



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIIAYA

CIVIL APPEAL NO. E025 OF 2021

KENYA COMMERCIAL BANK LTD.....APPELLANT

VERSUS

FRANCIS ODERA MAJENGO.....RESPONDENT

(Appeal from the judgment and decree of Siaya Senior Principal Magistrate James Ong'ondo in SPMCC No. 31 of 2016 delivered on the 1st July 2021)

JUDGMENT

1. This is an appeal from the judgment of Siaya Senior Principal Magistrate James Ong'ondo in SPMCC No. 31 of 2016 delivered on the 1st July 2021. The respondent herein **FRANCIS ODERA MAJENGO** filed suit vide plaint dated 21st April 2016 seeking amongst others, orders stopping the appellants from selling his motor vehicle registration number KBX 679L, as well as compelling the appellant to render accounts and further a declaration that the repossession of the subject vehicle was illegal as it was not founded on any legal instrument or donated by law and the same ought to be released.

2. The appellants filed their amended defence and counter-claim dated 26th July 2017 in which they denied the respondents averments and counter claimed against the respondent Kshs. 1,762,851.45 as well as interest on the same at 16% per annum from 15th May 2016 and costs of the suit.

3. In his judgement, the trial magistrate found that the appellant had failed to prove that the chattel document was registered as required under section 6 and 13 of the Chattels Transfer Act and as such the appellant could not be allowed to recover the monies owed to it by the respondent from the subject motor vehicle. The trial magistrate proceeded to allow the respondent's claim as prayed whilst dismissing the appellant's counterclaim.

4. Aggrieved by with the trial court's judgement, the appellant herein filed a memorandum of appeal dated 14th July 2021 on the 15th July 2021 which setting out the following grounds:

- a) *That the learned trial magistrate erred in law and fact by ignoring the terms of the Letter of offer dated 9th September 2013 where the plaintiff agreed to pay the loan facility of Kshs. 1,996,900 within 60 months at monthly instalments.*
- b) *That the learned trial magistrate erred in law and fact by failing to appreciate the evidence tendered with regard to the joint registration of the motor vehicle in the name of the plaintiff and the bank.*
- c) *That the learned trial magistrate erred in fact and in law by dismissing the counterclaim of Kshs. 1,762,851.45 together with interest, yet the plaintiff expressly admitted fault.*
- d) *That the learned trial magistrate erred in law and in fact by ignoring section 13 of the Chattels Transfer Act which provides that an unregistered instrument shall be deemed fraudulent and voidable as against certain persons who are specified in the section and that those persons do not include the plaintiff.*
- e) *That the learned trial magistrate erred in law and fact in granting all the reliefs sought by the plaintiff despite his express admission of default.*
- f) *That the learned trial magistrate erred in law and fact in ordering the unconditional discharge of the motor vehicle even though it was not paid for.*

g) That the learned trial magistrate erred in law in awarding costs to the plaintiff despite no demand having been issued before commencement of the suit and against the fact that the suit was precipitated by the plaintiff's breach of the terms of the letter of offer.

h) That the learned magistrate erred in law in arriving at a decision that was not supported by evidence or the relevant applicable laws.

5. Both parties agreed to dispose of the appeal by way of written submissions.

The Appellant's Submissions

6. It was submitted by the appellant that they had demonstrated the respondent's breach of the terms of the letter of offer dated 9th September 2013 as the respondent had on numerous occasions admitted to the appellant that he was in default and promised to pay if granted more time.

7. The appellant submitted that contrary to the holding of the trial court, the search certificate and log book produced by the plaintiff showed that the subject motor vehicle was registered in the name of both the borrower and the bank which evidence was sufficient proof that the security was registered.

8. It was submitted that even if the chattels mortgage was not registered, the appellant was not one of the persons contemplated under section 13 of the Chattels Transfer Act (now repealed by the enactment of **The Movable Property Security Rights Act, 2017** against whom an unregistered chattels mortgage will be deemed to be fraudulent and voidable. On this assertion, the appellant relied on the case of **Meshack Mariers Ongeri v Credit Bank Limited [2018] eKLR** as well as **Geoffrey Njenga v Godfrey Karuri & Another NBI ML HCCC No. 795 of 1999 [2000] eKLR**.

9. It was submitted that an unregistered instrument was a contract interpartes and was therefore enforceable between the parties.

10. The appellant submitted that the trial court ought to have considered the counterclaim as filed, taking into account the specific facts pleaded, and make a determination on the same failure of which the court failed to appreciate that the counterclaim was one of the alternative ways in which the bank could recover the money owed. Reliance was placed on Order 7 rule 3 of the Civil Procedure Rules which provides for counterclaims as well as the Court of Appeal case in **County Government of Kilifi v Mombasa Cement Limited [2017] eKLR** where the court considered the effect of Order 7 Rule 3 and stated that there was no provision that a counterclaim must be related to the original subject matter of the suit.

11. The appellant submitted that it adduced evidence that showed that the respondent had a loan balance of Kshs. 1,762,851.45 and prayed that the court awards the same with interest at 16% as agreed from the 15th May 2016. It was submitted that section 26 of the Civil Procedure Act gives the court discretion to award the interests from such earlier date as it deems fit.

The Respondent's Submissions

12. It was submitted that the letter of offer issued to the Respondent by the Appellant was quite categorical, that the instrument must be registered and as the registration was not done, the Appellant by themselves were in express breach of their own terms and conditions of the Letter of offer and they cannot be permitted to run away from it.

13. The respondent submitted that the Letter of offer was the basis upon which the present suit was filed and as such that the trial court considered its express terms clearly and arrived at the correct decision when it made a finding that certain terms of the said Letter of offer were not binding on the Respondent as they were not in line with the relevant law, the Chattels Instrument Act.

14. The respondent submitted that his understanding of Section 13 (1) (c) of the Chattel's Transfer Act (now repealed and replaced with **The Movable Property Security Rights Act, 2017**) was that an unregistered instrument shall be deemed fraudulent and void as against the person seizing the chattel or any part thereof as was held by Sitati J in the case of **KISII HCCA No. 70 of 2010 George Ndege Okello v K- REP Bank Limited**.

15. It was further submitted that the basis upon which the Respondent's came to court was that the appellant had unlawfully seized his chattel (motor vehicle registration number KBX 679X) and as such to suggest that the trial court misinterpreted the law was totally misleading and therefore the case of **Kisii HCCA NO. 74 OF 2015 – Meshack Maniera v Credit Bank Ltd** was not relevant.

16. It was submitted that the words of the trial court were that the amount claimed by the Appellant could not be recovered on the strength of non-existent and unregistered chattel instrument and therefore given that the Appellant was in clear breach of the terms and conditions of its own documents, they should not be allowed to benefit from the same.

17. The respondent submitted that in KISII HCCA No. 70 of 2010 (supra) the court held that even though it noted that **the appellant owed money to the respondent, such monies could not be recovered by an unregistered Chattel instrument nor by an unauthorized person and thus the respondent needed to go back to the drawing board and find other ways of recovering their monies**. The respondent also relied on the case of **NBI HCCC No. 257 of 2008, Venue Company Limited v Madatali Chatur** where the court held the same view.

Analysis & Determination

18. I have considered the pleadings in the lower court, the grounds of appeal and the written submissions. As the first appellate court, this court has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that the trial court saw and heard the

parties and giving allowance for that, and to reach an independent conclusion as to whether to uphold the judgment. see **Selle v Associated Motor Boat Co. [1968] EA 123.**

19. The evidence as emerges from the trial court is as follows; The respondent pleaded in his plaint dated 21st April 2016 that he applied for and was granted a loan facility of Kshs. 1,955,000 by the appellant to purchase motor vehicle registration number KBX 679L. The loan was to be serviced by monthly instalments of Kshs. 47,000/- per month over a period of 60 months starting from 15th March 2014. The respondent pleaded in his plaint that the defendant agreed to forward to him a chattel mortgage agreement for him to sign which he did not do and that on the 8th April 2016, the appellant thorough its agent, M/S Dimonde Agents & Auctioneers unlawfully and without notice repossessed the subject motor vehicle on account of alleged arrears. In his testimony, the respondent stated that when the subject motor vehicle was repossessed, he had entered into an agreement with Wedmon Marketing Consultants to hire out the vehicle for a period of one year at a cost of Kshs. 3000 per day which money he lost as a result of the repossession of the vehicle.

20. In cross-examination, the respondent testified that the log book of the subject vehicle was in the name of the appellant and the respondent's name and that there was no need to consult the appellant before he got into the agreement with Wedmon Marketing Consultants. The respondent testified in cross-examination that ON 13.3.2016, the vehicle was still security with the bank and that he had borrowed Kshs. 1,966,900 from KCB and that he was supposed to pay Kshs. 47,000 though the letter of offer provided for payment of Kshs. 47,832. He further stated that he knew the interest was illegal as the balance appeared inflicted.

21. The respondent further testified in cross-examination that he indicated the balance was Kshs. 1,742,291 and he was to pay Kshs. 36,298. He further stated that he could not pay as once the vehicle was released from the auctioneer, it had a break down. He further stated that the bank needed to avail statements so that he would know the exact amount due as he had not brought evidence of payment.

22. In re-examination, the respondent stated that the main issue was to get money and pay and as such there was no need to tell the bank that he had found something to do with the car so as to facilitate repayment of the loan. He further reiterated that he was not sure how much was due unless the appellant availed statements. The respondent further testified that it was the accountant who calculated the interest and that the calculation by the appellant was not correct. He stated that he was not able to repay the bank as the bank repossessed the vehicle.

23. The appellant called one Wycliff Mbunya to testify on its behalf. He adopted his recorded statement dated 2.2.2021 and produced the documents dated 12.10.2018 as PE 1-9(a-c). It was his testimony that the loan to the respondent was granted on the 21.1.2014 and the first instalment done on the 15.3.2014. He further testified that the amount of Kshs. 1,762,851.45 came from the statement and it was the balance when the last repayment was made in May 2016. He testified that the loan had been accruing at 16% p.a. which would push the figure higher.

24. When shown the agreement dated 13.3.2016, Mr. Mbunya testified that the appellant would agree with the bank in terms of not repossessing the vehicle as it would be bringing in Kshs. 48,000 in 8 days. He stated that the charge without encumbrance was misleading as the vehicle was co-owned with the bank. He further testified that the appellant prayed for judgement for Kshs. 1,762,851.45 and interest at 16% p.a. from 15.5.2016 as well as costs of the suit.

25. In cross-examination, Mr. Mbunya testified that no notice was issued to the respondent prior to filing of the counterclaim and that he was not aware that as such he was not entitled to costs. He stated that the appellant claimed interest as 16% p.a. and when referred to the loan statement PEx 4, he stated that the 2 interests of 10% paid and principal 16% were the same thing consisting of penalty interest and capital penalty interest.

26. When taken through the entire statement, Mr. Mbunya stated that the remaining balance was Kshs. 1,621,020.25 as at 25.7.2015 as compared to a letter issued by the bank on the 22.7.2015 that showed the balance at Kshs. 1,630,397.60, a difference of Kshs. 8,000.

27. When he was referred to the security clause 8.2.in PE 1, it was his testimony that the security was prepared, executed and perfected. He stated that perfection entails the registration at a relevant government registry as registered chattel but that he did not have the copy of registered chattel in court. He further stated that though the list of documents was filed in 2018, the logbook was not in the list the bank filed.

28. In re-examination, he stated that the penalty interest was levied on amount in arrears if the arrears go for more than one month as it was capitalized interest. He further testified that interest was on a daily basis but appeared on the statement at the end of the month and this explained the Kshs. 8,000 which was interest from 1st August. The defence then closed its case.

Determination

29. The gravamen of the dispute between the two parties herein as emerges from the pleadings filed in the lower court and which this court has to re-evaluate and re-assess is whether the repossession of the subject motor vehicle was illegal for failure of registration as provided by law and whether the appellant's counterclaim was merited.

Whether the repossession of the subject motor vehicle was illegal for failure of registration under the chattels Transfer Act (now repealed)

30. Section 6 of the Chattels Transfer Act Cap 28(Now repealed) provided:

“6(1) The period within which an instrument may be registered is twenty-one days from the day on which it was executed.

Provided that when the time for registering an instrument expires on a day whereon the Registrar's Office is closed, the registration shall be valid if made on the next following day on which the office is open.

31. Section 13 of the same Act provided:

“(a) Every instrument unless registered in the manner provided under this part, shall upon the expiration of the time for registration or if the time for registration is extended by the High Court upon the expiration of the extended time be deemed fraudulent and void as against:

(b) The assignee or trustee acting under any assignment for the benefit of the creditors of that person.

(c) any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorising the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was issued.

32. Further section 17 of the Act was in the following words:

“An instrument shall contain or shall have endorsed thereto a schedule of the chattels comprised therein, and, save as otherwise expressly provided by this Act, shall give a good title only to the chattels described in that schedule, and shall be void as against the persons mentioned in sections 13 and 14 in respect of any chattels not so described.”

33. I have deliberately referred to and reproduced the above provisions of the repealed Act for their relevance to the suit before the learned magistrate and the issues raised before him. A cursory look at those provisions, *vis-à-vis* the issues raised, one cannot say that they are frivolous. They are pertinent to the issues that were raised in the application and the suit before the lower court.

34. The respondent herein faulted the enforceability of the chattels mortgage instrument that led to the repossession of the subject motor vehicle.

35. There was no evidence presented before the trial court and this court that showed that the chattel mortgage had been registered. The appellant’s witness despite testifying orally that it was registered, could not prove the same.

36. The appellant herein has submitted that the respondent was not one of the persons provided for under section 13 of the now repealed Chattels Transfer Act. It relied on the case of ***Meshack Mariers Onger*** (*supra*).

37. I have perused the aforementioned case of ***Meshack Mariers Onger supra*** and note that the judge therein noted that failure to register the chattel mortgage instrument remained a contract inter-parties. My understanding of this is that the parties who agree to the registration of a chattel mortgage instrument to demonstrate perfection of the charge are bound by the same.

38. A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. See the case of ***Nancy Muthoni Nyaruai v Grace Wanjiku Mugure [2021] eKLR***. In the instant case, there was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

39. Accordingly, it is my opinion that the trial magistrate was right in holding that failure to prove that the chattel document was registered went to the root of the issues between the parties therein and was relevant in deeming the repossession of the subject motor vehicle as illegal.

Whether the appellant’s counterclaim was merited.

40. It was submitted by the appellant that the trial court ought to have considered the counterclaim as filed, taking into account the specific facts pleaded, and make a determination on the same. Mr. Mbunya who testified on behalf of the appellant in the trial court stated that the respondent was not given notice of the counterclaim and therefore was not sure if the appellant was entitled to costs.

41. Counterclaims are provided for under order 7 rule 3 of the Civil Procedure Rules which is in terms: -

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.” [Emphasis added]

42. The above provision allows or gives a defendant in a suit permission to raise a counterclaim based on any right or claim against a plaintiff. To this extent, the appellant was well within its right to file the counterclaim. The question thus is whether the trial court considered the same and determined it.

43. A look at the trial court’s judgement reveals that the court addressed itself as follows regarding the appellant’s counterclaim:

“Although I note that the plaintiff owes the defendant some balance on the loan facility, such mounts cannot be recovered on

the strength of non-existent and unregistered chattel instruments. This court cannot sanction such an act. The defendants must now find alternative ways of recovering the monies.”

44. In my view the trial court addressed itself to the counterclaim raised by the appellant and proceeded to find that the same could not be recovered against an unregistered chattel instrument, in this case being the subject motor vehicle herein.

45. I have perused the counterclaim by the appellant and note that it involves monies falling into arrears by the respondent. The respondent himself admitted that he fell into arrears. However, there is a dispute between the parties herein as to how much the arrears are.

46. Order 7 rule 3 of the Civil Procedure Rules on counterclaims further provides that if in the opinion of the court, such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

47. It is my opinion that the trial court ought to have pronounced and directed that the appellant pursues its counterclaim as a separate suit to that initiated before the trial court by the respondent herein so as to allow the parties ventilate the various issues that are in issue between them.

48. Taking all the aforementioned into account, I find this appeal lacking in merit. I however direct that the appellant pursues its counterclaim against the respondent in a separate suit.

49. Each party do bear their own costs as the Respondent too ought to have known that to benefit from the use of his motor vehicle as security for money advanced, there was need to register the chattel under the Chattels Transfer Act. Having benefitted from an illegal act, he does not deserve any costs.

Orders accordingly.

Dated, Signed and Delivered virtually at Mombasa this 17th Day of January, 2022

R. E. ABURILI

JUDGE

In the presence of:

Ms Achieng advocate for the Appellant-virtually

Mr. Ngala Awino advocate for the Respondent-Virtually

The respondent present in court physically

CA: Mboya and Akidah virtually from Siaya High Court