



**NCBA Bank Kenya PLC (Formerly NIC Bank Kenya PLC) v Ogembo (Civil Appeal E038 of 2021) [2023] KEHC 24812 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E038 OF 2021  
PN GICHOHI, J  
OCTOBER 31, 2023**

**BETWEEN**

**NCBA BANK KENYA PLC (FORMERLY NIC BANK KENYA PLC) ..... APPELLANT**

**AND**

**JOSHUA ONANI OGEMBO ..... RESPONDENT**

*((Being an Appeal arising out of the judgment and decree of Hon. N.S. Lutta (Chief Magistrate) in Kisii Chief Magistrate's Court Civil Case No. 239 of 2015 delivered on 30/03/2021))*

**JUDGMENT**

1. The brief background of this appeal is that the Appellant was the Defendant in Kisii CMCC NO. 239 of 2015; Joshua Onani Ogembo vs. NCBA Bank Kenya PLC (formerly NIC Bank Kenya PLC). In his Plaintiff dated 3<sup>rd</sup> June 2015, the Respondent (Plaintiff) averred that on 26<sup>th</sup> March 2008, he had entered into a Hire Purchase Agreement number HPR-4-560-002274 with the Appellant to hire out motor vehicle registration number KBA 736 M Forton Forland Truck.
2. Pursuant to the terms of the Hire Purchase, the Respondent deposited an initial sum to initiate the release and handover of the suit vehicle. He thereafter undertook to pay monthly instalments financed by the Appellant. The Respondent averred that he commenced repayment up to April 2010 when he failed to remit the required monthly instalments.
3. Following the breach by the Respondent, the Appellant undertook to repossess and retake possession of the suit vehicle on 16<sup>th</sup> July 2010. The Respondent contended that between April and July 2010, he was in default of Kshs. 433,343.66. That upon repossessing the suit vehicle, the Appellant terminated the Hire Purchase Agreement and then sold the suit vehicle in the sum of Kshs. 150,000.00 leaving a balance of Kshs. 283,343.66.



4. The Respondent averred that thereafter, between June 2012 and March 2015, he issued a standing order in the sum of Kshs. 10,000.00 to clear the outstanding balance owed to the Appellant and finally, a total sum of Kshs. 330,000.00 had been duly credit to the favour of the Appellant over and above the outstanding balance of Kshs. 283,343.66.
5. He lamented that in spite of this, the Appellant fraudulently referred him to the Credit Reference Bureau (CRB) as a result of which he suffered damage following the black listing of his name as a defaulter. He prayed for a multiplicity of reliefs before the trial court as follows:
  1. Declaration that upon the Repossession of motor vehicle registration number KBA 736 M Forton Forland Truck, the Hire Purchase Agreement Number HPR-4-560-002274 lapsed and/or stood terminated and the Defendant herein was only entitled to payment of the instalments which were in arrears as at 16/07/2010 when repossession was effected;
  2. Declaration that the instalments in arrears at the foot of the Hire Purchase Agreement Number HPR-4-560-002274 prior to repossession have since been fully and duly paid and hence there is no balance due and payable to and/or in favour of the Defendant;
  3. An order for refund on account of overpayment in the sum of Kshs. 46,656.34 only together with interests at court rates with effect from November 2014;
  4. An order directing and/or compelling the Defendant to rescind the reference of the Plaintiff's name to the Credit Reference Bureau (CRB) and cause the Plaintiff's name to thereby removed and/or cancelled therefrom;
5. Permanent injunction to restrain the Defendant either by itself, its agents, servants and/or employers from further refereeing the Plaintiff to the Credit Reference Bureau (CRB) on the basis of the alleged outstanding loan balance due at the foot of the Hire Purchase Agreement number HPR-4-560-002274;
6. Costs of the suit be borne by the Defendant;
7. Such further and/or other relief as the court may deem fit and expedient to grant.
6. In its Defence dated 17<sup>th</sup> August 2015, the Appellant generally denied the claim and pleaded that it would rely in the interpretation of the Hire Purchase Agreement. It further pleaded that the Respondent was in breach of the terms of the Hire Purchase Agreement and thereby allowed his loan account to fall into arrears.
7. The Appellant further pleaded that it is now standard practice in the banking industry that all creditors who default in their credit facilities be referred to the Credit Reference Bureau. It urged the court to dismiss and /or strike out the suit with costs .
8. Further, the Appellant referred to the trial court's judgment dated 30<sup>th</sup> March 2021, where the court found that upon repossession of the suit vehicle, the Hire Purchase Agreement number HPR-4-560-002274 stood terminated and further, found that the Respondent had fully paid up his dues and therefore ordered a refund in the sum of Kshs. 46,656.34 as the excess payment of the debt. The trial court then directed the Appellant to cause the Respondent's name to be removed from the CRB's portal with a permanent injunction issued restraining the Appellant from referring the Respondent to the CRB on the basis of the Hire Purchase Agreement. The Respondent was further awarded costs and interests.



9. Dissatisfied with that decision, the Appellant preferred this appeal. In its Memorandum of Appeal dated 6<sup>th</sup> April 2021, the Appellant raised seven grounds of appeal which in summary were that the Respondent failed to discharge his burden of proof to the required standard of proof. That the trial court arrived at an erroneous decision.
10. It faulted the trial court for failing to consider the evidence and written submissions holistically and further maintained that the Respondent was not entitled to the sum of Kshs. 46,656.34 since Respondent was still indebted to the Appellant as at November 2014. Lastly, it faulted the trial court for failing to appreciate the Hire Purchase agreement together with its meaning and tenor.
11. In the circumstances, the Appellant prayed that the Appeal be allowed by setting aside the judgment and decree of the trial court and substituting it with an order dismissing the suit with costs to the Appellant. The Appellant further prayed for costs of the Appeal.

### **Appellant's Submissions**

12. In compliance with directions that the appeal be canvassed by way of written submissions, the Appellant filed its submissions dated 7<sup>th</sup> September 2022. On the validity and effect of the Hire Purchase Agreement and whether the Respondent breached the same, the Appellant submitted that Agreement was valid and binding as between the parties herein. That the Respondent had breached the said Agreement when he failed to pay three (3) monthly instalments as a result of which his account fell into arrears causing the Appellant terminated the contract and repossess the suit vehicle.
13. On whether the Respondent proved his case before the trial court on a balance of probabilities, the Appellant answered it in the negative. It was submitted that the Respondent did not deny that he was in arrears. It was further submitted that the trial court misdirected itself when it found that the Respondent had overpaid his dues to the sum of Kshs. 46,656.34 when it solely relied on a letter from the Appellant's office. In his view, no other evidence corroborated this finding.
14. Further, the Appellant submitted that the court acted per incuriam when it proceeded to hold that the repossession was illegal when those orders were never pleaded and as such ought not to have been granted.
15. The Appellant further submitted that the trial court ought to have considered that the sums due and owing included penalty charges and interest as provided in the Hire Purchase Agreement and not the principal sum in isolation. In addition, it urged this court to take judicial notice of the fact that a standing order in itself is not proof of payment.
16. The Appellant further submitted that the Respondent's uncertified statements of accounts were less credible and of a lesser probative value in comparison to the certified statements produced by the Appellant. Additionally, the Appellant submitted that no money was credited as from June 2010 through to 23<sup>rd</sup> February 2012 when the sum of Kshs. 150,000.00 being the price of the sold vehicle was credited to the account. That had the trial court considered this default, coupled with the Respondent's failure to settle the debt due on 28/10/2009, together with the penalty interest, it would have arrived at a different and correct decision.
17. The Appellant submitted that the trial court ought to have considered that the Respondent was a serial defaulter since vide his letter dated 14<sup>th</sup> April 2011, he sought restructuring of his loan and further, the Respondent failed to prove that he had since cleared the loan as he did not furnish any cheque, deposit slips or bank statements.



18. While citing Regulation 18 (1) and (4) of the Credit Reference Bureau Regulations 2013, the Appellant submitted that it was its duty to share information concerning the customer's default in fulfilling his obligations under the Hire Purchase agreement. In support of this argument, the Appellant relied on the case of Rupa Cotton Mill (EPZ) Ltd & 2 others vs Bank of Borada (Kenya ) Ltd (2012) eKLR.
19. Lastly, the Appellant maintained that the listing of the Respondent was lawful on account of the fact that he had not cleared the outstanding balance and therefore, he thus ought not to have been delisted. It urged the Court to allow the appeal with costs to the Appellant.

### **Respondent's Submissions**

20. In his submissions dated 6<sup>th</sup> February 2023, the Respondent maintained that the findings of the trial court were proper and lawful. Emphasising on the facts before the trial court, he submitted that the Appellant did not deny that a standing order in the sum of Kshs. 10,000.00 was honoured by the Respondent.
21. He further submitted that through no fault of the Respondent, the Appellant failed to credit the sum of Kshs. 150,000.00 in his account and therefore, the Respondent could not be found culpable. In his view, the Appellant violated the provisions of Section 15 of the Hire Purchase Act and could not in the circumstances benefit from its own wrongdoing.
22. Lastly, the Respondent submitted that the Appellant did not counterclaim to recover any debt owed and by that inaction, the Respondent submitted that it was apparent that the Respondent was not a debtor. He urged this court to dismiss the Appeal with costs.

### **Analysis and Determination**

23. This being a first appeal, this Court's duty is to reconsider the entire evidence, evaluate it a fresh and draw its own independent conclusion but bearing in mind that this Court never saw nor heard the witnesses and should make due allowance in this respect (see *Selle and another vs Associated Motor Boat Co. Ltd & others* (1968) E.A 123.
24. The Respondent (Joshua Onani Ogembo) testified that in 2008, he entered into a Hire Purchase Agreement number HPR-4-560-002274 with the Appellant for an asset loan to purchase a truck registration number KBA 736M for Kshs. 1,000,000.00. The loan was to be repaid within thirty-five (35) monthly instalments of Kshs. 35,410.00 each after an initial deposit of Kshs. 440,000.00.
25. Though he claimed that he honoured that obligation, he admitted that he defaulted in monthly payments until April 2010. This prompted the Appellant to repossess the suit vehicle but he claimed to have defaulted only once. However, in his pleadings, he stated that he defaulted for three months and this is what he also admitted during cross-examination.
26. It is a fact that the Hire Purchase Agreement provided that arrears would attract interest and that default in payment would warrant repossession and sale of the suit motor vehicle. The Respondent's evidence was that two (2) days prior to the repossession on 16<sup>th</sup> July 2010, he had made arrangements with the Appellant for leave to make a late payment due to the challenges he had but the Appellant refused. In the circumstances, the entire balance by then as demanded by the Appellant was Kshs. 433,343.66. However, the Respondent was unable to raise the sum.
27. Therefore, when the vehicle was sold at Kshs. 150,000/= , the Appellant's position was that there was still a balance of Kshs.801,034.41. The Respondent's evidence was that he made a standing order at



Kshs. 10,000/- which was the sum he could afford. According to his pleadings, this was done on or about 12<sup>th</sup> June 2012 and it adhered up to and including March, 2015.

28. Whereas DW1 denied knowledge of that standing order, he admitted in cross-examination that the money was acknowledged by the Appellant. He also admitted that it was an indication that the Respondent was making efforts to repay the loan.
29. From the evidence tabled before court, there was no evidence that the Appellant entered into another agreement to vary the terms of Hire Purchase Agreement in terms of mode of payment including standing order. There was no evidence too that his obligation to pay outstanding arrears stopped after sale of the suit motor vehicle.
30. The fact that the Appellant acknowledged money in form of standing order should not be really an issue as it would not be expected that it would decline any payment made by a borrower towards clearance of the arrears due.
31. This Court notes that the Appellant's statement of defence dated 17<sup>th</sup> August 2015 contains mere denials to the averments in the Respondent's plaint dated 3<sup>rd</sup> June 2015. Further, the undated witness statement by Kenneth Mawira legal officer of the Appellant and filed in court on 9<sup>th</sup> March 2016 stated:-

“The plaintiff has current balance of Kshs. 1,060,372 on the loan account which continues to accrue charges and interest with payment in full (see attached statement of account).”

32. Another witness statement filed on 19<sup>th</sup> February 2020 by Joseph Olando (DW1) maintained that “The plaintiff has current balance of Kshs. 1,060,372 on the loan account which continues to accrue charges and interest with payment in full (see attached statement of account).”
33. The implication then is that the current balance remained the same several years later and still based on the same statement of account. There was no counterclaim for this amount by the Appellant as its Application dated 18<sup>th</sup> October 2016 seeking to amend the defence was dismissed by the trial court.
34. The bone of contention therefore is the two statements of accounts one produced by the Respondent and the other by the Appellant. The Appellant's contention is that the certified statement of account by the Appellant is of more probative value than the uncertified copy produced by the Respondent. That argument is absurd as the Appellant did not deny issuing the of statement held by the Respondent. These are two statements of account issued by the same bank (Appellant). It is the bank and not the customer which certifies bank statements.
35. According to Respondent, the bank statement he got from the Appellant , it was indicated that as at 16<sup>th</sup> January 2015, the balance was Kshs. 272,497.96. He alleges that he repaid the balance and then Kshs. 150,000/= was also debited to the loan account and therefore it meant that he cleared the balance indicated to him even surpassed by Kshs. 46,656.34 which was not refunded to him. He therefore urged the court to order that the sum of Kshs. 46,656.34 be refunded to him.
36. On the other hand, DW1 produced the Appellant's bank statement showing that that the Respondent was still in arrears and denied that the Respondent overpaid the bank by Kshs. 46,656.34 as alleged.
37. While relying on Section 15 of the Hire Purchase Act, the trial magistrate found that the Hire Purchase Agreement had terminated after repossession and sale of the suit motor vehicle. The court held thus:

“The sums paid by the Hirer as at the time was more than two thirds as according to the facts and figures admitted by the parties. The Defendant confirms payments by the plaintiff of



the sum amounting to 2/3 of the agreed amount of the in the Hire Purchase Agreement. The Defendant took the law in their hands by repossessing the vehicle without the court order and thus acting in contravention of the Act.”

38. Indeed Section 15 (1) of the Hire Purchase Act provides:-

“Where goods have been let under hire- purchase agreement and two thirds of the hire purchase price has been paid, whether in pursuance of the agreement or of a judgment or otherwise, or has been tendered by or on behalf of the hirer or a guarantor , the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by a suit.”

39. In its judgment, the trial court held:

“The Plaintiff has presented evidence before court that he made monthly payments of Kshs. 10,000/= to clear the balance and for overpayment of Kshs. 46,656.34. The interest accruing on the resale of the motor vehicle together with storage fees could not amount to interest imposed by the bank on the loan as the repossession and sale of the vehicle was unlawful.”

40. A perusal of the evidence on record as earlier highlighted shows that on a balance of probabilities, the Respondent indeed had cleared the arrears overpaid by Kshs. 46,656.34. This Court finds no error in trial court’s conclusion that the Respondent was entitled to a refund of the said sum in the circumstances of this case and as was pleaded.

41. In regard to the issue that reference of the Respondents ’ name to the Credit Reference Bureau (CRB), Regulation 18 (1) of the Credit Refence Bureau Regulations guides on the nature of the information to be shared regarding a customer and specifically provides that:

“Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer’s non-performing loan and any other negative information and may include details specified in sub-regulation (4)”

42. Sub- regulation (4) provides:-

“The nature of customer information to be shared pursuant to sub regulation (1),(2) and (3) include-

(a) ...;

(b) ...;

(c) ...;

(d) details of payment of credit facilities or default in payment by the customer, debt restructuring and actions taken by the institution to recover unpaid amounts including realization of securities, legal proceedings and related matters.”

43. There having been evidence of the Respondent’s actual default of monthly payments contrary to the Hire Purchase Agreement, then the Appellant carried its duties to shared such information. Indeed, in Rupa Cotton Mill (EPZ) Ltd & 2 others (supra), Musinga J (as he then was) held as follows



while dismissing the Plaintiff's Application where he (Plaintiff) was aggrieved by sharing of such information:-

“If a borrower has defaulted on a loan, it is mandatory that the bank shares this information with all other banks. The plaintiffs' assertion they have been portrayed as bad, impecunious and doubtful debtors does not lie. The information that the defendant has provided falls within the ambit of the provisions of the Banking (Credit Reference Bureau) Regulations, 2008 and more particularly as provided for in Section 14 of the Regulations...”

44. Inherently, the Appellant was in compliance with the said regulations. However, having been found to have cleared the loan and even overpaid as noted herein, there was no fault in the trial court issuing the orders sought by the Respondent.

45. In the upshot, the Appellant's Appeal lacks merit. It is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII (VIRTUAL) THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of;**

N/A for the Appellants.

N/A for the Respondent.

Court Assistant; Aphline

