



REPUBLIC OF KENYA



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**Daud v Moraa (Civil Appeal E044 of 2023)  
[2025] KEHC 12007 (KLR) (14 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E044 OF 2023  
BK NJOROGE, J  
AUGUST 14, 2025**

**BETWEEN**

**NAZAF MOHAMED HANIF DAUD ..... APPELLANT**

**AND**

**ISABELLA MORAA ..... RESPONDENT**

*(Being an appeal arising from the judgment and decree delivered on 23rd November 2023 by Hon. I.F. Koome, Senior Resident Magistrate, in Thika Chief Magistrate's Court Civil Suit No. E086 of 2023 – Nazaf Mohammed Hanif Daud v. Isabella Moraa)*

**JUDGMENT**

1. This judgment relates to the Appellant's Appeal dated 5th December 2023. It arises from the Judgment and Decree delivered on 23rd November 2023 in Thika Chief Magistrate's Court, presided over by Hon. I.F. Koome, Senior Resident Magistrate. It is in respect of Thika Chief Magistrates Court Civil Suit No. E086 of 2023 – Nazaf Mohammed Hanif Daud v. Isabella Moraa.
2. In the said judgment, the Trial Magistrate found in favour of the Defendant (the Respondent herein) against the Plaintiff (the Appellant herein) and proceeded to issue the following orders:
  - a. A declaration be and is hereby issued that the defendant is the beneficial owner of motor vehicle registration number KBL 944H.
  - b. An order be and is hereby issued directing the plaintiff to effect the transfer of motor vehicle registration number KBL 944H into the defendant's names within 14 days of delivery of the judgment in this matter.
  - c. In the event that the plaintiff fails to comply with order (b) above an order be and is hereby issued directing the Director NTSA to transfer motor vehicle registration number KBL 944H to the defendant.



- d. The defendant is awarded the costs of this suit.
3. The Appellant, being dissatisfied and aggrieved by the said judgment, has approached this Honourable Court seeking the following reliefs:
  - a. This Appeal be allowed.
  - b. This Honourable Court be pleased to set aside the Judgment rendered in Civil Suit No. E086 of 2023; Nazaf Mohamed Hanif Daud Vs Isabella Moraa and substitute it with Orders as sought in the Plaint.
  - c. Costs of this Appeal
  - d. Any other or further relief as this Honourable Court may deem fit to grant.
4. The Appellant is aggrieved that the Learned Trial Magistrate failed to adequately consider the totality of the Appellant's pleadings, written submissions, and the authorities cited. Thus, arriving at an erroneous conclusion that was contrary to the weight of the evidence adduced by the Appellant. The Appellant further contends that the Trial Magistrate erred in finding that the Appellant had failed to prove his case on a balance of probabilities. That the Trial Court erred in holding that the Respondent was the beneficial owner of the suit motor vehicle, in the absence of any proof of ownership. It is the Appellant's position that the Trial Magistrate improperly conflated the concept of beneficial ownership with legal title to the suit motor vehicle. In the Appellant's view, the judgment was narrow, simplistic, opportunistic, and oppressive.
5. This Appeal was listed for hearing under the Rapid Results Initiative (RRI) on 19th November 2024. Pursuant to the directions of the Court issued prior to its listing under the RRI, the parties were required to file written submissions. The Court has carefully read and considered the written submissions filed by the parties, namely: the Appellant's supplementary submissions dated 16th September 2024, the Appellant's submissions dated 20th May 2024, and the Respondent's submissions dated 10th June 2024. The Court acknowledges and appreciates the diligence and industry of both counsels in the presentation of their respective cases. The Court sincerely apologises for the delay in delivery of this Judgement and any inconveniences it may have caused the parties. The delay is attributed to unforeseen personal events that befell the Court as well as pressure of work and exigencies of time.

### **Brief Facts**

6. The Plaintiff (now the Appellant) instituted a claim before the Chief Magistrate's Court on 3rd March 2023. The Plaintiff averred that he is a garage owner and a motor vehicle dealer. He stated that in January 2021, he entrusted motor vehicle registration number KBL 944H to one Isaiah Osugo, a person well known to him, for use in his day-to-day activities. However, the said Isaiah Osugo passed away on 9th January 2023. Following his death, the Plaintiff made several attempts to recover the said motor vehicle from the estate of the deceased. Upon further investigation, the Plaintiff discovered that the motor vehicle was in the possession of the Defendant (now the Respondent). That she has since then refused to surrender it and continues to use the same against the Plaintiff's wishes, thereby necessitating the filing of the suit. The Plaintiff contended that no prejudice would be occasioned to the Defendant by the release of motor vehicle KBL 944H to him, being the duly registered owner thereof.
7. The Plaintiff sought a declaration that he is the rightful and duly registered owner of motor vehicle registration number KBL 944H. He also sought a mandatory injunction to compel the Defendant to return the said motor vehicle to him. Additionally, the Plaintiff prayed for the costs of the suit.



8. The Defendant, in response, filed a Statement of Defence and Counter-Claim dated 28th March 2023, wherein she denied the Plaintiff's claim in its entirety. The Defendant averred that motor vehicle registration number KBL 944H had been given to the deceased (her husband) for personal use as it had, in fact, been sold to him by the Plaintiff. She further stated that the deceased subsequently gifted the said motor vehicle to her. The Defendant asserted that since the purchase of the motor vehicle, her late husband consistently insured it in his own name as he was the beneficial owner thereof. Additionally, the Defendant claimed that the Plaintiff had previously sold several motor vehicles to her late husband, some of which were duly registered in his name with the National Transport and Safety Authority (NTSA). In the circumstances, the Defendant contended that she was under no legal obligation to accede to the Plaintiff's demands or notice of intention to sue.
9. By way of Counter-claim, the Defendant averred that at all material times, she has been and continues to be the beneficial owner of motor vehicle registration number KBL 944H. She asserted that her deceased husband purchased the said motor vehicle from the Plaintiff and subsequently gifted it to her for her personal use. The Defendant further stated that her deceased husband insured the vehicle in his own name while awaiting formal transfer of ownership by the Plaintiff into her name. Unfortunately, her husband passed away on 9th January 2022 before the formal transfer could be effected.
10. The Defendant contended that the Plaintiff was aware of her husband's death. That he is now attempting to unjustly take advantage of the situation by seeking to repossess the vehicle, which she has been using since it was purchased for her by her late husband. The Defendant emphasized that the Plaintiff is well known to her and that he had previously sold more than three motor vehicles to her deceased husband, some of which remain untransferred and unregistered in the deceased's name to date. Consequently, through the Counter-claim, the Defendant seeks an order compelling the Plaintiff to formally transfer the motor vehicle the subject of this suit to her and/or to the estate of the deceased, Isaiah Osugo.
11. The Defendant sought a declaration that she is the beneficial owner of motor vehicle registration number KBL 944H. She also sought an order directing the Plaintiff to transfer the said motor vehicle to her within fourteen (14) days from the date of delivery of the judgment. In the alternative, the Defendant requested that if the Plaintiff failed to comply with this order, the Court should direct the National Transport and Safety Authority (NTSA) to effect the transfer of the said motor vehicle to her. Additionally, the Defendant sought the costs of the suit.

### **Issues For Determination**

12. From the record and the submissions of the parties, the Court finds that only one issue arises for determination:
  - a. Who between Appellant and the Respondent proved their case based on either the Plaintiff or the Counter-claim on a balance of probabilities before the Trial Court?

### **Analysis**

13. This being a first Appeal, this Honourable Court is under a duty to re-evaluate and reassess the evidence afresh and draw its own independent conclusions. In doing so, the Court must, however, bear in mind that the Trial Court had the distinct advantage of seeing and hearing the witnesses, and thus was better placed to assess their demeanour and credibility.



14. The applicable legal principle was succinctly stated in *Mbogo and Another v Shah* [1968] EA 93, where the Court held:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

15. The duty of a first Appellate Court was definitively settled in the locus classicus case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court of Appeal (per Clement De Lestang, V-P, Duffus and Law JJ.A) laid down the guiding principle in the following oft-cited passage:

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

16. In undertaking its duty, this Court is mindful of the fact that it neither saw nor heard the witnesses who testified before the Trial Court. That advantage rested solely with the Trial Court, which was best placed to assess the demeanour and credibility of the witnesses. However, with respect to documentary evidence, the Appellate Court is in as good a position as the Trial Court to evaluate such materials. This is so since documents speak for themselves and no party may import into them matters that are extrinsic to their contents. The Court also notes that the record of the Trial Court does not speak as to the candour or impeachment of the witness who appeared before the Court below.

17. The duty of a first Appellate court was further restated by the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336, where it held:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

18. The same principle was echoed in the case of *Peters v Sunday Post Limited* [1958] EA 424, where the Court held as follows:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

### **The burden and standard of proof in civil cases**

19. The standard of proof required in civil cases is on a balance of probabilities. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, clearly stipulates that the burden of proof lies with the party who alleges. The provision states:

“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. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

20. Further, Section 108 of the *Evidence Act* provides that:

“The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”

21. The burden and standard of proof in civil cases was comprehensively discussed in *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR, where the Court, while citing Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372, stated as follows:

“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 the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

22. Similarly, in *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR, the Court explained the legal and evidential burden of proof and the shifting of that burden as follows:

“The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.....”

23. From the foregoing, it is clear that the Appellant, being the Plaintiff in the Trial Court, bore both the initial legal and evidentiary burden to prove his case against the Respondent on a balance of probabilities. Equally, the Respondent bore the burden of proving her Counter-claim on a balance of probabilities. Generally, it is only after a party has discharged their burden that the evidentiary burden shifts to the opposing party to adduce evidence in rebuttal. The evidential burden is dynamic, operating like a pendulum that may shift back and forth depending on the stage of the proceedings and the evidence presented. At any given point, its position is determined by asking: who would fail if no further evidence were adduced?



- a. Who between Appellant and the Respondent proved their case based on either the Plaintiff or the Counter-claim on a balance of probabilities before the Trial Court?
24. The legal and evidential burden of establishing facts and contentions rests initially with the party who asserts them. However, as stated by the Supreme Court and reiterated by Mrima J in *Sagala v Sagala* (Civil Appeal 9 of 2023) [2024] KEHC 5573 (KLR) (9 May 2024) (Judgment) while the legal burden remains constant, the evidential burden is fluid and may shift depending on the quality and weight of evidence presented. The court in *Sagala v Sagala* (supra) stated:
- “The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
25. In the present case, the Appellant asserted that he had given the motor vehicle to one Isaiah Osugo, a close acquaintance, in January 2021 for his day-to-day use. In response, the Respondent denied the Appellant’s claim of ownership and contended that the subject motor vehicle had been purchased by her now-deceased husband from the Appellant and subsequently gifted to her for her personal use. The Respondent further asserted that third-party insurance was consistently taken out in the name of the deceased and that she had been in possession and use of the motor vehicle since the time of its alleged purchase. In support of her claim, the Respondent produced third-party insurance policies bearing her late husband's name, specifically Policy No. 070/PED/TPO/NJE/19/11056, valid from 31st July 2019 to 30th July 2020, and another covering the period from 31st July 2020 to 30th July 2021.
26. The Appellant’s case as the Court understands it is that he had gifted the subject motor vehicle to the deceased. He had allowed the deceased to use it for day-to-day use. He had retained the title and ownership as indeed the logbook was registered in his name. It was still in his name as at the time of the proceedings.
27. On the other hand, the Respondent countered by denying that the motor vehicle was gifted to the deceased for day-to-day use. She alleged that this was a sale to the Deceased. That the Motor vehicle was fully paid for. Unfortunately, the records of the sale and payments had been stolen were held by the deceased’s son. That the deceased had as proof of ownership taken out insurance for the motor vehicle. That the deceased had in turn gifted the motor vehicle to the Respondent who was a wife.
28. The question this Court poses is as between the holder of a certificate of ownership and the holder of an insurance certificate, whom should the Court be persuaded as the bonafide owner thereof.
29. Both scenarios in this suit are fraught with serious issues. The Appellant seems to miss the date of delivery of the Vehicle by a mile. In 2019 the deceased was already taking out insurance for the motor vehicle. On the Respondent’s part she has not a single document as proof of sale of the vehicle, proof of any payments or even proof of a transfer to her.
30. This Court is not persuaded that proof that someone took out insurance for a vehicle can displace or dislodge proof by way of the logbook.



31. Section 8 of the *Traffic Act* states as follows;

“ 8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

32. The Court notes that this proof by way of registration is rebuttable. It can be displaced by cogent evidence. Though there were evidence or other transactions between the Deceased and the Plaintiff, all this was oral evidence that was denied by the Plaintiff.

33. On a balance of probabilities, this Court finds that the Respondent did not displace the Appellant’s claim as to ownership. By waving insurance certificates, the Respondent did not adduce sufficient evidence to prove there was any sale or intention to sell the subject motor vehicle to the deceased. Whereas every case will always be determined on evidence and its own circumstances, sad would be the day when an insurance certificate will trump over a logbook by way of proof of ownership. This is more so in absence of any other documentary or cogent evidence.

34. The principle of beneficial ownership relied upon by the Respondent would be most applicable in running down and material damage claims. It would hardly apply in claims arising out of ownership of the very thing. The Respondent prayed that the subject motor vehicle be registered in her favour. As this has been declined, she should deliver the Motor vehicle up or she will be compelled to do so by way of a mandatory injunction.

35. The Court is also concerned in absence of proof or sale or gift *inter vivos*, the Trial Court was prepared to pass the alleged ownership from the Estate of the late Isaiah Osugo to the Respondent. If the Appellant had sold the motor vehicle to the late Isaiah Osugo, then the transfer should be to the Estate or whomsoever the Probate and Administration Court declares as the owner thereof.

36. Accordingly, this Court is persuaded by the Appellant’s case and finds that the Respondent failed to discharge the burden. The Counter-claim fails on a balance of probabilities. The Court is therefore persuaded to overturn the Judgement of the Trial Court.

37. As to Costs, the same follow the event. The Appellant is awarded the costs of this Appeal and the Trial Court below.

### **Determination**

38. In view of the foregoing, the Court finds that the Appeal is merited and allows the same in the following terms;

a. THAT the Judgement of the Trial Court rendered in Thika Chief Magistrates Court Civil Suit No. E086 of 2023 Nazaf Mohamed Hanif Daud vs Isabella Moraa is hereby set aside and substituted with Judgement in favour of the Plaintiff as against the Defendant as follows;

i. A declaration that the Plaintiff is the rightful and duly registered owner of Motor Vehicle registration number KBL 944H.

ii. A mandatory Injunction compelling the Defendant to return motor vehicle registration number KBL 944H to the Plaintiff.

iii. The costs of the suit are awarded to the Plaintiff.

iv. The Defendant’s Counter-claim is dismissed with costs.



39. The Costs of the Appeal are awarded to the Appellant.

40. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14<sup>TH</sup> DAY OF AUGUST, 2025**

**NJOROGE BENJAMIN K.**

**JUDGE**

Judgment delivered in the presence of

Mr. Steve Ogolla for the Appellant.

Mr. Lukorito for the Respondent.

Ms. Susan Nzioka - Court Assistant

