

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL APPEAL NO. E165 OF 2023

NORTHWAVE CREDIT LIMITED.....1ST
APPELLANT
PETER NJAGI.....2ND
APPELLANT
MERCY NKIROTE.....3RD
APPELLANT

-VERSUS-

SUSAN WANGUI KIMOTHO.....1ST
RESPONDENT
NATIONAL TRANSPORT AND
SAFETY AUTHORITY.....2ND
RESPONDENT

(Being an appeal from the judgment and ruling of the Hon. L. Njora SPM delivered on 23rd June 2023 and 6th October 2023, respectively, in the CMCC No. E170 of 2022)

JUDGMENT

1. This is an appeal against the judgment of the Learned Trial Magistrate delivered on 23rd March 2023, wherein the Plaintiff's (now 1st Respondent's) suit was partly allowed. The suit concerned the purchase of motor vehicle KCL 922G (Toyota Prado) at a public auction conducted on 10th September 2021 by Hyvet Wairimu t/a Vetrank Investments Auctioneers.

2. Before the trial court, the 1st Respondent sought:
 - i. A declaration that she was a bona fide purchaser for value without notice;*
 - ii. Refund of Kshs 2,265,000/- as the purchase price;*
 - iii. Costs of assessment and repairs;*
 - iv. General damages for breach of contract and deprivation of use;*
 - v. Costs of the suit.*

3. The 1st Respondent's case is that she purchased a motor vehicle, KCL 922G Toyota Prado, through a public auction conducted by Hyvet Wairimu T/A Vetrank Investments Auctioneers on 10th September 2021. She paid Kshs. 2,265,000/=, was issued a certificate of sale and a copy of the logbook, and the vehicle was handed over to her. However, it was subsequently repossessed by Skigate Auctioneers on the instructions of Mombasa Kushi Motors Ltd, who alleged prior ownership disputes involving the Appellants and one George Ndung'u Gitu.

4. The 1st Respondent further alleged that the 2nd and 3rd Appellants fraudulently misrepresented themselves as having lawful authority to sell the vehicle and failed to disclose the existence of Nairobi CMCC E1300 of 2021, concerning the same vehicle.

5. The Appellants herein filed a statement of defence dated 13th March 2022, denying liability and asserting that any contract

for the vehicle was strictly between the 1st Appellant (a financing company) and the borrower George Ndung'u Gitu. They maintained that the 2nd and 3rd Appellants, who were officers of the 1st Appellant, were wrongly sued. A Third-Party Notice was issued against NTSA, which never entered an appearance.

6. After a full hearing, the Trial Court entered judgment for the 1st Respondent and awarded prayers (a), (b), (c), (d), and (f), but did not address the Third-Party Notice. A subsequent application for judgment against NTSA was dismissed on 6th October 2023, prompting this appeal.
7. Being aggrieved by the decisions of the Court, the Appellants appeal against the decisions in the memorandum of appeal dated 5th December, 2023, on the following grounds, inter alia:
 - a. *The Learned Magistrate erred in law and fact by finding the 2nd and 3rd Appellants liable contrary to the doctrine of privity of contract;*
 - b. *The Honourable Magistrate erred in law and fact by finding that the Plaintiff/1st Respondent did not acquire ownership of the suit motor vehicle;*
 - c. *The Trial Magistrate erred by failing to enter judgment for the 1st Defendant/Appellant as against the Third Party/2nd Respondent;*
 - d. *The Learned Magistrate erred in law and fact by making determinations on un-pleaded, unspecified and unsubstantiated issues;*

- e. *The Honourable Magistrate erred in making determinations with regards to the auctioneer who was not a party to the suit;*
- f. *The Trial Court erred in law and fact by deeming the 1st Defendant/Appellant's title to the motor vehicle as being encumbered by an unnamed defect/infirmary;*
- g. *The Honourable Magistrate erred by failing to find that it is an implied condition of auction sales that the property is sold on an "as is where is" basis;*
- h. *The Learned Magistrate erred in law and fact by finding that the 1st and 2nd Defendants/Appellants were guilty of material non-disclosure;*
- i. *The Esteemed Magistrate erred in law and fact by finding that Anthony Muiruri Irungu had registered the suit motor vehicle in his name;*
- j. *The Trial Magistrate erred in law and fact by finding that the 1st Defendant/Appellant testified to the existence of a case in relation to the suit motor vehicle;*
- k. *The Learned Magistrate erred in law and fact by finding that the Plaintiff was not issued with a logbook by the Third Party/2nd Respondent;*
- l. *The Honourable Magistrate erred in law and in fact by finding that the Claimant proved its case to the required standard;*
- m. *The Esteemed Magistrate erred in finding that the Plaintiff was entitled to the reliefs sought.*

8. The plaintiff/ 1st Respondent's case in the lower court was that the 2nd and 3rd Appellants, being husband and wife, deceitfully presented themselves as legal owners of the motor vehicle KCL 922 G Toyota Prado having the capacity to dispose of the motor vehicle to the Plaintiff. On 2nd September the 1st Respondent/ plaintiff heeded to a newspaper advert placed by Hyvet Wairimu T/A Vetrunk Investment Auctioneer at the instant of the Northwave Credit Limited advertising for sale the motor vehicle KCL 922 G Toyota Prado on 10th September 2021. She attended the sale and at the fall of the hammer she was declared the highest bidder and by way of memorandum of sale she was declared the purchaser of the motor vehicle and was issued with a certificate of sale.
9. That having paid the entire purchase price of Kshs. 2,265,000/=, which was acknowledged by the 1st Appellant and the motor vehicle was released to her together with a copy of the logbook, the motor vehicle was successfully transferred to the Plaintiff/1st Respondent, and a logbook was issued by the 2nd Respondent. The plaintiff undertook repairs in the motor vehicle for the purpose of selling the same. After undertaking the repairs, the motor vehicle was repossessed by Ns John Stanly Awiti T/A Skigate Auctioneers under the instructions of Mombasa Kushi Motors Co. Ltd on the grounds that it was still its property, and hence was fraudulently transferred to the plaintiff by the Appellants/1-3rd Defendants.

10. The plaintiff reported the matter at Muthaiga police station, and she learnt that the Motor Vehicle was under investigation for a suspected case of fraudulent transfer and authenticity of the logbook then issued to the 1st Defendant and George Ndung'u Gitu. The Plaintiff applicant wrote to Peter Njagi the 2nd Defendant by email dated 4th December 2021 complaining about the repossession and requiring him to facilitate in the recovery or in the alternative refund the sum of Kshs 2,265,000/= paid as the purchase price. The Plaintiff alleged that the 1st and 2nd Defendant deceitfully sold the motor vehicle without disclosing that it was subject to litigation in court. That they fraudulently misrepresented themselves as the owners of the motor vehicle and failed to inform her there was a pending case in Nairobi CMCC E01300 of 2021 North wave Credit Ltd Vs DCI & George Ndungu Gitu. As a result of their actions the Plaintiff suffered loss and damage to the 2,559,500/= being the purchase price, costs of assessment before and after repairs and the cost of the repairs. The Plaintiff sought judgment for the above sum, though broken down as well as general damages.

11. The Defendants filed a joint statement of defence dated 13th April 2022, denying the averments of the plaint. The 2nd and 3rd Defendants deny entering into a contract with the Plaintiff as agents of the 1st Defendant. The 1st defendant/Appellant, a company engaged in asset financing, entered into two financing agreements with George Ndung'u Gitu in June and July 2021, secured in part by motor vehicle

KCL 922G, which was registered in his name. The Appellant's interest in the vehicle was duly registered with NTSA on 24th June 2021.

12. In July 2021, while seeking to collect the updated logbook showing its joint interest, the Appellant discovered an attempt to transfer the vehicle to a third party, Anthony Muiruri Irungu. It lodged a complaint with Nairobi Central Police Station, leading to the vehicle's detention. NTSA investigated and later confirmed the Appellant's joint ownership by issuing a new logbook.
13. Meanwhile, the borrower defaulted, prompting the Appellant to instruct Vetrans Investments Auctioneers to repossess the vehicle on 21st July 2021. The Auctioneer filed Misc. Application No. E1154 of 2021 and obtained a court order directing the OCS Central Police Station to release the vehicle. However, because the Directorate of Criminal Investigations was holding the vehicle, the Appellant filed a second application Misc. Application No. E1300 of 2021, after which an order was issued and the vehicle released.
14. At the trial, each party called one witness who mirrored the averments in the pleading.
15. In submissions, the appellant contends the 2nd and 3rd Appellants were improperly joined in the suit, as the contract at issue was solely between the 1st Appellant and 1st Respondent. The only connection cited the payment directed to the 3rd Appellant, and the 2nd Appellant's role as an officer does not make them parties under the doctrine of privity of contract. The trial court erred in finding them liable, as this

improperly attempted to lift the corporate veil in violation of established company law principles. Precedents including **Prest v Petrodel Resources** and **Savings & Loan (K) Ltd v. Kanyenje Karangaita Gakombe** support this position.

16. The trial court also erred in raising, suo moto, the issue of whether the auctioneer had a duty to disclose pending investigations. This was not pleaded by the parties, denying the Appellants a fair hearing, violating natural justice principles (*audi alteram partem*), as affirmed in cases such as **Mbaki v. Macharia and Pashito Holdings v. Ndungu**.
17. The 1st Respondent alleged various instances of fraud in the sale of the motor vehicle. However, the evidence failed to meet the heightened standard of proof required for fraud.
18. The trial court declined to enter judgment in favour of the Appellants against the 2nd Respondent despite proper service of a Third- Party Notice and the 2nd Respondent's non-participation. This was a failure to properly exercise judicial discretion under the Civil Procedure Rules, and the Appellants argued they should be indemnified by the Third Party (NTSA).

Analysis and determination

19. As a first appellate court, I am guided by the principle in **Selle v Associated Motor Boat Co. [1968] EA 123**, which requires this Court to reconsider, re-evaluate and analyze the evidence afresh while bearing in mind that the trial court had the advantage of seeing the witnesses.

20. The guiding principle on interference with discretion remains as set out in **Mbogo & Another v Shah [1968] EA 98** decision as follows:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

21. From the record and submissions, the following issues arise for determination:

- i. Whether the 2nd and 3rd Appellants were wrongly found liable contrary to the doctrine of privity of contract,*
- ii. Whether the trial court erred in determining issues on un-pleaded matters,*
- iii. Whether the 1st Respondent proved fraud or failure to pass a good title in the sale of the motor vehicle;*
- iv. Whether the trial court erred in declining to enter judgment against the Third Party, NTSA.*

22. On the first issue, the Appellants submitted that the 2nd and 3rd Appellants were not privy to the contract entered into between the 1st Respondent and the 1st Appellant, and that the trial court’s decision to hold them liable amounted to a

misapplication of the doctrine of privity of contract. They relied on the decision in **Prest v Petrodel Resources Ltd & Others [2013] UKSC 34**, where the United Kingdom Supreme Court reaffirmed that companies are separate legal entities and that personal liability only attaches in exceptional circumstances where the corporate veil is pierced. They also cited the Court of Appeal decision in **Savings & Loan (Kenya) Ltd v Kanyenje Karangaita Gakombe [2015] eKLR**, which similarly underscored that contractual obligations cannot be extended to persons who are not parties to the contract.

23. The 1st Respondent, on the other hand, maintained that the 2nd and 3rd Appellants played an active role in the transaction. It was her evidence that portions of the purchase price were directed to the 2nd and 3rd Appellants and that the 2nd Appellant personally communicated with her at critical stages of the transaction. According to the Respondent, this conduct demonstrated involvement sufficient to justify liability notwithstanding the absence of formal contractual relations.

24. It is a settled principle that the doctrine of privity of contract restricts the enforcement of contractual rights and obligations to the parties to the agreement. A contract, therefore neither imposes obligations nor confers rights on non-parties. However, as has long been recognized, exceptions exist in circumstances relating to agency, trust relationships, statutory obligations, and instances where justice demands the lifting of the corporate veil to prevent

fraud or improper conduct. These exceptions are narrow, and they operate primarily to safeguard contractual certainty and prevent persons who never consented to contractual terms from being unjustly bound by them.

25. In **Savings & Loan (K) Ltd v Kanyenje Karangaita Gakombe [2015] eKLR**, the Court of Appeal affirmed that third parties cannot be saddled with contractual liabilities except under exceptional legal circumstances. The decision emphasized the importance of the sanctity of contract and the need to avoid stretching liability beyond the parties who voluntarily assumed obligations.
26. Turning to the present case, it is not disputed that the agreement for the sale of motor vehicle registration number KCL 922G was between the 1st Respondent and the 1st Appellant, a company dealing in asset finance and recovery. The 2nd and 3rd Appellants, who are husband and wife, were not parties to the said contract. There is no evidence that they signed the agreement, nor was any material placed before the trial court to show that they were authorized agents of the 1st Appellant at the material time.
27. The trial court nevertheless held the 2nd and 3rd Appellants liable on the basis that they allegedly participated in the sale and received part of the purchase price. The court inferred that such involvement created a basis for liability.
28. With respect, mere receipt of funds or indirect association with a contracting entity does not, without more, create contractual obligations. Unless a direct contractual relationship exists, or unless agency, trust, or statutory

liability is proved, the doctrine of privity bars the extension of liability to third parties. The court must be cautious not to impose obligations upon persons who never assumed them.

29. In the instant case, there was no evidence that the 2nd or 3rd Appellants acted as agents of the 1st Appellant, nor was there proof that they held the vehicle in trust, or that they abused the corporate structure to facilitate fraud or improper conduct. As was emphasized in **Prest v Petrodel**, the corporate veil may only be pierced where the company is deliberately used as a façade to conceal wrongdoing. No such evidence was tendered in this case.

30. I therefore find that the trial court improperly extended liability to the 2nd and 3rd Appellants in violation of the doctrine of privity of contract. The imposition of liability upon them was unwarranted and cannot stand. They are accordingly exonerated from liability.

31. The second issue is whether the trial court erred in determining issues not pleaded. The Appellants argued that the trial court erred in considering, *suo motu*, the question of whether the auctioneer owed a duty to disclose pending investigations and disputes involving the vehicle, and that such consideration violated their right to a fair hearing.

32. The 1st Respondent countered that the auctioneer's conduct was directly relevant to the core issue of whether good title passed, and that the matters raised were incidental to her claim for refund, damages, and proper transfer.

33. Upon review of the proceedings, I am satisfied that although the trial court referred to matters relating to the auctioneer's conduct, such matters were ancillary to the central question of whether the Respondent obtained valid title. The Appellants suffered no demonstrable prejudice.
34. In any event, auctioneers, as held in **Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna [2017] eKLR**, owe statutory and common-law duties of care in conducting sales, and may be liable in negligence or misrepresentation where they fail to disclose defects in title known to them or reasonably discoverable. The trial court's reference to this duty did not, therefore amount to a misdirection.
32. On whether the 1st Respondent proved fraud or failure to pass a good title in the sale of the motor vehicle, the legal position on fraud is well settled. Fraud must be specifically pleaded and strictly proved to a standard higher than a balance of probabilities but below beyond a reasonable doubt. This principle was articulated in cases such as **Urmila w/o Mahendra Shah v Barclays Bank International Ltd [1979] eKLR** and **Ndolo v Ndolo [2008] eKLR**.
33. The Appellants argued that the Respondent failed to meet this standard, particularly because the sale was expressly conducted on an "as is, where is" basis, thereby limiting the seller's liabilities.

34. The Respondent, however, adduced evidence showing that she participated in a lawful public auction, paid the full purchase price, received a logbook (number K4559208R), and took possession of the vehicle. Her deprivation thereafter was due to disputes among the Appellants, NTSA, and previous owners. She also established that the Appellants were aware of the ongoing investigations in Misc. Application E1300 of 2021, yet did not disclose this to her.
35. Under Section 27 of the Sale of Goods Act (Cap 31), the seller warrants good title unless the contract expressly provides otherwise. The “as is, where is” clause pertains primarily to the physical condition of the goods, not to the passing of valid and unencumbered title, unless clearly explained to the purchaser, which was not done here.
36. While non-disclosure of the pending investigations may point to negligence or misrepresentation, I am not persuaded that the Respondent proved fraud to the requisite standard. Nonetheless, she clearly demonstrated total failure of consideration because the Appellants were unable to confer a valid title, rendering the contract ineffective. In **Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & Another [2015] eKLR**, the Court of Appeal affirmed that where consideration wholly fails, the purchaser is entitled to a refund.
37. The trial court therefore properly ordered a refund of the purchase price and special damages, which were

specifically pleaded and strictly proved. Also, the court was correct in declining to award general damages, in line with **Kenya Tourist Development Corporation v Sundowner Lodge Ltd [2017] eKLR**, which reaffirmed that general damages are generally not awardable for breach of contract.

38. Did the trial court err in declining to enter judgment against the Third Party, NTSA? The Appellants argued that because the NTSA failed to enter an appearance after service of a Third-Party Notice under Order 1 Rule 15 of the Civil Procedure Rules, judgment ought to have been entered against it.

39. It is undisputed that NTSA was served but did not respond. However, NTSA's role is administrative to record ownership details and issue logbooks under the Traffic Act and the NTSA Act. As clarified in **Thuranira Karauri v Agnes Ncheche [1997] eKLR**, a logbook is only prima facie evidence of ownership and does not guarantee title.

40. NTSA does not investigate or guarantee the validity of underlying transactions. Absent a statutory breach, liability cannot attach to NTSA. Furthermore, a court cannot enter judgment against a third party merely for failing to enter an appearance; the claim must disclose a reasonable cause of action. This principle was affirmed in **Co-operative Merchant Bank Ltd v Wekesa [1997] eKLR**.

41. The Third-Party Notice in this case disclosed no legal basis for indemnity or contribution against NTSA. The trial court, therefore properly dismissed the application.

42. Having thoroughly re-evaluated the evidence, submissions, and the law, the Court reaches the following conclusions:

- i. The finding of liability against the 2nd and 3rd Appellants was erroneous and is hereby set aside.***
- ii. The finding that the 1st Respondent lawfully purchased the vehicle but suffered failure of consideration is upheld.***
- iii. The orders directing refund of the purchase price and proven special damages are affirmed.***
- iv. The decision declining general damages is proper and is upheld.***
- v. The dismissal of the Third-Party Notice against NTSA is proper and is affirmed.***
- vi. The appeal accordingly succeeds in part.***
- vii. Each party shall bear its own costs of the appeal.***

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **20th** day of **November** 2025.

P.M. MULWA
JUDGE

In the presence of:

Ms. Muthoni for Appellant

Mr. Makumi for Respondent

Court Assistant: *Carlos*