Co-operative Bank of Kenya & another v Gisemba (Civil Appeal E053 of 2022) [2024] KEHC 3080 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E053 OF 2022

DKN MAGARE, J

MARCH 20, 2024

BETWEEN

CO-OPERATIVE BANK OF KENYA ..... 1ST APPELLANT

VERONICA KWAMBOKA RANGI T/A NIRA AUCTIONEERS .... 2ND APPELLANT

AND

DUKE ORIKU GISEMBA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable Caroline Ocharo SRM given in Kisii CMCC 432 of 2022. The Appellant was the Defendant in the suit.

2. The Appellant filed 9 grounds of appeal vide the Memorandum of Appeal dated 28/7/2022.

    a. The Learned Magistrate erred in law and fact in ordering that there be a permanent injunction over the suit motor vehicle, Motor vehicle registration No. KCZ 60S, Prado Land Cruiser in favour of the Respondent, yet the Court had established that the 1st Appellant was a joint owner of the subject motor vehicle with ownership and collateral security rights attached to it.

    b. The Learned Magistrate erred in law and fact in ignoring the law on capacity to pass good title following her finding that there was evidence that confirmed that the subject matter vehicle was fraudulently transferred to the Respondent herein.

    c. The Learned Magistrate erred in law and fact by relying on an investigation report on the police produced by the Respondent which is inconsistent with the engine number particulars of the subject motor vehicle.

    d. The Learned Magistrate erred in law and fact by holding that the Respondent was an innocent purchaser for value without notice, yet the Appellants had demonstrated that the

consideration paid by the Respondent to the seller of the suit motor vehicle as returned to the Respondent one day after payment.

e. The Learned Magistrate erred in law and fact by holding that the Respondent was an innocent purchaser for value, yet the evidence in the Respondents affidavit dated 19th April, 2021 was that the Respondent's Further Witness Statement dated 17th August, 2021 and his viva voice evidence where he swore that he paid the Consideration in cash and via M-pesa; which Further Statement was only filed when the 1st Appellant highlighted to the court that the subject considerations was not paid as originally pleaded.

f. The Learned Magistrate erred in law and fact by holding that the Respondent was not a party to the fraud, by his conduct in taking the subject motor vehicle for inspection in order to obtain a new log book and not the seller.

g. The Learned Magistrate erred in law and fact by finding that the Appellants were liable for costs of the suit despite the court holding that the 1sty appellant had both the legal and equitable right to reposes the suit motor vehicle and advertise it for sale through its statutory right of redemption.

h. The Learned Magistrate erred in law and in fact in making outright prejudicial substantive conclusion, applying selective justice and disregarding the evidence tendered by the Appellants.

i. The Learned Magistrate considered extraneous issues which vitiated her judgment thus arriving at an erroneous finding.

3. Such a long-winded Memorandum of Appeal is an unnecessary and is inimical to Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Pleadings

7. Vide a Plaint dated 19/4/2021, the Respondent filed suit against the Appellant and Niro Auctioneers stating that he bought Motor Vehicle Registration KCS 060S Prado Land Cruiser form Kennedy Ng'anga Ngige (who is now deceased).

8. The Respondent stated that he was a lawful registered, and sole owner of motor vehicle Registration KCS 060S. He stated that on 25/11/2020 when he bought the vehicle he paid entire consideration and was an innocent purchaser for value without consideration.

9. The said motor vehicle was said to have been reposed in circumstances that amounted to trespass.

10. He sought the following prayers –

    a. That the court be pleased to issue an Order of permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents and or servants from selling by public auction entering into or taking possession or in other way interfering with the Plaintiff's possession of Motor Vehicle Registration No. KCZ 060S.

    b. A Declaration that the attachment and intended sale of Motor Vehicle Registration No. KCZ 060S was illegal and unlawful.

    c. An Order that the 2nd Defendant returns Motor Vehicle Registration No. KCZ 060S to the Plaintiff

    d. General damages for trespass

e. Costs of the suit.

11. The Appellant filed a defence dated 15/6/2021 where they denied the claim. They set out how one Kennedy Ng'anga Ngige applied for a loan on 1/9/2020 for Ksh. 4,070,000 and was to pay by monthly instalment of Kshs. 109,147.91. The said motor vehicle was served through Movable Property Rights Act No. (13 of 2017 where the vehicle was charged and is still charged to date to Cooperative Bank of Kenya, the Appellant.

12. The borrower was making repayments until March 2021 when the account went into default.

13. In a classic evasive defence, the Appellant in paragraphs 3 and 7 stated that paragraphs 3-6, 7-9 are contested. It was their case that a search would have revealed actual registration. The Appellant stated that it was not privy to the said agreement on 25/11/2020. The Appellant averred that it repossessed the motor vehicle as a joint owner and it is not trespass.

14. The Appellant was of the considered view that the intentions of the Respondent and borrower was to defraud the Appellants. It was stated that MPSR collateral search, Banks NTSA search and log book in the names of the Kennedy Ng'anga Ngige bear the same Engine Number 27R -1475603 while the Plaintiff's documents relate to Engine No. 27R1475593. They denied the claim.

Evidence

15. The Plaintiff testified on 8/9/2021 and produced all the documents on the list of documents. He adopted his witness statement and a further statement dated 17/8/2021. He was cross examined extensively.

16. It was the Plaintiff's testimony that the Motor Vehicle Registration No. KCS 060S was released on 20/5/2021 via a ruling by E.N. Obina, PM, on a running attachment.

17. The Plaintiff stated that he carried out a search on an NTSA platform and not moveable properties security search or at Sheria house. He stated that there were discrepancies in the vehicle, which he noted when we took the vehicle for inspection. He stated he paid for the vehicle. The seller corrected an anomaly on the Engine Number and registration was carried out.

18. DW1, Duncan David Okeyo testified and produced a statement testified that he works for NTSA He wrote a statement which he adopted. He stated that the transfer was not done in a proper way. He stated that Kennedy Ng'anga Ngige removed ownership of Cooperative Bank Limited.

19. He confirmed that the current search would show the Respondent was the owner. The registration to the bank was on 8/11/2020. He could not tell when transfer occurred. He also stated that the Respondent was issued with log book by NTSA.

20. He confirmed that the log book was a genuine document. He confirmed that Exhibit 1 was in the name of Kennedy Ng'anga Ngige and was issued by NTSA. The search as at 16/12/2020 was equally from NTSA. The witness was stood down. Later he came and confirmed that only registration and importation documents are available.

21. The second Defence witness Amon Ogembo testified on 15/3/2022. He adopted his statement and produced documents in his possession. He indicated issues of Engine numbers and a search showing colour and chassis number. He stated that he did not know whether the Plaintiff knew of the fraud. He stated that he did not have a log book but has a copy.

Submissions

22. The Appellant filed submission on 19/1/2024. They gave a background of the matter and raised 3 issues, which I shall address in the analysis.

23. They submitted that the motor vehicle was registered as collateral under the MPSR Act. They stated that the owner had not finished paying. They relied on section 8(e) of the Hire Purchase Act. This was supported by the decision of Patrick Kinyua Munyito v Francis Muriuki & Another (2016) eKLR. Based on this authority, it was submitted that ownership of goods under Hire Purchase only passes to the hirer upon payment of all sums due to the owner.

24. They also addressed the bona fide doctrine and fraud. It was their case that the case was proved. They stated that they were entitled to exercise the right of redemption. They annexed another document showing that the current registered owner is NCBA Bank Kenya Plc & George Muriu Ngega. I do not know what the 2 documents were meant to proof, the case in the lower court having been closed.

25. It was further submitted that no good title would pass because the 1st Appellant was joint owner of the motor vehicle and had not given prior consent to the sale. Reliance was placed on the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina (2019) eKLR.

26. They then amended the Memorandum of Appeal pursuant to leave granted on 20/211/2023 to pray for:-

> "Judgement of the Lower Court be set aside and substituted by an Order for compensation against the Respondent for the value of the subject Motor Vehicle Registration No. KCZ 060S in the sum of Kshs. 4,070,000/- following the sake of the motor vehicle by the Respondent during the Appeal proceedings."

27. The Respondents filed submissions stating that the subject Appeal was predicated on various grounds as set out in the amended Memorandum of Appeal dated the 1st of December, 2023 and filed in Court on the 7th of December, 2023. It was their case that the suit lodged at the Lower Court had been instituted by the Respondent herein, Duke Oriku Gisemba, who at the time of filing the same, was the duly registered owner in respect to Motor vehicle registration no. KCZ 060S, Prado Land Cruiser.

28. Their main grievance was inter alia that the 2nd Appellant herein acting under the instructions of the 1st Appellant had without Lawful basis attached the subject motor vehicle and advertised it for sale through a public auction. There submitted that the Respondent, had bought Motor vehicle registration no. KCZ 060S, Prado Land Cruiser from its original owner, Kennedy Ng'ang'a Ngige (now deceased) at a valuable consideration.

29. They stated that prior to said purchase, the respondent conducted due diligence and ascertained through a search dated the 26th of November, 2020 that the said motor vehicle was registered in the name of Kennedy Ng'ang'a Ngige. There Respondent submitted that there was no encumbrance at all registered against the said subject motor vehicle. Upon executing the sale agreement and payment of the agreed consideration, the vendor therein transferred the subject motor vehicle in his favour culminating to issuance of a Log book to his name as per exhibit 4. This was accompanied by possession. It was their view that repossession of his motor vehicle by the Appellants amounted to trespass.

30. They submitted that the Appellants had maintained that Kennedy Ng'ang'a Ngige had applied for a loan facility from the 1st Appellant for purchase of the subject motor vehicle. The Appellants allege that

the loan facility was secured by a joint registration over the subject motor vehicle which was further charged under the *Movable Property Security Rights Act* in its favour.

31. They set the following issue for determination: -

> "Whether the Trial Court erred in holding that the Respondent was an innocent purchaser for value and whether the Appellants tendered sufficient evidence in proof of any fraud on the part of the Respondent."

32. They broke down the issues as follows: -

    i. Whether the Trial Court erred in holding that the Respondent was an innocent purchaser for value.

33. On this they adopted submissions in the lower court. The main issue that then flows for the Court's determination is whether the Trial Court erred in making a finding that the Respondent had proved that he was an innocent purchaser for value of the subject Motor vehicle. They stated that they proved that an innocent purchaser was stated in the Court of Appeal case of Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR.: -

    a. He holds a certificate of title;

    b. He purchased the property in good faith;

    c. He had no knowledge of the fraud;

    d. He purchased for valuable consideration;

    e. The vendors had apparent valid title;

    f. He purchased without notice of any fraud;

    g. He was not party to any fraud.

34. They stated that in in its determination, the Court analyzed the totality of the evidence as tendered by the parties herein and the set of documents produced in support of their respective positions and concluded that there was proof that the Respondent was an innocent purchaser for value. It is not in contest that the Respondent produced a copy of a search and Logbook in proof that he was registered as the owner of the subject motor vehicle. The Respondent's evidence on this aspect was duly corroborated by PW2, DW1 and DW2.

    35. They stated at NTSA confirmed that the documents in the name of the Respondent and those of the previous owner "Kennedy" produced as Pexh1, 3 and 4 were confirmed as genuine and originated from their institution. Further, it was evident that the Respondent was not a party to the said agreement. Neither did they tender any proof that the Respondent was aware of the said agreement at the time of the purchase.

36. The Appellants have not demonstrated at all that the Trial Court erred in holding that the Respondent had no knowledge of fraud. As per the case of Koinange & 13 others vs Charles Karuga Koinange (1986) KLR 23, as cited in Sauli Maundu Mutua v Mary Munguti & another [2019] eKLR where the lower Court emphasized that fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. That mere mention of fraud or illegality in passing will not do. It was their case that the allegations on the alleged refund of the purchase price and discrepancies on the engine numbers were sufficiently addressed by the Trial Court, which held that Respondent had offered evidence which

sufficiently explained the circumstances under which the same was made. No witness was called by the Appellant to rebut and or controvert the Respondent's evidence that consideration for the purchase of the subject motor vehicle was fully paid.

37. Finally, the Respondent led evidence in proof that vendor "Kennedy" had apparent valid title. It is however notable that the said rule/doctrine has an exception, and one of it being where a party proves to be an innocent purchaser for valuable consideration as was aptly held in the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR. For clarity, in the said case, it was held thus;

> " The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; ..."

Analysis

38. 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 the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

39. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...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 is 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."

40. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. 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."

41. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

42. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself 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..."

43. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " 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."

44. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

> " Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

45. The Trial Court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

46. The main issues that the Appeal raises are: -

    a. Whether the Respondent was as innocent purchaser for value without Notice.

    b. What remedies are available to the parties.

47. This case has placed immense pain on the parties. However, the Appellant's conduct is a moral hazard. They have acted counter- intuitively at all stages of the dispute. Every time they got a chance, to act or protect or gain for themselves they worked so hard to lose.

48. The Appellant is not a hapless litigant who should not be warry of possible Fraud and how fraud is carried and consequently proved. However, both defence evidence and the Respondents evidence supported one fact and one fact only. This I shall demystify shortly through conceptualizing, contextually and problematizing the imbroglio that this case is.

49. The truth is that the first bullet was shot by Cooperative Bank, which was the led down to garden path to its peril. One of the safeguards parties have is the original title document. No transfer is possible without surrender of the same.

50. The evidence from NTSA was that the NTSA employs a two-key encryption. The transactions will be limited by being completed by the other party. In this there must have been approval on the side of Cooperative Bank.

51. If they did not approve, they must have left their credentials to be used. The last safeguard was surrender of the original log book. The Appellant's witness admitted that they did not have the original log book. Further, they did not produce any form of evidence showing they were jointly registered with the former owner. How could they be registered without having the original log book in their possession. Definitely the Appellant did not steal it.

52. There have been futile attempts to address fraud. The court is not required to address this as it is not in the pleadings. Parties file pleadings so that they may set boundaries for their cases.

53. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> " [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness."

54. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law

is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

1. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

"

"11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

56. It follows that pleadings must be specific as to the claim sought. A party cannot purport to throw unseemly information by way of pleadings and expect the court to read between the lines as to the intended meaning. As courts interpret the law, parties must do what it takes to set factual situations that bespeak the law. Proper factual interpretation flows from concise pleadings that clearly set out the intention of the parties. The court cannot be reduced into filling gaps in imprecise pleadings for if this were to happen, the court would then be descending in the arena of the parties' conflict. This is unacceptable. It is not the spirit of the aforestated Order 2 Rule 4 of the Civil Procedure Rules.

57. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the

parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

58. I note that there are no particulars of fraud attributed to the Respondent. Before proceeding to prove fraud, it must be pleaded. In the case of The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

59. Fraud is part of the matters that must be pleaded. Order 2 rule 4 provides as follows: -

> "(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> a. which he alleges makes any claim or defence of the opposite party not
>
> b. maintainable;
>
> c. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> d. which raises issues of fact not arising out of the preceding pleading.

60. The late Kennedy Ng'anga Ngugi, was a vital party to the transactions. Despite pleadings by both parties showing how crucial his conduct was, there was attempt to apply and join his estate to the suit.

61. The court cannot find fraud against the deceased in absence of pleadings and joinder of such a party. This is on the basis of audi altetrum partem.

62. The Responded pleaded that he is the registered owner, an owner in due course, an innocent purchaser without payment. The Appellant converted on lack of further payment. They however did not

challenge evidence of PW2 that they were paid cash. This is after party of the deposit was reserved due to the discrepancies. This are said to have been rectified. It is not material that are discrepancies in the Engine numbers. This is because, it is an issue on quality of the vehicle. If the Engine was charged, it is up to him. The chassis remains the registration identifier of a motor vehicle.

63. In any case, if the two relate 2 vehicles then why will the Appellant be interested in the vehicle registered in the name of the Respondent.

64. The Respondent's documents, show that as at 12/12/2020 the said motor vehicle registration KCS 060S, registered on 27/8/2020 was owned by Duke Oriku Gisemba and not Kennedy Ng'anga Ngige. There was only one other previous owner. A search on 26/12/2020 showed the owner as Kennedy Ng'anga Ngige. The police confirmed that the Engine and Chassis Number was intact and genuine. A search shows that the previous owners were Kennedy Ng'anga Ngige and Motor City Limited. At no point did Cooperative Bank show that they were registered. The motor vehicle was registered by Motor City Ltd and transferred to Kennedy Ng'anga Ngige and to the Respondent.

65. If fraud occurred, it is between the Appellant and the Deceased. However, given that the deceased still had a log book the Appellant must have been compliant.

66. Was the Respondent an innocent purchaser for value with notice? From the proceedings there is an inescapable conclusion that the Respondent did not participate in any fraud. Let the Appellant live the fact, probably that they registered a charge under MPRA and forgot to take original log book. I am using the word forget advisedly. The deceased owner was best placed to answer the events. He was never sued.

67. Was there fraud in this matter? There was none pleaded and none proved. The next question is whether there could have been a difference if the Deceased was joined as a party. We will never know.

68. The duty on the Respondent was a simple one it is set out in Sections 107 – 109 of the *Evidence Act*. The same provides as doth: -

> "(1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. 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."

69. The burden of proof is well settled. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

70. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "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 probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained."

71. Did the court err in holding that the Respondent was not party to the fraud? There was no fraud pleaded. The Appellant's witness was clear that they do not know the role the plaintiff played. Parties cannot throw the cases in the court and want the court to lift through the evidence and fraud.

72. Lastly, are prayers in the Memorandum of Appeal tenable? Firstly, even if the Appellant had succeeded in their case, the court could not have awarded damages sought. These are of the nature of special damages which can not only be particularly pleaded by specifically proved. In the case of David Bagine (supra), the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

73. If the sale of the motor vehicle was not in contempt of court, such evidence need to be introduced properly by adduction of evidence. There is no application to adduce and test the evidence.

74. In the case of Mwangi v Karanja (Civil Appeal 05 of 2018) [2022] KEHC 454 (KLR) (10 May 2022) (Ruling), justice J Wakiaga stated as doth: -

> " The legal position on when the appellant court may allow a party to adduce fresh and or additional evidence is now settled based on several decisions of the superior court and this court does not wish to re-invent the wheel thereof save for to state some of them as follows:A. National Cereals and Produce Board v Erad Supplies &general Contracts Ltd (CA 9 of 2012), The Administrator, H H The Agha Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127 the Court of Appeal emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage.

In Wanjie &others v Sakwa & others [1984] KLR 275, the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules. Chesoni JA observed at page 280: -

" this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.""

B) In the case of Kenya Medical Research Fundatiion v Erick Omenja t/a Manje Auto Garage [2020] eKLR the court had this to say:

"13. As said, the application under consideration is one for leave of the Court to adduce additional evidence appeal. Therefore, Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 is the legal foundational basis of the application. For ease of reference I will reproduce the said provisions.

75. In a nutshell the Appeal is untenable and is consequently dismissed with costs. Under Section 27 of *Civil Procedure Act*, the court can indicate costs. The said Section provides as doth: -

" 27.

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall

follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

76. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

77. The Appellant was seeking a sum of 4,070,000/=. The appropriate costs should be Ksh. 245,750/=. The end result is that I dismiss the Appeal with costs of Kshs. 245,750/= and grant stay of execution for 30 days.

Determination

78. In the upshot, I make the following Orders:

    a. The Appeal is devoid of merit and is dismissed in limine with costs of Kshs. 245,750 to the Respondent.

    b. There be stay of execution for 30 days.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MARCH, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mungai Kuria & Muthoga LLP Advocates

Ochoki & Co. Advocates for the Respondent

Court Assistant - Brian