendant had been charged to NIC Bank 3<sup>rd</sup> defendant under asset financing arrangement under which it was entitled to retain the log book until the loan was paid in full. That pursuant to the said agreement he paid the 1<sup>st</sup> defendant Kshs. 2,500,000/- and took over the loan from NIC Bank which he duly completed paying in February 2009. That upon paying the whole amount the 1<sup>st</sup> defendant became a constructive trustee who held the legal estate upon trust for the plaintiff, and the 1<sup>st</sup> defendant was entitled to transfer the same to him. That the 1<sup>st</sup> defendant handed over the suit vehicle to him and he used it uninterruptedly until 19<sup>th</sup> April 2009 when the 1<sup>st</sup> defendant deprived him of it when he repossessed it from him and drove it to Crater Automobiles (Nrb) Ltd. with an intention to trade it in. Upon making investigations he found out that the 1<sup>st</sup> defendant had fraudulently and in breach of trust placed on him collected the log book from NIC Bank an action he claims was not only illegal but amounted to a tort in detinue adding that the 3<sup>rd</sup> defendant was aware that the plaintiff was the constructive owner of the said motor vehicle and releasing the log book to the 1<sup>st</sup> defendant amounted to fraud and collusion.
2. He particularized fraud and collusion by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows; collecting the log book of motor vehicle KAV 428F from NIC Bank Ltd when he was barely a trustee obliged to transfer the said motor vehicle to the defendant and hand over the said log book; NIC Bank releasing the said log book to the 1<sup>st</sup> defendant whilst being aware that the plaintiff had taken over the hire purchase debt on behalf of the 1<sup>st</sup> defendant and was therefore entitled to the log book; taking possession of the vehicle knowing that the plaintiff had fully paid for it; taking the vehicle

- to Crater Automobile (Nrb) for purposes of trading it in whilst knowing that it belonged to the plaintiff. That pursuant to the said conversion the plaintiff reported the theft of his motor vehicle at Buru Buru Police station vide OB no. 45/19/4/09 and the police confiscated the said vehicle and placed it at Buru Buru police station pending the investigation. That the 1<sup>st</sup> defendant fraudulently obtained orders from the court vide Milimani CMCC Misc. 603 of 2009 ***Elijah Mpathia Irura t/a Warleen traders –vs- Francis Muriuki Muraguri and Patrick Kinyua Munyito*** for which he caused the vehicle to be released to him. He pleads further particulars of fraud that; that whilst knowing the same to belong to the plaintiff the 1<sup>st</sup> defendant fraudulently gave instructions to the auctioneers to repossess the same; giving false information that the said vehicle belonged to him; failing to disclose that the entire loan in addition to Kshs. 2,500,000/- being full purchase price of the said motor vehicle had been paid for by the plaintiff; failing to disclose that he had sold the said vehicle to the plaintiff.
3. The plaintiff pleads that as a result of the said actions the plaintiff has suffered loss and continues to suffer loss of user of the said motor vehicle and holds the defendant wholly liable. That the action of the 1<sup>st</sup> defendant obtaining the log book for the said motor vehicle from the bank after the plaintiff had paid the loan, converting the motor vehicle and intention to trade it in and the consequent repossession from Buru Buru police station was illegal and fraudulent as a result of which he has suffered and continues to suffer loss of user. On 28<sup>th</sup> May 2009, the court granted him a temporary injunction pending the inter partes hearing of his application.
  4. That whilst the order of injunction was in place, the 1<sup>st</sup> defendant, fraudulently and in flagrant breach of the aforesaid court order procured the 2<sup>nd</sup> defendant to be registered as the owner of the said motor vehicle and the 3<sup>rd</sup> defendant procured finances for the purchase through its Asset Financing Arrangement Services. The plaintiff contends that the said transfer being in breach of a court order is null and void and the 2<sup>nd</sup> defendant is obliged to nullification of sale and account off all the revenue earned by the said motor vehicle whilst in the defendants' possession. He particularizes the breach of court order and fraud by the defendants' at paragraphs 14 (i) to (iv) for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The plaintiff therefore prays for judgment against the defendants jointly and severally for:
    - i. ***A declaration that transfer of motor vehicle registration No. KAV 428F- Mitsubishi Fuso Lorry by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant in contravention of a court order made in this matter on 28<sup>th</sup> May, 2009 is illegal, null and void***
    - ii. ***An order of mandatory injunction compelling the 2<sup>nd</sup> defendant to hand over and transfer the motor vehicle registration no. KAV 428 F Mitsubishi Fuso Lorry to the plaintiff.***
    - iii. ***A Permanent injunction restraining the defendants either by themselves himself or through their his agents and/or servants from interfering with the plaintiff's possession and ownership of Motor Vehicle Registration No. KAV 428 F- Mistubishi Fuso Lorry.***
    - iv. ***As an alternative to i) above, Kshs, 4,100,000/-,***
    - v. ***Mesne profits, damages, interest at commercial rates and costs of the suit.***
  5. The 1<sup>st</sup> defendant Francis Muriuki Murungaru filed his defence to the plaintiff's claim on the 10<sup>th</sup> of June 2009. He denies having entered into agreement with the plaintiff on or about the 10<sup>th</sup> of May 2008 and adds that the plaintiff has forged documents and also forged the defendant's signature and that he has since reported the said forgery to Karatina police under OB No. 18/16/2009. He particularizes the fraud and forgery on the part of the plaintiff as follows;
    - i. Preparing an agreement for transfer of ownership dated 12<sup>th</sup> May 2008 and forging the defendant's signature.
    - ii. Preparing letter dated 12<sup>th</sup> May, 2008 under Ref: KAV 428 F payment and forging the defendant's signature
    - iii. Preparing letter under reference: Acceptance dated 12<sup>th</sup> May, 2008 and forging the defendant's signature thereto.

6. The 1<sup>st</sup> defendant denies receiving from the plaintiff the sum of **Kshs. 2,500,000/-** allegedly as down payment for the sale of motor vehicle registration no. KAV 428 F, as alleged and adds that the payments made of Kshs. 2,500,000/- are purely for other business transaction between the plaintiff's and the defendant companies. He avers that the defendant legally repossessed the said motor vehicle as a rightful owner and that is the reason he took the vehicle to Crater Automobile (NRB) for purpose of trading it as and as it legally belonged to him he could deal with it as he deemed fit. He admits knowledge of the theft case reported to Buru Buru police station vide OB. 45/19/4/09 and states he was summoned to the said station on 25<sup>th</sup> April 2009 to record his statement. He states that he had instructed the auctioneers to repossess the vehicle because the plaintiff had taken it into hiding and it was wrong of the plaintiff to allege that he had fraudulently obtained orders from the court and yet he did not complain to the Executive Officer of the court to investigate the claimed fraud. He denied the plaintiffs allegations on conversion and fraud and put him to strict proof thereof. He also denied the plaintiff's claim that he had suffered loss of user as the suit vehicle never belonged to him.
7. The 2<sup>nd</sup> defendant's in his statement of defence filed in this court on 19<sup>th</sup> April 2011 denied that the plaintiff did not suffer any loss of user of the suit motor vehicle adding that if at all it suffers the said loss of user claimed the same is not attributed to the 2<sup>nd</sup> defendant. He avers that he was not a party to the suit giving rise to orders issued on 28<sup>th</sup> May 2009. He avers that he purchased the motor vehicle KAV 428F from the 1<sup>st</sup> defendant on 22<sup>nd</sup> May 2009 under a sale agreement executed at Karatina and the 1<sup>st</sup> defendant handed over possession of the same on the same day after fully paying the consideration agreed on of **Kshs. 4,150,000/-**. That by the time the court issued the said court order on 28<sup>th</sup> May 2009 the motor vehicle's ownership had changed ownership from the 1<sup>st</sup> defendant to his names and the orders was made belatedly after the event and could not undo what had already been done especially since the 2<sup>nd</sup> defendant was not served with order and was not a party to the suit until 10<sup>th</sup> November 2010. He denied the fraud allegations levied against him stating he was a bona fide purchaser for value without notice adding that he was not aware of the said court order and was not part of the alleged fraud. He denied that the plaintiff's right to the suit motor vehicle was lost as a result of the alleged breach of the said court order and/or transfer of the vehicle by the 1<sup>st</sup> defendant and denied any liability on his part adding that he was never served with a demand against him.
8. The 2<sup>nd</sup> defendant also raised a **counter claim** as against the plaintiff. He avers that he and the 3<sup>rd</sup> defendant were jointly registered of the suit vehicle KAV 428F with him as the proprietor entitled to possession, use and control while the 3<sup>rd</sup> defendant was the financier. He avers that he purchased the vehicle from the 1<sup>st</sup> defendant on 22<sup>nd</sup> May 2009 for Kshs. 4,150,000/- and the same was transferred to him on 9<sup>th</sup> July 2009. That on or about 11<sup>th</sup> August 2009 the he applied for an agency finance facility of Kshs. 3,354,356/- inclusive of interest from the 3<sup>rd</sup> defendant and offered the said motor vehicle as a security for the facility by way of chattel mortgage agreement and as a result the 3<sup>rd</sup> defendant was registered as a co-owner of the said vehicle on 21<sup>st</sup> August 2009. He avers that he has been in possession of the suit vehicle from 22<sup>nd</sup> May 2009 to 8<sup>th</sup> December 2009 when the plaintiff unlawfully seized it from his driver at the DHL premises in Nairobi and detained the same. He avers that the plaintiff does not have any legal interest in the vehicle KAV 428F and has no cause of action against him since he purchased the same for valuable consideration from the 1<sup>st</sup> defendant without knowledge of the any claim by the plaintiff. He avers that the said seizure was illegal and without any justifiable cause and as such he should be compelled to return the said vehicle to him in good condition of repair and service. That due to the said seizure and detention of the suit vehicle he has suffered loss and damages which he continues to incur as he had secured a contract with DHL EXCEL on 22<sup>nd</sup> June 2009 for Kshs. 300,000/- net per month. He particularized his loss and damage as follows;

- a. **Loss of user at the rate of Kshs. 300,000/- per month from 8<sup>th</sup> December 2009,**
- b. **Insurance premium paid but unutilized Kshs.230,505/-;**

- c. **Repair charges Kshs. 187,000/-**
- d. **Any other loss arising from the plaintiff's unlawful seizure of the said vehicle as may arise pending the hearing and determination of the suit.**

9. He prays for judgment against the plaintiff for;

- i. ***A mandatory injunction against the plaintiff compelling the plaintiff to hand over to the 2<sup>nd</sup> defendant motor vehicle registration number KAV 428F Mitsubishi Fuso: Lorry in good condition and repair and service forthwith;***
- ii. ***General damages for trespass to goods;***
- iii. ***Loss of user and special damage as set out in the counter claim;***
- iv. ***Cost of suit and counter claim.***

10. The 3<sup>rd</sup> defendant in its defence dated 22<sup>nd</sup> March 2011 denied being party to the contract between the plaintiff and the 1<sup>st</sup> defendant and therefore was not privy to its contents nor constructive trust created thereon. That the Hire purchase agreement between the 1<sup>st</sup> and 3<sup>rd</sup> defendant abated upon payment of the option to purchase which according to the Hire purchase agreement was to be paid by the 1<sup>st</sup> defendant who was still the registered owner and further denied any proprietary interest in the said vehicle as alleged. It denied the allegations of fraud and collusion levied against it by the plaintiff stating that it was merely a financier to the 1<sup>st</sup> defendant for the hire purchase agreement and a co-owner with the 1<sup>st</sup> defendant who was authorized to collect the logbook purely for purposes of Chattel transfer act and cannot be possibly liable for the alleged fraud. It denied the 1<sup>st</sup> and 2<sup>nd</sup> defendants being its agents or servants adding that it had never been in control or possession of the suit vehicle and as such cannot be liable in tort or at all and urges that the suit be struck out. It avers that the charge was fully paid and the 2<sup>nd</sup> defendant exercised its option to purchase by executing a valid transfer and forwarding the original log book to the 2<sup>nd</sup> defendant. It further denied that the plaintiff was entitled to the prayers sought stating that the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered into an agreement with it governed by Chattels transfer and it was only registered as a mere chargee for purposes of securing the aforementioned financial interests and its proprietary interest was limited to that and as such the prayers sought cannot stand against it. It denied receiving any demand or notice of intention to sue and sought that the plaintiff's suit against it be dismissed with costs.

## **Evidence**

11. **Patrick Kinyua Munyito** the plaintiff testified that on the 12<sup>th</sup> May 2008 he entered in to a sale agreement with the 1<sup>st</sup> defendant in which he was to sell him the Motor vehicle registration No. KAV 428F Mitsubishi Fuso Lorry for a sum of Kshs. 4,100,000/-. That the said motor vehicle was then registered in the name of the 1<sup>st</sup> defendant and the log book held by NIC Bank which had financed its purchase. Pursuant to the agreement he paid Kshs. 2,500,000/- and immediately started repaying the loan with the NIC Bank which he completed on the 15<sup>th</sup> February 2009. The said payments were made through his account at Equity and Prime Banks. He took possession of Motor vehicle after paying the said 2,500,000/- and used it in connection with his business of flour milling through Aberdare Maize Millers. He later learnt that the 1<sup>st</sup> defendant had collected the log book of the said vehicle from the bank despite the agreement and having fully paid the full purchase price and clearing the plaintiff's loan with NIC Bank. On 19<sup>th</sup> of April 2009 the vehicle which was in his possession was forcefully repossessed from his driver and driven to Crater Automobile (Nrb) Limited. Since he did not know who repossessed the vehicle he reported the matter to Buru Buru police station and the police recovered the vehicle and kept at their police station pending investigations. He learned later that the police had released the vehicle to the 1<sup>st</sup> defendant on the 8<sup>th</sup> of May 2009 after the 1<sup>st</sup> defendant obtained court orders compelling the OCS to release the vehicle, in a matter he was not a party to. He too filed the suit and obtained a temporary order of injunction on the 28<sup>th</sup> of May 2009 restraining the 1<sup>st</sup> defendant or his

servants from dealing with the said vehicle pending interpartes hearing on the 11<sup>th</sup> of June 2009. The said order was served on the defendant on the 29<sup>th</sup> May 2009. The said order was extended to the 18<sup>th</sup> of June 2009 and again served on the 1<sup>st</sup> defendant. The injunction order remained in force until 11<sup>th</sup> of February 2010 when the ruling was delivered and interlocutory injunction was granted. In July 2009 before the ruling was delivered he saw the said vehicle being used to carry goods and he suspected that the vehicle was sold to a third party. On the 25<sup>th</sup> of September 2009 he established from the Registrar of Motor Vehicle that the vehicle was registered in the name of the 2<sup>nd</sup> defendant. He therefore concluded that the said vehicle had been sold whilst the injunction was still in place. He then filed HCCC No. 525 of 2009 on the 7<sup>th</sup> October, 2009 and applied for an injunction against the intended 2<sup>nd</sup> defendant and at this time the ruling in HCCC No. 281/09 (the current file) was still pending it could not be accessed. A ruling was delivered in HCCC No. 525 of 2009 on the 16<sup>th</sup> of December 2009 staying the proceedings pending the ruling in HCCC 281/09. However the 2<sup>nd</sup> defendant disobeyed the order by continuing to use the vehicle for his own use until he impounded the motor vehicle for safe keeping. He avers that the vehicle has been in his safe custody. That it was wrong for the 2<sup>nd</sup> defendant to release the log book to the 1<sup>st</sup> defendant without referring to him and also for purchasing the vehicle despite the exiting court orders. He sought a transfer of the vehicle to him and payment for the loss that he has suffered. He denied that he purchased fertilizer from the 1<sup>st</sup> defendant worth Kshs. 2,500,000/- and that the 1<sup>st</sup> defendant hired the vehicle as alleged.

12. **Francis Muriuki Murungaru** the 1<sup>st</sup> defendant testified that in 2006 he was financed by NIC Bank to purchase a vehicle Mitsubishi FN 617 Lorry. The log book remained with the bank as security and bore his name and that of NIC Bank as joint owners of the vehicle. The Plaintiff who is his brother in law had a good business relationship with him. The vehicle he had was instrumental to the plaintiff's business. The plaintiff had a milling company and a business of animal feeds and he used to hire his vehicles to assist him transport his commodities. The Plaintiff at his request and in an informal personal manner requested him to use his vehicle. The agreement was that the plaintiff instead of paying him for the use of the said motor vehicle would pay the monthly installments of Kshs. 165,000/- to NIC Bank and keep whatever profit he made over and above the monthly use of his motor vehicle. At no time did he agree to sell the subject vehicle to the plaintiff. Trouble emerged in February 2009 when he informed the plaintiff that the loan repayment was then finished and that he should hand over the vehicle to him and/or continue paying him every trip of hire the vehicle was to be used in his work. The plaintiff started being elusive and reluctant to pay him for use of the motor vehicle and also started hiding the suit motor vehicle. He thereafter instructed an auctioneer M/s Warleen Traders to look for the vehicle and repossess it, which the auctioneer did. He took the vehicle to Crate Automobiles (Nrb) limited as he wanted to sell the vehicle. He had already identified another vehicle at the said company. He did not go back to Crater until the 28<sup>th</sup> of April 2009 when he received a call that police were at the yard taking away the vehicle on allegation that it was stolen. On the 29<sup>th</sup> April 2009 he went to Buru Buru police station and he recorded a statement on the alleged theft. He was informed by the police that the plaintiff had not gone back from the day he lodged the complaint alleging theft on the 19<sup>th</sup> of April 2009. On the 8<sup>th</sup> of May 2009 the police told him that they were still investigating the matter and on the 22<sup>nd</sup> of May 2009 he sold the vehicle to Bernard Gitau Gathungu the 2<sup>nd</sup> defendant. On the same day he was served with the suit papers together with the court order but by then he had already sold the vehicle. He realized from the plaint that the plaintiff was bent on defrauding him of his vehicle. He stated that the agreement for transfer of ownership dated 12<sup>th</sup> May 2009 was a forgery as he had not seen or signed it. The letter dated 12<sup>th</sup> May 2008 REF: KAV 428F payment was also a forgery and his signature too and so is the letter REF: *Acceptance dated 12<sup>th</sup> May 2008*. He stated that reported the forgery case at Karatina police station OB No.18/1/6/009 and the police launched investigation. He admitted being paid Kshs. 2,500,000/- by the plaintiff stressing he had a long business relationship. He added further that on the 6<sup>th</sup> of May 2008 the plaintiff ordered one thousand bags of 50Kg fertilizers, that one bag was being sold at 2,500/- . That when they supplied the fertilizers the plaintiff paid by issuing

2 postdated cheques No. 000065 for Kshs. 1,250,000/- dated 13<sup>th</sup> May, 2008 and cheque No. 000066 for kshs 1,250,000 dated 20/5/2008. That one of the lorries that supplied the fertilizer was the suit vehicle together with another vehicle KAN 327C and the plaintiff signed accepting delivery of 1000 bags of 50Kg fertilizer. That he had been paying for the insurance cover of the motor vehicle and also taken it for inspection even during the period the plaintiff alleged he had possession. That he never had any financial problems over the period of hire which could have led him to want to sell the vehicle and that he no longer owns the vehicle since 22<sup>nd</sup> of May 2009 having sold and transferred the same to one **Bernard Gitau Gathungu**. Therefore he cannot be ordered to hand over the vehicle to the plaintiff neither has he defrauded the plaintiff as the case reported to the police is still pending. That it is the plaintiff who has forged the documents and signature to defraud.

13. **Bernard Gitau Gathungu the 2<sup>nd</sup> defendant**, testified that **Peter Tharumba Kiongo** pointed out the truck to him on 20<sup>th</sup> May 2009 and together they proceeded to meet the seller, the 1<sup>st</sup> defendant who confirmed that he was the owner of the said truck and that the selling price of Kshs. 4,300,000/- was inclusive of Kshs. 150,000/- agent fees. He was also showed him the original log book of the truck registration number KAV 428F which was in his name and that of NIC Bank. He then explained that the said truck was asset financed by NIC Bank and that he had just finished paying off the asset financing of the purchase price advanced to him by NIC to buy the truck. On 20<sup>th</sup> May 2009 he was not in a position to complete the transaction as he needed to confirm ownership of the lorry and arrange for financing to purchase the same from his bank. That on 21<sup>st</sup> May 2009 he carried out a search which confirmed that the said vehicle was registered in both 1<sup>st</sup> defendant's name and the bank. He also confirmed from the Bank that the 1<sup>st</sup> defendant had repaid all the amount owing. He promised the 1<sup>st</sup> defendant to return on 22<sup>nd</sup> May 2009 to enter into a sale agreement for sale and purchase of the vehicle. On 22<sup>nd</sup> May 2009 he secured a Bankers cheque of Kshs. 1,700,000/- from NIC Bank and another cheque of Kshs. 300,000/- to add to the sum of Kshs. 2.3 million he had raised in cash. On 22<sup>nd</sup> May 2009 he couldn't go to Karatina to finalize the transaction and requested Peter Tharumba Kiongo who finalized the transaction and delivered the truck to him plus the transfer of motor vehicle signed by the 1<sup>st</sup> defendant, PIN certificate, Certificate of incorporation of NIC bank, ID card and Pin certificate and the sale agreement executed at M.C. Kamweji Advocates and a receipt for Kshs. 4.3 million given to him by the 1<sup>st</sup> defendant. That later on he started making minor repairs and modifications to the lorry as it appeared to have been neglected for some time and also had the same fitted with a Car track tracking device. It was inspected and he took out a comprehensive insurance cover and he finished transferring the vehicle into his names on 9<sup>th</sup> July 2009. On 22<sup>nd</sup> June 2009 he secured a contract with DHL Excel Supply Chain Ltd. Later he was advised that he could use the same vehicle as chattel mortgage. He applied for the facility in August 2009 for a sum of Kshs. 2,580,000/- executed the Chattel mortgage agreement on 11<sup>th</sup> August 2009 and was compelled to take out an insurance cover with ICEA Ltd and transfer the vehicle in the joint names of himself and NIC Bank. That after signing the sub-contract with DHL he started using the said track for transport business in October, November and December 2009 at DHL premises at Industrial area until the vehicle was seized by the plaintiff in the company of police on 8<sup>th</sup> December 2009 who confiscated the ignition keys from him and that is the time he was informed by the 1<sup>st</sup> defendant that there was a case against him HCCC 525 of 2009 which had been advertised in the Daily nation on 26<sup>th</sup> October 2009. He denies being served with any court orders on the same from either HCCC 281 of 2009 or HCCC 525 of 2009 or being served with the court orders of 7/10/2009 or 16<sup>th</sup> December 2009 since the plaintiff had taken the law in his own hands and seized the vehicle. That the said vehicle has been held unlawfully by the plaintiff since 8<sup>th</sup> December 2009 and this has made him suffer loss of user and incur financial loss as a result he has fallen into arrears in paying for the chattel mortgage loan he took.

14. **Peter Tharumba Kiongo** stated that on 20<sup>th</sup> May 2009 he pointed out the said truck to the 2<sup>nd</sup> defendant and even took him to view and test it on the same day. Later, on 22<sup>nd</sup> May 2009 he met

1<sup>st</sup> defendant having been sent to him by the 2<sup>nd</sup> defendant to represent him in a transaction involving the sale of truck Registration Number KAV 428F as he was tied up in an urgent business. He testified that the 2<sup>nd</sup> defendant gave him 3 bankers cheques one drawn by NIC Bank for Kshs. 1,700,000/- one drawn by Co-operative bank for Kshs.300,000/- and Kshs. 2,300,000/- in cash which also included brokers fees of Kshs. 150,000/-. That on the said date he proceeded to meet the 1<sup>st</sup> defendant at Karatina and they both proceeded to M.C. Kamwenji Advocates who drew up the sale agreement in his presence they signed and attested the sale agreement and proceeded to exchange the amount in cash and bankers cheques with the log book together with Transfer form and the 1<sup>st</sup> defendant's copy of ID and PIN Certificate. He then went to where the truck was parked and he was given the truck keys after being shown the jack, spare wheel, spanner and tool box. He then drove the lorry to Kikuyu where he handed it over to the 2<sup>nd</sup> defendant. Later on he helped the 2<sup>nd</sup> defendant to contact some jua kali artisans who helped him renovate the truck's body while he himself did an extensive service of the said truck which included some mechanical repairs as the lorry appeared to have been neglected for some time.

15. **Henry Maina**, a legal manager with the 3<sup>rd</sup> defendant testified that it entered into a hire purchase agreement with the 1<sup>st</sup> defendant to purchase the suit premises for a sum of Kshs. **4,800,000/-** it never assent to the same and was never signed any contract with the plaintiff and was therefore not privy to the same. That it only financed the purchase of the suit vehicle by the 2<sup>nd</sup> defendant via chattels mortgage agreement to a tune of **Kshs 2,580,000/-**. That it only entered into an agreement governed by Chattel's mortgage Act and Hire Purchase Act and it was trite law that a hire purchase and Chattel mortgage agreement point to an intention to enter into an agreement to hire coupled with an option to purchase and that it was only registered as a financier it was only registered as a mere charge for purposes of securing its financial interests and it's proprietary interest was limited to that as it was never a beneficiary of the suit vehicle neither did it collude with other defendants to defraud the plaintiff and further denied being privy to the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

16. **Charles Murage Kamwenji** the 3<sup>rd</sup> defendant's witness, testified that on the 22<sup>nd</sup> may 2009 the 1<sup>st</sup> defendant who is a business man in Karatina came to his office together with Peter Tharumba Kiongo at around noon where they wanted him to draw for them a motor vehicle sale agreement. Upon receiving the details on the transaction, he prepared the sale agreement dated 22<sup>nd</sup> May, 2009 over sale of motor vehicle KAV 428 F Mitsubishi Fuso which was being sold for Kshs. 4,150,000 of which Kshs.2,000,000 was paid vide 2 cheques and Shs 2, 150,000/- was paid in cash in his presence. That he duly witnessed the parties exchange the instruments of sale including the logbook, signed transfer by the 1<sup>st</sup> defendant and NIC Bank Ltd, the cheques, cash and keys to the lorry among other insurance documents. The said Peter Tharumba Kiongo and the 1<sup>st</sup> defendant signed the sale agreement and he witnessed by stamping and fixing his signature on 22<sup>nd</sup> May 2009.

## **SUBMISSIONS**

17. The plaintiff submitted that in support of his testimony he adduced a sale agreement dated 12<sup>th</sup> May 2008 which showed the agreed purchase price for the suit lorry and the two cheques worth Kshs. 2.5 million paid to the 1<sup>st</sup> defendant. Though the defendant did not dispute the said payment he claimed that the same was towards payment of fertilizers a claim the plaintiff denied adding that he bought his fertilizer from Yala East Africa and adduced documents to support the same and argued that the 1<sup>st</sup> defendant had failed to explain the plaintiff's support documents or the cash receipts he adduced in evidence. Further that he could not explain how 1000 bags of fertilizer could be carried in 2 Lorries and also could not explain how his shop which deals with food stuffs could be selling such huge sums of fertilizers. He submitted that the second payment was done by the plaintiff taking over the 1<sup>st</sup> defendant's chattel mortgage loan account held with 3<sup>rd</sup> defendant, NIC Bank which he sought to support with a forwarding letter and a copy of the said sale agreement. The 1<sup>st</sup> defendant denied the said arrangement and claims that his signature in the said

document was a forgery. He sought to distinguish the 1<sup>st</sup> defendant's signatures as appearing in different documents and attributes the same to the 1<sup>st</sup> defendant's wayward ways to swindle the plaintiff. That he also acknowledged receipt of the Kshs. 2.5 million and added that the 1<sup>st</sup> defendant therefore cannot claim that the said signature used there wasn't his. That though the 1<sup>st</sup> defendant claims to have reported the matter to the police vide OB 18/1/6/2009 no action has been taken 5 years on and states that he has never been called to the police to record a statement. That his application seeking the court to subject his signature to be examined by a document examiner was dismissed. That though the 3<sup>rd</sup> defendant wanted to claim that the signature by the receptionist was a forgery he could not deny that the document was received at the bank. That though the defendant denies the said documents the bank accepted the arrangement between the plaintiff and 1<sup>st</sup> defendant. That the plaintiff took over the loan account though it remained in the 1<sup>st</sup> defendant's name for technical reasons and continues to pay the loan after the agreement till full payment which he claims he did through personal cheques. He submitted that it beats logic that the bank could accept payment from a stranger. He refutes the 1<sup>st</sup> defendant's claims that he had hired the suit lorry for a certain sum as there was no evidence to support the said claim and there was no evidence that the bank was notified of the said arrangement. He referred the court to analyze the hiring services between the plaintiff and the 1<sup>st</sup> defendant previously for the month of January 2008 to April 2008 for the two lorries the same was invoiced at Kshs. 240,000/- which translated to Kshs. 60,000/- per month adding that it would beat logic that he would hire one lorry for Kshs. 165,000/- per month. That it would be logical to conclude that the plaintiff purchased the suit lorry to terminate the hire services reason that the invoices only go up to April. That there is no evidence to support the 1<sup>st</sup> defendant's claim that he hired the suit lorry to the plaintiff so that he can pay him directly through the bank as no evidence was adduced to support this claim and the only written document in regards to this was the letter forwarding the sale agreement between him and 1<sup>st</sup> defendant. That immediately after purchasing the suit lorry he purchased the insurance as is consistent with ownership as opposed to hire purchase and adduced a copy of the said insurance into evidence. That though the defendant has claimed to have taken out an insurance policy there is no evidence supporting the same and though there is a business card and various cheques to Precious Insurance Brokers it is not evident that the said insurance was for the suit vehicle KAV 428F and it is clear that the said cheques were pertaining to other motor vehicles. He submits that there is ample evidence that he purchased the suit lorry adding that on belief that there was a valid agreement he proceeded to pay for the purchase price through the 1<sup>st</sup> defendant's loan account. The 1<sup>st</sup> and 3<sup>rd</sup> defendant's having accepted the money are therefore estopped from denying that the 1<sup>st</sup> defendant did not have capacity to sell or the plaintiff did not validly purchase the suit vehicle. That since the chattel mortgage agreement provides that the motor vehicle could only pass to the 1<sup>st</sup> defendant after clearing the loan which was eventually cleared by the plaintiff and the vehicle passed to the 1<sup>st</sup> defendant. That other than the 1<sup>st</sup> defendant requiring consent to sell the suit vehicle he also required consent to hire out or sublet the lorry and as such the 3<sup>rd</sup> defendant need not only fault the sale but also the 1<sup>st</sup> defendant for hiring out the suit vehicle, allowing a 3<sup>rd</sup> party to carry out the obligation of the hirer to keep goods in possession and taking out an insurance cover on the suit vehicle on behalf of the 1<sup>st</sup> defendant. That the said agreement binds the parties to it and not him as he was not a party. That upon purchase the plaintiff took over possession of the suit vehicle. That once the said loan was cleared the 1<sup>st</sup> defendant collected the log book from the bank without the plaintiff's knowledge and went to Crater Automobiles with an intention of disposing off the same but the same was recovered by the police who detained it pending investigations only for the 1<sup>st</sup> defendant to secure a release order under what he termed as suspicious circumstances. He submitted that the sale of fertilizer by the 1<sup>st</sup> defendant was not genuine but the payment have been shown to be consistent with the terms of agreement of sale adduced and he paid Kshs. 164,400, which changed to Kshs. 165,000/- a change he claims came after the sale agreement entered into by the parties on 12/05/2008. That the court on 28<sup>th</sup> August 2009 issued a temporary injunction barring the defendant/ respondent from transferring, charging or otherwise dealing with motor vehicle registration number KAV 428F Mitsubishi Fuso pending

inter-partes hearing set on 11<sup>th</sup> June 2009. The said order was extended until the hearing and determination and finally a ruling delivered by Justice Onyancha. Which order was served upon the 1<sup>st</sup> defendant on 29<sup>th</sup> May 2009 that by 16/06/2009 the vehicle was still in the names of Francis Muriuki Muraguri but was later registered in the names of **Bernard Gathugu**, the 2<sup>nd</sup> defendant on 9<sup>th</sup> July 2009. That despite the 1<sup>st</sup> defendant knowledge of the said order he proceeded to transfer the same to a 3<sup>rd</sup> party. He submitted that the alleged sale agreement adduced by the 1<sup>st</sup> defendant is not signed by the buyer but by someone else who had no power of attorney adding that the date was backdated and inserted by pen to defeat the court order of 28/5/2009. He raised question as to why despite the vehicle being purchased was only registered almost 2 months later while putting a car track earlier on 13/06/2009 and entering into a contract on 13/6/2009. That the defendant did not avail a copy of transfer allegedly signed on 22/05/2009. He insisted that the said transfer was signed after the order of 28/5/2009 had been made and hence the said transfer was in breach of the said court order. He relied on the case of **Clerk and Others – vs- Chadburn & Others** where it was held that; “An act done in willful disobedience of an injunction or court order was not only a contempt of court but also an illegal and invalid act which could not therefore effect any change in the rights and liabilities of others.” Which passage was adopted in the case of **Judicial Service Commission –vs- The Speaker of National Assembly & 5 Others**.

18. In **Petition No. 337 of 2013, Hon. Justice Joseph Mbalu Mutava –vs- The attorney General and the Judicial service Commission**, the court had no hesitation in making orders invalidating the appointment of the tribunal by the president, even though he was not a party to the matter before it. He submitted that the 1<sup>st</sup> defendant in purporting to transfer the suit vehicle did so in willful disobedience of the court order and as such this act was invalid and could not affect any change of rights and that the sale agreement entered between the 1<sup>st</sup> and 2<sup>nd</sup> defendant on 12/05/2008 was null and void as one cannot transfer an interest he does not have. He submitted that the suit vehicle was being used for transport services various goods as evidenced by the weigh bridge receipts. That it was wrong for the defendant to rely on only one clause whilst ignoring the other clause in proving their case and according to his agreement with the 2<sup>nd</sup> defendant the 3<sup>rd</sup> defendant was on completion of payments of the said loan it was to hand over the transfer and log book to him. He urged the court to find that all the reliefs sought are merited. He submitted in calculating loss of user he used to pay Kshs. 60,000/- and as such the said amount should be adopted per month from 19<sup>th</sup> April 2009 until date of delivery of judgment. He also seeks an award of Kshs. 5,000,000 in general damages plus cost of suit. He also pointed out that the 2<sup>nd</sup> defendant did not counter claim from the 1<sup>st</sup> defendant who had clearly wronged him and a party is bound by their pleadings. It was his submissions that the 1<sup>st</sup> defendant has no claim against him as he was not a party to the illegal agreement seeking to sell the suit vehicle when there was an order in place. That the 2<sup>nd</sup> defendant did not acquire any title or interest and cannot claim anything based on what the court enjoined and that the 2<sup>nd</sup> defendant was clearly in breach of the said court order when the suit vehicle was impounded and he cannot base a cause of action on his own wrong as was held in the case of **Nabro Properties Ltd. Vs. Sky Structures Limited & 2 Others [2002] 2 KLR 299**, that since the court enjoined the vehicle for transport based on what the court had enjoined.

19. He submitted that he had proved his claim on a balance of probability as opposed to his counterpart the 2<sup>nd</sup> defendant adding that it appears that the 1<sup>st</sup> defendant benefited twice for the same lorry and urged the court to dismiss the 2<sup>nd</sup> defendant’s counter claim.

20. Insert 1<sup>st</sup> defendant submissions

21. The 2<sup>nd</sup> defendant on the question whether the plaintiff had legal capacity to sell motor vehicle registration KAV 428F to the plaintiff without prior authority or consent of the 3<sup>rd</sup> defendant. He denies the plaintiff’s allegation of the plaintiff having purchased the suit vehicle from him vide the said agreement dated 28<sup>th</sup> May 2008 adding that it was not in dispute. They submitted that since the 3<sup>rd</sup> defendant had registered interest in the suit vehicle the 1<sup>st</sup> defendant had to seek the 3<sup>rd</sup>

defendant's consent and authority to sell or transfer the vehicle to the plaintiff from the evidence adduced no such consent was given by the 3<sup>rd</sup> defendant. It was submitted further that though the plaintiff purported sale through a letter dated 12/5/2008 the belated action could not have invalidated the alleged transaction. That the 1<sup>st</sup> defendant lacked capacity to sell the motor vehicle unilaterally without the consent of the 3<sup>rd</sup> defendant. On the question of whether the alleged sale of motor vehicle registration No. KAV 428 F to the plaintiff was irregular the defendant relied on the testimony of the 3<sup>rd</sup> defendant's legal officer who stated that they did not consent to the purported sale would have been in violation, that clause 2.9 of the chattel mortgage enforce between the 1<sup>st</sup> and 3<sup>rd</sup> defendant expressly barred the plaintiff and 1<sup>st</sup> defendant from selling, hiring out or subletting the subject vehicle without the 3<sup>rd</sup> defendant's written consent. That the 3<sup>rd</sup> party was a stranger to the transaction between the plaintiff and 1<sup>st</sup> defendant in connection to the sale of the suit motor vehicle adding that the plaintiff had failed to prove on a balance of probability that he paid the purchase price for the vehicle to the 1<sup>st</sup> defendant a claim that was denied by the 1<sup>st</sup> defendant and even if the same was paid the contract was vitiated for lack of written consent from the 3<sup>rd</sup> defendant.

22. It was submitted that that at no time was the suit vehicle transferred to the plaintiff and as such he never acquired any interest on the same that can defeat the interest of the 2<sup>nd</sup> defendant. That the defendant's witnesses in their evidence proved that the 1<sup>st</sup> defendant entered into an agreement with the 2<sup>nd</sup> defendant for purchase of suit vehicle for Kshs. 4,150,000/- and only concluded the said purchase after ascertaining the ownership of the suit vehicle and later on 22/5/2009 proceeded to secure 2 bankers cheques for Kshs. 1,700,000/- and Kshs.300,000/- from NIC and Co-op Bank respectively whilst topping up with Kshs. 2,300,000/- which he had in cash which catered for sale price of kshs.4,150,000/- and brokers fees of Kshs. 150,000/-. That due to engagements he sent Peter Tharuba Kiongo to conclude the said transaction on his behalf and deliver the suit vehicle to him. The 1<sup>st</sup> defendant confirmed that he received the entire purchase price and signed the transfer of the suit vehicle to the 2<sup>nd</sup> defendant plus its log book. That the plaintiff has not adduced any evidence to contradict that the sale agreement was entered into on 22<sup>nd</sup> May 2009 adding that the bankers cheques adduced in evidence for payment of Kshs. 2,000,000/- towards the purchase price has not been discredited by the plaintiff who presented them to the issuing banks and even to the Director of Criminal Investigations and wouldn't have done so if he deemed the same as forgeries. That the suit was filed against the 1<sup>st</sup> defendant on 28<sup>th</sup> May 2009 and no orders were in force against the 2<sup>nd</sup> defendant prior hence the sale of motor vehicle KAV 428F between the 1<sup>st</sup> and 2<sup>nd</sup> defendant was a clean deal for valuable consideration and there was no order that was ever served upon him barring the said sale and only became party to the suit on 10<sup>th</sup> November 2009 when this court issued a consolidation order of suit 525 of 2009 and 281 of 2009 and that is when the 2<sup>nd</sup> defendant become aware of the said orders and as such he could not have purported to have served him with the said order. He added that had he served him the same would not have had any effect as he was not a party in the said suit. That the 2<sup>nd</sup> defendant was registered as owner of motor vehicle KAV 428F on 9<sup>th</sup> July 2009 adding that there is no law that compels the purchaser of the motor vehicle to register the vehicle to his name on the same day of purchase and there was no orders served on him barring him from registering the said vehicle.

23. The 3<sup>rd</sup> defendant restricted its submissions solely to matters that touched on it. It was submitted that the sale agreement dated 12<sup>th</sup> May 2008 between the plaintiff and the 1<sup>st</sup> defendant is void as the 1<sup>st</sup> defendant being a hirer had no capacity to sell the same the same to the plaintiff and the property of the suit vehicle remained with the 3<sup>rd</sup> defendant. It referred the court to clause 4 of the Hire purchase agreement which provides that,

*"The hirer may become the owner of the goods at anytime during the period of hire by paying to the owner the amount by which at such time the amount already paid by Hirer by way of installments falls short of aggregate of.*

*The balance of the hire purchase price specified in the schedule Any other money due to the owner pursuant to this agreement The option payment.”*

24. That the 1<sup>st</sup> defendant was not owner of the suit motor vehicle on the date of the alleged sale agreement as he had not become the owner of the suit vehicle as the last installment was on 19<sup>th</sup> February 2009 as by that time he was a mere hirer and not owner of the goods. On this it relied on the case of ***National Industrial Credit Bank Ltd. –vs- James M. Mugo & Ano. Embu Civil appeal No. 47 of 2004*** where it was found that, “ownership of goods under Hire Purchase Agreement only passes to Hirer upon payment of all sums due to the owners.”

It also referred to Chitty on Contracts vol. 2, street and Maxwell 199. “*The absence of any property in the goods in the hirer means that a general rule, he can pass no title to a third party. Any purported conveyance of the goods, as by way of sale, pledge or execution of a bill of sale will not cause the property in goods to vest in a third party for nemo dat quod non habet.*”

25. It submitted that prior to the said agreement consent of the 3<sup>rd</sup> party was required. That had the 1<sup>st</sup> defendant wished to assign the hire purchase agreement he would have been required to appear before the 3<sup>rd</sup> defendant’s Asset Finance department with the plaintiff and would have put their request in writing and the same would have been approved by the 3<sup>rd</sup> defendant based on the parties credit worthiness and a fresh hire purchase agreement would be prepared by the 3<sup>rd</sup> defendant and executed by the plaintiff. That none of this was done by the 1<sup>st</sup> defendant and as such the plaintiff was fraudulent.

26. It was submitted that the 3<sup>rd</sup> defendant was not privy to the contract of sale between the 1<sup>st</sup> defendant and the plaintiff. The 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant denies receipt of the letter appearing in the plaintiff’s list of documents. The 3<sup>rd</sup> defendant claims that there was no such stamp as was appearing on the letter dated 12<sup>th</sup> May 2008 and sought to differentiate it to the stamp appearing on the letter dated 2<sup>nd</sup> March 2009 which bore the words Asset Finance Department and was signed by the receiving officer. It was also submitted that should have the said letter have been received by the 3<sup>rd</sup> defendant though the same was not proved by the plaintiff the same would not validate the alleged agreement between the plaintiff and the 1<sup>st</sup> defendant. It was submitted that although the plaintiff claims that he paid monthly installments for the said hire purchase on behalf of the 1<sup>st</sup> defendant no documentary evidence was adduced to support the same adding that the plaintiff has placed heavy reliance on unsubstantiated allegations. As the statements adduced only show money leaving his account but there is no evidence showing the destination of the said funds adding that the same would not have validated the sale agreement. It also submitted that it was under no obligation to play the role of detective to establish the source of funds used to pay for the hire purchase facilities as hires are routine business and the same don’t necessarily rouse suspicion.

27. It was submitted that upon its client of the full hire purchase price and exercise of option to pay the 3<sup>rd</sup> defendant released the original log book and by doing so it cannot be said that they committed fraud as they had no contractual agreement with the plaintiff and were not even aware of the alleged agreement for sale between the plaintiff and the 1<sup>st</sup> defendant. It added that it only granted the 2<sup>nd</sup> defendant a loan secured by the suit vehicle and denied financing the 2<sup>nd</sup> defendant in purchasing the suit vehicle from the 1<sup>st</sup> defendant which it argued was corroborated by the 3<sup>rd</sup> defendant’s witness statement that it obtained a loan facility of Kshs. 3,354,356 from it secured by the suit vehicle and the 2<sup>nd</sup> defendant’s testimony as corroborated by a copy of the log book which proved that by the time he approached it he had already registered the vehicle in his names and he was not aware of the said court order of 28<sup>th</sup> May 2009. It submitted that it had been wrongfully enjoined in the said suit as it was only a financier to the 1<sup>st</sup> and 2<sup>nd</sup> defendants under 2 separate agreements and hence not a necessary party to this suit.

28. That the plaintiff has not laid any legal basis why it is entitled to reliefs sought. It submitted that the plaintiff is not entitled to the declaration that the transfer of motor vehicle registration no. KAV 428F by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant on contravention of the court order made on 28<sup>th</sup> May 2009 is illegal, null and void in that the sale took place on 22<sup>nd</sup> May 2009 prior to the said order and the plaintiff failed to show that the 3<sup>rd</sup> defendant had prior knowledge of the said court order restraining the sale or transfer of the suit vehicle adding that at the time it was not a party to instant suit which issued the said orders and as such cannot be said to have contravened the same. That the 2<sup>nd</sup> defendant was therefore an innocent purchaser for value without notice of the alleged fraud.

29. On the prayer on a mandatory injunction against the plaintiff compelling the plaintiff to hand over to the 2<sup>nd</sup> defendant motor vehicle registration number KAV 428F Mitsubishi Fuso: Lorry in good condition and repair and service as he has not established a prima facie case that he is the true owner of the suit vehicle and that the alleged sale agreement was void ab initio. That the plaintiff has not demonstrated how he stands to suffer irreparable loss as the suit vehicle is a chattel which can easily be quantified as it had been valued at Kshs. 4,300,000/- as at August 2009. It added that the balance of probability tilts in the defendant's favor. The 2<sup>nd</sup> defendant was an innocent purchaser for value without notice and who had been wrongfully deprived use of the suit vehicle for over 4 years.

30. That no legal basis has been established by the plaintiff to entitle him to Kshs. 4,100,000/- sought as he did not advise the court how he arrived at the said sums. On mense profits it argues that the plaintiff forcefully seized the suit vehicle from the 2<sup>nd</sup> defendant on 19<sup>th</sup> April 2009 and as such is not entitled to the prayer sought for having unlawfully dispossessed the 2<sup>nd</sup> defendant and is liable to him as prayed in the counterclaim. On the claim for general damages it was submitted that general damages will not be awarded for breach of contract. On this she relied on the case of **Securicor Courier (K) Ltd. Benson David Onyango & Another [2008] Eklr.** Where it was held that, *“general damages cannot therefore flow from the alleged agreement between the plaintiff and the 1<sup>st</sup> defendant. On special damages it was submitted that special damages must not only be specifically pleaded but also proved.”*

31. I have considered the issues drawn by the plaintiff, 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant dated 14<sup>th</sup> March 2014 and the 2<sup>nd</sup> defendant's separate list dated 24<sup>th</sup> March 2014 and in my view these are the issue for determination.

### **Issues for determination**

- i. **Who is the owner of the suit motor vehicle?**
- ii. **Did the plaintiff entered into a valid sale agreement with the 1<sup>st</sup> defendant for the sale of the suit vehicle?**
- iii. **Whether the plaintiff has proved his claim of fraud by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants?**
- iv. **Is the plaintiff entitled to the plaintiff entitled to general mense profits and loss of user ?**
- v. **Was the sale agreement between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant valid?**
- vi. **Has the 2<sup>nd</sup> defendant proved his counter claim**
- vii. **Is the 2<sup>nd</sup> defendant entitled to damages and loss of user?**
- viii.

### **Determination**

- i. **Who is the owner of the suit motor vehicle?**

32. From the evidence adduced the original owner KAV 428F as at 12<sup>th</sup> May 2008 was the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant having bought the vehicle through a chattels mortgage. Insert search The vehicle was to pass to the 1<sup>st</sup> defendant upon completion of the payment of the said loan.

**ii. Did the plaintiff entered into a valid sale agreement with the 1st defendant for the sale of the suit vehicle?**

33. The plaintiff in support of his claim of ownership of the said vehicle has adduced an agreement for transfer of ownership of a second hand vehicle registration no. KAV 428F dated 12th May 2008 made between Francis Muraguri and Patrick Kinyua Munyito. The same was for the sum of Kshs. 4,100,000. The terms were that the seller Francis Muraguri was to transfer the loan balance of Kshs. 1,600,000 with NIC Bank to Patrick Kinyua who would continue to service the same and also to pay the difference of Kshs. 2,500,000 to the seller Francis Muraguri. Francis on the other hand was to transfer the said motor vehicle to facilitate and enable the buyer to service the said loan and he was also to do a letter to NIC to facilitate the transfer of the said motor vehicle to Patrick. The said agreement for transfer was signed by both the seller and buyer. The 1<sup>st</sup> defendant denied knowledge of the said arrangement and claims that his signature in the said document was a forgery. In regards to Kshs. 2.5 million supposedly paid to him by the plaintiff was for payment for sale of fertilizer. The 1<sup>st</sup> defendant claims to have reported the matter to the police vide OB 18/1/6/2009 but no action has been taken 5 years on as investigations was still on going.
34. There is an acknowledgement letter forwarding 2 cheques one dated 18/8/2008 for Kshs. 1,250,000 and another one dated 20/8/2008. There is a letter written by Francis Muraguri to NIC bank authorizing the transfer of loan account for motor vehicle Mitsubishi Fuso KAV 428F to Patrick Kinyua. This letter was denied by the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant's signature was challenged. However I note that the signatures alleged to have been of the 1<sup>st</sup> defendant on the agreement for transfer of ownership and letter of acceptance were not subjected to examination by a handwriting expert by either of the parties. It was not the duty of counsels to make a comparison of the said signatures in their submissions but to adduce expert evidence to establish whether the alleged signatures belong to the 1<sup>st</sup> defendant. It is trite law that he who alleges must prove. In the court's ruling dated 5<sup>th</sup> February 5<sup>th</sup> February 2014 the court ruled that, it should not be asked to investigate documents the plaintiff seeks to rely on but the parties were at liberty to have the police investigate the documents. The receipt stamp on the said letter indicate it was received at NIC head office reception on 13 May 2008 however, NIC refuted receipt of the said letter nor any knowledge of the alleged transaction between the plaintiff and the 1<sup>st</sup> defendant. Further in support of his claim the plaintiff annexed the copy of agreement to transfer allegedly signed by the parties and his statements of account which were to support the transfer of the said monies from his account to the defendants account and various copies of cheques to NIC for Kshs. 165,000 allegedly for payment of the outstanding Kshs. 1,600,000 which he claims had been a loan account, transferred to him by Francis as per the agreement for transfer of ownership dated 12th May 2008. However, I note that the statement the plaintiff has adduced belong to the 1<sup>st</sup> defendant. I have perused the same and though there is claim of monies being forwarded and credited in the 1<sup>st</sup> defendant's account it is not clear the source of the said funds. I find that should have the plaintiff adduced his statements the same could have been cross referenced with the 1<sup>st</sup> defendant's statements in an aim to determine if the said funds emanated from his account to the defendants. In this regards then I find that the said statements of accounts do not provide this court with any probative value in determining the issue at hand. The cheques adduced though drawn in the name of NIC on cannot state certainly that the same were ever deposited or cleared by the said bank and if the same were for payment of the 1<sup>st</sup> defendant's loan account. Lastly the 3<sup>rd</sup> defendant has shown through clause 2 of the chattel mortgage that the 1<sup>st</sup> defendant had no capacity to hire out or sell the said vehicle whilst the amount was still owing and could only do so with their consent which they did not give. Based on these findings I am of the view that the plaintiff has not established that he had a valid sale agreement with the 1<sup>st</sup> defendant for the sale of the suit vehicle. As such the plaintiff therefore never acquired any legal interest of the suit vehicle as the documentary evidence in particular the sale agreement and the letter to NIC transferring the Chattel mortgage loan to him he relies on is disputed and has not been proved to have been signed by the 1<sup>st</sup> defendant. a party relying on a written must adduce evidence of its legality should the same be challenged. It is hard to tell whether they had any business relations as each party had its own story to tell.

**iii. Whether the plaintiff has proved his claim of fraud by the 1st, 2nd and 3rd defendants?**

35. The plaintiff's assertion that the 1st and 3rd defendant perpetuated fraud in the transfer and acquisition of the truck by the 2nd defendant. In the case of *Koinange & 13 others v Koinange [1968] KLR 23* it was held that, "*allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do.*" The standards of proof in a fraud claim are higher than on a balance of probability; see the case of *Ratilal Gordharibhai Patel -vs- Lalji Makaiji (1957)* where it was held that "*the burden of proof in a fraud case is very high approaching but below the burden of proof beyond reasonable doubt.*" The 2nd defendant on his part denied the fraud allegations levied against him, stating he was a bona fide purchaser for value without notice, adding that he was not aware of the said court order and denied being the cause for the plaintiff to lose the right to the suit motor vehicle and denied any liability on his part, adding that he was never served with a demand against him.

36. On the part of the 3rd defendant, the plaintiff alleges that it was aware that the plaintiff was the constructive owner of the said motor vehicle, having taken over the 1st defendant's hire purchase debt and was therefore entitled to the log book, and by releasing the log book to the 1st defendant, amounted to fraud and collusion. In its defence, the 3rd defendant argued that it cannot be said that it committed fraud as they had no contractual agreement with the plaintiff and were not even aware of the alleged agreement for sale between the plaintiff and the 1st defendant. It stated that it was only registered as a financier as a mere charge for purposes of securing its financial interests and its proprietary interest was limited to that since it was never a beneficiary of the suit vehicle and neither did it collude with other defendants to defraud the plaintiff. It further denied being privy to the contract between the 1st and 2nd defendant, adding that it was only a financier to the 1st and 2nd defendants under 2 separate agreements and hence not a necessary party to this suit. Other than the letter dated **12<sup>th</sup> May 2008** said to have been forwarded to NIC, which the 3rd defendant refutes ever got to them, there is no other documentary evidence to show that the NIC Bank was a party to the arrangement between the plaintiff and the 1st defendant. From the foregoing, it is clear that the plaintiff was not privy to the said contract and as such could not be blamed for adhering to the terms between it and parties it had entered into contractual agreements with. In this regard, I therefore find that there was no contract between the plaintiff and the 3rd defendant and his claim of fraud against him does not stand. As the bank was not under any obligation to inform the plaintiff of any dealings with the 1<sup>st</sup> defendant, in my view the 3<sup>rd</sup> defendant ought not to have been enjoined as a party to this suit by the plaintiff.

37. The plaintiff alleges that the 1st defendant had fraudulently and in breach of trust placed on him, collected the log book from NIC Bank, an action he claims was not only illegal but amounted to a tort in detinue. The transfer document the plaintiff alleges was signed by the 1st defendant has been challenged and he has alleged that the same was a forgery. The plaintiff did not call any witness or adduce any evidence to ascertain this. The 1st defendant has reported the matter to the police and investigation is said to be underway. From the foregoing, one cannot infer fraud as the same requires a higher burden of proof than proof on a balance of probability. I find that the plaintiff has not met this threshold.

**iv. Is the plaintiff entitled to the plaintiff's general mense profits and loss of user?**

38. Having found that the plaintiff had no legal interest in the suit motor vehicle and having not proved his case on a balance of probability, the plaintiff's claim for general damages, mense profits and loss of user fails and his case is dismissed.

**v. Was the sale agreement between the 1st defendant and 2nd defendant valid?**

39. There is the issue raised on whether the 1<sup>st</sup> defendant had capacity to sell the vehicle as at 22<sup>nd</sup> May 2009. It is not in dispute that when the plaintiff obtained the court order on 22<sup>nd</sup> May 2009 the same was served on the 1<sup>st</sup> defendant on 28<sup>th</sup> May 2009. By then the 1<sup>st</sup> defendant had already entered into an agreement with the 2<sup>nd</sup> defendant on the sale of the suit vehicle a fact that was confirmed by the advocate who drew the sale agreement. At the time there was an ongoing case which was not drawn to the 2<sup>nd</sup> defendant's attention. As at 22<sup>nd</sup> May 2009 the 1<sup>st</sup> defendant had completed payment of the loan he had secured from the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant in his defence claims to be an innocent purchaser for value without notice. In support of his case he has adduced a motor vehicle sale agreement stamped 22/5/2009. The same is between Francis Muraguri and Bernard Gitau Gathungu the 2<sup>nd</sup> defendant. The said agreement was for the sale of KAV 428F Mitsubishi Fuso Chassis no. **BAVFN617RSA0034 ENGINE NO. 6D16-981046** for Kshs. 4,150,000. With payment of Kshs. 1,700,000 paid by bankers cheque number 011937 with co-operative bank and Kshs. 300,000 via cheque number 155541 and Kshs. 2,150,000 paid in cash upon execution of the agreement.
40. As at the time the said sale agreement was being made a copy of records from registrar of motor vehicle issued on 16<sup>th</sup> June 2009 indicated that the said vehicle was co-owned by Muraguri Muriuki and NIC Bank. After the conclusion of the said transaction the said vehicle appears to have been transferred to Gathungu Bernard as evidenced by a copy of records from Registrar of Motor vehicle issued on 25<sup>th</sup> September 2009 which indicated that the owners of the said truck were NIC and Gathungu Bernard (the 2<sup>nd</sup> Defendant). To be able to purchase the said truck the 2<sup>nd</sup> defendant appears to have sought financing from NIC as evidenced by the letter dated 11/08/2009 from NIC to Gathungu Bernard Gitau which informed him that the said financing he had requested had been approved for Kshs. 2,580,000 with Kshs. 1,720,000 of the purchase price of Kshs. 4,300,000 being paid directly to the bank. The said loan facility was to attract a loan interest of 9.94% which put the total sum to Kshs. 3,349,356 payable in 36 installments plus one final installment of Ksh. 97,956.00. In order for the funds of the said facility to be released to him Bernard Gathungu (2<sup>nd</sup> defendant) had to execute a chattel mortgage with NIC Bank which he did on 11/08/2009. This created a binding contract between Bernard and NIC for the funding to purchase the said truck.
41. The 3<sup>rd</sup> defendant (NIC Bank) also adduced customer account statements for Bernard Gathungu which showed payments for the hire purchase amount running from 31/08/2009 to 28/11/2011 which showed payments of the hire purchase installments to NIC. Having found that the plaintiff has not proved his claim on a balance of probability proved his claim on ownership of the suit motor vehicle as at no time was the suit vehicle transferred to the plaintiff and as such he never acquired any interest on the same that can defeat the interest of acquired by the 2<sup>nd</sup> defendant. I also find that at the time the 2<sup>nd</sup> defendant purchased the suit motor vehicle he had no knowledge on any defect in title. He has adduced various documents from sale agreement and evidence of the payment to the 1<sup>st</sup> defendant and even the chattel mortgage he took with the 3<sup>rd</sup> defendant in order to purchase the suit motor vehicle as such I find that the 2<sup>nd</sup> defendant has proved that he is an innocent purchaser for value and upon purchase of the suit vehicle he acquired proprietary rights over the suit motor vehicle.

**vi. Has the 2<sup>nd</sup> defendant proved his counter claim?**

The 2<sup>nd</sup> defendant claims as against the plaintiff that he has been in possession of the suit vehicle from 22<sup>nd</sup> May 2009 to 8<sup>th</sup> December 2009 when the same was unlawfully seized by the plaintiff. The 2<sup>nd</sup> defendant claims that due to the said seizure and detention of the suit vehicle he has suffered loss and damages which he continues to incur as he had secured a contract with DHL EXCEL on 22<sup>nd</sup> June 2009 for Kshs. 300,000/- net per month. He particularized his loss and damage as follows;

Loss of user at the rate of Kshs. 300,000/- per month from 8<sup>th</sup> December 2009, Insurance premium paid but unutilized Kshs. 230,505/-; repair charges Kshs. 187,000/-. He prays for judgment against the plaintiff for;

- i. A mandatory injunction against the plaintiff compelling the plaintiff to hand over to the 2nd defendant motor vehicle registration number KAV 428F Mitsubishi Fuso: Lorry in good condition and repair and service forthwith;
- ii. General damages for trespass to goods;
- iii. Loss of user and special damage as set out in the counter claim;
- iv. Cost of suit and counter claim.

42. The 2<sup>nd</sup> defendant in support of this claim he adduced a contract between DHL Excel supply Chain Kenya and Bernard Gitau Gathungu the same was executed on 22<sup>nd</sup> June 2009 by Albert Onyango and the 3<sup>rd</sup> defendant and witnessed by Immaculate Muthoni and Bernard M. Kamau. He stated that after signing the sub-contract with DHL he started using the said track for transport business in October, November and December 2009 at DHL premises at Industrial area until the said vehicle was seized by the plaintiff in the company of police on 8th December 2009 which has made him suffer loss of user and financial loss resulting him to fall into arrears in paying for the chattel mortgage loan he took to purchase the said vehicle.

**vi. Is the 2<sup>nd</sup> defendant entitled to damages and loss of user?**

43. The 2<sup>nd</sup> defendant in his testimony stated that he purchased the vehicle from the 1st defendant on 22<sup>nd</sup> May 2009 for Kshs. 4,150,000/- and the same was transferred to him on 9th July 2009 and he has been in possession of the suit vehicle from 22<sup>nd</sup> May 2009 to 8th December 2009 when the plaintiff unlawfully seized it from his driver at the DHL premises in Nairobi and detained the same. That due to the said seizure and detention of the suit vehicle he has suffered loss and damages which he continues to incur as he had secured a contract with DHL EXCEL on 22<sup>nd</sup> June 2009 for Kshs. 300,000/- net per month. He particularized his loss and damage as follows; Loss of user at the rate of Kshs. 300,000/- per month from 8th December 2009, Insurance premium paid but unutilized Kshs. 230,505/-; repair charges Kshs. 187,000/- any other charges that may arise pending the hearing and determination of the suit. The 2<sup>nd</sup> defendant in support of this claim he adduced a contract between DHL Excel supply Chain Kenya and Bernard Gitau Gathungu the same was executed on 22<sup>nd</sup> June 2009 by Albert Onyango and the 3<sup>rd</sup> defendant and witnessed by Immaculate Muthoni and Bernard M. Kamau. He stated that after signing the sub-contract with DHL he started using the said track for transport business in October, November and December 2009 at DHL premises at Industrial area until the said vehicle was seized by the plaintiff in the company of police on 8th December 2009 which has made him suffer loss of user and financial loss resulting him to fall into arrears in paying for the chattel mortgage loan he took to purchase the said vehicle. However other than the said contract there are no invoices adduced for any work done by the 2<sup>nd</sup> defendant from 22<sup>nd</sup> June 2009 until 8th December 2009 when the said vehicle was taken from him.

The Civil Procedure Act Cap 21 Laws of Kenya defines mesne profits, in relation to property means:- ***“Those profits which the person in wrongful possession of such property actually received on might with or ordinary diligence have received therefore, together with interest as such profits but does not include profit due to improvements made by the person in wrongly possession.”***

Order 21, Rule 13 of Civil Procedure Act provides;

***“(1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree - For the possession of the property. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits. Directing an inquiry as to rent or mesne profits from the institution of such suit until:- The delivery of possession to the decree-holder. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or the expiration of three years from the date of the decree, whichever even first occurs.***

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

44. Mesne profits are special damages which not only need to be pleaded but also proved. In the Court of appeal case of **Malcom Bell vs. Daniel Torotich and another 2012 Eklr**, where the appellant had sought mesne profits in a case of trespass it was held that, “the appellant sought orders of mesne profits in the appeal, but there was no satisfactory evidence to support both the claim for mesne profits or the claim for general damages.”

The 2nd defendant apart from the contract between him and DHL there no invoices adduced to support that the said truck had been engaged in any work by DHL between 22nd June 2009 and 8th December 2009 when the same was taken by the plaintiff. I however find that the 2<sup>nd</sup> defendant has proved that his claim for loss of the insurance paid of **Kshs. 230,505/-** and repair charges of **Kshs. 187,500/-**. I further find that the 2<sup>nd</sup> defendant incurred a loss and trespass to goods arising from the plaintiff’s unlawful seizure of the vehicle and therefore award him general damages of **Kshs. 1,500,000/-**. **The 2<sup>nd</sup> defendant is also granted a mandatory injunction against the plaintiff compelling the plaintiff to hand over the suit motor vehicle to the 2<sup>nd</sup> defendant in good condition of repair and service forthwith.** I therefore enter judgment for the 2<sup>nd</sup> defendant against the plaintiff of **Kshs. 1,918,005/-**. The sum of Kshs. 418,005 out of Kshs. 1,918,005/- shall earn interest at court rates from the date of this of filing the suit until payment in full and the balance of Kshs. 1,500,000 shall earn interest at court rates from date of this judgment until payment in full.

**Who pays costs?**

45. On issue of costs section 27 of the Civil Procedure Act provides that, “(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.**” In the case of **Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others [2014] eKLR** it was held that: “It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit.”

The plaintiff filed this suit as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants but has failed to prove on a balance of probability his claims against them as such he is condemned to pay costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Orders accordingly.

Dated, signed and delivered this **12<sup>th</sup>** day of **February** 2016.

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Plaintiff**

.....**For the 1<sup>st</sup> defendant**

.....**For 2<sup>nd</sup> Defendant**

.....For 3<sup>rd</sup> Defendant

**MS. Charity**

**Court Clerk**