Madan Mohan Aggarwal Substituted by Usha Aggarwal t/a Esso Motor Sales and Service Station v Mubia (Deceased) & another (Civil Appeal 13 of 2019) [2024] KEHC 2919 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2919 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL 13 OF 2019

AK NDUNG'U, J

MARCH 20, 2024

BETWEEN

MADAN MOHAN AGGARWAL SUBSTITUTED BY USHA AGGARWAL T/A ESSO MOTOR SALES AND SERVICE STATION ..... APPELLANT

AND

SAMUEL KARIMI MUBIA (DECEASED) ..... 1ST RESPONDENT

FRANCIS NDICHU GATHOGO ..... 2ND RESPONDENT

(Appeal from original Decree passed on 20/08/2019 in Nanyuki CM Civil Case No. 66 of 2014-J. W Gichimu)

JUDGMENT

1. By a plaint dated 29/08/2001, the Appellant sued the Respondents claiming an amount of Kshs. 1,469,975/- with interest at commercial rate from January 1996 and costs of the suit. The Appellant's case was that by a hire purchase agreement dated 12/09/1995, the Appellant sold a motor vehicle registration number KAG 114A at a consideration of Kshs.1,590,000/- to the 1st Respondent (now deceased). It was further averred the said motor vehicle was returned on 15/01/1996 and at the time, the Respondents were indebted to the Appellant in the sum of Kshs.1,469,975/-. It was also averred that the 2nd Respondent was sued as a guarantor of the 1st Respondent upon a written guarantee by the 2nd Respondent dated 12/09/1995.

2. In response, the 2nd Respondent filed an amended defence and counterclaim dated 25/04/2016 whereby he denied the allegations in the plaint and denied signing the guarantee. In his counterclaim, the 2nd Respondent averred that he bought a motor vehicle registration number KAS 943N and was registered in the name of his wife Margaret Wangu Gichuki to hold in trust for him. On 21/11/2006, his motor vehicle was however attached by the Appellant on account that he had failed to pay the

amount guaranteed to the 1st Respondent and despite his frequent demand for the release of the motor vehicle, the Appellant adamantly declined.

3. His claim was therefore for the return of the motor vehicle KAS 943N or its replacement or payment of its market value plus loss of user at the rate of Kshs.6,000/- from the date of the attachment of the motor vehicle; a declaration be issued that the attachment of the motor vehicle was unlawful and illegal; payment of a sum of Kshs.1,200,000/- being the value of the motor vehicle at the time of the unlawful attachment.

4. The matter proceeded for hearing with the Appellant calling 2 witnesses. The 2nd Respondent called three witnesses.

5. At the conclusion of the matter, the trial court entered judgment in favour of the 2nd Respondent's counterclaim in terms of prayer 1A and 1B of the counterclaim. Prayer 1A was a declaration that the attachment of the 2nd Respondent's motor vehicle was illegal and prayer 1B being payment of Kshs. 1,200,000/- being the value of the motor vehicle at the time of the unlawful attachment. The Appellant's claim was dismissed.

6. In dismissing the Appellant's claim, the trial court noted that the purported signature by the 2nd Respondent on the guarantee was made on top of the revenue stamps and found that the signature was obscured by the revenue stamp and agreed with DW1 that the same could not be examinable. The court went ahead and held that the Appellant had the duty to prove that the signature belonged to the 2nd Respondent but he failed to discharge that burden.

7. Further, the court was not satisfied that the Appellant was present when the guarantee was executed since the guarantee was witnessed by one Irene who could have confirmed that the 2nd Respondent executed the guarantee but she was not called as a witness. The Appellant therefore failed to prove that the 2nd Respondent executed the guarantee hence he could not be bound by the alleged guarantee. The court further held that the attachment and sale of the motor vehicle was unlawful since the court of appeal had set aside the ex-parte judgment and what the Appellant was required to do was to return the motor vehicle.

8. The court further observed that the Appellant admitted that the motor vehicle was sold by the auctioneers but failed to disclose the amount as he said the auctioneers disappeared with the monies. The court stated that the Appellant was the one who engaged the auctioneers and therefore, he was bound to return the motor vehicle or pay a sum equivalent to its value.

9. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 03/09/2019 raising 8 grounds of appeal challenging the trial magistrate's findings. The appeal was filed on the following grounds;

    i. The learned magistrate erred in awarding the 2nd Defendant's counterclaim as prayed in prayer 1A and 1B of the amended defence.

    ii. The award of costs against the Appellant was erroneous.

    iii. The learned magistrate erred in rejecting the testimony of PW2, an expert in forensic handwriting without adequate reason or explanation which was important on the signature of the 2nd Defendant as a guarantor of the 1st Defendant.

    iv. The learned magistrate erred by finding that the value of the motor vehicle was Kshs.1,200,000/- whereas the Respondent did not offer any proof on the value of the motor vehicle.

v. The learned magistrate erred holding that the decision of the Court of Appeal had no bearing on the present suit and clouded his judgment with irrelevant matters to dismiss the Appellant's case.

vi. The judgment was fraught with irregularities to facts and confusion on the evidence and the court did not appreciate what it had to determine which resulted in denial of justice to the Appellant.

vii. The Respondent did not adduce evidence that motor vehicle KAS 943N belonged to him for court to give him colossal award in the counterclaim.

viii. That the Respondent's witness, Margaret Wangu Gichuki testified that she was the owner of the motor vehicle KAS 943N and not the Respondent hence the judgment was factually flawed.

10. The appeal was canvassed by way of written submissions. The Appellant's counsel in his brief submissions stated that he was relying on the grounds of appeal and the submissions filed before the trial court. He also submitted that the bone of contention in this appeal was ownership of motor vehicle registration number KAS 943N. He stated that the 2nd Respondent was not the registered owner of the said vehicle according to his evidence on record. That the sale agreement of the said motor vehicle was between his wife, DW3 who testified that the vehicle was registered in her name and Equity Bank. This was confirmed by the 2nd Respondent who testified that the said vehicle belonged to his wife yet his wife was not a party to the suit therefore, the Respondent was awarded Kshs.1,200,000/- and costs of the suit unlawfully.

11. Further, the said Margaret Wangu had filed an application in Civil Case No. 153 of 2001 objecting the attachment of the said vehicle but the same was dismissed on account that she failed to prove her claim over the subject vehicle and the court held that under section 8 of the *Traffic Act*, the vehicle belonged to Japan Motors Exhibition Ltd. Therefore, the learned magistrate erred on matter of ownership and therefore the trial court judgment must be set aside.

12. He further submitted that the Respondent's main defence was based on the fact the signature on the guarantee was not his. The learned magistrate held that he was not bound by the handwriting expert evidence without giving adequate reasons. That the contention by the Respondent that his wife held the vehicle as a trustee to him was not proved by the Respondent.

13. The submissions before the trial court concentrated on the issue of the signature on the guarantee and the expert evidence.

14. In rejoinder, the 2nd Respondent's counsel submitted that the trial court considered the evidence of the document examiner and rightly held that none of the forensic reports were binding on the court as superior courts have held that expert opinion evidence is not binding to the court. Further, all questions regarding admissibility, qualifications, relevance and competence of expert testimony are left to the discretion of the court hence it was within court's mandate upon finding the expert evidence unreliable to make its decision based on the rest of the evidence. Reliance was placed on the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001 1EA 139.

15. On the ownership of the motor vehicle, he submitted that the 2nd Respondent bought the motor vehicle and registered it in the name of his wife to hold on behalf and in trust of the 2nd Respondent. The Appellant failed to rebut the issue of trust in their reply to the counterclaim and did not raise it during the hearing of the matter therefore, raising the issue of trust in this appeal is an afterthought. The issue of trust remained uncontroverted throughout the trial. That the 2nd Respondent signed the

motor vehicle sale agreement together with his wife effecting intention of the 2nd Respondent beneficial interest in the motor vehicle. That an express trust arose in favour of the 2nd Respondent since the purpose of the trust and its beneficiary had been identified.

16. Further, on the claim that Nyeri High Court Civil Case 153 of 2001 was dismissed, counsel submitted that the case did not dismiss the 2nd Respondent's claim of ownership but the Judge held that by the mere fact that the 2nd Respondent had signed the sale agreement, it conferred a beneficial interest in the motor vehicle upon him and therefore, his ownership of the motor vehicle is undisputable. He submitted that the Appellant would not have attached the 2nd Respondent vehicle if at all the vehicle did not belong to him. Further, the objection by DW3 for attachment of the motor vehicle was rebutted by the Appellant with proof of the 2nd Respondent's signature in the motor vehicle sale agreement as well as photographs of the vehicle bearing the 2nd Respondent's name which further buttressed the 2nd Respondent claim of ownership. DW3 did not object to the claim of ownership of the motor vehicle by the 2nd Respondent.

17. It is urged that the Appellant admitted to selling the motor vehicle hence he received payment after the unlawful attachment of the vehicle which amounts to unjust enrichment. That his claim that auctioneers disappeared with the proceeds of sale was unproven. Therefore, the award by the learned magistrate was a judicious exercise of discretion and the Appellant is thereby inviting this court to interfere with an exercise of discretion which is against the principles governing the exercise of appellate powers.

18. I have considered the grounds of appeal, the record of appeal, the applicable law and the learned submissions by counsel as well as legal authorities cited. This being the first appellate court, I am mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at my own independent findings on whether or not to allow the appeal. It is the duty of this court sitting on appeal to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others{{^}} {1968} EA 123 and in Peters v Sunday Post Limited {1958} E.A. page 424.

19. The evidence before the trial court was as follows; PW1 the plaintiff, testified that he entered into a hire purchase agreement with the 1st Defendant for the purchase of motor vehicle KAG 114A at a purchase price of Kshs. 1,590,000/- on 12/09/1995. On the same day, he entered into an agreement with 1st Defendant to the effect that if the motor vehicle had an accident, the 1st Defendant was to return it to the Plaintiff. The motor vehicle had an accident 2nd January 1996 and it was written of. The 1st Defendant passed away by which time he had an outstanding balance of Kshs.1,469,975/-.

20. He testified that he sued the 2nd Defendant since he was a guarantor to the 1st Defendant having signed a guarantee dated 12/09/1995. That he attached the 2nd Defendant motor vehicle registration number KAS 943N and sold it after the 2nd Defendant failed to pay the outstanding amount after the court gave an order for attachment of the said vehicle. The vehicle was sold by auctioneers but they disappeared with the money. He produced the hire purchase agreement as Pexhibit1, invoice as Pexhibit2, guarantee as Pexhibit4.

21. On cross examination, he stated that the 2nd Defendant signed the hire purchase document and Pexhibit3. P-exhibit 4 had the signature of the guarantor and it was not true that the signature had been forged. That Pexhibit4 did not have the details of the motor vehicle registration number, did not show any money and he did not sign Pexhibit4. That the guarantor would not know how much money he would pay until it was ascertained and the money was payable on demand. He stated that

he did not send any demand to the 2nd Defendant but he was informed verbally. He further stated that he repaired motor vehicle registration number KAG 114A at a cost of Kshs.900,000/- and sold it at Kshs.535,000/-.

22. That the motor vehicle KAS 943N belonged to Margaret Gichuki but he had no dealings with her. That the attachment was done by the auctioneers but he never made a demand of the proceeds of sale. His lawyers dealt with the auctioneers. He maintained on re-examination that he was suing the 2nd Defendant as a guarantor and that the 2nd Defendant became aware of the amount due after he was served with a plaint and that the 2nd Defendant signed the document before him. He was recalled and he maintained that the 2nd Defendant signed the guarantee while in his office and in his presence. On further cross examination, he testified that the guarantee signed on the revenue stamp as it was the norm to sign on the revenue stamp and his secretary Irene signed the guarantee. He himself did not sign.

23. PW2, was a private document examiner with Globe Forensic Business. He stated that he was a retired inspector of police and had trained as a document examiner in the year 1997. He stated that he had 20 years of experience in document forensic examination and that he was a trainer in document examination under National Industrial Training Authority.

24. He testified that he examined the questioned signature in document marked A (the guarantee document), sample document marked as B1-B10, and non- registered signature C1-C2. He stated that the signature on the guarantee document as compared with non-registered signature and specimen signature showed individual character as having being made by the 2nd Defendant. His conclusion was that the signature on document marked A and individual signature were similar with sample produced. The signatures were made by the same person being the 2nd Defendant. He produced the report as P-exhibit6.

25. On cross examination, he testified that he trained for 21 days at CID training school and he did not have a diploma or a degree in the field of document examination. He testified that he did not take any specimen signature but C1-C2 was a copy of the signature which he was informed that it was forwarded to CID to do a report. He stated that he used a magnifying glass in his examination and he did not have the machine that are in the CID laboratory including Video Spectral Compressor, a projective and electronic document analyser. He stated that microscope and magnifying glasses are also used at the CID.

26. He testified that the signature on document A (guarantee document) was appended on the revenue stamp but the clarity of the signature was affected by the revenue stamp. That the signature in B1-B2 were at variance and even a lay man could tell that they were made by different parties. The variance was not captured in his report. As to B3-B4 the signature were different but did not clarify which signature was more similar to the questioned signature.

27. The Respondent called three witnesses. DW1 CI Daniel Gutu was a forensic document examiner with 10 years of experience and was working with DCI. He stated that he was trained at Regional Forensic Laboratory and Nation Robust University in Khartoum, Sudan. He testified that the documents were received in their laboratory from DCI Laikipia East accompanied by an exhibit memo marked as A- questioned document, B- known signature of Francis Ndichu and C1-C2- specimen signature of Francis Ndichu. He was required to ascertain whether signature on A was made by the same author compared with known signature and specimen on C1-C2.

28. His finding was that the questioned and known signature were not signed by Francis Ndichu. He considered the signature initialisation and terminal strokes, sign constructions and arrangements pen movement, pen pressure and ink flow and sign pacing and base line alignment. He stated that he used

VSC board in preparing the report. Further, the signature on P-exhibit 6 marked A was not visible and was not examinable. That the magnifying glass was no longer in use because of their inaccuracy and the VSC is used as the most reliable and can magnify the document up to 20 times. He produced the report as D-exhibit 1a and the exhibit memo as D-exhibit 1b.

29. On cross examination, he testified that his report showed that the signatures were made by different authors.

30. The 2nd Respondent testified as DW2. He denied knowing the 1st Respondent. He also denied signing the questioned documents. He testified that he did not guarantee the 1st Defendant and did not know that the 1st Defendant owed the plaintiff any money. He testified that he counterclaimed for costs and the motor vehicle KAS 943N which was taken by auctioneers on 06/12/2006. That the auctioneers referred him to Nyeri High Court where he found that there was warrant of attachment against his property since he did not know that there was a case against him. He produced a certificate of search as Dexhibit2 that showed that the motor vehicle was owned by his wife and equity Bank.

31. On cross examination, he denied signing the guarantee document and that the signature on B1 was not his.

32. DW3 Magaret Wangui Gichuki testified that she was DW2's wife. She adopted her written statement and maintained that the motor vehicle KAS 943N was attached by auctioneers on instructions of the Appellant. She asked PW1 to return the motor vehicle but he told her to go and see the auctioneers.

33. On the material before court, the issues that arise for determination are;

    a. Whether the 2nd Respondent signed the document titled guarantee dated 12.9.95 as a guarantor to Samuel Karimi Mubia in the Hire purchase agreement for motor vehicle Registration no. KAG 114A.

    b. Based on (a) above, whether the 2nd Respondent is liable to pay the sum of Kshs. 1,469,975 with interest to the Appellant.

    c. Whether the 2nd Respondent owned Motor vehicle KAS 943N

    d. Whether the Appellant's attachment of motor vehicle KAS 943N was unlawful.

    e. Whether the Appellant is liable to pay the 2nd Respondent Kshs. 1,200,000 plus interest from 21st November 2006.

    f. Whether the 2nd Respondent is entitled to payment for loss of user at Kshs. 6000 per day from date of attachment of the vehicle.

    g. Who bears the costs of this appeal and in the court below.

34. The above issues require prove to the threshold required in law based on the respective claims in the Plaint and the Amended Defence and Counterclaim. Thus, the Appellant and the 2nd Respondent respectively, bore the burden of proof to substantiate to the satisfaction of the court their claims set out in the plaint and the defence and counter claim. What does the law say about the burden of proof?

35. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

    13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

36. Section 107(1) of the *Evidence Act* provides as follows:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of a fact which he asserts must prove that those facts exist?"

37. Further, Section 109 of the *Evidence Act* states:

> " The burden of proof as to any particular fact lies on that 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"

38. It is within this legal background that I proceed to re-evaluate the evidence to determine prove of the issues set out for determination.

> Whether the 2nd Respondent signed the document titled guarantee dated 12.9.95 as a guarantor to Samuel Karimi Mubia in the Hire purchase agreement for motor vehicle Registration no. KAG 114A.

39. The 2nd Respondent's maintained that he never signed the guarantee. He denied that the signature on the document was his. The Appellant on the other hand contends that the trial court held that it was not bound by the handwriting expert evidence without giving adequate reasons. That the trial court rejected the evidence of his witness, PW2, the expert without giving an explanation.

40. As seen earlier, PW2 testified to the effect that the signature on the guarantee, Pexhibit4 belonged to the 2nd Respondent a conclusion made after examining his signature in other documents and his specimen signature. On cross examination however, he testified that the signature on document A (guarantee document) was appended on the revenue stamp but the clarity of the signature was affected by the revenue stamp.

41. DW1, another expert who testified on behalf of the 2nd Respondent told the court that the signature on the guarantee agreement was not examinable since it was not visible. The trial court while considering the two reports held that neither of those two reports were binding to the court.

42. The trial court further held that it looked at the signature on Pexhibit4 and noted that the same was made on top of two revenue stamps. PW1 told the court that he affixed the stamps before the 2nd Respondent could sign and this was the norm. The court agreed with DW1 that the stamps substantially affected the signature and made it difficult to examine. The court further held that there was no doubt that the stamps obscured the signature and held that the Appellant failed to discharge the burden of proof by failing to prove that the signature belonged to the 2nd Respondent.

43. It is trite law that expert evidence is not necessarily binding on the court. In Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

44. The Court of Appeal, in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

45. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."...

46. In the instant case, there were 2 conflicting expert reports. The court was faced with 2 contrary opinions. On the evidence before court, it has not been shown why this court should go by one of the opinions and not the other. This is a proper case where alternative evidence with probative value was necessary to resolve the issue in controversy.

47. That alternative evidence is lacking. A secretary named as Irene who signed the document and who purportedly saw the 2nd Respondent signing it was not called as a witness. The law as set out in the beginning of this analysis is that he who alleges must prove. This degree of prove is well enunciated in the case of Miller vs Minister of Pensions [1947] cited with approval in D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR. The court stated:-

> " 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', thus proof on a balance or prepondence 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."

48. The trial court found the signature appended on the revenue stamp to have been obscured by the revenue stamp. This was confirmed by both experts who testified for the Appellant and the 2nd Respondent. This court had the advantage of looking at Pexhibit4 titled a 'guarantee'. The contested signature is appended on the revenue stamp. Pexhibit4 is a copy which is not in its original form. The Appellant failed to prove that the 2nd Respondent signed the contested document.

> Based on (a) above, whether the 2nd Respondent is liable to pay the sum of Kshs. 1,469,975 with interest to the Appellant.

49. In light of the finding in issue no. (a), issue (b) answers in the negative. Having not been shown to have signed the purported guarantee, the 2nd Respondent is not liable to pay the Appellant Kshs, 1,469,975.

Whether the 2nd Respondent owned Motor vehicle KAS 943N

50. It is contended for the Appellant that the 2nd Respondent was never the registered owner of the vehicle in question. It is urged that in his evidence the 2nd Respondent confirmed that the vehicle belonged to his wife. The sale agreement produced, it is added, has the said wife as the buyer and she testified that the vehicle was registered in her name and Equity bank.

51. Counsel dwelt at length on the issue of ownership of the motor vehicle. He submitted that the court awarded the said amount despite the fact that there was no proof that the motor vehicle belonged to the 2nd respondent. That the allegation by the 2nd Respondent that the subject motor vehicle was registered in his wife's names (DW3) in trust for him was not proved.

52. On his part, counsel for the 2nd Respondent submitted that the issue of ownership of the subject motor vehicle was first raised on appeal by the Appellant. The same was not rebutted by the Appellant in his response to the counterclaim and during the hearing of the matter.

53. This is so because even during the hearing of the matter before the trial court, the Appellant was not seen challenging the ownership of the subject motor vehicle. He did not also challenge the ownership of the motor vehicle in his submissions before the trial court. It was first raised in his memorandum of appeal and his submissions before this court. The matter proceeded before the trial court as if there was no question as to ownership of the motor vehicle and since the same was not an issue before the trial court, the trial court was not given an opportunity to address itself on this issue. The judgment by the trial magistrate also did not touch on this issue.

54. It is urged that the Appellant cannot raise new issues in this appeal that were not canvassed by the parties during the hearing of the suit.

55. The issue whether new issues can be raised in an appeal has been considered by our courts in a myriad of authorities and the law is largely settled. The Court of Appeal in Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR (as cited in Frera Engineering Company Limited v Morris Mureithi Mutembei (2020) eKLR) stated –

> "...It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not

> address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance...
>
> Ultimately we cannot see any justification why we should allow the appellant, in the circumstances of this case, to raise a new issue some 15 years from the date of the appointment of the Tribunal, without any form of explanation as to why the issue was never raised earlier before the Tribunal or the High Court or why he did not bother to seek the leave of this Court so as to give the Attorney General a fair opportunity to object or prepare for the new point. We shall not say more on this issue, which we find not to be properly before us."

56. In Thomas Openda v Peter Martin Ahn [1982] eKLR while faced with a similar issue, the Court of Appeal cited the case of Girdhari Lal Vidyarthi v Ram Rakha [1957] EA 527 in which it was held that a plaintiff who had relied in his pleadings exclusively on a resulting trust in his favour could not on appeal be heard to allege an express trust, especially as the whole conduct of the proceedings below made it clear that only a resulting trust was in issue and the case of Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd [1960] EA 620, in which it was held that although an appellate court has a discretion to allow an appellant to take a new point on appeal it will not do so if the matter had not been properly pleaded or if all the facts bearing on the new point have not been elicited in the court below. The court cited with approval and followed three English authorities to the same effect, Ex parte Firth [1882] 19 Ch Div 419, North Staffordshire Railway Co v Edge [1920] AC 254, and The Tasmania [1890] 15 AC 223.

57. The decision in Alwi A Saggaf v Abed A Algeredi [1961] EA 767, illuminates the issue further by the court stating in clear terms that a new point which had not been pleaded or canvassed should not be allowed to be taken on appeal, unless the facts, if fully investigated, would have supported it.

58. I hasten to add that a clear distinction must be drawn between the raising of an unpleaded matter on appeal and the consideration of evidence already recorded by the trial court by the Appellate court fulfilling its legal duty to re-evaluate the evidence.

59. The 2nd Respondent's case as set out in the Amended Defence and Counterclaim dated 11th April 2016, is that the 2nd Respondent bought motor vehicle registration no. KAS943 N and registered it in the name of Margaret Wangu Gichuki who was and is 2nd Respondent's wife. She was so registered to hold the said motor vehicle on behalf and trust of the 2nd Defendant. It is this averment of fact that the 2nd Respondent was bound to prove before the trial court.

60. I have considered the rival submissions by the parties. I have had recourse to the evidence on record. I have reminded myself of my duty to re-evaluate the evidence with a view to reaching my conclusions on the disputed fact. Of necessity, I must fall back on the legal dictates on the burden of proof. He who alleges proves.

61. As submitted by counsel for the 2nd Respondent, the 2nd Respondent pleaded ownership of the motor vehicle stating that the wife held it in trust for him. In evidence, he produced a certificate of search marked as Pexhibit2 which showed that the motor vehicle was registered in the name of his wife

Margaret Wangu and Equity Bank. He goes ahead to state in his evidence in chief at page 152 of the record of appeal that;

> " My wife got the money from her produce maize (sic) to buy the motor vehicle. I pray for Kshs. 1.5 million because I installed seat in the motor vehicle.....I pray that the motor vehicle be returned to my wife. The motor vehicle belongs to my wife who is the registered owner."

62. On cross examination he confirmed 'The vehicle belongs to my wife.

63. On her part, DW3, Margaret Wangui Gichuki, the wife to the 2nd Respondent testified that;

> "Motor vehicle KAS 943N belong (sic) to me. It was registered in my names. The motor vehicle was taken by PWI. I asked him to return the motor vehicle."

64. I have had regard to the 2nd Respondent's pleading and the evidence adduced in support thereto. The burden to prove ownership of the motor vehicle lay on the 2nd Respondent even in the absence of a defence. In Karugi & Another V. Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added).

65. The 2nd Respondent in support of his counterclaim readily testifies that the motor vehicle in question belongs to DW3 a fact confirmed by the said DW3. On what basis then, would the court make a finding that the motor vehicle belonged to the 2nd Respondent through a trust? As it were, it matters not what defence the Appellant mounted against the counterclaim. That would never change the evidence offered by the 2nd Respondent clearly stating that the vehicle belongs to wife. The pleaded trust is left bare with no evidence to support it.

66. An argument may arise, and indeed this has been raised, that the issue of ownership is a new matter introduced at the appellate stage. I need to bring clarity in that regard by indicating that this court's finding on the issue is based on its own re-evaluation of the evidence on record which evaluation has led to the conclusion that by his own very evidence and that of DW3 the 2nd Respondent failed to prove ownership.

67. In view of the above, it is my finding that the 2nd Respondent has failed to prove ownership or any trust in his favour in respect of the vehicle in question.

    i. Whether the Appellant's attachment of motor vehicle KAS 943N was unlawful,

    ii. Whether the Appellant is liable to pay the 2nd Respondent Kshs. 1,200,000 plus interest from 21st November 2006,

    iii. Whether the 2nd Respondent is entitled to payment for loss of user at Kshs. 6000 per day from date of attachment of the vehicle.

68. The finding above renders these issues moot and I need not delve into them.

Who bears the costs of the appeal and in the court below

69. Costs follow the event unless for reasons to be stated by the court. In our instant suit both the Appellant and the Respondent have failed in their respective claims. It is only fair that each bears its costs both for this appeal and in the court below.

70. The cumulative result of the above findings is that neither the Appellant, nor the 2nd Respondent proved their respective claims as set out in the Plaint and the Defence and Counterclaim before the trial court. I set aside the findings and orders of the trial court and substitute thereof an order dismissing the Appellant's suit and the 2nd Respondent's Counter Claim. For reasons stated above, each party is to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH 2024.

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A.K. NDUNG'U

JUDGE