



**Kenya Women Finance Trust & another v Khisa (Civil Appeal  
E007 of 2022) [2023] KEHC 27056 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E007 OF 2022**

**DK KEMEL, J**

**DECEMBER 15, 2023**

**BETWEEN**

**KENYA WOMEN FINANCE TRUST ..... 1<sup>ST</sup> APPELLANT**

**PAWABA AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANN SATIWA KHISA ..... RESPONDENT**

*(Being an appeal arising from the judgment of the Chief Magistrate's Court at Bungoma Hon. A. ODAWO (S.R.M) delivered on 10th January, 2022 in Bungoma Civil Suit no. 334 of 2019)*

**JUDGMENT**

1. Vide a Complaint dated 3<sup>rd</sup> August 2001, the Respondent herein sued the Appellants claiming for; a permanent injunction restricting the defendants by itself or its agent from repossessing and selling motor vehicle registration number KBV 403L; a declaration that the plaintiff was wrongly listed in the Credit Reference Bureau; a declaration that the plaintiff serviced the loan borrowed and has no sums due and owing to the 1<sup>st</sup> Appellant; a claim against the 1<sup>st</sup> Appellant for discharge of the logbook for motor vehicle KBV 403L; a declaration for a refund of the proceeds from the sale of KBX 690G having been sold and not reflected in the loan repayment schedule amounting to Kshs. 550,000/= ; general damages for wrongful listing in the Credit Reference Bureau; a refund of the sums overpaid; costs of the suit and interests on the above prayers.
2. The Appellants in their statement of defence denied the Respondent's claim and asserted that the Respondent had pending arrears resulting from a separate loan account thus the repossession was substantiated.
3. In its judgement dated 10<sup>th</sup> January 2022, the trial Court allowed the Respondent's claim in terms of prayer 1 of the amended complaint thereby issuing a permanent injunction restraining the respondent from repossessing and selling MV Reg No. KBV 403L.



4. Aggrieved by the judgement of the trial Court, the Appellants lodged their Memorandum of Appeal dated 4<sup>th</sup> February 2022, on the following grounds:
  - a. That the learned magistrate erred in law and in fact in disregarding the doctrine of sub judice.
  - b. That the learned magistrate erred in law and in fact in entering judgment for the respondent against the appellants when the respondent's claim had not been substantiated
  - c. They prayed for the appeal to be allowed and that the court do proceed to set aside the subordinate court's decision and dismiss the respondent's case with costs.
5. The appeal was canvassed by way of written submissions. The Appellant and the Respondent filed and exchanged their respective submissions.
6. Vide submissions dated 22<sup>nd</sup> June 2023 and filed on 7<sup>th</sup> July, 2023, the Appellants argued that the respondent's suit was sub judice as described under section 5 and 6 of the Civil Procedure Act as the issues in trial in the current suit were being tried in Bungoma CMCC No. 83 of 2018 *Peter Nyongesa Khakina Sitawa Khisa vs. KWFT & Agunja Auctioneers* where the plaintiff therein had challenged the repossession and sale of M/V Reg No. KBX 690G and subsequently sought for orders for accounts. It was further submitted that the facts and reliefs in the above quoted case and those of the current suit as filed in the trial court were substantially similar. Reliance was placed in the case of Kenya National Commission on Human Rights vs. Attorney General Independent Electoral and Boundaries Commission & 16 Others (interested parties) and Thiba Min Hydro Co. Ltd vs. Josphat Karu Ndwiga.
7. The appellant further submitted that the respondent did not prove her case on a balance of probabilities and was thus unworthy of the orders issued. Counsel contended that the respondent did not support by documentary evidence that she had cleared the outstanding amount owed to the 1<sup>st</sup> Appellant. It was submitted that the appellants testified on how the respondent took up various loan facilities with them and the repossession of the two motor vehicles was to recover arrears in the separate loan accounts and as such the burden of proof shifted to the respondent to prove otherwise. Counsel quoted Section 109 of the Evidence Act and relied on the cases of Hellen Wangari Wangechi vs. Carumera Muthini Gathua (2005)eKLR, Evans Nyakwana vs. Cleophas Bwana Ongaro (2015)eKLR and Miller vs, Minister of Pensions (1942) 2 ALL ER 372.
8. The respondents on the other hand submitted that the appellants did not raise the issue of Sub judice as a preliminary objection or by way of an application vide a notice of motion in the primary suit as required under the law seeing that the provisions of the law which prescribe it is couched in mandatory terms with the effect being a claim of sub judice is capable of disposing off a suit at the preliminary stages. Counsel quoted the case of Jamuburi Commercial Centre Welfare Association vs. Njuguna & 5 Others (Environment and Land Petition E008 of (2022)KEELC 15586 (KLR).
9. It was further argued that the issues in question in Bungoma CMCC No. 83 of 2018 *Peter Nyongesa Khakina Sitawa Khisa vs. KWFT & Agunja Auctioneers* and the current suit were distinct as the Principals are different and so is the subject matter. It was contended that the respondents through DW1 confirmed that the subject matter in Bungoma CMCC No. 83 of 2018 *Peter Nyongesa Khakina Sitawa Khisa vs. KWFT & Agunja Auctioneers* has since been dispensed with. The respondents therefore urged the court to dismiss the appellants appeal with costs.
10. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the parties in this appeal as well as the parties' submissions in the lower Court. In my humble view, I find the only issues for consideration is whether this Court should interfere with the decision of the trial Court and grant the orders sought.



11. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
12. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated that;  

“[A]n appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect”
13. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;  

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
14. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the same stated with regard to the duty of the first appellate court;  

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
15. I have considered the evidence before me and it is not in contention that the Respondent took up loans from the 1<sup>st</sup> Appellant and secured the same using two motor vehicles MV Reg No. KBX 609G and MV Reg No. KBV 403L. It is not also in contention that MV Reg No. KBX 609G was repossessed and sold and that the Appellants now intend to sell MV Reg No. KBV 403L to recover an alleged loan balance. The question which remains therefore is whether this matter is sub judice and whether the Appellant has cleared the loan amount and arrears due to warrant the prayers sought.
16. What is sub judice or when can a matter be referred to as sub judice?. According to Black Law Dictionary 9<sup>th</sup> edition, sub judice means-“before a court for determination.....”
17. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.
18. The provisions of Section 6 of *Civil Procedure Act* define the above principle or the doctrine as follows;  

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating



under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

19. The suit filed by the Respondent vide Bungoma CMCC No. 83 of 2018 *Peter Nyongesa Khakina Sitawa Khisa vs. KWFT& Agunja Auctioneers*, going by what has been laid before me, reveals that the plaintiff therein Mr. Peter Nyongesa filed the suit seeking injunctive orders against the repossession and threatened sale of M/V Reg No. KBX 609G on the grounds that the impoundment was fraudulent, full of misrepresentations on the part of the defendants (appellants herein) and marred with irregularities. It therefore sought the following orders inter alia:-

i. A permanent injunction as sought in paragraph 19.

19. The plaintiff's claim against the defendants jointly and severally is for a permanent injunction restraining the defendants from interfering with the plaintiff's possession of M/V Reg no. KBX 609G without due process, a declaration that the chattels mortgage dated 9<sup>th</sup> November 2017 is null and void, an order for them to render due and accurate accounts to the plaintiff to facilitate them service their loan and an order for general damages in view of the illegal and irregular manner in which the said motor vehicle was impounded.

ii. A declaratory order as sought in paragraph 19.

iii. An order for accounts

iv. General damages

v. Costs of this suit and interest thereon at court rates

20. In the present suit before this court the Respondent in her plaint dated 30<sup>th</sup> March 2021 seeks inter alia the following reliefs namely: -

a. A permanent injunction in terms of paragraph 20 above.

20. The plaintiff's claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendant is for an order of injunction to permanently restrain the 2<sup>nd</sup> defendant from repossession and selling motor vehicle KBV 403L

b. A judgment in favour of the plaintiff in terms of paragraphs 22,23,24, & 25 above

22. The plaintiff further claims against the 1<sup>st</sup> defendant is for declaration that the plaintiff was wrongfully listed in the Credit Reference Bureau (CRB).

23. The plaintiff's further claim against the 1<sup>st</sup> defendant is for a declaration that the plaintiff serviced the loan borrowed and has no sums due and owing to the 1<sup>st</sup> defendant

24. The plaintiff further claim against the 1<sup>st</sup> defendant is for a discharge of logbook for M/V KBV 403L

25. The plaintiff further claims for a declaration that the plaintiff is entitled to a refund of the proceeds from sale of M/V KBX 690G the same having been sold and not reflected in the loan repayment schedule amounting to Kshs. 550,000 and interest thereof.

c. General damages and damages on wrongful listing with CRB

d. A refund of sums overpaid.



- e. Costs of the suit.
21. From my evaluation of the above pleadings and reliefs sought, I find that the issues for determination are not similar and neither are the reliefs sought as the subject matter in both suits is distinct. In my view, a determination of either would not render the other as spent and of no use. The ground on this matter being sub judice therefore fails.
22. The other issue for consideration is whether the respondent discharged the burden of proof to warrant the orders issued. The respondent in the primary suit as noted above sought inter alia for injunctive orders. In support of her case, she produced various documents listing from Exhibit No. 1-13 while the appellants in support of their case presented documents in support of their case listing from Exhibit 1-10.
23. From the evidence on record, the respondent averred that with the repossession and sale of M/V Reg No. KBX 690G she had cleared her arrears with the appellant. The appellant on the other hand insists that the respondent has not cleared her arrears thus the repossession of M/V Reg no. KBV 403L. The appellant who runs the respondent's account has neglected to disclose the amount realized from sale of M/V Reg No. KBX 690G whether the same was realized for a separate loan account as alleged. The trial court in its judgment remarked and I quote;
- a. From the analysis above, and having looked at the report produced by PW2 and the statement of accounts, produced as DE2, the two are in conflict.
  - b. What the court is grappling with is whether the Plaintiff has paid the full loan amount.
  - c. The amount that was recovered from the sale of M/V Reg No. KBX 690G was not disclosed to the court neither was it reflected in either PE 13 nor DE2.
  - d. ....
  - e. ....
  - f. Be as it may, based on the above and the conflicting evidence, the Court is left to determine this matter based on a balance of convenience.
  - g. In my view, for the court to allow the defendant to proceed to sell M/V Reg No. KBV 403L in the circumstances, would be to encourage the unjust enrichment of the Defendant. In case indeed the proceeds of the sale of M/V Reg No. KBX 690G were enough to cover the arrears.
24. Justice Mativo (as he then was) in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, which was cited by the learned counsel for the Respondent quoted with approval Lord Brandon in *Rheir Shipping Co. SA. v Edmunds* [1955] IWLR 948 at 955 as follows:
- “No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”
25. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof therefore in a suit or proceeding, lies on that person, who would ideally fail if no evidence at all were given on either side, See also (Section 107 of the *Evidence Act*).
26. The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Mativo J (as he then was) in the above case stated that the standard of



proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo (as he then was) cited with approved Lord Denning in *Miller v Minister of Pensions* [1942] 2 ALL ER 372 as follows:

“The .....(standard of proof).....is well settled. It must carry a reasonable degree of probability..... 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.

27. Applying the above principles, I concur with the trial courts conclusion as set out above noting that the Appellants have a fiduciary duty towards their clients and in this case the respondent to provide them with proper records of their accounts. In my view, the actions of the appellants who seem to be denying the respondent a right to know the status of her loan account is in bad faith and is geared towards unjust enrichment and economic duress. Procedural fairness has embedded in it the age-old natural justice requirements that justice must not only be done, but it must also manifestly and undoubtedly be seen to be done. The 1st Appellant in the trial court failed to avail evidence of the amounts realized from sale of the subject vehicle despite the Respondent’s assertions that the sale proceeds had fully settled the loan arrears and that it could not go for another vehicle. It was thus incumbent upon the 1<sup>st</sup> Appellant to avail a copy of the statement to the contrary. The conduct of the 1<sup>st</sup> Appellant in refusing to do so was thus in bad faith and could only be seen to be taking the Respondent for a ride. I have read the impugned judgment by the Honourable learned trial magistrate delivered on 10<sup>th</sup> January 2022. The Judgment is well reasoned and speaks for itself and I see no need to interfere with it.
28. In view of the foregoing observations, it is my finding that the appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**D.KEMEI**

**JUDGE**

In the presence of

Miss Ngeiywo for Appellant

No appearance for Angima for Respondent

Kizito Court Assistant

