**Tarus v Mutai & another (Civil Appeal E039 of 2024)**
**[2026] KEHC 4322 (KLR) (31 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4322 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL E039 OF 2024**

**RN NYAKUNDI, J**

**MARCH 31, 2026**

**BETWEEN**

**JOHN KIPNG'ETICH TARUS ..... APPELLANT**

**AND**

**PATRICK KIPROTICH MUTAI ..... 1ST RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 2ND RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. C. Menya (PM) delivered on 5/2/2024 in Eldoret CMCC No. 1047 of 2019; Patrick Kiprotich Mutai – vs- John Kipngetich Tarus and National Transport and Safety Authority)***

**JUDGMENT**

## Background

1. The brief background of this appeal is that the appellant was sued by the 1st Respondent herein in Eldoret CMCC Case No. E0147 of 2019. The facts at the trial court were that on the 16th day of October, 2018, he entered into motor vehicle sale agreement with the 1st defendant over motor vehicle registration No. KBR 971C Toyota Corolla of chassis number NZE1213260777 then legally registered in the name of the Appellant herein. The 1st Respondent herein stated that on signing of the said agreement and upon paying the agreed consideration, in cash to the Appellant herein, the 1st Respondent took immediate possession of the motor vehicle. The 1st Respondent/Plaintiff stated that upon being in possession of the motor vehicle he exercised due diligence and proceeded to have the motor vehicle registered under his name together with the 1st defendant filing the online TIMS documents provided by the 2nd defendant and paying the requisite fee for the same subsequently becoming the third owner of the said motor vehicle.

2. The 1st Respondent/Plaintiff further averred that on 28th October, 2019 the officers from Directorate of Criminal Investigation Nairobi through the DCI Eldoret Central Police station impounded the subject motor vehicle and towed it to Eldoret Central Police station and booked vide OB NO. 122/28/10/219 on allegation that it had a fake chassis Number and that the defendant did not have proper documentation. That the appellant working in cahoots with the officials of the 2nd Respondent fraudulently and knowingly caused the motor vehicle to be transferred to the Plaintiff with full knowledge and/or the 2nd defendant ought to have known that the motor vehicle was not genuine. As a result, he sought the following reliefs:

    a. Refund of consideration on the sale of the motor vehicle.

    b. Damages for breach of contract.

    c. Compensation for loss of user over the said motor vehicle.

    d. Costs of this suit with interest at court rates.

3. The matter was set for a full trial and judgment was entered as follows:

> " Having analyzed the above issues, I shall grant the following prayers: -
>
> I shall award damages for breach of contract to the Plaintiff.
>
> This is bearing in mind that as a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been in breach complained of had not occurred.
>
> I am bearing in mind that the Plaintiff must have gone through a lot of suffering especially at time the vehicle was taken from him.
>
> I shall therefore award Kshs. 400,000/= for the same.
>
> I shall decline to award compensation for loss of user over the said motor vehicle since there were no receipts to prove loss of user.
>
> I shall award the costs of the suit with interest at court rates from the date of filing the suit until payment in full."

4. The Appellant herein being aggrieved and dissatisfied with the judgement and decree delivered on 5th February, 2024 by Hon C. Menya (PM) preferred this appeal vide a Memorandum of Appeal dated 28th February, 2024 based on the following grounds: -

    a. That the learned trial magistrate erred in law and in fact in failing to take into account the totality of the evidence on record thus arriving at a wrong decision on the issue of liability for the changed chassis number.

    b. That the learned trial magistrate erred in law and facts by misdirecting herself in awarding damages for breach of contract.

    c. That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced by the appellant.

    d. That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced by DW2 (Duncan David Odike).

e. That the learned trial magistrate erred in law and in fact by failing to consider the submissions of the appellant.

5. The Appellant sought the following prayers from his memorandum of appeal;

a. The Judgment and decree of the lower court be set aside and be substituted with a proper finding by this honorable court.

b. That this honorable court be pleased to make any further orders as may be just and expedient in the circumstances.

c. That the costs of this appeal be borne by the Respondents.

6. The Appeal was canvassed by way of written submissions.

**Appellants Written Submissions.**

7. The Appellant herein through learned counsel Mr. Nyachiro started by submitting that the appeal before this court lies on both matters of fact and law. He submitted that this court is vested with the same powers as the trial court and is obligated to re-evaluate the evidence and reach its own conclusions. However, this duty must be exercised cautiously recognizing that this court does not lightly interfere with findings of fact unless they are based on no evidence, are founded on a misapprehension of the evidence, or where the trial court acted on wrong principles.

8. It is submitted for the appellant that an appellate court is not bound by the trial court's findings of fact where it is evidence that the court failed to consider relevant circumstances or material probabilities, or where its conclusions are inconsistent with the overall evidence.

9. Learned Counsel Mr. Nyachiro submitted that there is overwhelming evidence on record that ought to have dislodged the trial magistrate's findings particularly the assertion that the suit motor vehicle had questionable credentials. That there was no proof that the 1st Respondent was not paid, nor was any evidence tendered to show that he lacked control over the transfer process. That the trial court's conclusion in this regard were therefore baseless.

10. On the question of who is to blame for the alteration, counsel submitted that good title refers to a title that is transferable without encumbrances. That throughout the proceedings, the true title to the motor vehicle, the logbook, was never interrogated but the focus was shifted to the chassis number, one of the components

11. It is submitted for the Appellant that a careful examination of the logbook shows that the chassis number for motor vehicle KBR 971C is NZE121-3260777. That this same number appears on the NTSA records. The misdirection arose solely from reliance on a misleading DCI "tape lifting" report which suggested a different number, NZE121-0391280. Further that photographs included in the Plaintiff's further list of documents clearly show the genuine chassis number 3260777. That the handwritten number 0391280 has no evidentiary foundation.

12. Counsel submitted that the DCI report was presented by a proxy witness, PW2 as the maker was deceased. That the report was never scrutinized or tested. The trial court relief heavily on it without interrogating its accuracy, despite DW2 confirming its inconsistencies.

13. In sum, it is counsel's position that chassis number NZE121-32077 is the genuine number. All documentary evidence and witness testimony confirm that NZE121-326077 is the number appearing on the logbook and NTSA records, not the handwritten 0391280 relied upon by the DCI. That the trial court ought to have ordered the production of the vehicle for verification once it became clear that

the maker of the report was deceased. Instead, the court relied solely on an untested and contradicted report to enter judgment against the appellant. He urged this court to find merit in the appeal and set aside the judgment of the trial court.

14. As at the time of writing this Judgment, I had nothing on record filed on behalf of the Respondents herein.

**Analysis and Determination**

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike an appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. I am guided by the decisions in Peters v Sunday Post Limited [1958] EA 424 and Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, which remain the authoritative statements on the duty of a first appellate court in this jurisdiction. Accordingly, while this court has the power to depart from the findings of the trial court, it will do so only where such findings are based on no evidence, founded on a misapprehension of the evidence, or where the trial court has acted on wrong principles of law.

16. It is in Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated: -

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

17. Having reviewed the record of appeal and the written submissions filed by the Appellant, the following issues commend themselves for determination:

    a. Whether the learned trial magistrate erred in finding that the chassis number of motor vehicle KBR 971C was tampered with so as to visit liability upon the Appellant.

    b. Whether the award of damages for breach of contract was properly made in the circumstances of the case, and what orders should issue.

18. Before turning to those issues, I note that the Respondents did not file any written submissions in response to the Appellant's case, despite having had ample opportunity to do so. It is a well-established principle that where a party does nothing in response to matters properly placed before the court, the court may proceed to determine the matter on the basis of the record as it stands, drawing appropriate inferences from the absence of a response. The Appellant's case therefore stands unchallenged before this court, and I shall proceed to evaluate it against the totality of the evidence on record despite the absence of a response.

    Whether the trial magistrate erred in finding that the chassis number of motor vehicle KBR 971C was tampered with

19. I must begin this analysis with an important observation that distinguishes this appeal from the way it has been argued. All parties proceeded on the footing that the DCI forensic report, Exhibit 7, was credible evidence of tampering. The report, prepared by the Crime Scene Support Services Flying Squad Unit dated 15th November 2019, examined motor vehicle KBR 971C on 28th October 2019 and recorded three forensic observations: a variation in font style when compared with the genuine VIN from the manufacturer; a rough texture on the surface bearing the chassis numbers indicating grinding; and a variation in depths indicating tampering or alteration. The tape lifting exercise thereafter restored an underlying chassis number of NZE121-0391280. The 1st Respondent's written submissions at the trial court explicitly listed as an undisputed fact that the report was not challenged by the defendants. Equally, the 1st defendant himself, in cross-examination, conceded that there was fraud in the documents. Against that background, the Appellant's attack on the reliability of the DCI report at this appellate stage is, with respect, a somewhat belated position. The more focused and honest question is not whether tampering occurred, but who in the chain of ownership bears personal responsibility for it.

20. The law governing the proof of fraud in civil proceedings is settled. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR where Tunoi, JA. (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

21. As regards the standard of proof, the Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;

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

22. Applying that standard to the specific case against the Appellant, I am of the considered view that the evidence falls short of distinctly proving that the Appellant personally participated in or had knowledge of the chassis tampering at the time of the sale. The following considerations lead me to that conclusion.

23. First, PW2, the crime scene officer who testified on behalf of the deceased maker of the DCI report, expressly confirmed in cross-examination that the name of John Kipngetich Tarus appeared nowhere in the DCI report. He further acknowledged that the report did not show when the alteration occurred and that he could not tell who tampered with the chassis numbers. Where the forensic expert himself cannot attribute the tampering to a specific person or point in time, the gap in the evidence cannot be filled by inference alone.

24. Second, the vehicle had a documented history of multiple owners before it came into the Appellant's hands. The NTSA records showed that the previous owners before the Appellant were Charles Githaga Chege and, by the Appellant's own account, James Mwaura Kamuyu before that. The discrepancies in the ownership chain, highlighted in the 1st Respondent's submissions, are themselves evidence that the fraud in this matter predated the Appellant's involvement. The insertion of a false owner, the variations in the number of previous owners across different logbook copies, and the murky acquisition chain all suggest a scheme that cannot be lightly attributed to the appellant. None of the previous owners was joined as a party or called as a witness. Their absence leaves the full picture of this fraud unresolved on the record.

25. Third, DW2, the NTSA clerical officer in charge of records, gave evidence that in the process of transfer of a motor vehicle through the TIMS system, the chassis number cannot be amended. Only the ownership changes. This testimony has a direct bearing on the attribution of the tampering. If the TIMS system cannot alter chassis particulars, then the physical tampering of the chassis, the grinding, the alteration of font depth, the substitution of characters must have occurred outside and independently of the TIMS transfer process. The Appellant was a user of the TIMS portal, not a technician with access to the physical vehicle once he had sold it. No evidence was adduced to show that the Appellant had the means, opportunity, or motive to physically alter the chassis after the sale. Indeed, the DCI examination occurred one year after the sale, during which time the vehicle was in the exclusive possession and use of the 1st Respondent.

26. Fourth, the Appellant has not been charged with any criminal offence arising from this matter. While the absence of a criminal charge does not by itself establish innocence in civil proceedings, it is a factor that the court may note in the overall assessment of whether there is cogent evidence of personal dishonesty on the part of the Appellant. The DCI, which investigated the matter and impounded the vehicle, did not find sufficient cause to prefer charges against the Appellant.

27. The anomalies in the acquisition chain of the Appellant are troubling. The sale agreement through which the Appellant claims to have purchased the vehicle from James Mwaura Kamuyu through one Cleophas Kipruto Bett bore signatures that the Respondent submitted appeared to have been made by one person. The Appellant's own name did not appear in that agreement. On cross-examination the Appellant conceded the existence of fraud in the documents. These are matters that cast a shadow over the Appellant's account of how he came to own the vehicle, and they may well have warranted a different outcome had the 1st Respondent joined the preceding owners in the suit or applied to have them called as witnesses so that the full chain could be examined. However, the litigation as constituted placed the Appellant as the sole defendant bearing the allegation of fraud, and the question this court must answer is whether the evidence against him personally, as distinct from the evidence of a general fraudulent scheme of uncertain origin, meets the standard required to sustain a finding of fraud against him. In my assessment, it does not. The concession of fraud in the documents does not translate into an admission that the Appellant himself was the author of that fraud. It is equally consistent with the Appellant having been a conduit in a scheme orchestrated by those who preceded him in the ownership chain.

28. I should also address the equally troubling question of the Winnie Mong'are Musa transfer. The evidence on record from DW2 was that the TIMS system requires the registered owner to initiate a transfer using personal credentials. At the time the vehicle was transferred to Winnie Mong'are Musa, the 1st Respondent was the registered owner. The 1st Respondent denied ever effecting or authorizing that transfer, and he was in possession of the original logbook throughout. DW2 acknowledged that the vehicle was under caveat at the material time and could not satisfactorily explain how the transfer nonetheless proceeded. He admitted that no lost logbook report was before the court and that the name

of Linda Kerubo Nyandieka appeared inserted as a previous owner in subsequent searches without a corresponding TIMS account. These facts point compellingly to the fraudulent hand of officials within the 2nd Respondent's institution, as counsel for the 1st Respondent rightly submitted at the trial court. The trial court dismissed the suit against NTSA with no order as to costs, and since that dismissal was not challenged on appeal, it stands. This court cannot in this appeal disturb that finding. However, it must be said that the Winnie Mong'are transfer, occurring as it did after the vehicle left the Appellant's hands, cannot be laid at the Appellant's door on the evidence available.

29. For the foregoing reasons, I find that while the tampering of the chassis number of motor vehicle KBR 971C is established, the evidence does not sufficiently establish, to the standard required for a finding of fraud, that the Appellant personally knew of or participated in that tampering at the time he sold the vehicle to the 1st Respondent. The finding of fraud and personal dishonesty against the Appellant was therefore not supported by the evidence to the requisite standard. Ground (a) of the Memorandum of Appeal succeeds to that extent.

**Whether the award of damages for breach of contract was properly made**

30. The trial court awarded Kshs. 400,000/= as damages for breach of contract, grounding the award on its finding that the Appellant bore responsibility for the vehicle's questionable credentials. I have found above that the finding of personal fraud against the Appellant was not established to the required evidential standard. The question that remains is whether a breach of contract, independent of fraud, is nonetheless made out on the facts so as to sustain the damages award.

31. In approaching this question, the starting point is the express written agreement that the parties executed on 16th October 2018. That agreement was headed a sale on an "AS IS — WHERE IS BASIS" and recorded expressly that the buyer had seen, tested and approved the vehicle to his own satisfaction. These are not technical formulae inserted without the parties' understanding. They are plain words recording a deliberate and informed act. The 1st Respondent inspected the motor vehicle before purchase, approved it to his own satisfaction, paid Kshs. 600,000/= in cash, and took immediate possession. The contractual risk allocation was express and unambiguous from the outset.

32. The common law principle of caveat emptor, that the buyer beware, has always operated with greatest force in transactions of this nature. Where a buyer has the opportunity to inspect goods before purchase, elects to inspect them, and expressly records his satisfaction with their condition, he assumes the risk of defects that his inspection did not reveal. The 1st Respondent was not an uninformed purchaser dealing from a position of vulnerability. He was purchasing a second-hand motor vehicle in a market where prudent buyers verify the chassis number against the logbook and the NTSA records before committing their funds. He had both the opportunity and the means to do so. He chose to approve the vehicle to his own satisfaction and to complete the transaction on an 'as is where is' basis. Having done so, he cannot thereafter look to the seller for indemnity against a defect that his inspection failed to uncover.

33. Even approaching the matter purely from the standpoint of causation, the 1st Respondent's case encounters a difficulty that, on the evidence, is insurmountable. The DCI examination took place on 28th October 2019, a full year after the sale on 16th October 2018. During that entire intervening period the vehicle was in the exclusive possession and use of the 1st Respondent. Against this backdrop, the evidence of PW2 becomes decisive. He acknowledged in cross-examination that the DCI report does not show when the alteration of the chassis occurred and that he could not tell who tampered with the chassis numbers. The forensic expert tasked with establishing the tampering was unable to say whether it happened before the sale, during the transfer, or at some point during the year the vehicle was in the

1st Respondent's possession. In the law of contract, a claimant must establish not only that a breach occurred but that the breach caused the loss complained of. Where the expert who identified the defect cannot anchor that defect to the date of the sale transaction, the essential causal link between the seller's act and the buyer's loss collapses in my considered view.

34. Wholesomely, the 1st Respondent could point to nothing establishing the condition of the chassis at the date of sale. A claim in breach of contract that rests on an undated defect, in respect of a vehicle that passed through the buyer's exclusive hands for over a year before any defect was raised, and which was purchased on an express 'as is where is' basis after inspection and approval, cannot be sustained. The 1st Respondent has not discharged the burden of establishing that the condition of the vehicle at the date of sale was other than what was represented and accepted by him.

35. I accordingly find that the award of Kshs. 400,000/= for breach of contract was not properly made and cannot stand. The breach of contract claim against the Appellant is dismissed. Ground (b) of the Memorandum of Appeal as a result succeeds.

36. In the end, I find that this appeal succeeds entirely. The judgment and decree of Hon. C. Menya (PM) delivered on 5th February 2024 in Eldoret CMCC No. 1047 of 2019 is set aside in its entirety insofar as it concerns the Appellant. In its place, I substitute an order dismissing the 1st Respondent's suit against the Appellant.

37. The order dismissing the suit against the 2nd Respondent with no order as to costs was not challenged in this appeal and no cross-appeal was filed in that regard. That order remains undisturbed.

38. Each party shall bear its own costs.

**DATED SIGNED DELIVERED VIA E-MAIL AND CTS AT ELDORET THIS 31ST DAY OF MARCH, 2026**

**.....**

**R. NYAKUNDI**

**JUDGE**