**Kamau t/a Demka Dairy v Munyito & 2 others (Civil Appeal E072 of 2022) [2025] KEHC 11830 (KLR) (8 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11830 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL E072 OF 2022**

**MA ODERO, J**

**AUGUST 8, 2025**

**BETWEEN**

**PAUL NDUATI KAMAU T/A DEMKA DAIRY ..... APPELLANT**

**AND**

**PATRICK KINYUA MUNYITO ..... 1ST RESPONDENT**

**GEORGE MITHAMO KINYUA ..... 2ND RESPONDENT**

**I & M BANK LIMITED ..... 3RD RESPONDENT**

## JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 8th December 2022 by which the Appellant PAul Nduati Kamau T/a Demka Dairy seeks the following orders:-

> " 1.
>
> (a) That the judgment of the Subordinate court be set aside and judgment be entered as prayed.
>
> (b) That this appeal be allowed.
>
> (c) That costs in the lower court and in this appeal. [SIC]

2. The Respondents namely Patrick Kinyua Munyito (1St Respondent, George Mithamo Kinyua (2Nd Respondent) And I & M Bank Limited (3rd Respondent) all opposed the appeal.

3. The appeal was canvassed by way of written submissions. The Applicant filed the written submissions dated 2nd April 2025 whilst the 1st and 2nd Respondents relied upon their written submissions dated 8th November 2024.

**Background**

4. By way of an Amended Plaint dated 5th March 2019 the Appellant sought in the lower court the following orders:-

> "(a) An order of specific performance, compelling the 2nd and 3rd defendants to surrender the original logbook for motor vehicle Registration No. KBY 224, and also to execute all necessary transfer documents in favour of the plaintiff.
>
> (b) In the alternative to (a) above, an order authorizing the Registrar of Motor Vehicles to cancel the existing logbook and transfer ownership of the motor vehicle to the plaintiff's name without requiring the respondents participation in the transfer.
>
> (bi) Kshs. 1,911,500/= being the totals expended by the plaintiff's on the 1st and 2nd defendants accounts with I & M Bank Ltd.
>
> (c) Such other or further orders as this honourable court may deem fit to grant.
>
> (d) Costs of the suit plus interest."

5. The Appellant told the court that sometime in December 2016 he became interested in purchasing a motor vehicle Registration No. KBY 225 U make Mitsubishi FH Truck (hereinafter referred to as 'the Vehicle')

6. According to the Appellant he conducted due diligence before entering into a contract for the purchase of the said vehicle. The Appellant then approached the 1st Respondent whom he alleges was a disclosed agent for the 2nd and 3rd defendants. He entered into an agreement dated 7th January 2017 with the 1st Respondent to purchase the vehicle at a price of Kshs. 2,600,000 to be paid in installments.

7. The appellant stated that the 1st Respondent informed him that the 3rd Respondent (the Bank) were the financiers for their purchase of the vehicle and requested him to pay the outstanding loan to the bank. That the Appellant paid to the bank an amount of Kshs. 1,846,580 plus a further Kshs. 65,000 being costs. The Appellant claims this amount is due to him from the 3rd respondents. The Appellant stated that he paid the full purchase price and took possession of the vehicle which he has been using for commercial purposes.

8. The Appellant stated that having paid to the 1st Respondent an amount of Kshs. 2.6 million and having taken possession of the vehicle he faced another hurdle. The vehicle was repossessed by an auctioneer on account of loan arrears owed to the 3rd Respondent who had financed the purchase of said vehicle. That this attachment crippled the Appellants business and he was left with no option but to clear the outstanding loan which he did by paying Kshs. 1,911,500 to the Bank.

9. The Appellant complained that despite having paid the full purchase price the Respondents have failed, refused and/or declined to surrender the completion documents and have failed to execute transfers to enable the Appellant transfer the vehicle into his own name. The Appellant claims that the actions of the Respondents amount to a breach of contract.

10. For the above reasons the Appellant filed in the lower court Nyeri Civil Case No. 379 of 2017 seeking the remedies aforementioned.

11. The 3rd defendant put in a defence dated 12th February 2018 in which they denied having entered into and/or breached any contract with the Appellant.

12. The 1st Respondent Patrick Kinyua Munyito stated that he knew the Appellant as a long time customer. That the Appellant expressed an interest in purchasing the vehicle registration KBY 225 U, which vehicle was registered in the name of the 2nd Respondent who is the son of the 1st Respondent.

13. The 1st Respondent told the Appellant that the vehicle was worth Kshs. 6.0 million and that a loan had been taken from the bank to finance its purchase. The 1st Respondent stated that the owner had already paid to the bank an amount of Kshs. 2.6 million. He told the Appellant to refund this Kshs. 2.6 million to the owner and then take over payment of the loan balance due to the bank and that upon completion of all loan arrears the vehicle would be released to the Appellant.

14. Vide a judgment delivered on 29th November 2022 the learned trial magistrate dismissed the Appellants suit entirely and directed that each party meet its own costs.

15. Being aggrieved by this decision of the trial court the Appellant filed this appeal which appeal was premised upon the following grounds:-

> " 1. That the learned trial magistrate erred in fact and in law by disregarding the evidence on record even when the defendant had acknowledged the transaction and thereby occasioning an injustice.
>
> 2. That the learned trial magistrate erred in law and in fat when he misdirected himself on the application of the law of contract thereby arriving at a wrong conclusion.
>
> 3. That the judgment delivered was against the weight of evidence, the law applicable and should be set aside."

16. As stated earlier the appeal was opposed.

**Analysis And Findings**

17. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.

18. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday post limited [1958] E.A 424]

19. In SELLE and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123 it was stated as

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."

20. Likewise in Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated as follows:-

> " An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the

evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

21. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles;-

    (1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

    (2) In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

    (3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

22. The basis of the Appellants claim is breach of contract. Therefore the Appellant must satisfy the court firstly that there existed a legally valid and enforceable contract between himself and the Respondents and secondly the Appellant needed to prove a breach of said contract, on the part of the Respondents.

23. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provide as follows:-

> " Burden of proof
>
> 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."

24. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR, it was held that:-

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person....." [Own emphasis]

25. This is a civil case and as such the standard of proof required would be on a balance of probability. In the case of Kanyungu Njogu -vs- Daniel Kimani Maingi [2000] eKLR it was stated that when the court is faced with two probabilities it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

26. Similarly in the case of Wiliam Kabogo Gitau -vs- George Thuo & 2 Others [2010] eKLR, Hon. Justice Luka Kimaru (as he then was) stated 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 more probable than not that the allegations that he made occurred." [Own emphasis]

27. Further in the case of Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of appeal in discussing balance of probability stated thus;-

> " That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged but if the probabilities are equal it is not. 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." [Own emphasis]

28. In order to prove his case against the Respondents the Appellant needed to establish the following:-

(i) That a legally valid and enforceable contract existed between himself and the Respondents (or any one of the Respondents.

(ii) Having proved the existence of a legal contract, then the Appellant needed to prove a breach of said contract by the Respondents causing him harm or damage.

**Existence of a Contract**

29. Blacks Law Dictionary defines a contract as

> " An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

30. In the case of Rose -vs- Jr Crompton & Bros Ltd [1923] 2KB it was held that;-

> " To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."

31. The element of a binding contract are 'offer' 'acceptance' and 'consideration'. All three elements must be shown to be present in order to prove the existence of a valid legal contract.

32. In William Muthee Muthami -vs- Bank Of Baroda [2014] eKLR the Court of Appeal observed as follows:-

> " In the law of contract the aggrieved party to an agreement must, in addition prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

33. The Appellant claimed that he had entered into an agreement with the Respondents for the purchase of the vehicle Registration KBY 225 U. According to the Appellant the person with whom he entered into an agreement for the purchase of the said vehicle was the 1st Respondent Patrick Kinyua Munyito.

34. The Appellant produced in the lower court a Vehicle Sale Agreement dated 7th January 2017 (see Page 10 of the Record of Appeal). That agreement names Patrick Kinyua Munyito as the seller whilst the Appellant Paul Nduati Kamau and 2 others are named as the purchasers. The purchase price was indicated to be Kshs. 2,600,000 to be paid by way of a deposit of Kshs. 650,000/= cash and two (2) installments of Kshs. 975,000 to be paid by cheque. The Agreement was duly signed by both parties.

35. The purchaser confirmed that he paid the full purchase price and took possession of the vehicle which he was using for commercial purposes.

36. It would appear from the above that there existed a valid sale Agreement between the Appellant and the 1st Respondent.

37. However the Appellant committed one cardinal error. He failed to confirm that the vehicle in question actually belonged to the person who was purporting to sell the vehicle to him.

38. In his evidence the Appellant insisted that he conducted due diligence before he entered into the sale agreement. However it is clear that no attempt was made to confirm the true owner of the vehicle. At Page 8 of the Record is the copy of records of the motor vehicle registration No. KBY 225 U clearly showing that said vehicle was registered in the joint name of I & M Bank and George Mithamo Kinyua. The vehicle was not registered in the name of the 1st Respondent.

39. Under cross-examination the Appellant admitted that

> "I did not do a search of the vehicle I was buying. It was on trust basis. I believed the car belonged to Patrick....."

40. In his evidence the 1st Respondent admitted that the vehicle did not belong to him. He stated that the vehicle belonged to the 2nd Respondent who was his son. That the 1st Respondent stated that he only undertook the sale of the vehicle on behalf of his son who was unwell.

41. It is quite obvious that contrary to his assertions the Appellant did not carry out due diligence before entering into an agreement to purchase the vehicles. The very least he ought to have done was to conduct a search at NTSC which search would have revealed that the 1st Respondent was not the registered owner of the vehicle.

42. Similarly if the Appellant had asked to see the log-book he would have realized that the purchase of the vehicle had been financed by I & M Bank who therefore had a lien over the vehicle.

43. It is trite that one can only sell what one owns. A person cannot sell a vehicle which does not belong to him. The Appellant did not enter into any sale agreement with the 2nd Respondent who was the registered owner of the vehicle. The Appellants 'belief' on trust that the vehicle belonged to the 1st Respondent will not suffice. He entered into an agreement with a person who did not own the vehicle and had no capacity to sell the same.

44. The Appellant argued that he entered into the sale agreement with the 1st Respondent who was acting as an 'agent' of the owner. Firstly the registered owner did not testify in court to confirm that he had authorized the 1st Respondent to sell the vehicle on his behalf. No Agency documents or a Power of Attorney drawn out by the owner in favour of the 1st Respondent were exhibited in court. The mere

fact that the 1st Respondent was the father of the owner did not make him the agent of said owner for purposes of selling the vehicle.

45. In the case of Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR, the High Court stated as follows;

> " Ample judicial authorities were cited by both sides on agent-principal relation arising from the addendum herein. I am content to rely on the literary work in Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, which defines such a relationship to be:- "a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts." [Own emphasis]

46. Similarly, in Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015] eKLR, the Court of Appeal stated as follows;

> .....The concise Dictionary of Law, 2nd Edition, page 17 defines an "agent" as,
>
> "A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."
>
> In Garnac Grain Co. Inc. v H. M. Faure & Fair Dough Ltd and Bunge Corporation (1967) All E. R. 353 Lord Pearson with the concurrence of the House used the words – "The relationship of the Principal Agent can only be established by the consent if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it.... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct." (own emphasis)

47. There is no evidence that the 2nd Respondent ever appointed the 1st Respondent as his agent for purposes of sale of the motor vehicle. The Appellant can only blame himself for proceeding to deal with a person who had not been appointed by the owner of the vehicle to act on his behalf. The 1st Respondent was on a frolic of his own. He had no capacity and/or authority to bind the 2nd Respondent through an alleged contract for sale.

48. This lack of capacity renders the alleged agreement dated 7th January 2017 null and void. The same is not enforceable by a court of law. The Appellant also brought a claim for breach of contract against the Respondents. It goes without saying that a non-existent contract cannot be breached.

49. The Appellant has complained that the Respondents have failed and/or declined to execute the documents necessary to have the vehicle transferred to him even after he paid the full purchase price of Kshs. 2,600,000. Firstly as demonstrated earlier the vehicle did not belong to the 1st Respondent and consequently the 1st Respondent had no capacity sell and/or to transfer the vehicle to a third party.

50. Secondly the Appellant did not enter into any agreement with the 2nd Respondent who was the registered owner of the vehicle. As such the appellant has no claim against the 2nd Respondent.

51. Thirdly as the 3rd Respondents correctly pointed out their agreement to finance the purchase of the vehicle was entered into with owner of the vehicle (2nd Respondent) and not with the Appellant. As such the 3rd Respondents have no duty or obligation to effect transfer of the vehicle to the appellant even if the loan had been fully paid off.

52. I note however that vide the consent dated 9th May 2018 (see pages 38-40 of the record) the Appellants claim as against the 3rd Respondent was compromised by the Appellant clearing the outstanding loan due to the bank.

53. Finally I find no merit in this appeal. The Appellant failed to prove his case on a balance of probability. The appeal is dismissed in its entirety. Costs to be met by the Appellant.

**DATED IN NYERI THIS 8 TH DAY OF AUGUST 2025.**

**..... .**

**MAUREEN A. ODERO**

**JUDGE**