



**Kibet t/a Kiwell Enterprises v Endovour Credit Limited (Civil Appeal
E016 of 2021) [2022] KEHC 10609 (KLR) (16 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 10609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E016 OF 2021
SN MUTUKU, J
FEBRUARY 16, 2022**

BETWEEN

KIRUI WELDON KIBET T/A KIWELL ENTERPRISES APPELLANT

AND

ENDOVOUR CREDIT LIMITED RESPONDENT

*(Being an appeal against the Ruling of the Honourable Ruguru N(Ms)
PM delivered on 31st March, 2021 in Ngong SPMCC NO. 93 of 2020)*

JUDGMENT

Background

1. The Appellant herein entered into a Hire Purchase Agreement with the Respondent where he was advanced a loan of Kshs 2,000,000 against his Motor Vehicle Registration No. KBF xxxx. Interest on that loan was calculated at Kshs 640,000 and added to the loan making a total of Kshs 2,640,000. The Appellant fell in arrears leading to the repossession of the Motor Vehicle by the Respondent on or about 27th March 2020. The Appellant was aggrieved by that action. He believed that he had repaid more than 2/3 of the Hire Purchase price. He moved to court and obtained an injunction against the Respondent restraining the Respondent from disposing the motor vehicle. The court eventually ordered the release of the motor vehicle to the Appellant. These orders aggrieved the Respondent who filed Notice of Motion dated 22nd December 2020 seeking review of the orders of the court dated 22nd July 2020. The Respondent also sought to orders to repossess the vehicle and have it confined within the Respondent's Auctioneers' premises pending hearing and determination of the suit. The trial court, in its ruling dated 31st March 2021, declined to review its orders but instead ordered the Appellant to clear the outstanding balance within 3 months failure to which the Respondent was at liberty to repossess the vehicle and preserve it pending hearing and determination of the main suit. This Appeal arises from that ruling.



Memorandum of Appeal

2. The Appellant has raised the following Grounds of Appeal: -
 1. The Learned Magistrate erred in law and fact in allowing the Respondent's application dated 22nd December 2020 in spite of the issues raised in the supporting affidavit and submissions.
 2. The Learned Magistrate erred in law and fact by expressly basing her decision on a counterclaim that was filed out of time and without leave of court thus rendering the counterclaim a nullity and for no legal consequence.
 3. The Learned Magistrate erred in law and fact in granting a positive order for repossession of a motor vehicle when the application for the said order was not based on any pleadings.
 4. The Learned Magistrate erred in law and fact by rendering a ruling in the matter before considering the Appellant's application dated 1st February, 2021 seeking to strike out the Respondent's Defence and counter claim for having been filed out of time and without leave of court.
 5. The Learned Magistrate erred in law and fact in failing to apply the express provisions of section 15 of the *Hire Purchase Act*, Chapter 507 Laws of Kenya.
 6. The Learned Magistrate erred in law and fact when she failed to find and hold that the Appellant having paid over 2/3rds of the Hire Purchase price to the Respondent's repossession of his motor vehicle without a court order was in breach of section 15 of the *Hire Purchase Act*, Chapter 507 Laws of Kenya and abrogated the Hire Purchase Agreement.
 7. The Learned Magistrate erred in law and fact and misdirected herself when she failed to find that the *Hire Purchase Act* is categorical that if the owner (the Respondent) is guilty of breaching section 15 of the *Act*, the Hirer (Appellant) shall be released from all liability under the hire purchase agreement.
 8. The Learned Magistrate erred in law and fact by failing to find and hold that once the Appellant was released from liability, a counter claim, if any, was not suitable.
 9. The Learned Magistrate erred in law and fact by failing to find and hold that the Respondent had committed an immoral or illegal act by repossessing the motor vehicle after 2/3rds purchase price had been paid and an action by way of counterclaim cannot be founded on an immoral or illegal act.
 10. The Learned Magistrate erred in law and fact by failing to apply the principles governing applications for review when dealing with the Respondent's Application.
 11. The Learned Magistrate erred in law and fact when she failed to find that there was neither new nor important matter of evidence, error or mistake apparent on the face of the record or sufficient cause to grant the Respondent's Application.
 12. The Learned Magistrate erred in law and fact and as a result arrived at a wrong decision and in all circumstances failed to do justice to the Appellant.
 13. The ruling of the Honorable court has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.



3. This Court directed that this Appeal be disposed of by way of written submission and ordered the Appellant to file and serve a Record of Appeal together with submissions. The Record of appeal, dated 22nd June, 2021, was filed in court on 15th November, 2021.

Appellant's Submissions

4. The Appellants filed his submissions dated 15th November, 2021, in which he submits that a party who comes to court for review must satisfy at least one of the following:
 - i. That there is discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the decree was passed or the order made; or
 - ii. On account of some mistake or error apparent on the face of the record; or
 - iii. For any other sufficient cause/reason.
5. The Appellant argued grounds 1, 2, 3, 4, 9,10 and 11 together. He referred this court to his submissions filed in the lower court in respect of the Notice of Motion dated 22nd December 2020. In those submissions the Appellant had relied on the case of *National Bank of Kenya Ltd -vs- Ndungu Njau* (1997) eKLR where the court analyzed the ingredients for a review. He argued that the order for repossession made on the strength of a counter-claim filed out of time and without leave of the court was a presumption of the learned magistrate rendering the order null and void. The Appellant cited the Supreme Court of Kenya decision in Civil Application No. 3 of 2016 at para. 35 *County Executive of Kisumu -vs- County Government of Kisumu & 6 others* where the court stated that:

".....what we hear the applicant telling the court is that he is acknowledging having filed "a document" he calls "an appeal" out of time and without leave of the Court..... However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. Such a filing renders "the document" so filed a nullity and of no legal consequence....."
6. On grounds 5,6,7,8,9,12 and 13 the Appellant relied on his submissions filed in the subordinate court and urged this court to consider the same. He submitted that the Respondent did not oppose the Appellant's application for injunction though he was served and neither did he file a defence to the Plaintiff. He submitted that the application for review was an abuse of the process of the court; that the Defendant having abrogated the Hire Purchase agreement in contravention of the law by repossessing the Plaintiff's motor vehicle after the Appellant has made payments of more than 2/3rds, he cannot sustain an action or get relief from the Appellant as no action can be founded on an illegal and immoral conduct and this the action of repossessing the motor vehicle was in contravention of Section 15 of the Hire Purchase Act. The Appellant urges that this appeal be allowed with costs.

Respondent's Submissions

7. The Respondent filed his submissions on 15th November 2021. He has submitted that the appeal should be struck out as the Record of Appeal has no certificate of record to verify that the same does tally with that on record and that the same is incomplete as it doesn't contain the application dated 22nd June, 2020. The Respondent argues that he filed his application due to the fact that the Appellant had initially filed an application dated 22nd June, 2020 without service; that the court erred in granting the mandatory injunction compelling release of the asset without granting leave to respond to the said



application; that his only recourse was the application dated 22nd December, 2020 to prove to court that as at the time of repossession the Appellant had not complied with the 2/3 rule.

8. The Respondent argued that the undisputed loan balance was Kshs. 890,000/- and the same was based on the application filed by the Appellant dated 22nd June, 2020. On this point, he argued that parties are bound by their pleadings and relied on *Independent Electoral Boundaries Commission and Another versus Stephen Mutinda Mule & 3 others* [2014] eKLR.
9. On the Appellant's Application dated 5th February, seeking to strike out the Respondent's Defence and Counter Claim for having been filed out of time, the Respondent argued that the Defence and Counter Claim was stamped by the court hence can be asserted as a mere technicality and that the Appellant was indolent as he slept on his entitlement to seek judgment in the event of non-compliance with the 14 days to file defence. On this point, the Respondent relied on the doctrine of equity that favors the vigilant and on the case of *Mohammed Shally Sese (Shah Sese) versus Fulson Company Limited and Another* (2006).
10. It was the Respondent's argument that Order 42 rule 6 was not complied with in furnishing security pending appeal. He contended that he remained patient despite court granting a stay pending appeal without any security.

Analysis and Determination

11. This is a first appeal. It is a requirement that this court sitting as the first appellate court owes a duty to reconsider the evidence, make its own evaluation of that evidenced and draw its own conclusions, always giving allowance to the fact that it did not see or hear the witnesses. With that in mind, it is my understanding that I am not bound by the findings of fact of the trial court (see *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR).
12. The same requirement is also found in Section 78(2) *Civil Procedure Act* provides:

Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
13. I have taken time to read the Record of Appeal, the record of the lower court, the Memorandum of Appeal, parties' arguments as contained in their rival submissions and cited authorities. It is clear to me that this is an Interlocutory Appeal. It emanates from the Ruling in respect of the Notice of Motion dated 22nd December, 2020 by the Respondent for orders that the court review out of time its ex parte orders dated 22nd July, 2020 which granted the Appellant full custody of motor vehicle KBF xxxx.
14. I have noted that the main suit, being the Complaint dated 22nd June 2020 and fled on the same date has not been determined. The subject matter is motor vehicle KBF xxxx. I have noted that it is alleged by the Appellant that the Respondent filed Defence to this Complaint and a Counter Claim out of time. There is also on record a Notice of Motion dated 1st February 2021 filed by the Appellant seeking to strike out the Defence and Counterclaim. This application has not been determined. I remember to restrain myself from making any findings or pronouncements and determination that may pre-empt the trial of the main suit and the pending application, unless it is absolutely necessary to do so.
15. There are certain issues that are not in dispute. One is that the parties entered into a Hire Purchase Agreement where the Appellant was advanced Kshs 2, 640,000 inclusive of interest. It is alleged that the Appellant defaulted in repayments leading to the repossession of the motor vehicle that was used



as security. The Appellant alleges that the Respondent in repossessing the vehicle is in breach of the Hire Purchase Act Section 15. There is also the issue of filing Defence and Counterclaim out of time. All these are issues that are pending determination in the lower court.

16. This court will confine itself to the Ruling dated 31st March 2021, the basis of this interlocutory appeal. This Ruling was based on the Notice of Motion dated 22nd December 2020. It seeks review of the court's *ex parte* orders of 22nd July 2020 and further sought to have the motor vehicle in issue released to the Respondent in this Appeal pending the hearing and determination of the main suit. The trial magistrate reasoned, *inter alia*, as follows:

"..... On of the major grounds of the Application is that, as at 27th/3/2020, when the subject M/V was repossessed, the plaintiff had an outstanding balance of the principal loan of Kshs 890,000. On the other hand, he plaintiff submitted that, at the time of repossession, he had paid 2/3 of the loan and repossession was therefore in contravention with Section 2 (*sic*) of the Hire Purchase Act.

17. Having noted the foregoing and appreciating that the M/V is currently in the possession of the Respondent find no reasons at this juncture to review the subject order and have the subject M/V kept at the auctioneers' yard without hearing the main suit. That as it may, the Plaintiff is directed to clear the undisputed loan balance within the next three (3) months failure to which, the defendant is at liberty to repossess the subject motor vehicle and preserve it pending the hearing and determination of the main suit."
18. My understanding of the above decision is that the trial court declined to grant the prayers sought in the Notice of Motion dated 22nd December 2020 and instead directed the Appellant to clear the balance of the outstanding loan. It also seems as if the Appellant through her advocate is arguing the Application for review instead of the Appeal. My reading of the grounds of appeal fail to show the relationship between the grounds of appeal and the ruling dated 31st March 2021. For instance I do not see any order allowing the Application dated 22nd December 2020. I have captured above the main decision of that ruling.
19. I fail to see the orders for repossession of the M/V.
20. Briefly put, the grounds of appeal contained in the Memorandum of Appeal are not supported by what is contained in the lower court record. The only mistake I have noted is for the order directing the Appellant to clear the outstanding loan before hearing parties in the main suit to determine the issues raised therein. There is dispute as to what is owing and on the manner the amounts are being calculated.
21. I am restrained to find that the grounds raised in the memorandum of appeal are not merited. However, it is my finding that the main suit and the application contesting the proper filing of the Defence and Counterclaim raise pertinent issues that requires intervention of the court for ends of justice to be met.
22. Finding no merit in this Appeal because of the manner it has been drafted, it being at variance with the evidence contained on record and the ruling dated 31st March 2021, it stands dismissed. To avoid wasting judicial time and for ends of justice to be met, this matter is remitted to the SPMCC Court in Ngong to be placed before another Magistrate other than Ruguru N. for the hearing and determination of the pending matters. Costs are payable to the Respondent.
23. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 16TH FEBRUARY 2022.



S. N. MUTUKU
JUDGE

