



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO. 100 OF 2019**

**BETWEEN**

**KENYA WOMEN FINANCE TRUST LTD.....APPELLANT**

**AND**

**PHYLIS ANYANGO OLWA.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Mbita Principal Magistrate's*

*PMCC No. 3 of 2018 by Hon. Jacinta A. Owiti (Mrs.) – Senior Principal Magistrate).*

**JUDGMENT**

1. Kenya Women Finance Trust Ltd, the appellant herein, was the defendant in Mbita Principal Magistrate's PMCC No. 3 of 2018 where the claim was for attachment of the respondent's goods irregularly. The respondent was awarded Kshs. 100,000/= damages for trespass to property and Kshs 180,840/= the value of the lost property, costs and interest.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Abisai & Company Advocates. The following grounds of appeal were raised:

a) That the learned trial magistrate erred both in law ad fact by finding that the law applicable in the circumstances was the Land Act particularly section 90, 96 & 97 when clearly the issue in contention did not involve a legal charge nor land but were clearly on a Chattels Mortgage governed by the Chattels Transfer Act.

b) That the learned trial magistrate erred in both law and fact in finding that a statutory notice of sale ought to have been served on the respondent in compliance with section 90 of the Land Act 2012 when that was not a requirement under the Chattels Mortgage or the Chattels Transfer Act.

c) That the learned trial magistrate erred in both law and fact by failing to appreciate that clause 6 of the chattels mortgage gave the appellant absolute right to sell any security under the chattels mortgage upon default by the respondent without any further notice.

d) That the learned trial magistrate erred in both law and fact by finding that the respondent had indeed defaulted in her loan yet went ahead to give a finding in her favour.

e) That the learned trial magistrate erred in both law and fact in failing to appreciate that once the chattels mortgage is valid, parties to it are bound by its terms and no party should escape their contractual liability.

f) That the learned trial magistrate erred in both law and fact in finding that the appellant was liable for trespass yet the chattels mortgage gave them the right to confiscate the property used as security.

g) That the learned trial magistrate erred in law and fact in finding that indeed the respondent had used the property in question as security in the chattels mortgage yet failed to hold the respondent to her bargain under the chattels mortgage.

h) That the learned trial magistrate erred in both law and fact in applying selective justice and acknowledging the validity of the chattels mortgage, the indebtedness of the respondent and application of the Chattels Transfer Act only to ironically apply the Land Act in execution of the Chattels Mortgage.

i) That the learned trail magistrate erred in both law and fact in failing to appreciate that the chattels mortgage is a binding contract between two consenting parties and that when the respondent did not oppose her indebtedness for over three years, the appellant was

within their right to execute under the contract.

j) That the learned trial magistrate misapprehended and misapplied the law governing chattels transfer leading to a travesty of justice.

k) That the learned trial magistrate erred in both law and fact by applying selective justice in failing to appreciate that awarding the respondent damages and hence unjustifiably enriching the respondent on account of the appellant, contrary to the law and equity.

l) That the learned trial magistrate erred in both law and fact in allowing the respondent's claim in its entirety without taking into account the weight of documentary and oral evidence tendered by the appellant in court.

m) That the learned trial magistrate erred in law and fact in failing to acknowledge that no evidence was tendered in any form of a rebuttal by the respondent to challenge the evidence given by the appellant.

n) That the learned trial magistrate erred in law and fact in failing to give due consideration to the contents of the appellants' submissions and more specifically the authorities referred to therein.

o) That the learned trial magistrate greatly misdirected herself in treating the submissions of the appellant very superficially thereby erroneously arriving at a wrong conclusion in law.

p) That the learned trial magistrate erred in law and fact by failing to take into account the provisions of all relevant land laws.

q) That as a result of the foregoing the learned trial magistrate erred in law in finding that the appellant's claim was not worthy of the prayers sought in the defense even in the fact of finding that there existed a valid chattels mortgage, parties were bound by the contract, the goods attached were offered as security and that the Respondent had indeed defaulted in her loan.

3. The appeal was opposed by the respondent through the firm of Amos O. Oyuko & Company Advocates. The respondent contended that that the appellant did not follow the law on attachment.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The dispute herein arose out of a loan that had been advanced to the respondent by the appellant. The respondent was evasive as to whether she had completed the repayment or not but this was not an issue before the learned trial magistrate. The only issue was whether the proclamation, attachment and the subsequent sale was legal.

6. The appellant argued that the financial transaction between the two parties was governed by the Chattels Mortgage Document and Loan Agreement which the appellant strictly enforced. The agreement between the parties provided in part:

*In the event that default is made by the Borrower and /or Grantor:-*

...

...

*Then the Grantee either by its officers or by its agents or servants shall without further consent by the Grantor or without giving the Grantor any notice exercise all the rights provided by clause 7 of the third schedule of the Chattels Transfer Act which include the right to enter upon any lands*

7. The parties herein entered into an agreement under the Chattels Transfer Act, now repealed. Their agreement was therefore subject to clause 7 of the third schedule of the Act. It provides:

*Provided always, and it is hereby declared and agreed, that if default is made by the grantor in payment of any of the principal or interest moneys hereby covenanted to be paid on the day on which they ought to be paid according to the terms hereof, or in the observance or performance of any of the covenants, conditions or agreements herein expressed or implied, and on the grantor's part to be observed and performed, or if the grantor becomes bankrupt, or if at any time execution is levied against the goods of the grantor that execution is not stayed or satisfied within ten days, then and in that case the grantee, either personally or by his agent or servants may immediately thereupon or at any time thereafter, without any further consent by the grantor, and without giving to the grantor any notice, or waiting any time, and notwithstanding any subsequent acceptance of any payment of any money due on this security, enter upon any lands or premises whereon the chattels for the time being subject to this security may be, and take possession thereof, and sell or dispose of them or any part thereof by private sale or public auction, separately or together, in such lots and generally in such manner in every respect as the grantee deems expedient, with power to allow time for payment of purchase-money, or to buy in the chattels or any part thereof at the auction, and to rescind or vary the terms of any contract or sale, and to resell without being answerable for any loss or expense occasioned thereby, and to execute all such assurances and do all such things for giving effect to any such sale as may be necessary or proper; and the receipt of the grantee or his agent shall be a sufficient discharge to any purchaser at the sale for any of the purchase-money; and upon any sale purporting to be made in exercise of the powers herein expressed or implied no purchaser shall be bound to inquire as to the propriety or regularity of any*

*such sale, or be affected by notice express or constructive that any such sale is improper or irregular.*

*And it is hereby declared and agreed that the grantee shall stand possessed of the proceeds of any such sale upon trust, after paying thereout the costs, charges and expenses of and incidental to taking possession, sale, and the preparation and registration of this instrument, to apply them in reduction of the moneys then owing on the security of this instrument, including all moneys herein covenanted to be paid, notwithstanding that they may not then have become due, or that any promissory notes or bills of exchange may then be current for them, and to pay the balance to the grantor.*

8. The import of the clause is that:

- a) The grantee can both personally or by his agent or servants enter upon the grantor's premises and seize the chattels subject of the security.
- b) No notice to the grantor or his consent will be required.
- c) Sell or dispose of them or any part thereof by private sale or public auction, separately or together without being answerable for any loss or expense occasioned thereby.

9. It clear therefore that the Auctioneers Act was inapplicable in this dispute. It could only be applicable if the appellant opted to sell the property by public auction. Section 9 of the Auctioneers Act provides:

**(1) No person shall, in Kenya, carry on the business of an auctioneer unless he holds a valid license issued by the Board under this Act.**

**(2) A person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.**

The learned trial magistrate therefore erred in failing to appreciate that the chattels mortgage was a binding contract between the two parties.

10. The judgment and the decree of the learned trial magistrate is hereby set aside. The suit by the respondent is accordingly dismissed with costs. The appeal therefore succeed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 29<sup>TH</sup> DAY OF JUNE, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**