REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E245 OF 2023

PAUL MUNGATIA……..APPELLANT
-VERSUS-
EQUITY BANK LIMITED……..RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree in the Mombasa Chief Magistrate's Court Civil Case No. E034 OF 2021. The impugned judgement was delivered on 11 August 2023.
2. In the lower court, the appellant sued the respondent for a mandatory injunction to compel the respondent to return to the appellant, the original logbook of the appellant's vehicle registration no. KBS 071 F (Mercedes Benz).
3. According to the appellant's plaint amended on 4 June 2021, on or about 12 April 2016, the appellant obtained a loan facility of Kshs. 300,000/= from the respondent. He pledged his motor vehicle as security for the loan which is why he handed over the vehicle's original log-book and a signed transfer form to the respondent. According to the loan arrangement, the vehicle was to be registered and remain in the joint names of the appellant and the respondent until such a time that the loan had been repaid.

4. The appellant paid his loan by 11 July 2017 and, therefore, it was pleaded, he was entitled to his log-book and the registration of the vehicle transferred back to his name. However, the respondent is said to have refused, neglected or ignored to effect the transfer and return the log-book.
5. At some point, the appellant attempted to dispose of the motor vehicle only to discover that the vehicle had been transferred to one Kenyanjui Mbugua Dennis. The appellant averred that he suffered loss and damage as a result since he could not sell the motor vehicle. It is for this reason that he sued for the release of the log-book and for general damages, amongst other prayers in his plaint.
6. The respondent contested the appellant's claim and filed a statement of defence to that end. The respondent's position was that on the 18 April 2016, it forwarded to the Kenya Revenue Authority, Roads Department the appellant's log-book together with the rest of the documents necessary for the registration of vehicle into the joint names of the appellant and the respondent. Thus, the registration of the vehicle into the name of Kenyanjui Mbugua Dennis was done by the Kenya Revenue Authority or the National Transport and Safety Authority and not the respondent.
7. As far as the release of the log-book back to the appellant is concerned, the respondent contended that it had written to the National Transport and

Safety Authority, seeking for the log-book but as at the time of filing its defence, the respondent had not received any response from the Authority. The Authority is established through the National Transport and Safety Authority Act No. 33 of 2012 and, among its roles, is the duty to register and license motor-vehicles. Prior to its creation, this function was performed by the Kenya Revenue Authority.

8. The respondent pleaded it was the National Transport and Safety Authority or the Kenya Revenue Authority that ought to bear the responsibility for any loss or damage that the appellant may have suffered as a result of the withholding of the log-book or the transfer and registration of the appellant's motor into the name of a third party.
9. In his judgment, the learned magistrate dismissed the appellant's claim with costs to the respondent. The appellant was aggrieved by this outcome hence the instant appeal. In the memorandum of appeal dated 5 September 2023, the appellant has appealed against the judgment and decree. The grounds have been captured as follows:

> ***"1. The learned honourable magistrate erred in law and fact by failing to appreciate that the plaintiff's claim was founded on negligence and breach of fiduciary duty of the defendant as a bank owed to the plaintiff as its customer and not a claim of conversion and detinue.***

2. They learned honourable magistrate erred in law and in fact by failing to appreciate that the defendant's failure to perfect the security before drawdown, which was its obligation under the agreement, caused the plaintiff's loss and damages.

3. The learned honourable magistrate erred in law and fact by failing to appreciate that the defendant's liability arose from a breach of its duty of care to the plaintiff.

4. The landed honourable Magistrate erred in law and fact by failing to appreciate that the plaintiff had proven its case against the defendant on a balance of probabilities.

5. They landed honorable magistrate erred in law and fact by failing to appreciate that it was the defendant that dealt with NTSA and NTSA's liability could only have determined by a third party or co-defendant's claim.

6. The landed honourable magistrate erred in law and fact by relying on the case of Tom Mboya Oduru versus Kenya Revenue Authority (2016) eKLR which is not relevant to the suit herein as the plaintiff had no contact or dealings with NTSA regarding the registration of the security.

7. The learned Honourable magistrate erred in law and fact by failing to provide an analysis and reasons for not finding the defendant liable."

10. Based on these grounds, the appellant has prayed that the appeal be allowed and that the judgment of the lower court be set aside. The appellant has also prayed for release of his log-book and damages, costs of the appeal and interest.
11. At the hearing of his claim, the appellant reiterated the averments made in his pleadings and added that after he sold his motor vehicle for Kshs. 700,000/=, the purchaser returned it apparently because the registration of the transfer of the vehicle into the purchaser's name could not be effected. Besides the sale of the vehicle falling through, he could also not insure the vehicle without a log-book hence he could not use the vehicle.
12. Besides his testimony in court, the appellant adopted his witness statement which he filed in court as his evidence. In answer to questions asked during his cross-examination, the appellant confirmed that he was aware of the efforts made by the respondent to retrieve the log-book from the National Transport and Safety Authority but, as far as he was concerned, he had nothing to do with this Authority and, in any event, he was not privy to what transpired between the Authority and the respondent.

13. He maintained that the contract of the loan was between him and the respondent and once he repaid the loan he was entitled to his log-book, in line with the terms of the contract. On the sale of the vehicle, he testified that he received the purchase price of Kshs. 700,000/= on 11 November 2017; however, he had no evidence in proof of the fact that he had refunded or was refunding the purchase price when the sale fell through.
14. On behalf of the respondent Ezekiel Changawa testified, and like the appellant, he adopted the witness statement filed on behalf of the respondent as his evidence. The statement was, however, signed by one Charles Ochaka. He admitted the bank having received the appellant's log-book and a duly signed transfer form. He reiterated that the registration of the appellant's vehicle into a third party's name was the National Transport and Safety Authority's fault.
15. Upon cross-examination, the respondent's witness confirmed that one of the terms of the contract was that the security was to be perfected before the drawdown, meaning that the loan could only be disbursed upon registration of the appellant's vehicle in the joint names of the appellant and the respondent. He also admitted that it was the respondent's responsibility to present the log-book and the transfer form for registration of the joint ownership of the vehicle. However, the registration was never effected.

16. The appellant had twelve months to repay the loan and that the appellant repaid the loan before May 2016. Despite the settlement of the loan, the respondent's witness admitted the log-book was not delivered to the appellant and that only the National Transport and Safety Authority could resolve the question of registration of the appellant's vehicle back to his name.
17. It is apparent from the pleadings filed by the respective parties in the lower court and the evidence they presented that there wasn't much of a dispute on the facts material to determination of the appellant's claim.
18. Both parties were in agreement that there was a loan agreement signed between them. The contract was signed on 12 April 2016 and in discharge of his obligations to the respondent, the appellant handed over the log-book of his motor-vehicle together with the rest of the documents necessary for registration of the vehicle into the parties' joint names. He was subsequently given the loan which, according to his evidence, he repaid in 2017 before the expiry of the one year within which he was to repay the loan..
19. The dispute arose when the respondent could not hand back the appellant's log-book upon repayment of the loan. The fact of the respondent's failure to return the appellant's log-book was not disputed. The pertinent question that the lower court ought to have considered was whether the respondent owed the appellant a duty of care and if so,

whether that duty was breached by the respondent's failure to return the appellant's log-book.

20. My reading of the respondent's case is that it does not dispute that indeed it owed he appellant a duty of care. Its case is that the failure to return the log-book was attributed to National Transport and Safety Authority.

21. In its statement of defence, it pleaded, *inter alia*, as follows:

> ***"7. The defendant avers that the plaintiff by failing to sue NTSA left the tort feasor out of these proceedings and has done so at his own peril. He has no cause of action against the defendant as the defendant is not a registrar of motor vehicles and the defendant shall rely on the authority of Tum Mboya Oduru -v- Kenya Revenue Authority HCCC No. 1053 of 2006 (2016) eKLR .***
>
> ***8. The defendant , in the alternative avers that both KRA (NTSA) and the plaintiff are liable in negligence for the motor vehicle logbook's unavailability and or the registration of the motor vehicle in the name of name a third party/stranger."***

22. The respondent then proceeded to particularise the negligence of the National Transport and Safety Authority and the appellant. And in the submissions filed on behalf of the respondent the latter pursued this theme and urged as follows:

"19. It is our submission that the transfer of ownership of motor vehicle for the subject motor vehicle (produced before the trial court as D. exb.3 and appean·11g at page 43 of the Record of Appeal was duly filled and signed by the appellant and the respondent and the particulars given therein were correctly entered. The transfer fee was paid by the appellant on the 12th April 2016 to National Transport and Safety Authority (NTSA) and we refer your Lordship to the Paid Invoice (produced before the trial court as D. exb.4 a11d appean'11g at page 44 of the Record of Appeal in support of the same.

20. We submit humbly but most vehemently that the parties to the loan agreement had done what was required to be done on their part by filling and signing the motor vehicle transfer form and paying the fee for registration which documents were duly forwarded by the respondent to KRA (now NTSA) and we are of the humble view that it was upon KRA (now NTSA to deal and effect the joint registration of the subject motor vehicle as requested for by the parties."

23. And to demonstrate that it had made the necessary efforts to recover the log-book from the National Transport and Safety Authority, the respondent exhibited a letter dated 15 May 2017 it had written to the

Authority asking for the appellant's log-book. In that letter, the respondent wrote as follows:

> ***"Logbook for motor vehicle registration number KBS 017F***
>
> ***We refer to the above matter.***
>
> ***On or about 18th April 2016, the bank sought joint registration of the log book for the above mentioned motor vehicle in the names of Equity Bank (K) Ltd and Paul Jesse Mungatia. The transfer was paid for and a receipt issued. The purpose of joint registration was to secure the bank's interest against a loan advanced to the Paul Oh Jesse Mungatia. To date the log book is yet to be done.***
>
> ***Enclosed herein are copies of the E-slip to the time of lodgement; copy of transfer forms, Logbook, copies of ID and PIN for Paul Jesse Mungatia and certificate of incorporation and PIN for Equity (K) Ltd.***
>
> ***The customer has since cleared the loan and requests the logbook.***
>
> ***Your assistance will highly be appreciated***
>
> ***Yours faithfully,***
>
> ***For: Equity Bank (K) Ltd***
>
> ***Signed***

Kariuki Kingori

Manager Legal Services”

24. The respondent may have forwarded the requisite documents to the National Transport and Safety Authority as stated in its letter but going by the terms of the contract between it and the appellant, it had the obligation to ensure joint registration of the vehicle into the names of the respondent and the appellant had been effected. As a matter of fact, the respondent could only disburse the loan to the appellant after the joint registration.

25. The clause on security provided that “*the facility will be secured by joint registration and chattels mortgage over motor vehicle registration numbers KBS 071F to be executed”*.

26. The contract provided the registration of the security was a condition precedent to the disbursement of the loan. To this end, it provided in part as follows:

> ***“As conditions precedent before the proposed facility will become available to the borrower, the lender requires the following from the borrower, each in satisfactory form and substance:***
>
> ***e) duly executed and perfected security documents of the items referred to in clause 5 above.”***

27. If the respondent had registered the security prior to disbursement of the funds, as it was indeed enjoined to under the contract, it would have been impossible for the appellant's vehicle to be registered in the name of a third party who was not only not privy to the contract but was also a stranger to the appellant.

28. Failure by the respondent to ensure that the transfer and the registration of the vehicle had been effected in terms of the contract left open the door for the registration of the vehicle in a stranger's name. The legal consequences of the respondent's inaction is that it failed in its duty of care towards the appellant; in short it was negligent.

29. The tort of negligence was defined by Lord Atkin in the *locus classicus* case of **Donoghue versus Stevenson (1932) AC 562** where the learned judge held as follows:

> ***"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cages found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a***

practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour ? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ¢ The answer seems to be— persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of Heaven v. Pender (11 Q. B. D. 503, 509).”

30. The respondent ought to have taken reasonable care, and have the transfer of the vehicle registered as envisaged in the contract to avoid the sort of consequences that its inaction resulted to. The consequences were foreseeable and, therefore, avoidable.
31. It does not help that the respondent sought to pass the blame to the National Transport and Safety Authority. If the respondent was convinced that the Authority was liable for the negligence, then it was entitled to

invoke order 1 rule 15 of the Civil Procedure Rules and institute third party proceedings against the respondent. That rule reads as follows:

> ***15. Notice to third and subsequent parties (Order 1, rule 15)***
>
> ***(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***
>
> ***(a) that he is entitled to contribution or indemnity; or***
>
> ***(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
>
> ***(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

32. Sub rule (2) provides that a copy of the notice shall be filed and served on the third party according to the rules relating to the service of a summons while sub rule (3) is to the effect that the notice shall state the nature and grounds of the claim, and has to be filed and served within fourteen days of leave, unless the court directs otherwise.

33. If, the respondent was disposed that it had a cause of action against the National Transport and Safety Authority on the latter's liability, as it seems to have convinced the learned magistrate, it was enjoined to file a third party notice so that the question of the respondent's liability to the appellant could be determined not only between the appellant and the respondent but also as between the appellant and the third party or between the respondent and the third party.

34. The following paragraphs in learned magistrate's judgment is clear that the magistrate was persuaded that the National Transport and Safety Authority was responsible for the damages that the appellant may have suffered:

> ***"What the court has to agonize over is whether the black hand of the Defendants is visible in the unlawful transfer of the chattel and continued retention of the log book which actions have visited profound hardship, prejudice and detriment to the Plaintiff.***

The Defendants have shown correspondences confirmed by the Plaintiff in their own documents showing that the misstep on the irregular registration was committed by NTSA.

The Defendants ought therefor (sic) not suffer sanctions for the mistakes of the registering governmental authority which is a separate and distinct legal persona clothed with the competence of suing and being sued. The court is counselled by the decision in Tom Mboya Oduru versus Kenya Revenue Authority (2016) eKLR cited by the Defendants in this regard.

In addition to the foregoing the court observes that the pragmatic approach for the Plaintiff was to turn his cannons on NTSA and enjoin them in this suit which they failed to do."

35. The National Transport and safety Authority may as well have been responsible for the breach of duty of care towards the appellant and for the consequent loss and damage that may have ensued but in the absence of third party proceedings, there was no legal basis of relieving the respondent of its responsibility and passing it to the National Transport and Safety Authority.

36. In reaching its decision, the respondent relied on **Tom Mboya Oduru v Kenya Revenue Authority (2016) KEHC 6084 (KLR)15**, a decision that was cited by the respondent. In that case, the plaintiff sued the Kenya

Revenue Authority for registration of a vehicle that had been purchased in an auction. Sergon, J held that Kenya Revenue Authority was wrong sued and started as follows:

> ***"It therefore follows, that the registrar should have been the right person to sue for purposes of obtaining the damages sought. NTSA should have been enjoined to shed clarity in this case since it took the mandate of the Registrar of motor vehicles . These two authorities are separate entities that can each be sued".***

37. That case is inapplicable to the circumstances of the appellant's case for the obvious reason that the plaintiff in the cited decision was dealing directly with the Kenya Revenue Authority, the Registrar of Motor Vehicles or the National Transport and Safety Authority. He had submitted his application for registration of a transfer of a motor vehicle to his name and, as far as I gather, a consent of some sort had been entered between the parties to transfer the vehicle to the plaintiff's name. The case before the learned magistrate was that respondent was liable for the withholding of the appellant's log-book and the registration of the appellant's vehicle into the names of a third party.
38. With due respect to the learned magistrate, the burden of joining the National Transport and Safety Authority to the proceedings was on the respondent for the simple reason that it was the respondent, and not the appellant, that made a claim against the Authority in circumstances

which, under order 1 rule 15 of the Civil Procedure Rules, it would be seeking either contribution or indemnity from the Authority. Had the learned magistrate given attention to this rule, he probably may not have come to the decision he came to.

39. As far as damages are concerned, the learned magistrate established that indeed the appellant suffered some damages. I understand this to be what he meant when he stated thus; *"… the unlawful transfer of the chattel and continued retention of the log book which actions have visited profound hardship, prejudice and detriment to the Plaintiff."*

40. In the submissions filed in the lower court, the appellant asked for general damages of Kshs. 1,000,000/= and to this end, he relied on the decision in **David Murithi Githaiga versus CFC Stanbic Bank Limited (2019) eKLR**. In that case the court awarded aggravated damages of Kshs. 300,000/=. Apparently, the vehicle which had been sold to the appellant had been transferred to someone else's name, a fact that Gikonyo, J. held had *"enhanced the appellant's distress."*

41. The respondent's position was that the appellant was not entitled to any damages and, therefore, it did not submit on quantum of damages. Nonetheless, the respondent did not file a cross-appeal against that part of the learned magistrate's decision according to which the learned magistrate held that the actions to withhold the transfer of the appellant's log-book and transfer the vehicle into the name of a third *"visited*

profound hardship, prejudice and detriment to the Plaintiff." Simply put, the plaintiff had suffered damages as a result of the impugned actions.

42. Even if the learned magistrate held that the appellant had not proved liability against the respondent, he ought to have assessed damages payable to the appellant had his suit succeeded and, considering that he had, for all intents and purposes, found the appellant to have suffered damages. That said, for completeness of record, I have the option of assessing general damages payable to the appellant noting, amongst other prayers, the appellant has sought in this appeal is the prayer for award of general damages.

43. It is trite that only reasonable compensations should be made and, for the sake of uniformity, comparable injuries should attract comparable awards. These principles have been espoused in **H West & Son Ltd and Another v Shephard - [1963] 2 All ER 625 where the House of Lords held as follows:**

> ***"My lords, the damages which are to be awarded for a tort are those which "so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act" (Admiralty Comrs v Susquehanna (Owners), The Susquehanna (Per Viscount Dune-din, [1926] All ER Rep 124 at p 127, [1926] AC***

655 at p 661)). The words "so far as money can compensate" point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional." (per Lord Morris of Borth-y-Gest)

44. But no particular circumstances in any two or more cases are similar, to last detail. There will always be peculiarities or variations the extent of which will ultimately be reflected in the awards made.

45. In the appellant's case, it is apparent that since he repaid his loan to the respondent, he had been stuck with a vehicle that he could neither dispose of nor use. He was deprived of the ownership documents of the motor vehicle and, in any event, the motor vehicle was in the name of a third party.

46. But there is a letter dated 7 June 2018 from the respondent addressed to the appellant's counsel informing them to log into the Transport Information System and accept the registration process of the vehicle back to the appellant's name. The letter read as follows:

> ***"RE: YOUR LETTER RELATING TO PAUL MUNGATIA & MOTOR VEHICLE REGISTRATION NO. KBS 017F***
>
> ***We refer to the subject above and your letter dated 11th May, 2018 contents of which we have duly noted. Our response is as hereunder;***
>
> ***We confirm that the motor vehicle registration issue was raised with the National Transport and Safety Authority (NTSA) on 15th May 2017. NTSA has since advised that the double registration error has since been corrected on the Transport Information Management System (TIMS) and your client may login into the system and 'accept ownership' to complete the registration process.***
>
> ***We hope that this puts the matter to rest."***

47. From the court proceedings in court, there is no evidence that the appellant attempted to log into his TIMS account to accept the transfer as advised. In his evidence, the appellant admitted that his lawyers had written to the respondent demanding release of the log-book and rectification of ownership details of the motor vehicle. He was also aware of the respondent's response. Even then the appellant testified as follows: *"I was never advised to accept the ownership in any Tims"*.

48. This was obviously untrue as it was contrary to what the letter to the appellant's lawyers said. More importantly, there is no proof of any response from the appellant's lawyers advising that the appellant had made any attempt to log into his TIMS account and failed to "*accept ownership*" or that the vehicle was not in the appellant's TIMS account. It stands to reason that if the appellant had any trouble in carrying out the respondent's instructions, nothing would have been easier than responding to the respondent's letter and advising it accordingly. I hold that the appellant failed to mitigate the damages that he suffered.

49. Taking these all these factors into consideration, and doing the best I can, I am of the humble view that an award of Kshs. 100,000/= would be a near adequate compensation for the appellant under the head of general damages.

50. The appellants appeal is, thus, allowed. The lower court judgment is set aside and the learned magistrate's order dismissing the appellant's suit with costs is substituted with the following orders:

    (a) A Mandatory injunction is hereby issued compelling the respondent to return to the appellant the original log-book of the vehicle registration number KBS 071 F in the plaintiff's sole name.

    (b) The appellant is hereby awarded the sum of Kshs. 100,000/= as general damages together with costs and interest which shall be calculated at court rates and interest shall accrue from the date of judgment in the lower court till payment in full.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE