



REPUBLIC OF KENYA



**Jama v Keru & another (Civil Appeal E347 of 2023)
[2025] KEHC 11858 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E347 OF 2023

LP KASSAN, J

JULY 31, 2025

BETWEEN

ABDI MOHAMED JAMA APPELLANT

AND

PETER THUO KERU 1ST RESPONDENT

MOMENTUM CREDIT LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. Wendy K. Micheni, CM
delivered on 28.03.2023 in Milimani CMCC No. 10387 of 2018)*

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 28.03.2023 in Milimani CMCC No. 10387 of 2018. The suit was commenced by way of a plaint dated 26.11.2018 filed by Abdi Mohamed Jama, being the plaintiff in the lower court (hereafter the Appellant) against Peter Thuo Keru (hereafter the 1st Respondent) alongside Momentum Credit Limited (hereafter the 2nd Respondent). Therein, the Appellant sought the following reliefs:
 - a. A permanent injunction restraining the Defendants by itself, servants, legal representatives, agents or howsoever from disposing off, auctioning, selling, transferring or in any other manner interfering with the Plaintiff's motor vehicle registration number KBV 359M Toyota Prado.
 - b. An order to cancel the transfer effected to the Defendants and the Plaintiff to be registered as the owner of motor vehicle registration number KBV 359M Toyota Prado.
 - c. General damages



- d. Costs of the suit plus interest
 - e. Any other relief that this Honourable Court may deem fit and just to grant.
2. It was pleaded that the Appellant that he purchased a Toyota Prado motor vehicle (registration number KBV 359M) for Kshs 3,950,000 in June 2013, paying the full price and providing documents for transfer. He subsequently discovered that the vehicle had been transferred to the 1st Respondent without his knowledge, leading to a complaint being lodged with the Banking Fraud Investigation Department. He remains in possession of the vehicle and seeks a permanent injunction to prevent the Respondents from disposing of, selling, or interfering with the vehicle, an order to cancel the irregular transfer to the defendants, and for the Appellant to be registered as the rightful owner. Additionally, he claims general damages and costs of the suit with interest.
 3. Upon entering appearance, the 2nd Defendant filed a statement of defence and counterclaim dated 17.12.2019. The 2nd Respondent denied the Appellant's claims regarding the motor vehicle ownership and transfer, putting the Appellant to strict proof on various allegations. The 2nd Respondent asserted that the Appellant had no legal or equitable right to the motor vehicle, as the 2nd Respondent held a security interest over it. That the Appellant alleged to have purchased the vehicle from a non-existent entity.
 4. By way of counterclaim, the 2nd Respondent sought judgment against the 1st and 2nd Defendants (1st Respondent and Appellant respectively) in the following manner:
 - a. A declaration that the Plaintiff is lawfully entitled to repossess and sell motor vehicle registration KBV 359M to recover the sum of Kshs 1,863,544/= due to it as at 17th December 2019 plus any accruing interest and other charges in terms of the chattels Mortgage and that should the proceeds of sale of the Motor vehicle be insufficient to clear the outstanding loan facility together with interest and other charges, the 1st Defendant do pay the deficit thereof to the Plaintiff.
 - b. In the alternative the 1st Defendant do pay the Plaintiff the sum of Kshs 1,863,544/= plus interest at court rates from 17th December 2019 till payment in full.
 - c. Such further or other relief that this Honourable Court may deem fit and just to grant.
 5. The 2nd Respondent states that the 1st Respondent secured a loan of KShs 1,050,000 from them, with the motor vehicle serving as collateral under a chattels mortgage. The 1st Respondent subsequently defaulted on this loan, which the 2nd Respondent attributed to a scheme of fraudulent intent involving the Appellant. The 2nd Respondent claimed to be lawfully entitled to repossess and sell the motor vehicle to recover the outstanding sum of Kshs 1,863,544, plus accruing interest and other charges. In the alternative, should the proceeds from the sale be insufficient, the 2nd Respondent seeks an order for the 1st Respondent to pay the remaining deficit, in addition to claiming costs for both the main suit and the counterclaim.
 6. Upon close of submissions, the trial court delivered judgment in favour of the 2nd Respondent and granted reliefs a) to c) sought in the counterclaim. The trial court equally awarded costs of the suit to the 2nd Respondent, to be borne by the Appellant, and the 1st Respondent. Resultantly, the trial court proceeded to dismiss the Appellant's plaint.



Substratum Of The Appeal

7. Being aggrieved by the aforementioned decision, the Appellant preferred this appeal by way of the memorandum of appeal dated 28.04.2023 which is based on the following grounds:
 - i. That the learned trial magistrate erred in fact and in law in failing to appreciate the nature of the subject matter of the Plaint dated 26th November 2018.
 - ii. That the learned trial magistrate erred in fact and in law by failing to consider that the 2nd Respondent had no claim against the Appellant and hence arriving at a wrong and erroneous decision.
 - iii. That the learned trial magistrate erred in fact and in law in awarding the 2nd Respondent costs against the Appellant whereas there was no claim against the Appellant in the 2nd Respondent's counterclaim in the trial court hence arriving at an erroneous decision.
 - iv. That the learned trial magistration erred in fact and in law by failing to consider and address the fact that the Appellant has all along been in possession of the subject motor vehicle hence arriving at an erroneous decision.
 - v. That the learned trial magistrate erred in fact and in law by relying on an investigation report by the 2nd Defendant that was neither produced by the maker of the document nor testified on therefore resulting to her arrival at a wrong and erroneous decision.
 - vi. That the learned trial magistrate erred in fact and in law by failing to appreciate the law, the evidence and the authorities tendered by the Appellant and understanding the same and was therefore wrong in her decision.
 - vii. That the Learned Magistrate erred in law and in fact in finding that the Appellant's plaint dated 26th November 2018 was devoid of merit and therefore dismissed the same.
8. The Appellant consequently seeks that the appeal be allowed with costs and the judgment in the Magistrates' court be set aside, and further such orders as this Honourable Court may deem fit and just be made accordingly.

Submissions On The Appeal

9. The Appellant asserts that the trial court mistakenly delivered judgment against them, given that the 2nd Respondent's counterclaim sought no orders against the Appellant. That the counterclaim was instead primarily focused on the 1st Respondent, seeking repossession and sale of a motor vehicle or monetary payment for a defaulted loan, a transaction the Appellant was not involved in. The Appellant further highlights that the 2nd Respondent's own witness confirmed the motor vehicle was in the 1st Respondent's possession, rendering any judgment against the Appellant on this matter impossible to execute.
10. Moreover, the Appellant submits that the trial court failed to acknowledge their request for interlocutory judgment against the 1st Respondent, who did not file a defence, thus leaving the Appellant's claims against the 1st Respondent uncontroverted. The judgment granted against the 1st Respondent in favour of the 2nd Respondent was also irregular because there was no proof that the 2nd Respondent's counterclaim was served on the 1st Respondent, thereby infringing upon the 1st Respondent's constitutional right to a fair hearing. For these reasons, the Appellant seeks to have the appeal allowed, the judgment set aside, and costs awarded.



11. The issues for determination are:
 - a. Whether the trial court erred in failing to appreciate the nature of the Appellant's case as pleaded in the plaint dated 26th November 2018.
 - b. Whether the trial court erred in awarding judgment and costs against the Appellant on a counterclaim which, according to the Appellant, did not specifically target him.
 - c. Whether the trial court erred in failing to enter interlocutory judgment against the 1st Respondent, who had not filed a defence to the Appellant's claim.
 - d. Whether the trial court erred in its reliance on documents not properly produced or testified upon.
 - e. Whether the trial court's decision dismissing the Appellant's plaint was justified on the evidence and the law.

Analysis And Determination

12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. 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.

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 is well settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was unfounded, 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. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and



determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

15. The Appellant’s claim was essentially founded on ownership rights to motor vehicle registration number KBV 359M. He contended that he had purchased the motor vehicle outright in June 2013 for Kshs 3,950,000, had submitted the necessary transfer documentation, and remained in physical possession of the vehicle. The Appellant’s case was therefore that the transfer of ownership to the 1st Respondent was fraudulent, and he sought permanent injunctive relief and cancellation of the transfer.
16. Upon my re-evaluation of the record, I find that the trial court correctly identified that the Appellant’s claim was one of declaratory ownership and injunctive relief. The trial court was obligated to interrogate the evidence of ownership and the chain of title, including the competing claims raised in the 2nd Respondent’s defence and counterclaim. The nature of the subject matter was well understood by the trial court, and I find no misapprehension on this aspect. The Appellant’s case was premised on an alleged purchase of the suit vehicle, KBV 359M, from a dealer known as Kilifi Motors, paying the full purchase price of KShs 3,950,000. He claimed to have submitted documents for transfer and asserted continuous possession of the vehicle. However, the evidence on record shows that the 2nd Respondent produced a copy of the logbook showing the subject vehicle was first registered on 21.06.2013. It had one previous owner, not mentioned. The Appellant produced a sale agreement the date entered is illegible due to faintness. The same was entered by Kilifi Motors as the seller described as importers and dealers of motor vehicles P.O. Box 85752-80100 Mombasa. The signature of the seller does not show the name and designation of the one who signed on behalf of Kilifi Motors.
17. The trial court, therefore, rightly found that the Appellant did not enjoin Kilifi Motors, the entity he claimed sold him the vehicle, to explain its capacity to transfer title in a vehicle that, on record, belonged to the 1st Respondent. The failure to join Kilifi Motors as a party to the suit left a critical evidentiary gap in the Appellant’s claim. On this aspect, I find no misdirection on the part of the trial magistrate, who was entitled to question the legitimacy of the sale.
18. The Appellant has faulted the trial court for awarding judgment on the counterclaim against him, yet the counterclaim, in his view, was directed primarily at the 1st Respondent. Upon perusal of the counterclaim, I note that the 2nd Respondent framed its prayers in a manner that included the Appellant as the 2nd Defendant in the counterclaim proceedings. Relief (a) of the counterclaim sought orders to repossess and sell the vehicle to recover loan arrears, a prayer necessarily affecting the Appellant since he was claiming ownership of the very same vehicle.
19. Therefore, it cannot be said that the counterclaim had no bearing on the Appellant, particularly since the 2nd Respondent alleged fraud involving both the Appellant and the 1st Respondent. It was proper for the trial court to issue orders affecting the Appellant since he was in possession of the vehicle subject to the chattel mortgage. However, I agree with the Appellant that the trial court ought to have more clearly separated liability for any monetary deficit beyond the auction proceeds, which was a claim properly directed at the 1st Respondent. In awarding costs of the entire counterclaim against both Defendants indiscriminately, the trial court fell into error, since the monetary shortfall liability was solely pleaded against the 1st Respondent.



20. It is not disputed that the 1st Respondent did not file a defence to the Appellant's plaint. Ordinarily, the Appellant would have been entitled to request for an interlocutory judgment against the 1st Respondent under Order 10 of the Civil Procedure Rules. The record shows that no such interlocutory judgment was formally sought and entered, and the trial proceeded on a consolidated basis with the counterclaim. The trial magistrate, in my view, was therefore correct to treat the matter as fully contested once the 2nd Respondent filed its defence and counterclaim, since the claims of ownership, transfer, and rights over the vehicle were intertwined. The Appellant cannot now fault the trial court for failing to grant an interlocutory judgment which was never formally entered at the outset.
21. The Appellant argued that the counterclaim by the 2nd Respondent was strictly directed at the 1st Respondent and ought not to have resulted in costs being awarded against him. On perusal of the counterclaim, however, it is clear that the 2nd Respondent claimed rights of repossession and sale of the vehicle to recover its outstanding loan. Since the Appellant claimed ownership and remained in possession of the suit vehicle, the counterclaim necessarily implicated him because any enforcement of the security could only occur against the party in actual possession.
22. Nonetheless, I agree with the Appellant in part: the prayer in the counterclaim seeking personal monetary liability beyond the proceeds of sale was solely against the 1st Respondent, and the trial court should have apportioned costs accordingly. The blanket award of costs against both Defendants in the counterclaim was therefore excessive and warrants interference.
23. The Appellant has further challenged the trial court's reliance on the 2nd Respondent's investigation report, which was produced by DW1 on 16th August 2022. However, the Appellant did not object to the production of this document, which had been included in the list of documents dated 27th December 2019. Having been produced without objection, the trial magistrate was correct in relying upon the same. Consequently, this issue cannot be raised at this stage on appeal.

Final Orders

24. Consequently,
 - a. The appeal is hereby dismissed for want of merit.
 - b. The judgment delivered by the trial court on 28.03.2023 in Milimani CMCC No. 10387 of 2018 is hereby upheld. Costs in the said matter on the counterclaim is against the 1st Defendant in the counterclaim only.
 - c. The 1st Respondent shall have the costs of the appeal herein.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025.

HON. LINUS P. KASSAN

JUDGE

In the presence of:

No appearance for Appellant

No appearance Respondent

Carol – Court Assistant

