



**Njogu v Wanyoike (Civil Appeal E794 of 2021)
[2024] KEHC 6297 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6297 (KLR)

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

CIVIL APPEAL E794 OF 2021

JN NJAGI, J

MAY 30, 2024

BETWEEN

LEONARD NJOGU APPELLANT

AND

AGNES N. WANYOIKE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D W. Mburu, SPM, in
Milimani Commercial Courts Civil Suit No.1790 of 2014 delivered on 12/11/2021)*

JUDGMENT

1. The respondent herein sued the appellant seeking for declaratory orders that she was the lawful owner of motor vehicle registration No. KAY 643 G Toyota Station Wagon. The appellant filed a defence denying the claim and in addition filed a counterclaim seeking for a declaration that he was the lawful owner of the motor vehicle.
2. After a full trial in which the respondent was the only witness in her case and the appellant was the only witness in the defence case, the trial magistrate found that the respondent was the lawful owner of the motor vehicle. The appellant was aggrieved by the decision and filed the instant appeal.
3. The appeal raises 15 grounds of appeal which can be condensed into the following:
 1. The trial magistrate erred in law and in fact in holding that the respondent was the lawful owner of the suit motor vehicle and failing to find that the appellant was the beneficial owner of the motor vehicle.
 2. The trial magistrate erred in law and in fact in failing to consider the evidence and submissions of the appellant.



3. The trial magistrate erred in law and in fact in failing to consider the appellant's counterclaim and not making a finding on it.
4. That the trial magistrate erred in law and in fact in making a finding that there was no sale agreement and proof of payment when the respondent had admitted having signed the transfer form and surrendered document for registration upon a consideration.
5. That the trial magistrate erred in law and in fact by shifting the burden of proof of the respondent to the appellant.

Appellant's case at the lower court

4. The appellant who was the defendant at the lower court testified that he had bought the suit motor vehicle from the respondent at a consideration of Ksh.500,000/=. That the respondent handed over the vehicle to him together with the original log book, her KRA PIN Certificate and a duly signed transfer form to enable him transfer the ownership of the motor vehicle to himself. The appellant proceeded to use the motor vehicle as security with a lender for a loan of Ksh.600,000/=. The respondent was transferred by her employer to South Sudan. That when she came back to the country in December 2013, she borrowed the vehicle from him for use for some time. He gave her the vehicle. That after some time she expressed interest to have ownership of the vehicle revert back to her. He informed her that he had used the motor vehicle to secure a loan of Ksh.600,000/= for which there was a balance of Ksh.300,000/= remaining. She promised to pay the balance. He introduced her to the agents of the lender. She however reneged on payment of the balance. He made demands for her to return the vehicle to him but she ignored him. He denied the respondent's claim and filed a counterclaim seeking to be declared the lawful owner of the motor vehicle.

Respondent's Case at the lower court

5. It was the evidence of the Respondent who was the plaintiff at the lower court that she was at all material times the registered owner of the suit motor vehicle. That sometimes in February 2014 she was contacted by individuals who claimed to be auctioneers who intimated that they had instructions to seize the suit motor vehicle on claims that the appellant defaulted payment of Ksh.600,000/= loan that he had used the motor vehicle as security. That she checked on the log book of the vehicle and found it missing. She learnt that the appellant had deposited it as security for a loan. It was her contention that she was not privy to the agreement between the appellant and his creditors. That she had not given consent to her log book being used as collateral. She filed suit seeking for a declaration that she was the lawful owner of the suit motor vehicle.
6. During the hearing, the respondent stated in cross-examination that the appellant had never been in possession of the suit motor vehicle. That her log book, PIN and identity card were stolen. That she suspected that the appellant had stolen them and she made a report of loss of the documents to the police. She however did not report the appellant to the police. She stated in re-examination that she had signed the transfer form of the suit motor vehicle but did not explain the circumstances under which she signed the transfer documents.

Appellant's Submissions

7. The appellant submitted that the trial court erred in its finding that the respondent was the lawful owner of the motor vehicle yet the respondent had admitted having signed the transfer form thereby giving beneficial ownership of the motor vehicle to the appellant. That the respondent had surrendered



the requisite documents to the appellant to enable him transfer the motor vehicle. That the documents were sufficient to prove beneficial ownership of the motor vehicle. That the appellant had taken possession immediately hence stamping the conclusion of the sale. That it was erroneous for the trial magistrate to reject the transfer form as not sufficient proof of beneficial ownership.

8. The appellant submitted that the burden of proof was on the respondent to prove ownership of the motor vehicle on a balance of probabilities. The appellant submitted that the trial court in determining the case used a standard of proof higher than that of a balance of probabilities.
9. It was submitted that the trial court did not consider the appellant's counterclaim. It was submitted a counterclaim is in law an independent suit which ought to be determined in the judgment by either allowing the counterclaim or dismissing it. It was submitted that the judgment of the trial court did not meet the test and standard of a judgment.
10. The appellant submitted that the registration of a person in the log book is prima facie evidence of ownership that can be rebutted through evidence. Therefore, that the mere fact of registration alone is not conclusive proof of ownership. In this respect the appellant relied on the cases of *Osapil v Kaddu* (2000) 1 E.A 193, *Securicor Kenya Limited v Kyumba Holding Ltd* (2005) eKLR and *Bernard Muia Kilovos v Kenya Fresh Produce* (2020) eKLR.

Respondent's submissions

11. The respondent submitted that it was not disputed that she was the registered owner of the motor vehicle. That this being the case, the respondent was protected by section 8 of the [Traffic Act](#) that provides that "the person in whose name a vehicle is registered, shall unless the contrary is proved be deemed to be the owner of the vehicle."
12. It was submitted that the respondent had demonstrated that the vehicle was in her possession and that she was not privy to any arrangement or transaction alienating the vehicle to the appellant. That in the premises she had discharged her evidential burden to the required standard which shifted the burden to the appellant to prove his assertion of ownership.
13. It was submitted that the appellant failed to discharge his burden of proof. That he did not tender any evidence of sale of the motor vehicle between him and the respondent. That he did not show that he paid the money to the appellant. That whereas he stated that he took a loan of Ksh.500,000/= to buy the motor vehicle he did not tender such evidence. The respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

14. It is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand - see the Court of Appeal case of *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR.
15. The issue for determination in the appeal is whether the trial court erred in holding that the respondent was the lawful owner of the suit motor vehicle and failing to find that she had sold the same to the appellant.



16. The standard of proof in a civil case is on a balance of probabilities. 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.”

17. 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 lose, because the requisite standard will not have been attained.”

18. The respondent in her evidence told the court that she was the lawful owner of the motor vehicle as she never sold it as alleged by the appellant. The appellant on the other hand told the court that the respondent sold her the suit motor vehicle and filled the transfer forms to enable him transfer the motor vehicle into his name. The appellant claimed ownership of the vehicle in his counterclaim. The question is as to who between the parties had proved ownership of the motor vehicle.

19. The trial magistrate in finding for the respondent referred to section 8 of the *Traffic Act* which provides that “the person in whose name a vehicle is registered shall unless the contrary is proved, be the owner of the motor vehicle.”. In this regard the magistrate quoted the Court of Appeal decision in *Benard Muia Kilovoo v Kenya Fresh Produce Exportes* (2020) eKLR where it was held that:

The Court of Appeal in these binding decisions is clearly stating:

- i. That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.
- ii. Where there exists other compelling evidence to proof otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
- iii. Each case must however be considered in its own peculiar facts.

20. The magistrate held that though the appellant told the court that he obtained a loan of Ksh.500,000/= from the 1st defendant (whose case was withdrawn) which he used to buy the motor vehicle from the respondent, there was no documentary evidence produced before the court to proof that there was such a loan extended to him by the 1st defendant. That the respondent admitted to have signed the transfer forms but the appellant did not explain why he stayed for 2 years without him pursuing to



have the motor vehicle registered in his name. More so that the appellant did not comply with section 9(2) of the Traffic Act which requires a purchaser of a motor vehicle to notify the Registrar of Motor Vehicles within 14 days of transfer of ownership of a motor vehicle. The magistrate accordingly held that the appellant had not proved the sale of the motor vehicle as alleged.

21. I have considered the evidence adduced before the lower court and the judgment of the trial magistrate. The record of the trial court shows that the respondent initially sued the respondent and Safari Development Co. Ltd (1st defendant). The appellant failed to enter appearance and the matter proceeded *ex parte*. Thereafter a consent was recorded between the respondent and the 1st defendant for the case against the 1st defendant to be withdrawn as the appellant was paying the money that was owed to the 1st defendant. The case against them was withdrawn. The log book of the suit motor vehicle that was placed as security with the 1st defendant was with consent of the parties released to the respondent. Later, the appellant learnt of the case. The *ex parte* judgment was set aside by the High Court and is after that the matter proceeded before the trial court and the impugned judgment delivered.
22. The respondent claimed that the appellant was her boyfriend but the appellant denied it and said that she was his business associate. The appellant said that he paid for the vehicle in cash and took possession of the vehicle immediately. That they did not write down a sale agreement as they were acting on trust. He said that he took an insurance cover for the vehicle after taking possession of it.
23. The respondent on the other hand said that she suspected that the appellant had stolen her PIN certificate, identity card and the log book. That she reported the loss to the police but did not report that the appellant is the one who had stolen the documents. She admitted that she signed the transfer form.
24. The trial magistrate recognized that this was a difficult case to decide because of the shortage of evidence on either side. There was no sale agreement if indeed the appellant bought the vehicle from the respondent. Neither was there documentary evidence of payment. There was no independent evidence that the appellant took possession of the motor vehicle after the purported sale. Though the appellant said that he obtained an insurance cover in his name after he bought the vehicle, he did not produce such cover.
25. The respondent on the other hand admitted that she signed the transfer form. She did not explain why she signed the transfer form if at all she had not sold the motor vehicle to the appellant.
26. The appellant faulted the trial court for shifting the burden of proof that lay on the respondent to him.
27. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

107 “(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.”



28. Whereas the legal burden is always on the plaintiff there is the evidential burden which keeps on shifting to either party depending on the evidence adduced in court. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR stated the following on the two concepts:

“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.”

29. The fact that evidential burden of proof can shift depending on the circumstance of the case, was stated by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, thus:

(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.

30. The burden of proof was on the respondent to prove that she did not sell the suit motor vehicle to the appellant. However, once the appellant adduced evidence that the respondent had signed the transfer documents in his favour and the respondent admitted that she had indeed signed the transfer forms in favour of the appellant, the burden of proof shifted to the respondent to explain the circumstances under which she signed the transfer documents in favour of the appellant if she had not sold the motor vehicle to him. At that point it was her case which would fail if no evidence was given as to why she signed the transfer forms.

31. Failure to give an explanation as to why she signed the transfer forms in favour of the appellant could only lead to the conclusion that she did so as she had sold the motor vehicle to the appellant. The fact that she admitted to have signed the transfer forms put into doubt her story that the appellant had stolen her PIN certificate, identity card and log book. This is confounded by the fact that she never reported to the police that the appellant had stolen her log book and used it as security for a loan.

32. The fact that the appellant did not produce a sale agreement or that he did not take steps to register the motor vehicle soon after the respondent signed the transfer forms could not work against him. It was clear from the evidence that the two parties were friends and as such they could have dealt with each other on trust basis.

33. Section 8 of the *Traffic Act* presumes that the person in whose name a vehicle is registered is the owner of the motor vehicle unless the contrary is proved. In this case though the respondent is the presumed owner of the motor vehicle by virtue of registration, the appellant had proved his counterclaim that he had purchased it from the respondent who had transferred ownership to him.

34. The upshot is that it is my finding that the respondent had not proved her case against the appellant and instead that it is the appellant who had proved his counterclaim against the respondent that he had bought the motor vehicle from her. In the premises, the judgment of the lower court is set aside and judgment is instead entered for the appellant against the respondent in the following terms:

(1) 1) A declaration is made that the Appellant, Leonard Njogu, is the lawful owner of motor vehicle registration No. KAY 643G Toyota station wagon.



(2) An order is made and hereby issued that the respondent, Agnes N. Wanyoike, her agents, employees and or any other person do return motor vehicle No. KAY 643G Toyota station wagon and its original logbook to the appellant herein, Leonard Njogu.

35. Orders accordingly. The appellant to have the costs of the suit at the lower court and the cost of this appeal.

Delivered, dated and signed at NAIROBI this 30th day of May 2024.

J. N. NJAGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr Nyakiangala for appellant

Mr Mwangi holding brief Arthur Ingutia for Respondent

Court Assistant – Amina

