



REPUBLIC OF KENYA



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Kbenways Company Limited v Family Bank Kenya Limited (Civil Case 9 of 2017) [2023] KEHC 1471 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE 9 OF 2017
AN ONGERI, J
FEBRUARY 24, 2023**

BETWEEN

KBENWAYS COMPANY LIMITED PLAINTIFF

AND

FAMILY BANK KENYA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff in this case Kbenways Company Limited has sued Family Bank Kenya Limited in the Plaint dated 1/9/2017 seeking the following remedies:-
 - i. A declaration that the attachment and sale of the motor-vehicle registration number KHMA 993E was irregular, wrongful and unlawful.
 - ii. Compensation for loss of earnings assessed at Kshs.45,624,712/= as at 1st September, 2017.
 - iii. Special Damages, aforesaid.
 - iv. General and Punitive Damages for unlawful deprivation of use of the Motor Vehicle registration number KHNA 993E.
 - v. Costs and interest of this suit.
 - vi. Any other or further relief, this Honourable Court may deem fit and just to grant.
2. The Defendant entered appearance and filed a defence dated 12/2/2018 denying the Plaintiff's claim.
3. The Plaintiff's evidence in summary was as contained in the Plaintiff's written witness statement dated 5/4/2019 in which the Plaintiff stated that it took out a loan facility that was repayable in 36 months, upon default of the monthly repayments, the Defendants instructed auctioneers to dispose the subject motor vehicle by way of public auction and the motor vehicle was subsequently sold off.



4. The Plaintiff stated that as a result of the unlawful possession of the motor vehicle, he was therefore claiming lost earnings of Kshs. 82,504/= on a daily basis from 7/3/2016 to date.
5. The Plaintiff was therefore seeking for a declaration that the attachment and sale of the motor vehicle was irregular, wrongful and unlawful as the Defendant was not legally entitled to dispose off the motor vehicle in the absence of a specific debenture and/or chattel empowering it to do so.
6. In his evidence in Court, the Plaintiff said that the Defendant wrongfully attached his motor vehicle when he was not in arrears and undervalued it and sold it off on 27/5/2016.
7. In Cross-Examination, the Plaintiff said he was advanced Kshs.7,560,000/= which was to be repaid in 36 instalments of Kshs.266,700 each month.
8. He also admitted the letter of offer had a default clause that in default of any one instalment, the entire outstanding amount would become due and payable.
9. The Plaintiff also said in Cross-Examination that he was aware that the point Defendant had a right to repossess the vehicle.
10. However, the Plaintiff maintained that he was not in default when the vehicle was repossessed and sold off.
11. The Defendant called one witness who adopted his statement dated 13/2/2023 in which the Defendant stated that the Plaintiff approached the defendant for an asset facility of Kshs. 7,560,000 for purposes of acquisition of a brand new JCB Excavator Model JS2 205LC and this was subsequently approved vide a letter of offer dated 27/3/2014. The Facility was to be repaid in 36 equal installments of Kshs. 266,700/= and secured through the registration of a debenture.
12. The Defendant further stated that the Plaintiff defaulted and/or reneged on making the monthly repayments towards settlement of the loan facility severally even upon being served with notices on several occasions, the Defendant subsequently initiated the process of recovery of the asset and instructed Josrick Merchant Auctioneer to repossess the asset, the asset was advertised for sale via public auction and subsequently sold.
13. The witness (DW.1) Domiano Kiprop Chesir said in his oral evidence in Court that in the letter of offer dated 27/3/2014, the Defendant stated at Clause 8.0 that in Default of anyone instalment the entire amount became due and payable.
14. DW.1 said the Plaintiff was in default at the time of repossession of the motor vehicle.
15. He said the default amount was kshs.3,477,128.07. He said after selling the motor vehicle, the expenses were offset and the balance of Kshs.1,77,620.85 was deposited in the Plaintiff's account.
16. I have considered the Originating Summons dated 25/6/2021 together with the documents attached thereto.
17. DW.1 said notices were issued to the Plaintiff on 11/2/2015, 18/3/2015, 20/5/2015 and 28/5/2015.
18. In Cross-Examination, DW.1 said the notice dated 11/2/2015 was for payment of Kshs.273,135.23 and the one dated 18/3/2015 was demanding arrears of 272,876.40.
19. DW.1 also said the amount due and payable was Kshs.6,617,512.15 but at the time of sale of the vehicle, the outstanding amount was 3,477,125.07.



20. DW.1 also said the forced sale amount was 6.2 Million. He said the vehicle was valued at the time of sale but the valuation Report was misplaced and it was not filed in Court.
21. DW.1 also said the Chattel Mortgage was not registered because the vehicle was registered in the Joint Names of the Plaintiff and the Defendant and further that the Plaintiff executed a blank transfer form.
22. The parties filed written submissions as follows which I have considered.
23. The Plaintiff submitted that he was offered an asset finance facility of Kshs. 7,560,000/= to facilitate acquisition of the subject motor-vehicle vide a letter of offer dated 27/3/2014, the vehicle was valued at Kshs. 10,800,000/= and he was required to settle the balance, which he did.
24. The Plaintiff submitted that the loan was advanced and the parties were to execute a Chattels Mortgage and/or Specific Debenture over the said motor vehicle which was to serve as a security but the Defendant failed to prepare and register the said instruments.
25. The Plaintiff submitted that on 7/3/2016 the Defendant instructed Josrick Merchants Auctioneers to repossess the motor vehicle to recover loan arrears and subsequently the subject motor vehicle was sold for Kshs. 6,200,000/=.
26. The Plaintiff submitted that in the instant suit there was no Chattels Mortgage and/or Debenture Mortgage was executed and registered as between the parties herein as required by the Chattels Transfer Act and therefore the Defendant was not legally entitled to attach and sell the motor vehicle as it purported to do. The Plaintiff cited the case of *Kenya Women Microfinance LTD. v Martha Wangari Kamau* [2021] eKLR, *Wanjohi v Resma Commercial Agencies LTD. & Another* in support of its assertions.
27. The Plaintiff submitted that it was entitled to general damages for the illegal and unlawful sale and/or the attendant unlawful deprivation of the use of the motor vehicle as a result of the illegal sale.
28. The Plaintiff further submitted that; it was entitled to special damages assessed at Kshs. 4,600,000/= as the difference between the motor vehicle pegged at Kshs. 6,200,000/= at the time of sale, whereas its value at the time of purchase was Kshs. 10,800,000/=.
29. The Defendant submitted that the repossession and subsequent sale was on account of the Plaintiff's indebtedness and/or default and further that it followed the proper procedure during the repossession and sale of the excavator and cited the case of *Syrilla A. Barasa & 2 Ors v Margaret Aseka Barasa* [2022] eKLR in which the court summarized the process under rule 12 of the Auctioneers Rules, 1997.
30. The Defendant submitted that it was not legally obligated to execute and register a chattels instrument and further that registration of instruments served as a notice of existence of the instrument to third parties and therefore non-registration of the instrument did not in any way vitiate the security nor the rights and obligations of the parties therein. The Defendant cited the case of *Mesback Mariera Ongeru v Credit Bank Limited* [2018] eKLR
31. The Defendant contended that the non-registration of the chattels mortgage did not in any way vitiate the defendants legal and contractual right to realize its security in the instant case.
32. The Defendant therefore argued that the Plaintiff was undeserving of the prayers sought.
33. The Defendant argued that special damages must not only be specifically pleaded but strictly proved, that the Plaintiff did not produce any valuation report to prove that the excavator was worth much more than what it was sold for and further that for loss of earnings he did not tender any evidence such as payment vouchers as proof of earnings to support his claim of Kshs. 82,594 on a daily basis. The



Defendant cited the following cases *Cecilia W. Mwangi & Anor v Ruth W. Mwangi* NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR & *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR

34. The Defendant reiterated that the Plaintiff's claim for punitive damages for the unlawful deprivation of the excavator did not fall within the parameters warranting an award for punitive damages and cited the case of *Godfrey Julius Ndumba & Anor v. Nairobi City County* [2018] eKLR
35. I have considered the evidence adduced in this case. I find that it is not in dispute that the Plaintiff approached the Defendant and he was granted a loan of Kshs. 7,560,000/=.
36. It is not in dispute that the Plaintiff was to repay the loan in 36 months at the rate of Kshs.266,700/= per month.
37. It is not in dispute that the Defendants repossessed the motor vehicle and sold it on 6/5/2016 at Kshs.6.2 Million.
38. The issues this Court must determine are as follows:-
 - i. Whether the Plaintiff was in default at the time of repossession and sale of the motor vehicle.
 - ii. Whether the attachment and sale of the motor vehicle was irregular, wrongful and unlawful.
 - iii. Whether the Plaintiff is entitled to the remedies he is seeking against the Defendant.
 - iv. Who pays the costs of this suit?
39. On the issue as to whether the Plaintiff was in default at the time the vehicle Reg. No. KHMA 993E was repossessed, the Plaintiff maintained that he was not in default and further that he had paid all the arrears and there was a balance of 700/= in his account.
40. The Defendant said several notices were issued to the Plaintiff dated 11/2/2015, 18/3/2015, 20/5/2015 and 28/5/2015.
41. I find that the Defendant admitted that the motor vehicle was sold on 6/5/2016 which was a year after the said notices were issued to the Plaintiff.
42. The Plaintiff had cleared the arrears at the time of sale and I find that he was not in default.
43. I find that clause 8.0 which stated that the entire amount because due and payable upon default did not entitle the Defendants to sell the motor vehicle since the Plaintiff was not in arrears at the time of sale of the Motor Vehicle.
44. The Plaintiff said he had cleared the arrears and he was told to clear the balance of 12,000/= outstanding. He said he deposited the 12,000/= and after the bank fully repaid the arrears, he had a balance of 700/= in his account.
45. On the issue as to whether the attachment and sale of the motor vehicle was irregular, wrongful and unlawful, I find that the answer is in the affirmative.
46. I find that no demand notice was issued to the Plaintiff demanding the entire sum unpaid at the time of default and secondly, I find that all arrears had been paid at the time of the attachment and sale of the motor vehicle.
47. On the issue as to whether the Plaintiff is entitled to the remedies he is seeking in the Plaintiff, I find that the Plaintiff is seeking the following remedies:-
 - i. A declaration that the attachment and sale was irregular, wrongful and unlawful.



- ii. Loss of user assessed at Kshs.45,624,712 and loss of earnings of Kshs.82,504 daily.
 - iii. Special damages Kshs.4,608,295/= being the difference between the market prize of the vehicle and the sum of Kshs.6,200,000/= at which the Motor Vehicle was forcefully sold.
 - iv. General damages and punitive damages for wrongful deprivation and use of the motor vehicle.
 - v. Costs of the suit and interest.
48. I find that the Plaintiff is entitled to a declaration that the sale of his motor vehicle was irregular, wrongful and unlawful for reasons that he was not in default at the time of the sale of the said vehicle and I so declare.
49. On the remedy of loss of user of Kshs.45,624,712, the Plaintiff is seeking together with daily loss of earnings of Kshs.82,504/=, the law requires that special damages be specifically pleaded and proved.
50. I find that the Plaintiff did not prove loss of user of 45,624,712 and loss of daily earnings of 82,504/= and therefore is not entitled to the same.
51. On the issue as to whether the Plaintiff is entitled to special damages of Kshs.4,604,295/= being the difference between the fair market value of the vehicle and the forced sale price of 6,200,000/= at which the vehicle was sold, the Plaintiff said he was not given a chance to value the vehicle at the time of sale since it was carried away and sold by the Defendant.
52. The Plaintiff said he bought the vehicle at 10,800,000/= in the year, 2014 and the Defendant sold it at 6,200,000/= on 6/5/2016.
53. The Defendant on its part said it valued the motor vehicle before the sale but they did not file the Valuation Report since it was misplaced.
54. The Plaintiff's evidence that the vehicle was valued at 12,000,000/= at the time of sale has no basis.
55. I find that there is no dispute that the vehicle was bought at kshs.10,800,000/= in the year, 2014.
56. I award the Plaintiff the difference between the 10,800,000/= which he bought the motor vehicle and the 6,200,000/= at which the Defendant wrongfully attached and sold the motor vehicle.
57. I find that the said difference is Kshs.4,600,000/=.
58. On the issue as to whether the Plaintiff is entitled to General Damages, I find that the answer is in the affirmative.
59. I award the Plaintiff General Damages and punitive damages of kshs. 500,000/= for being deprived of his motor vehicle. In the case of *Real People Kenya Limited & another v John Nyandega t/a Akmal Enterprises & another* [2022] eKLR under similar circumstances, the court awarded a sum of Kshs 500,000/= being general damages for unlawful sale of the Respondents' subject Motor Vehicle.
60. Finally, I find that the Plaintiff is entitled to costs of the suit and interest from the date of filing suit until payment in full.
61. In a nutshell, the Plaintiff is entitled to the following remedies:-
- i. A declaration that the attachment and sale of motor vehicle Reg. No.KHMA 993E was irregular, wrongful and unlawful.
 - ii. Special Damages of Kshs. 4,600,000/= being the difference between the fair market value of the motor vehicle and the forced sale prize of Kshs. 6,200,000/=.



- iii. General Damages for unlawful deprivation of the motor vehicle assessed at Kshs. 500,000/=.
 - iv. Costs of the suit and interest from the date of filing suit until payment in full at Court rates.
62. Judgment be and is hereby entered in favor of the Plaintiff against the Defendant in the sum of Kshs. 5,100,000/= plus costs and interest at court rates from the time of filing suit until payment in full.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 24TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

