



REPUBLIC OF KENYA



KENYA LAW
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**Progressive Credit Ltd & another v Mutiso (Civil Appeal E090 of 2021)
[2022] KEHC 16633 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E090 OF 2021
TW CHERERE, J
DECEMBER 21, 2022**

BETWEEN

PROGRESSIVE CREDIT LTD 1ST APPELLANT

IDEAL AUCTIONEERS 2ND APPELLANT

AND

OSCAR MUTISO RESPONDENT

*(Being an appeal from the judgement and decree in Githongo PMCC
NO. 43 OF 2018 by Hon. E. Ndegwa on 16th Day of June, 2021)*

JUDGMENT

Background

1. The evidence and exhibits tendered by the parties at the trial disclose that by a loan agreement dated August 30, 2016, 1st Appellant advanced the August 30, 2016 respondent KES. 650,000/- and the same plus interest was to be repaid at KES. 80,168/- on or before the 1st of every month starting from October 1, 2016 to October 1, 2017. The facility was secured by M/V KBZ 889 E belonging to the Respondent.
2. Later by a loan agreement dated November 11, 2016, 1st appellant advanced the respondent KES. 1,789,684/- and the same plus interest was to be repaid at KES. 80,000/- for 6 months, KES. 100,000/- for 17 months and KES. 835,752/- as the last instalment payable on or before 25th of every month starting from 25th December, 2016 to December 25, 2018. The facility was secured by M/V KCJ 445 P belonging to the Respondent.
3. Subsequently on January 24, 2018, the parties entered into another loan agreement to reschedule the previous two loans which the respondent had fallen in arrears.



4. On the ground that respondent had failed to comply with the loan agreement and on the basis that the loan outstanding as at that date was KES. 2,249,595.30 cts, 1st appellant by a letter dated June 23, 2018 instructed 2nd appellant to repossess M/V KBZ 889 E.
5. Repossession of M/V KBZ 889 E by the 2nd appellant on July 13, 2018 prompted Respondent to file PMCC NO. 43 OF 2018 at suit Githongo.
6. By his evidence, respondent stated that he had fully repaid the loan for KES. 650,000/- and he thus sought orders of declaration that the repossession of M/V KBZ 889 E was illegal; declaration that the loan of KES. 650,000/- had been fully settled; general damages for loss of user and a mandatory injunction compelling 1st respondent to release M/V KBZ 889 E to respondent.
7. 1st appellant's case on the other hand was that respondent failed to fully repay both loans and thus contended that the repossession was lawful.
8. By a judgment dated 16th Day of June, 2021, the trial magistrate ruled that on the loan of KES. 650,000/-, Respondent had repaid KES. 964,000/- and thus the loan was fully settled. On the basis that the loan was fully paid, the trial magistrate ruled that the repossession was illegal, ordered release of M/V KBZ 889 E and awarded the respondent KES. 150,000/- in damages for loss of user.
9. Dissatisfied with the trial court's judgment, appellants filed this appeal on the July 13, 2021 setting out the following grounds of appeal: -
 - i. The learned trial magistrate erred in law and fact by arriving at an erroneous judgment in respect of an amended statement of Defence and counter claim.
 - ii. The trial magistrate erred in law and fact by failing to consider the appellant's exhibits.
 - iii. The learned trial magistrate erred in law and fact by failing to appreciate that the plaintiff had expressly stated in his witness statement that the motor vehicle was sold.
 - iv. The learned trial magistrate erred in law and fact by failing to appreciate that the 1st appellant adhered to the due procedure of repossession of the motor vehicle security.
 - v. The learned trial magistrate erred in law and fact by failing to totally consider the produced exhibits portraying the pending loan balance and the loan restructure agreement.
 - vi. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the plaintiff never bothered to produce documents to prove payment of the loan facilities granted by the 1st appellant.
 - vii. That the learned trial magistrate erred in law and in fact by failing to delve into the merits of the counter claim and the documents produced by the 1st appellant thus not dealing with the same conclusively.
 - viii. That the learned magistrate erred in law and in fact by failing to find that the amended statement of defence and counter claim was highly meritorious.
10. From the foregoing, appellants seek orders: -
 - i. That this appeal be allowed.
 - ii. That this honourable court sets aside the judgment of Hon. Ndegwa and the orders granted therein.



- iii. Costs of the appeal be borne by the Respondent.
 - iv. Any other reliefs as the Honourable court may deem fit and just to grant in the circumstances of this appeal.
11. The appeal was canvassed by way of written submissions which both parties dutifully filed.
 12. From the pleadings drawn by the respondent, the issues for trial related only to the first loan of KES. 650,000/- that was secured by M/V KBZ 889 E belonging to the respondent.
 13. A reading of the loan agreement dated August 30, 2016 demonstrates that the sum of KES. 650,000/- advanced to respondent was payable together with interest at KES. 80,168/- for 12 months whose total sum was KES. 962,016/-.
 14. The trial magistrate found as a fact, and 1st appellant did not controvert the fact that respondent had paid KES. 964,000/- out of the first loan. Although the trial magistrate misapplied the In duplum rule, the finding that the loan of KES. 650,000/- was fully repaid was well founded.
 15. The trial magistrate having found that the loan of KES. 650,000/- was fully repaid correctly found that repossession of respondent's M/V M/V KBZ 889 E was unlawful and the order that the same be released to Respondent was in the circumstances merited.
 16. Concerning the award for loss of user at KES. 150,000/-, it is apparent that the said sum was neither specifically pleaded nor proved. The Court of Appeal in *David Bagaine v Martin Bundi* [1997] eKLR stated as follows concerning damages which are claimed under the title "loss of user": -

“We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved.”
 17. The holding by the Court of Appeal was restated in *Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa* [2018] eKLR where the Court held that:

“a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, "do the best it can" and make an award on a claim that was neither pleaded nor proved-see *David Bagaine v Martin Bundi* [1997] eKLR.
 18. From the foregoing, I find that the trial magistrate erred in equating the claim for loss of user to a claim for general damages and the award for KES. 150,000/- to Respondent cannot therefore be allowed to stand.
 19. Concerning the counterclaim, "whoever alleges must prove. Section 107 of the *Evidence Act*, chapter 80 Laws of Kenya states as follows:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.



2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
20. As rightly observed by the trial magistrate, the witness who testified for the 1st respondent stated that he could not explain how the sum claimed in the counterclaim was arrived at. I therefore find that the trial magistrate's order dismissing the counterclaim was well founded.
21. From the foregoing, I find that the appeal fails on all grounds except on the award for loss of user in the sum of KES. 150,000/- which is hereby set aside.
22. 1st appellant shall bear the costs of this appeal.

DELIVERED IN MERU THIS 21ST DAY OF DECEMBER 2022.

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellants - Mr. Waweru for Chege Kibathi & Co. Advocates LLP

For Respondent - Mr. Mwiti for Joshua Mwiti & Co. Advocates

