Bashy African Credit Limited v Mwaniki & 2 others (Civil Appeal E1158 of 2023) [2025] KEHC 629 (KLR) (Civil) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1158 OF 2023

LP KASSAN, J

JANUARY 30, 2025

BETWEEN

BASHY AFRICAN CREDIT LIMITED ..... APPELLANT

AND

MARCLUS NJUE MWANIKI ..... 1ST RESPONDENT

GLEN OMONDI OLIECH ..... 2ND RESPONDENT

MUTAI GITONGA ..... 3RD RESPONDENT

(Being an appeal from the judgment of Hon. Wendy Micheni (CM) delivered on 19th October 2023 in Nairobi CMCC No. E129 of 2023)

JUDGMENT

1. This appeal derives from the judgment delivered on 19th October 2023 in Nairobi CMCC No. E129 of 2023. The suit was commenced by a plaint filed on 5th December, 2022 by Marclus Njue Mwaniki, the plaintiff in the lower court (hereafter the 1st Respondent) against Bashy African Credit Limited (hereafter the Appellant), Glen Omondi Oliech and Mutai Gitonga (hereafter the 2nd and 3rd Respondents). The reliefs sought therein were a declaratory order that the 1st Respondent is the lawful owner of the motor vehicle registration number KCZ 224W Subaru Forester (the subject motor vehicle), a further declaratory order that the purported auction conducted on 18th May, 2022 is null and void ab initio, and a consequent order for release of the subject motor vehicle to the 1st Respondent, who also sought costs of the suit.

2. The 1st Respondent pleaded that sometime on or about 9th December, 2021 he applied for a loan facility with Benghazi E.A. Ltd (the Company) for the sum of Kshs. 122,000/- upon which the logbook relating to the subject motor vehicle was to act as collateral. The 1st Respondent pleaded that before he

could repay the first instalment thereof, the loan sum was revised upwards to a sum of Kshs.140,000/- owing from interest rates, which rates the 1st Respondent felt strained by and thus engaged the 2nd Respondent who offered to assist him in obtaining a loan buy-out at lower interest rates.

3. It was pleaded by the 1st Respondent that during the waiting period, however, the subject motor vehicle was repossessed, only for him to later discover that the Appellant had colluded with the 2nd Respondent and consequently advanced a loan amount to him in the sum of Kshs. 767,000/- upon which the subject motor vehicle was to purportedly act as collateral notwithstanding the fact that the said vehicle belonged to the 1st Respondent at all material times. That subsequently, the subject motor vehicle was sold to the 3rd Respondent, by way of a fraudulent and illegally undertaken public auction.

4. Upon entering appearance, the Appellant filed a statement of defence and counterclaim dated 4th August, 2023. In its statement of defence, the Appellant denied the key averments in the plaint and liability. More particularly, the Appellant averred that while it is true that the 2nd Respondent took out a loan facility with it, to the tune of Kshs. 767,000/- the same said Respondent availed a sale agreement allegedly entered into between himself and the 1st Respondent, indicating that the latter had sold the subject motor vehicle to the former.

5. The Appellant further averred that the 2nd Respondent thereafter defaulted on the loan facility, thereby causing it to repossess the subject motor vehicle and consequently sell it to the 3rd Respondent by way of a public auction carried out on 18th May, 2022. That in the premises, it had a legal interest in the subject motor vehicle, at all material times.

6. By way of its counterclaim, the Appellant sought a declaration that the 3rd Respondent is the bona fide owner of the subject motor vehicle pursuant to a public auction carried out on 18th May, 2022; a further order directing the National Transport and Safety Authority (NTSA) to issue a new logbook in the name of the 3rd Respondent; and an alternative order that judgment be entered against the 1st and 2nd Respondents in the sum of Kshs. 977,942.50 being the alleged outstanding loan arrears owing to the Appellant prior to the public auction.

7. It is noteworthy that the Appellant did not annex the complete typed and certified proceedings from the lower court to its record of appeal. The proceedings forming part of the record do not contain the witness testimonies and proceedings before the lower court as from 22nd August, 2023.

8. Be that as it may, the court makes reference to the impugned judgment, which indicates that the 2nd and 3rd Respondents did not enter appearance and/or file their statements of defence. The said judgment also makes mention that when the suit proceeded for hearing, the 1st Respondent testified, while the Appellant called one (1) witness. Thereafter, the parties filed and exchanged written submissions.

9. Upon close of submissions, the trial court by way of its judgment delivered on 19th October, 2023 found in favour of the 1st Respondent and the Appellant in respect of the suit and counterclaim, respectively; as prayed; save that in the counterclaim, the trial court entered judgment in favour of the Appellant and solely against the 2nd Respondent in the sum of Kshs. 977,942.50. The trial court likewise ordered that the costs of both the suit and counterclaim be borne by the 2nd Respondent.

10. Being aggrieved by the judgment delivered in respect of the suit, the Appellant sought to challenge it by way of the memorandum of appeal dated 1st November, 2023 containing the following grounds:

    1. The Learned Magistrate erred in law and in fact in finding that there was fraud despite the particulars of fraud having not been specifically pleaded by the 1st Respondent.

2. The Learned Magistrate erred in law and in fact by failing to appreciate that the motor vehicle registration number KCZ 224W was subject to a chattel mortgage hence the appellant had a right to sell and auction upon default of repayment of the loan subject to clause 4(c)(i) of the offer letter dated 18th January, 2022.

3. The Learned Magistrate erred in law and in fact in making a declaration that the auction conducted on 18th May 2022 by the appellant's agents was null and void.

4. The Learned Magistrate erred in law and in fact by failing to appreciate that ownership of motor vehicle registration number KCZ 224W Subaru Forester had passed from the 1st Respondent to the 3rd Respondent and the only remedy for the 1st Respondent was damages.

5. The Learned Magistrate erred in law and in fact by making a declaration that the 1st respondent is the lawful legal and beneficial owner of motor vehicle registration number KCZ 224W Subaru Forester wine red colour despite him failing to prove his relationship with the 2nd respondent and how the vehicle ended up in the custody of the 2nd respondent.

6. The Learned Magistrate erred in law and in fact in relying on extraneous matters other than evidence adduced in court." (sic)

11. The appeal was canvassed by way of written submissions. however, at the time of writing this judgment, only the submissions by the 1st Respondent were on record; the Appellant did not avail its written submissions for the court's reference. It is also noted that the 2nd and 3rd Respondents did not participate in the appeal.

12. The court has considered the memorandum of appeal; the record of appeal; and the submissions filed in the appeal. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. From the foregoing, it follows that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

14. Upon review of the memorandum of appeal and submissions by both the Appellant and the 1st Respondent on appeal, it is the court's view the appeal turns on the key issue being whether the 1st

Respondent's suit was meritorious as pertains to the validity of the sale of the subject motor vehicle and consequently, whether the trial court arrived at a reasonable finding in respect of the suit, in the circumstances. The court will therefore address the six (6) grounds of appeal under that head.

15. The summary of the respective pleadings has already been set out. That said, as earlier mentioned, the Appellant did not avail a complete copy of the typed and certified proceedings to enable this court ascertain the contents of the respective testimonies. The court is therefore left to make reference to the impugned judgment as well as the respective bundles of documents filed in the suit.

16. The learned trial magistrate upon restating the pleadings by the parties, stated in her judgment that for claims founded on fraud, the legal position is that the particulars thereof must be specifically pleaded. That notwithstanding, the learned trial magistrate reasoned that in the absence of any rebuttals by the 2nd Respondent in particular on the allegations of fraud made against him, it was fair to conclude that the repossession and consequent sale of the subject motor vehicle was marred with fraud and misrepresentations, and hence the Appellant and the 2nd Respondent did not acquire any legal right over the said vehicle. The learned trial magistrate further reasoned that the testimony tendered by the Appellant's witness in effect stating that the 2nd Respondent's act of frustrating the joint registration of the subject motor vehicle in his name as well as that of the said Appellant, is a clear indication that the Appellant had been deceived by the 2nd Respondent. For those reasons, the learned trial magistrate deemed the subsequent sale of the subject motor vehicle null and void, thus rendering judgment in favour of the 1st Respondent, as prayed in the plaint.

17. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> > However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> > > " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
> > >
> > > The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
> > >
> > > > " Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and

> substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

18. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

19. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the plaint lay squarely with the 1st Respondent, irrespective of whether or not his claim was controverted.

20. From a re-examination of the pleadings and material on record, it is not in dispute that the 1st Respondent was at all material times the registered owner of the subject motor vehicle, as seen from a copy of the logbook tendered before the trial court. Proceeding on, upon perusal of the letter of offer dated 9th December, 2021 and constituting item 1) in the 1st Respondent's list and bundle of documents dated 5th December, 2022 it is apparent that the 1st Respondent took out a loan facility with the Company, for the sum of Kshs. 122,000/- which facility was to be utilized for business purposes. According to the said letter, the maximum amount available under the loan was a sum of Kshs. 140,000/-. Nevertheless, upon its perusal of the said letter as attached to the record of appeal, there is nothing to indicate that the subject motor vehicle was to act as collateral for the said loan facility.

21. From a further re-examination of the pleadings and material on record, the court observed that both the Appellant and the 1st Respondent availed in their respective bundles of documents, copies of the sale agreement purportedly entered into between the 1st and 2nd Respondents, in respect of the subject motor vehicle. The said agreement is dated 18th November, 2011 and indicates that the 1st Respondent had agreed to sell the aforesaid motor vehicle to the 2nd Respondent at a consideration of Kshs. 1,900,000/-. The said agreement was equally executed by the 1st and 2nd Respondents.

22. On the one hand, the Appellant argued that it relied on the aforesaid agreement in advancing the loan sum of Kshs. 767,500/- to the 2nd Respondent vide the letter of offer dated 18th January, 2022 executed between itself and the 2nd Respondent, as it was led to believe that the said Respondent had purchased the said vehicle from the 1st Respondent and which vehicle was to be utilized as security for the loan.

23. Upon its perusal of the letter of offer being relied on by the Appellant, the court observed that indeed, the subject motor vehicle was listed as collateral on the loan. The court further observed that the

Appellant similarly tendered evidence by way of a cheque dated 18th January, 2022 to support the averment that a sum of Kshs. 700,000/- was subsequently advanced to the 2nd Respondent pursuant to the loan, which Respondent it would appear later defaulted on the loan, thereby resulting in repossession and sale of the subject motor vehicle to the 3rd Respondent by way of a public auction which was conducted on 18th May, 2022, following which a certificate of sale was issued, confirming the purchase by the 3rd Respondent. It is also apparent from the record that thereafter, the Appellant applied for a forced transfer to be effected on the subject motor vehicle, in the name of the 3rd Respondent.

24. Suffice it to say that, the 1st Respondent on the other hand, denied entering into and executing the sale agreement in question with the 2nd Respondent and maintained that the subject motor vehicle belonged to him at all material times. Furthermore, the 1st Respondent stated that in view of the foregoing, the purported sale of the subject motor vehicle by way of a public auction is null and void, the same having been founded on alleged fraud and misrepresentation.

25. That said, the pertinent question remains whether the 1st Respondent therefore succeeded in his claim for fraud and misrepresentation, in order to warrant the reliefs granted by the trial court.

26. In addressing the question above, it would do well for this court to first seek to define and set out the pertinent ingredients associated with the tort of fraud and/or misrepresentation. Guidance is drawn from the decision by the Court of Appeal in Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment) when it restated the Black's Law Dictionary, 9th Edition at page 131 definition of 'fraud' as follows:

> " A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

From a reading and understanding of the above definition, fraud entails a concealment and/or misrepresentation of the true facts on the ground.

27. The Court of Appeal further set out the principles encapsulating the tort of fraud in the case of Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR in the manner hereunder:

> " The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
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> > " 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." [Emphasis added].
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> The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.
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> As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-
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> > " ...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."

28. The above rendition is echoed in an earlier decision of Urmilla W/O Mahendra Shah v Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1 KLR 1168, where the Court of Appeal rendered itself thus:

> " Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned."

29. From a reading of the foregoing binding authorities, it is clear that the burden of proof lay squarely with the 1st Respondent herein to not only specifically plead the particulars of fraud/misrepresentation, but to go a step further in strictly proving the same, to a standard of proof higher than the typical balance of probabilities applicable in civil cases.

30. From a glance of the 1st Respondent's pleadings, whose contents are summed up hereinabove, it is clear that neither the particulars of the alleged fraud nor those of misrepresentation, were set out in the plaint.

31. From a further glance of the totality of the material on record, it is also apparent that while the 1st Respondent averred that the Appellant and the 2nd Respondent colluded to defraud him of the subject motor vehicle through the sale thereof, the 1st Respondent did not tender any credible evidence to support those allegations.

32. To add on, upon consideration of the foregoing factors and upon re-examination of the material and evidence tendered, the court did not come across any credible material to support the 1st Respondent's averment that the sale of the subject motor vehicle by way of public auction, was consequently founded on an illegality or fraudulent misrepresentation, in order to render such sale null and void.

33. In view of all the foregoing circumstances, the court is of the view that notwithstanding the fact that the 1st Respondent's case was uncontroverted by the 2nd and 3rd Respondents, the trial court had no basis for finding in favour of the 1st Respondent and in granting the reliefs sought in the plaint, in the absence of any credible evidence tendered to support the claim.

34. It therefore follows that the trial court erred in entering judgment in favour of the 1st Respondent in respect of the suit. The court is therefore inclined to disturb the impugned judgment in that respect.

35. Consequently, the appeal is found to be meritorious and the same succeeds. Consequently, the judgment delivered by the trial court on 19th October 2023 in Nairobi CMCC No. E129 of 2023 is hereby set aside and is substituted with an order dismissing the 1st Respondent's/Plaintiff's suit with costs to the Appellant/2nd Defendant. However, the judgment entered in favour of the Appellant/2nd Defendant in respect of the counterclaim is hereby upheld. In the circumstances, the Appellant shall equally have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Maina holding Thuku for Appellant

Wanyanyi for the Respondent

Guyo - Court Assistant